RATANLAL & DHIRAJLAL

THE LAW OF EVIDENCE

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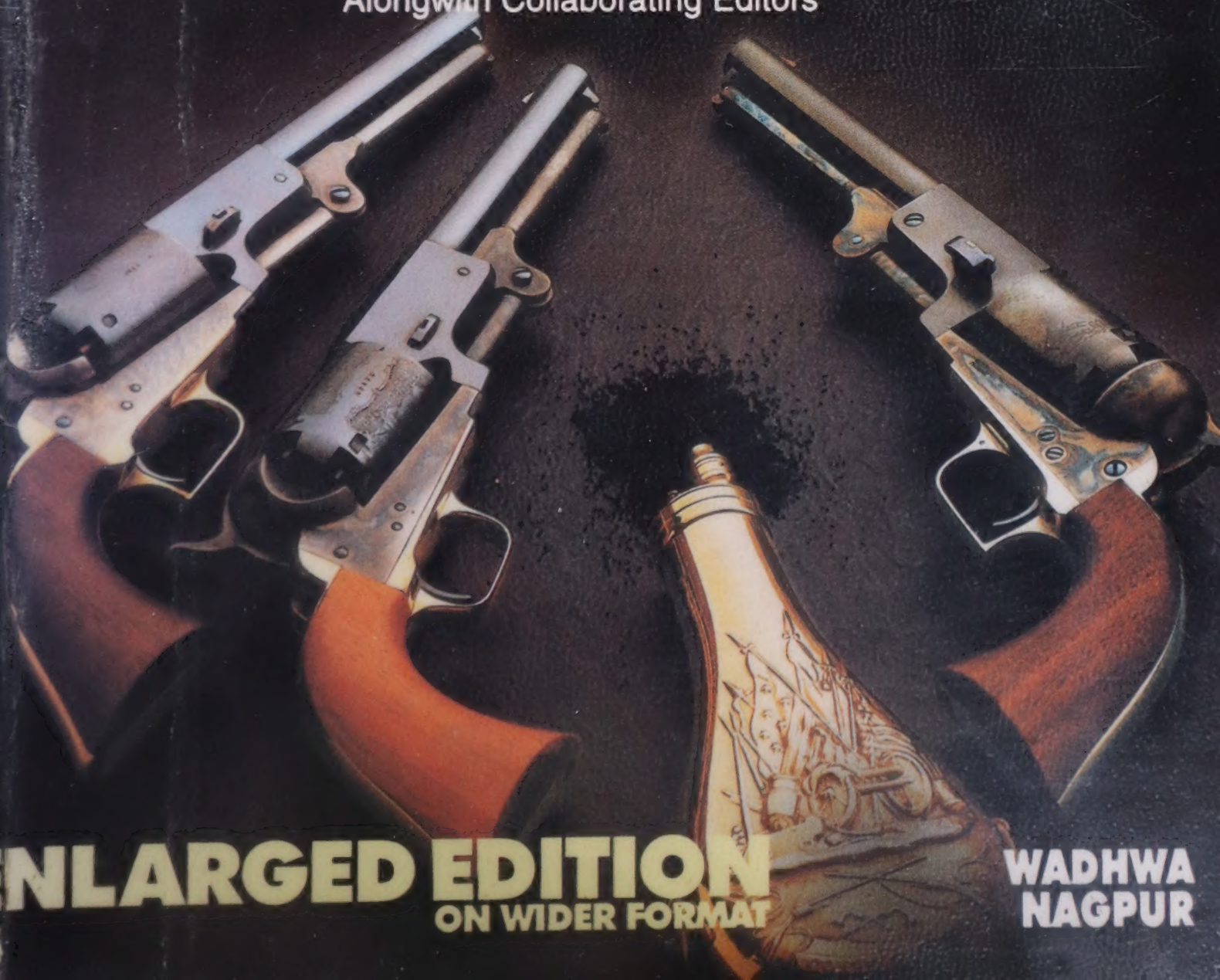
33

TWENTIETH EDITION REPRINT 2004

Justice Y V CHANDRACHUD
Former Chief Justice, Supreme Court of India

Justice ALLADI KUPPUSWAMI
Chief Justice, High Court of Andhra Pradesh (Retd.)

Alongwith Collaborating Editors



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RATANLAL & DHIRAJLAL'S

The Law of Evidence

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RATANLAL & DHIRAJLAL'S

The Law of Evidence (Act I of 1872)

Enlarged edition on a wider format. Containing all notable decisions of the Supreme Court and various High Courts reported upto Jan. 2002 with exhaustive notes, comments, case-law references, State Amendments etc., etc. alongwith the changes made by the Information Technology Act, 2000 incorporated at appropriate places.

by

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Twentieth Edition 2002 Reprint 2004

(Enlarged Edition on Wider Format)

by

Hon'ble Mr. Justice Y.V. Chandrachud,
Former Chief Justice, Supreme Court of India

Hon'ble Mr. Justice Alladi Kuppuswami,
Chief Justice, High Court of Andhra Pradesh (Retd.)

in collaboration with

V.R. Manohar, Former Advocate-General of Maharashtra
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and

The Publishers' Editorial Board

preface to the twentieth edition

The Law of Evidence occupies a unique position in the field of substantive and procedural laws. The existence of substantive rights can only be established by, relevant and admissible evidence. The law of evidence plays a pivotal role in the effective functioning of the judicial system. With rapid advances in diverse fields of life, human relations have undergone an unforeseen transformation, presenting new conflicts and controversies. The law of evidence had to groom itself up for facing the emerging developments which pose unprecedented problems in the collection of evidence and proof of facts. Significant changes have taken place between the publication of the last edition and the present enlarged edition of the time-honoured commentary on the subject by Ratanlal and Dhirajlal. The present edition has had to face the vast ramification of the subject, during the period intervening between the preceding and present edition. Legal pronouncements, scholarly views on the provisions of the Act and on judicial decisions, and statutory amendments reflecting the legislative response to the existing and emerging social challenges have not only developed the subject out of its narrow contours but have given to it new directions. Capturing all the strands of the changing scenario, integrating them into the existing text, examining them from the point of view of their success or failure in the context of the socio-economic and legal problems which brought about the statutory provisions and legal decisions and, shaping the comments accordingly, have been the main tasks that the present edition set before itself. In shaping the comments and reporting the decisions of the period, the traditional style of the book, namely, sorting out the principles in the form of comments on the one hand, and giving the facts and decisions under the heading "Cases", on the other, has been maintained.

In some interesting cases, Courts have had to examine anew whether the statements contained in the First Information Report can be ascribed evidentiary value in an exceptional class of cases. A number of judgments of the Supreme Court have thrown light upon the assessment and appreciation of the testimony of police witnesses, chance witnesses, interested witnesses, child witnesses, so on and so forth. Considerable light has been thrown by decisions of the Supreme Court and the High Court on questions relating to the standard of proof and appreciation of evidence. Clarifications have been provided in a number of judgments on the conflict between ocular, circumstantial and technical evidence. Special rules of evidence are being developed in the appreciation of evidence of victims of sexual assault. The Supreme Court has ruled that such a victim cannot be equated with an accomplice witness. The doctrine of "*res gestae*" has been elaborated to lend a liberal touch to cases in which the victim is the sole witness. There is also a liberalisation of the view about statements which can be regarded as parts of a transaction. The strict rule of corroboration has been softened and freed from its hackneyed shackles to meet the challenges of new forms of human ingenuity. Sig-

(contd.)

nificant developments have also taken place in the field of "without prejudice communications". The effect of presumptions in cases of dowry deaths has occupied the minds and concerns of Courts to meet the growing social evil of desperate dimensions. A set of new rules has been devised to deal effectively with cases requiring a person to be subjected to blood test for determining paternity or drunkenness. The scope of the theory of privilege as to documents is being constantly narrowed, one of the latest and thorniest question being whether a Commission of Enquiry can enter upon and decide the question of privilege claimed by the State and its agencies.

This edition notices with care, the explanation of the status of family Courts, the growing recognition of the utility and value of circumstantial evidence, the use of evidence obtained by unlawful means, the extent to which domestic inquiries have to follow the basic principles of law, the extent to which the Supreme Court can interfere with concurrent findings, the expanded meaning of the word "conduct" in reference to persons and parties whose conduct is relevant, the methods of ascertaining the identity of wrongdoers, a new dimension to the meaning of the expression "reasonable ground to believe" in the context of evidence in cases of conspiracies, the accused using in his favour his statements to police which amount to a confession, probative element in the statements as to facts of public nature in Acts and notifications, and acceptance of the opinion of experts on the identity of type-script. The maxim *res ipsa loquitur* has been explained by the Supreme Court, especially in regard to the scope of its application. The newly created presumptions about suicide by married women and the absence of consent in certain rape cases have had their share of cases explaining the scope of the expressions used in creating these presumptions. The expansion of the varied application of the doctrine of estoppel, which was likely to have crippling effects on the functioning of the Government and educational institutions, has now been subjected to the requirement of the balancing process of equities on both sides.

The total number of cases appearing in our primary reports were taken up and absorbed into the commentary, since every Court ruling has its own value, great or small. This was particularly necessary in the case of a subject like evidence with its procedural overtones. Every case is an example which sub-serves the purpose of assuring that substance is not sacrificed on the altar of procedure. Naturally, therefore, rulings have touched the high figure of more than fifteen thousand. Discussions in judgments on matters of evidence are generally fact-related. Conclusions are drawn pertaining to the subject from which the facts emerge. If the search into case-law can locate a principle, it can then be presented in a concrete shape.

The changes brought about in the Evidence Act by its amendment by the Information Technology Act, have been noted and discussed at appropriate places.

(contd.)

preface
to the twentieth edition (contd.)

Fair trial is the essence of all judicial proceedings. More often than not, it is matters of evidence which prejudice a fair trial. Then, there is an inevitable remand or even retrial. In the application of the various provisions of the Act to a trial process, due attention has been paid to human rights and fair trial.

An extensive subject-index has been provided. Every manner of heading used in the text is reflected in the index. This was necessary for easy search and location of the point under reference in view of the very extensive nature of the commentary.

Mumbai
12th March, 2002
'Mahashivratri' Day

Y.V. CHANDRACHUD
ALLADI KUPPUSWAMI

acknowledgements

Justice Kuppuswami had the pleasure and privilege of discussing some aspects with his friend Justice M. Jagannadhrao, now Chairman of the Law Commission and incorporated some matter contained in some of his addresses and articles.

Sri. N.V.R. Gopalakrishnan Acharyulu, Advocate Hyderabad and Shri J. Chalameswara Rao, now judge of A.P. High Court, rendered valuable assistance in connection with some important sections of the Act.

Sri. C.A. Balasubramaniam, Additional Controller-General of Accounts (Retd.), took considerable pains in correcting the typed script.

Sri. K.L. Narasimham who almost single handed, typed and retyped more than three thousand pages.

Special thanks are due to the Publishers' Editorial Board for maintaining of the manuscript and checking every minute details from page one to last.

In an exercise of this magnitude there may be some mistakes here and there. The discerning users of the book are requested to kindly overlook them.

JUSTICE ALLADI KUPPUSWAMI

preface to the nineteenth edition

The Law of Evidence occupies a unique position between substantive and procedural laws. The assertion of Substantive rights can only be established by evidence, relevant and admissible. Therefore, the law of evidence plays a pivotal role in the effective functioning of judicial system. With rapid advances in diverse fields of life, human relationship has undergone an unforseen transformation, presenting new kinds of conflicts and controversies. The law of evidence has to groom itself for facing the emerging developments which pose unprecedented problems in the collection of evidence and the proof of facts. Naturally, significant changes have taken place between the publication of the last edition and the present edition of this book on evidence. In some interesting cases, courts have had to examine anew whether the statements contained in the First Information Report can be ascribed evidentiary value in an exceptional class of cases. A number of judgments of the Supreme Court have thrown light upon the assessment and appreciation of the testimony of police witnesses, chance witnesses, interested witnesses, child witnesses and so forth. Considerable light has been thrown by these decisions and the High Court decisions upon questions relating to standard of proof and appreciation of evidence. Clarifications have been provided in a number of judgments on the conflict between ocular, circumstantial and technical evidence. Special rules of evidence are being developed in the appreciation of evidence of victims of sexual assault. The doctrine of "*res gestae*" has been elaborated to lend a liberal touch to cases in which the victim can be the sole witness. The strict rule of corroboration has been softened and freed from its hackenyed shackles, to meet new forms of human ingenuity. Significant developments have also taken place in the field of "without prejudice communications". The effect of presumptions in cases of dowry deaths has occupied the minds and concerns of courts to meet a growing social evil of desperate dimensions. A set of new rules has been devised to deal effectively with cases requiring a person to be subjected to blood test for determining paternity or drunkenness. the frontiers of the doctrine of estoppel have been widened to meet the challenge of novel contentions. The scope of the theory of privilege as to documents is being constantly narrowed, one of the latest and one of the thorniest questions being whether a Commission of Enquiry can enter upon and decide the question of privilege claimed by the State and its agencies.

These and many other developments have been noticed in this edition to enrich the text of the commentaries.

MUMBAI
April 3rd, 1997

Y.V. CHANDRACHUD
CHIEF EDITOR

preface to the eighteenth edition

Appearing, as it does, five years after the preceding edition, the present edition has had to face and harness the vast growth of the subject during the period. Legal pronouncements, in the shape of a large body of case-law, scholarly views on the provisions of the Act and also on judicial decisions under those provisions and statutory amendments showing legislative responses to the existing and emerging social problems have not only developed the subject out of its existing bounds but also imparted to it certain new trends and directions. Capturing all the strands of the changing scenario, integrating them into the existing text, examining them from the point of view of their success or failure in the context of the socio-economic and legal problems which brough about the statutory provisions and legal decisions and shaping the comments accordingly have been the main tasks that the present edition set before itself. In shaping the comments and reporting the decisions of the period, the traditional style of the book, namely, sorting out the principles in the form of comments, on the one hand, and giving the facts and decisions under the heading "Cases", on the other, has been maintained.

This edition witnesses the explanation of the status of family courts; the growing recognition of the utility and value of circumstantial evidence, rethinking about the appreciation of the evidence of victims of sexual assault; the use of evidence obtained by unlawful means; the extent to which domestic inquiries have to follow the principles of this subject; the extent to which the Supreme Court can interfere in concurrent findings; a liberalisation of the view about statements which can be regarded as parts of the transaction, (*res gestae*); the expanded meaning of the word "conduct" in reference to persons and parties whose conduct is relevant; the methods of ascertaining the identity of wrongdoers; a new dimension to the meaning of the expression "reasonable ground to believe" in the context of evidence in cases of conspiracies; expansion of the scope of the expression "without prejudice negotiations"; the accused using in his favour his statements to police which amount to confession; viewing the dying declarations of women sacrificed at the altar of dowry; probative element in the statements as to facts of public nature in Acts and notifications, and acceptance of the opinion of experts about the identity of type- script. These developments have been recorded in the field of relevancy of facts.

In reference to the scope of the expression "direct evidence" computerised information and videotaping of a happening have been taken out of the "hearsay" exclusion, but not newspaper reports of similar happenings. In the matters of burden of proof, the matters relating to election petitions and "*alibi*" pleas have attracted comments from the Supreme Court. The maxim *res ipsa loquitur* has also invited Supreme Court comments as to the scope of its application. The newly created presumptions about suicide by married women and absence of consent in certain rape cases have had their share of cases explaining the scope of the expressions used in creating these presumptions. The rapid expansion of the varied applications of the doctrine of estoppel, which were likely to have crippling effects on the functioning of the Government and educational institutions, the same has now been subjected to the requirement of the balancing process of equities on both sides.

The extent of police privilege in not disclosing their sources of information, and the legal professional privilege and how it becomes affected if a privileged document happens to fall in the hands of a third person, have been examined anew in the light of demands of public interest.

MUMBAI
31st AUGUST, 1992
"GANESH CHATURTHI"

M. HIDAYATULLAH
V.R. MANOHAR

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EXPLANATION OF ABBREVIATIONS

A.C.	..	Appeal Cases, Law Reports, from 1891—
A.I.R.	..	All India Reporter, from 1914—
A.L.J.R.	..	Allahabad Law Journal, from 1904—
And.	..	Indian Law Reports, Andhra Series.
A.W.N.	..	Allahabad Weekly Notes, 1881-1908.
Agra	..	Agra High Court Reports, 1866-1868.
All.	..	Indian Law Reports, Allahabad Series, from 1876
All E.R.	..	All England Reports, from 1936—
App. Cas.	..	Law Reports, Appeal Cases, 1875-90.
Appx.	..	Appendix.
Archbold	..	Archbold's Criminal Pleadings, Evidence and Practice.
Ass.	..	Indian Law Reports, Assam Series, from 1949—
B. & A.	..	Barnewall and Alderson, 1817-1822, K.B.
B. & C.	..	Barnewall & Cresswell's Reports.
Beng. L.R.	..	Bengal Law Reports, 1868-1875.
Bom.	..	Indian Law Reports, Bombay Series, from 1876—
B.H.C.	..	Bombay High Court Reports, 1862-1875.
Bom. L.R.	..	Bombay Law Reporter, from 1899—
B. & S.	..	Best and Smith, 1861-1865, K.B.
Burma L.R.	..	Burma Law Reports, 1895-1908.
Cal.	..	Indian Law Reports, Calcutta Series, from 1876—
C.L.J.	..	Calcutta Law Journal, from 1905—
C.L.R.	..	Calcutta Law Reports, 1878-1883.
Cr. L.J.	..	Criminal Law Journal, from 1904—
C.W.N.	..	Calcutta Weekly Notes, from 1896—
C. & K.	..	Carrington and Kirwan, 1843-1850, N.P.
C. & M.	..	Carrington and Marshman, 1840-1842, N.P.
C. & P.	..	Carrington and Payne, 1823-1841, N.P.
Ch.	..	Law Reports, Chancery Division, from 1891—
Ch. D.	..	Chancery Division, Law Reports, 1875-1890.
Coke	..	Coke's Reports, 1752-1816.
Cox	..	Cox's Criminal Cases, from 1843—
Cr. R.	..	Criminal Rulings of the Bombay High Court, from 1861-1910.
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THE LAW OF EVIDENCE

THE INDIAN EVIDENCE ACT

(ACT 1 OF 1872)[1]

[*Received the G.-G.'s assent on March 15, 1872*]

Preamble.

WHEREAS it is expedient to consolidate, define and amend the Law of Evidence; it is hereby enacted as follows:—

SYNOPSIS

1. *History of the law of evidence in India* ... 1
2. *Objects and Reasons* ... 3
3. *Whether can be an aid to construction of statute* ... 3
4. *Preamble, object and its role in construction* ... 4
5. *Consolidating Act* ... 4
6. *Principles of Interpretation* ... 5
7. *Repeal* ... 6

COMMENTS

"The Law of Evidence is the system of rules and standards by which the admission of proof at the trial of a lawsuit is regulated."[2]

"Law of Evidence is not about determining the consequences of facts but about *establishing those facts*."[3]

1. HISTORY OF THE LAW OF EVIDENCE IN INDIA

In India there was no uniform law on the subject of evidence prior to the passing of the Indian Evidence Act (1 of 1872). Before the advent of the British Rule in India, during the Mohammedan rule, a practice had grown to follow some rules of evidence on the basis of customs and usages of Muslims. For sometime even after the British started ruling the country, the same rules of Mohammedan Law continued. The British rulers, though they did not have any codified or consolidated law of evidence in their country, thought fit to frame some rules to be followed by the courts in India. By that time the courts in the Presidency towns in India, which were established by Royal Charter, were following the English rules of evidence subject to some modifications made by certain Acts. But in the *muffassil* area, the English rules of Evidence did not prevail and the courts were following Mohammedan rules of evidence especially in criminal cases. As some English Judges were presiding over the courts even in *muffassil* area, they used to follow the rules of evidence of their country as their guide.

For the first time, the Evidence Act II of 1855 prescribed some rules of evidence to be followed in our country, but Section 58 thereof stated that 'Nothing contained in this Act shall be so construed as to render inadmissible in any court which, but for the passing of this Act, would have been admissible in such court. That Act of 1855 did not prohibit the adoption of rules of English system or the rules of Mohammedan Law established by practice or custom that was followed in the courts.

After taking note of several comments made by the judges working in India, a Draft Bill was prepared and introduced in the Legislative Council by Mr. Maine (later Sir Henry Sumner Maine) who

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1. For Statement of Objects and Reason, see Gaz. of India, 1868, p. 1574.
2. MCCORMICK ON EVIDENCE, 1984, 3rd Edn., p. 1.
3. STEVE UGLOW'S EVIDENCE : TEXT & MATERIALS, 1997, p. 1.

was then the Law Member of the Legislative Council. The Draft Bill was prepared basing on the report of the Commissioners, which was presented in 1868 to Her Majesty, in which it is stated as follows: "India does not at present possess a uniform law upon this subject. Within the Presidency towns, the English Law of Evidence is in force modified by certain Acts of the Indian Legislature, of which Act 2 of 1855 is the most important; this Act contains many valuable provisions. It extends the range of judicial notice and facilitates the proof of documents, of foreign system of law and of matters of public history.....The Act however bears difference in many cases to the existing law and it appears to have been designed, not as a complete body of rules, but as supplementary to and corrective of the English Law, and also of the customary law of evidence prevailing in those parts of British India, where English Law is not administered. This customary Law has not assumed any definite form; the Mohammedan Law, since the enactment of the new Code of Criminal Procedure, has ceased to have any validity in the country courts, even in criminal matters; and those courts have, in fact, no fixed rules of evidence except those contained in Act 2 of 1855. They are not required to follow the English Law as such, although they are not debarred from following it where they regard it as the most equitable..... In a country like India where the task of judicial investigation is attended with peculiar difficulties and where it is the duty of the judge in all civil and criminal cases to decide without a jury, there is a greater danger of miscarriage from the mind of the court, being uninformed, than from it's being unduly influenced by the information laid before it. It seems therefore better to afford every facility for the admission of truth although with some risk that falsehood or error may be mixed up with it than to narrow, with a view to the exclusion of falsehood, the channels by which truth is admitted." (Arbuthnot's Select Reports (Preface, page 27). The Draft was referred to the Select Committee of the Legislative Council. The Select Committee, in its findings, stated that it was not sufficiently elementary for the officers for whose use it was designed and that it assumed an acquaintance on their part with the law of England which could scarcely be expected from them. Thus it held the opinion that it was not suitable to the conditions in India.[4]

Later, a Draft Bill based on the two reports submitted by the Select Committee was prepared under the Chairmanship of Mr. Stephen and was introduced by Mr. Stephen who succeeded Mr. Maine in the Legislative Council. In his speech in the proceedings of the Legislative Council on 18th April, 1871 he stated, "It would be exceedingly difficult to say precisely what, at the present moment, the law upon the subject certainly is. To some extent, it is far from being clear to what extent and in some parts of the country—though questions might be raised as to the particular parts of the country—the English Law of Evidence appears to be in force in British India. Whatever may be the theory, it both is and will continue to be so in practice; for if the English Law of Evidence has not been introduced into the country English lawyers and *quasi*-lawyers have decided; and they have been deciding according to the law of justice, equity, and good conscience. Practically speaking, these attractive words mean little more than an imperfect understanding of imperfect collections of not very recent editions of English text books. It is difficult to imagine anything much less satisfactory than such a state of the Law as this. A good deal may be said for an elaborate legal system, well understood and strictly administered; a good deal may be said for unaided motherwit and natural shrewdness; but a half and half system, in which a vast body of half understood Law, totally destitute of arrangement and of uncertain authority, maintains a dead alive existence, is a state of things which it is by no means easy to praise."

After getting the approval of the Legislative Council and receiving the assent of the Governor-General in India on the 15th of March, 1872, it became law as "The Indian Evidence Act". Mr. Stephen (later Sir James Stephen) wrote in Chapter 2 of his book "Indian Evidence Act" as follows: "Every Judicial proceeding, whatever, has for its purpose the ascertaining of some right or liability. If the proceeding is criminal, the object is to ascertain the liability to punishment of the person accused; if the proceeding is civil, the object is to ascertain some right of property or of status or the right of one party and the liability of the other, to some form of relief. All rights and liabilities are dependent upon and arise out of facts, and facts, fall into two clauses, those which can, and those which cannot be perceived by the senses. Of facts which can be perceived by the senses, it is superfluous to give example. Of facts which cannot be perceived by the senses, intention, fraud, good faith, and knowledge may be given as examples. But each class of facts has in common, one element which entitles them to the name of facts; they can be directly perceived either with or without the intervention of the senses. A man can testify to the fact that, at a certain time, he had a certain intention on the same ground as that on which he can

4. First Report of the Select Committee published in Gazette of India, 1871 part 4 page 273. Second Report published in Gazette of India, 1872 part 5 page 34.

testify that, at a certain time and place, he saw a particular man. He has in each case a present recollection of a past direct perception."

2. OBJECTS AND REASONS

The Law of Evidence is the most important branch of adjectival law. It is to legal practice what logic is to all reasoning. Without it, trials might be infinitely prolonged to the great detriment of the public and the vexation and expense of suitors. It is by this that the Judge separates the wheat from the chaff among the mass of facts that are brought before him, decides upon their just and mutual bearing, learns to draw correct inferences from circumstances, and to weigh the value of direct testimony. It is by this guide that he is able to tread his way with comparative safety among the burning ploughshares of perjury, forgery and fraud that beset his footsteps, and to rest his judgment on a basis of probabilities at least comparatively satisfactory to his own mind. (*Norton*)

The Indian Evidence Act has codified the rules of English law of evidence with such modification as are rendered necessary by the peculiar circumstances of this country. But the Act is not exhaustive, and cases do arise for the solution of which principles of common law are resorted to. The Code, though chiefly drawn upon the lines of the English law of evidence, was not intended to be a servile copy of it.

The object of codification is that, on any point specifically dealt with by an Act, the law should be ascertained by interpreting its language, instead of, as before, roaming over a vast number of authorities to discover what the law is, and extracting it by a critical examination of the prior decisions.[5]

One great object of the Evidence Act was to prevent laxity in the admissibility of evidence, and to introduce a correct and uniform rule of practice that was previously in vogue. The Evidence Act is not intended to do more than prescribe rules for the admissibility or otherwise of evidence on the issues as to which the Courts have to record findings.

The main **principles** which underlie the law of evidence are:

(1) evidence must be confined to the matters in issue;

(2) hearsay evidence must not be admitted; and

(3) the best evidence must be given in all cases.

The object in adducing evidence is to find out the truth or otherwise of the disputed facts over all points in issue, and that no evidence is adduced which is not relevant to the issue, though evidence of collateral facts is admissible.[6]

3. WHETHER CAN BE AN AID TO CONSTRUCTION OF THE STATUTE

It is pointed out by the Supreme Court[7] that the statement of object and reasons for enacting a law is not admissible as an aid to the construction of the statute and it cannot even control the meaning of the words used in the Act. But it can be referred to for a limited purpose of knowing the circumstances and the purpose in sponsoring the Bill. It can be looked into as to what the Legislature intended to achieve.[8] When the provisions of the Act leave no room to doubt what was meant by the Legislature, it is not even relevant to consider.[9] As the Bill might have undergone some changes in the Legislature, there will not be any guarantee that the reasons and the objects which were sought to be achieved have remained the

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5. *Bank of England* v. *Vagliano*, 1891 AC 107.
6. *Hales* v. *Kerr*, (1908) 2 K.B. 601; *Butterley Co.* v. *New Hucknall Colliery Co.*, 1909 1 Ch 37. **Also see** *Siris Chandra Nandy* v. ***Rakhalananda***, AIR 1941 PC 16 (18).
7. *Central Bank of India* v. *Workers*, AIR 1960 SC 12; *State of West Bengal* v. *Union of India*, AIR 1963 SC 1241; *A.C. Sharma* v. *Delhi Administration*, AIR 1973 SC 913; *State of West Bengal* v. *Subodh Gopal*, AIR 1954 SC 92, 104; *Thangal Kungu Musaliar* v. *M. Venkatachalam*, AIR 1956 SC 246; *Aswini Kumar Ghose* v. *Arabanda Bose*, AIR 1952 SC 369; *I.T. Commr.* v. *Sodra Devi*, AIR 1957 SC 832; *Express Newspapers Limited* v. *Union of India*, AIR 1958 SC 578.
8. *Workmen of Fire Stone Tyre & Rubber* v. *Management*, AIR 1973 SC 1227.
9. *State of Haryana* v. *Chanan Mal*, AIR 1976 SC 1654; *Pathumma* v. *State of Kerala*, AIR 1978 SC 771.

same before it came into being as an Act. So it was held that objects and reasons of the Bill cannot be an aid to the construction of the statute.[10] A reference may be had for a limited purpose to find out the prevailing conditions and circumstances at the time of introduction of the Bill, and the extent and urgency of evil which the Bill sought to remedy.[11]

4. PREAMBLE, OBJECT AND ITS ROLE IN CONSTRUCTION

The object of the preamble of an Act is to indicate what[12], in general terms, was the object of the Legislature in passing the Act.[13]

The preamble can be looked at, to solve any ambiguity or to fix the meaning of the word which may have more than one meaning, or to keep the effect of the Act within its real scope wherever the enacting part is open to doubt in any respect.[14] It may give useful assistance as to what the statute intends to reach but when it is clear and unambiguous the preamble cannot vary its meaning.[15] It cannot be looked into, to create an ambiguity.[16] It cannot either restrict or extend the enacting part, where the language and object and scope are not open to any doubt.[17] The enacting part prevails over the preamble where there is conflict between the two.[18] The Supreme Court has pointed out that the policy and the purpose of a given Act may be deduced from the long title and preamble thereof.[19] The Supreme Court held that the Court cannot start with a preamble for construing the provisions of an Act, though it would be justified in resorting to it if it finds that the language used by Parliament is ambiguous or is too general, though in point of fact Parliament intended that it should have a limited application.[20] It is one of the cardinal principles of construction that when the language of the Act, is clear the preamble must be disregarded. Where the object or meaning of an Act is not clear it may be resorted to, to explain it.[21]

While the preamble gives the purpose and object of an Act, it does not give any specific purpose of any particular section in the Act.

5. CONSOLIDATING ACT

The preamble here shows that the Indian Evidence Act is not merely a fragmentary enactment, but a consolidating one. The reasons and object of consolidation are to see that differences in practice adopted till then by different courts while admitting evidence are avoided and certain guidelines are given for admitting the evidence relating to different issues in a given case. Secondly, if such consolidation is done by a codified enactment, such law alone should be sought for interpreting the language therein and it would help avoiding critical examination of a number of authors to make out what the law was on a particular given point.[22]

As this Act is expected to be the whole law or complete code applicable in India, the principles of equity, justice and good conscience cannot be drawn by the Judge relying on the principles of law in

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10. *Aswini Kumar Ghose* v. *Arabanda Bose*, AIR 1952 SC 369.
11. *Supra*, AIR 1957 SC 832; AIR 1956 SC 246; AIR 1954 SC 92, **see** also *Joti Prasad* v. *Kalka Prasad Bhatnagar*, AIR 1962 All 128.
12. For Statement of Objects and Reasons, **see** Gazette of India 1868, p. 1574.
13. In re : *Kerala Education Bill of 1957*, AIR 1958 SC 956, 974; *Y.A. Mamarde* v. *Authority and Co.*, AIR 1972 SC 1721; *Bhola* v. *Kausilla*, AIR 1932 All 617 (FB); *Kannammal* v. *Kanakasabai*, AIR 1931 Mad 629; *Finch* v. *Finch*, AIR 1943 Lah 260 (SB); *Bhola* v. *R.*, AIR 1942 FC 17.
14. MAXWELL ON INTERPRETATION OF STATUTES (8th Ed., p. 40).
15. **See also** *Pakala Narayanaswamy* v. *Emperor*, AIR 1939 PC 47; *Commissioner of Labour* v. *Associated Cement Co.*, AIR 1955 Bom 363; *Y.A. Mamarda* v. *Authority & Co.*, AIR 1972 SC 1721.
16. *Jnanendra* v. *Jadu Nath*, AIR 1938 Cal 211; *Aswini Kumar* v. *Arabinda Bose*, AIR 1952 SC 369; *State of West Bengal* v. *Subodh Gopal*, AIR 1954 SC 92; *Kavalappara* v. *State of Madras*, AIR 1960 SC 1080; *A.C. Sharma* v. *Delhi Administration*, AIR 1973 SC 913.
17. MAXWELL ON INTERPRETATION OF STATUTES, 8th Ed., pp. 41 to 42.
18. *Secretary of State* v. *Maharaja of Bobilli*, ILR 43 Mad 529 (PC); *Manilal Singh* v. *Trustees for improvement of Calcutta*, ILR 45 Cal 343 (FB).
19. In re : *Kerala Education Bill of 1957*, AIR 1958 SC 956.
20. In *Burrakur Coal Co.* v. *Union of India*, AIR 1961 SC 954; *Yusuf S.K.* v. *State*, AIR 1954 Cal 258; *Rishi Kesh Singh* v. *State*, AIR 1970 All 51 (FB).
21. CRAIES ON INTERPRETATION OF STATUTES (5th Ed., pp. 188 to 189).
22. ILR 23 Cal 563 : *Narendra* v. *Kamalbasini*, 23 IA 18; **following** *Bank of England* v. *Vagliano*, 1891 AC 107

England. Accordingly, a judge cannot allow evidence which is inadmissible under the provisions of this Act, even if he feels that such inadmissible evidence throws some light on the issue.[23] Once a statute is passed, which purports to contain the whole law of evidence applicable in India. It is not open to any judge to exercise a dispensing power, and admit evidence not admissible by the statute, because it appears to him that the irregular evidence would throw light upon the issue. The principles of exclusion of evidence adopted by the Act must be applied strictly and cannot be relaxed at the discretion of the Court.[24]

The Act reduces the English law of evidence to the form of express propositions arranged in their natural order with some modifications rendered necessary by the peculiar circumstances of India. It is, in the main, drawn on the lines of the English law of evidence.

SUBBARAO J. observed: "It has been acknowledged generally, with some exceptions, that the Indian Evidence Act was intended to and did in fact consolidate the English law of Evidence. In case of doubt or ambiguity over the interpretation of any of the sections of the Evidence Act, the Court can with profit look to the relevant English Common Law for ascertaining their true meaning.[25] Prior to the above decision it was held, while interpreting Section 92 of the Act, that English cases do not control the Indian Statute and however useful they may be for understanding the law on which the statute is based, they are scarcely direct authority regarding its construction on which alone must depend the decision in a case governed by the Statute.[26] But if there had been legislation within the jurisdiction of the Privy Council and the House of Lords in England, using the same or similar expressions as in the Indian enactment the guidance afforded by such English decisions would indeed be valuable.[27]

The Indian Evidence Act is not exhaustive of the rules of Evidence.[28] The Evidence Act deals with the subject of Law of Evidence in general; there are other rules of evidence contained in other enactments. Thus the whole Law of Evidence is contained in the Evidence Act as well as in those Statutes, Acts and Regulations which are not expressly repealed by this Act. The Law of Evidence which is a complete Code does not permit the importation of any principle of English Common Law relating to evidence in criminal cases to the contrary.[29]

6. PRINCIPLES OF INTERPRETATION

It was pointed out by LORD HERSCHELL that the natural meaning, uninfluenced by any considerations derived from the previous state of law, has to be looked at and that one should not start enquiring how the previous law stood. The Court would be justified if it looks into the history of the legislation, not for purpose of construing the provisions of the Act, but for a limited purpose to know the condition and circumstances in passing the enactment and the mischief to be prevented, and the remedy for the same.[30]

JUSTICE KRISHNA IYER observed: "Legislative history within circumspect limits may be consulted by courts to resolve ambiguities. While understanding and interpreting a statute, the roots of the past, the foliage of the present and the seeds of the future must be within the ken of the activist judge..... Courts must search for a reliable scientific method of discovery rather than the speculative quest, for the spirit of the statute, and the cross-thoughts from legislator's lips or law commissioners pens..... The words of a statute must be understood in the sense which the Legislature has in view, and their meaning must be found not so much in strictly grammatical or etymological propriety of language, nor in its popular use. The words cannot be read in isolation; their colour and content are derived from their context and therefore, every word must be examined in its context.[31]

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23. *Sris Chandra Nandy* v. *Rakhalananda*, AIR 1941 PC 16, 20.
24. *Sris Chandra* v. *Rakhalananda*, (1940) 43 Bom LR 794 : 68 IA 34 : ILR (1941) 1 Cal 468; *Parbhoo* v. *Emperor*, AIR 1941 All 843 (FB).
25. *State of Punjab* v. *Sodhi Sukhdev Singh*, AIR 1961 SC 493 : (1961) 2 SCR 371.
26. *Rowland Ady* v. *Administrator General of Burma*, AIR 1938 PC 198; *Subhadra* v. *Kesavan*, 1962 Ker LT 938.
27. *State of Madras* v. *S.A. Baffaki*, AIR 1954 Mad 926.
28. *Rudolf Stallmann*, In re : ILR (1911) 39 Cal 164; *King-Emperor* v. *Tun Hlaing*, ILR (1923) 1 Ran 759 (FB); *Re, Annavi Muthiriyan*, ILR (1915) 39 Mad 449.
29. *H H. Advani* v. *State of Maharashtra*, AIR 1971 SC 44 : 73 Bom LR 112.
30. *Bank of England* v. *Vagliano*, 1891 AC 107, 144; *Sanghvi* v. *M.C.G. & K.M.W. Union*, AIR 1969 SC 530.
31. *Union of India* v. *Sankalchand*, AIR 1977 SC 2328.

A word of every day use must be construed in its popular sense.[32]

If the provisions are unambiguous and clear, one should not have recourse to the pre-existing law, although it may be useful and legitimate when the provisions are doubtful and couched in a language which had previously acquired a technical meaning.[33] Consideration arising out of legislative history cannot be allowed to override the plain words of a statute.[34] If a particular section or a word has received judicial construction and if it is re-enacted or re-used, then such re-enactment may be treated as legislative recognition of the construction given by the judicial pronouncement unless there is something to rebut the same.[35] A statute is an authentic repository of the Legislative will, and the function of the Court is only to interpret according to the intent of the Legislature that made it.[36] No words should be considered as redundant or surplus in interpreting a rule or a statute.[37]

It is a matter of judicial prudence to decide an issue under a specific statute by confining the focus to that statutory compass as far as possible. Any derivation into wider jurisprudential areas is fraught with unwitting conflict and confusion.[38] A statute must be read as a whole and every provision must be construed with reference to the context and other clauses as far as possible to make it consistent.[39]

The Law of Evidence is a law of procedure and it would not affect substantive rights. The Law relating to procedure, when amended, operates retrospectively, unless it creates new disabilities or obligations or imposes new duties, in which case it is to be treated as prospective.[40]

7. REPEAL

The provisions of Section 6 of the General Clauses Act, would apply only when the statute or regulation having the force of statute is actually repealed and it would not apply to any enactment which is of temporary nature which automatically expires by efflux of time.[41]

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32. *Rattanlal Gupta* v. *Surajbhan*, AIR 1974 SC 391; *CIT* v. *Tajmahal Hotel*, AIR 1972 SC 168.
33. *Nirmani* v. *Sati*, ILR 48 Cal 556 (FB).
34. *Commr. I.T.* v. *Madurai Mills*, AIR 1973 SC 1357.
35. *Rukmayabaya* v. *Lullobhoi*, 5 MIA 234; *Docks* v. *Cameron*, 11 HLC 443; ILR 53 All 612 : *Radha mohan* v. *Abbas*, AIR 1931 All 294.
36. *Commr. of S.T.* v. *Mangalsan*, AIR 1975 SC 1106; *Dhoom Singh* v. *Prakash Chandra Sethi*, AIR 1975 SC 1012.
37. *Dinesh* v. *State of Assam*, AIR 1978 SC 17.
38. *State* v. *Orient Paper Mills*, AIR 1977 SC 687.
39. *Hubli Municipality* v. *Subharao*, AIR 1976 SC 1398.
40. *Vangopal* v. *State of M.P.*, AIR 1970 SC 1636; *Data Ziva* v. *State*, AIR 1967 Goa 4.
41. *T. Barai* v. *Henry*, AIR 1983 SC 150.

PART I

RELEVANCY OF FACTS

CHAPTER I

PRELIMINARY

Short title.

S. 1. This Act may be called the Indian Evidence Act, 1872.

Extent.

It extends to the whole of India except the State of Jammu and Kashmir and applies to all judicial proceedings in or before any Court, including Courts-martial, other than Courts-martial convened under the Army Act, the Naval Discipline Act or the Indian Navy (Discipline) Act, 1934, or the Air Force Act but not to affidavits presented to any Court or Officer, nor to proceedings before an arbitrator;

Commencement of Act.

And it shall come into force on the first day of September, 1872.

SYNOPSIS

1.	*Territorial Jurisdiction*	...	7	5.	*Contempt proceedings*	...	10
2.	*Applicability of the Act*	...	7		*5A. Court*	...	11
3.	*Judicial proceedings*	...	8	6.	*Affidavit*	...	11
4.	*Proceedings not judicial*	...	8	7.	*Proceedings before arbitrator*	...	12

COMMENTS

1. TERRITORIAL JURISDICTION

This Act extends to the whole of India except the State of Jammu and Kashmir. The word 'Whole of India' was substituted in 1950, for the words 'all the provinces of India', which was substituted in 1948 for the words 'The Whole of British India'. Under the Indian Constitution, India consists of territories specified in the First Schedule and also such other territories as may be acquired. The Act applies to the whole of India excluding the State of Jammu and Kashmir (*vide* definition of 'India' under Section 3). Jammu and Kashmir is governed by a separate Evidence Act [(13 of 1977) Samrat] on the same lines as this Act.

2. APPLICABILITY OF THE ACT

This Act applies to all judicial proceedings in or before any Court including Courts-Martial other than Courts-Martial convened under the Army Act, the Naval Discipline Act, the Indian Navy Discipline Act and the Air Force Act. This Act does not apply to affidavits presented to any Court or Officer and to proceedings before arbitrators. The Evidence Act has no application to enquiries by Tribunals, even though they may be judicial in character. The law only requires that rules of natural justice should be observed in the conduct of enquiries and if they do so the decisions of Tribunals are not liable to be impeached.[1]

The Law of Evidence is the *lex fori* which governs the Courts. Whether a witness is competent or not; whether a certain matter requires to be proved by writing or not; whether certain evidence proves a certain fact or not; that is to be determined by the law of the country where the question arises, where the

1. *Union of India* v. *T.R. Varma*, AIR 1957 SC 882 : 1958 SCJ 142.

remedy is sought to be enforced, and where the Court sits to enforce it.[2] The Law of Evidence is a part of the law of procedure.

3. JUDICIAL PROCEEDINGS

The words 'Judicial Proceedings' is not defined in this Act, but under Section 2(1) of the Criminal Procedure Code, 1973, it includes any proceedings in the course of which evidence is or may be legally taken on oath.

An enquiry is judicial if its object is to determine jural relation between one person and another or a group of persons, or between him and the community generally.[3] But even a judge acting without such an object in view, is not acting judicially. An enquiry in which evidence is legally taken is included in the term judicial proceeding.[4] One should keep in mind the distinction, though thin, between judicial proceedings and administrative proceedings. An inquiry about matters of fact, where there is no discretion to be exercised and no judgement to be formed but something is to be done in a certain event as a duty, is not a judicial but an administrative inquiry.

4. PROCEEDINGS NOT JUDICIAL

The following proceedings have been held to be not judicial:—

(a) Proceedings before a Magistrate not authorised to conduct any enquiry.[5]

(b) An inquest proceeding before the Coroners under Coroners's Act, 1871.[6]

Coroners are Magistrates in view of Section 20, for purposes of Sections 18, 21 and 26 of this Act and are entitled to administer oath and take evidence but they cannot give any definite judgement.[7]

(c) An enquiry by a District Magistrate into a crime alleged[8], delivery of possession by *Nazir*.[9]

(d) An enquiry under Section 476 (New Section 340) Cr.P.C.[10] see CONTRA in.[11]

(e) An enquiry under Section 176 Cr.P.C.[12]

(f) **Domestic Tribunals—Departmental Proceedings.**—In enquiries before tribunals or in departmental proceedings, strict rules of evidence may not apply because usually the enquiring officers consist of persons not having acquaintance with the rules of evidence. Even though the Evidence Act is not applicable in certain cases, the principles of natural justice should be observed. In a case relating to the powers of a Local Government Board under the Housing and Town Planning Act of 1909, which came up for hearing in the case of *King* v. *Local Government Board Ex-parte Arlidge Rice*,[13] it was held that the procedure indicated by the rules under the statute was followed and there was no obligation on the Board to hear the appellant either personally or through his representative or counsel as there was no provision in the statute. When the matter was taken in appeal in *Rex* v. *Local Government Board Ex-parte Arlidge*[14], the appeal was allowed by a majority judgement (HAMILTON L.J. **dissenting**) stating that the Local Board should not have dismissed the appeal without giving the appellant an opportunity of being heard in support of the appeal, they quashed the order of the Local Board dismissing the original appeal. It was further held that the owner of the property who was the appellant before the Local Board

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2. *Bain* v. *Whitehaven and Furness Junction Railway Co.*, (1850) 5 HLC 1(19).
3. *Alchayya* v. *Gangayya*, ILR 15 Mad 138.
4. *Queen Empress* v. *Tulja*, ILR (1887) 12 Bom 36 (42).
5. *Queen Empress* v. *Bharma*, ILR (1886) 11 Bom 102 (FB).
6. *Tanaji Rao* v. *H.J. Chinoy*, (1969) 71 Bom LR 732.
7. *R.* v. *Bhagwan Das*, AIR 1941 Bom 50; *R.* v. *Ramnath*, AIR 1926 Bom 151.
8. *Chandrasangji Himatsangji* v. *Mohansangji Hamirsangji*, ILR 30 Bom 523; *Chandasang* v. *Mohanang*, 8 Bom LR 705 (PC).
9. *R.* v. *Hareearam*, ILR 32 Cal 367.
10. *R.* v. *Dayanath*, ILR 37 Cal 72.
11. *R.* v. *Abdulla*, ILR 37 Cal 52.
12. In re : *Laxshminarayan*, AIR 1928 Bom 390.
13. (1913) 1 KB 463.
14. (1914) 1 KB 160.

was entitled to a hearing as he had no opportunity of seeing and considering the report of the officers concerned and the documents which the Local Board had before it.

The judges who gave the majority judgment followed the dictum of LORD BURN L.C. in *Board of Education* v. *Rice*[15] wherein it was stated that the Board must act 'in good faith and fairly listen to both sides'. Against the majority opinion the Local Board went in appeal to the House of Lords in *Local Board* v. *Arlidge*[16]. VISCOUNT HALDANE observed: "When the duty of deciding an appeal is imposed, those whose duty it is to decide must act judicially. They may deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same."

LORD SHAW observed: "Insofar as the term 'Natural Justice' means that a result of process should be just, it is harmless though it may be a high sounding expression; insofar as it attempts to reflect the old *JUS NATURALE*, it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions."

In another case also[17], VISCOUNT SIMON and LORD ATKIN observed that Lord Loreburn's dictum in *Board of Education* v. *Rice* affords a complete guide for the application of the principle.

In our country so far as domestic tribunals and departmental enquiries are concerned, time and again, it was observed by the Supreme Court that though such enquiries are not governed by strict rules of evidence and this Act is not made applicable, the ordinary principles of proof and the rules of natural justice have to be applied.[18]

Some of the **cases** on such proceedings are :

Officers conducting Departmental Inquiries.[19]

Departmental proceedings.[20]

Disciplinary Proceedings Tribunal.[21]

Though the Tribunal need not strictly follow the provisions of the Evidence Act, it must in all cases follow the principles of natural justice and should avoid hearsay evidence, because, oral evidence of a witness will have value only when he can be held responsible for its truth by cross-examination by the opposite party; secondly, hearsay evidence has no *prima facie* assurance of truth and thirdly, avoidance of hearsay evidence is not merely a technical rule under the Evidence Act but it is a rule of natural justice.[22] (See also Notes under "Court" in Section 3).

The Supreme Court observed, "In a domestic enquiry all the strict and sophisticated rules of this Act may not apply. All materials which are logically probative for a prudent mind are permissible though departmental authorities and administrative tribunals must be careful in evaluating such material and shall not glibly swallow what is strictly speaking not relevant under the Evidence Act. The essence of

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15. 1911 AC 179.
16. 1915 AC 120.
17. *General Medical Council* v. *Spackman*, 1943 AC 627.
18. *K.L. Shinde* v. *State of Mysore*, AIR 1976 SC 1080; *State of Mysore* v. *Shivabasappa*, AIR 1963 SC 375; *Fire-stone Tyre & Rubber* v. *Workmen*, AIR 1968 SC 236; *Central Bank of India* v. *Prakash Chand Jain*, AIR 1969 SC 983 : (1969) 1 SCR 735; *Central Bank of India* v. *Karunamoy*, AIR 1968 SC 266; *Kesoram Cotton Ltd.* v. *Gangadhar*, AIR 1964 SC 708; *Union of India* v. *T.R. Varma*, AIR 1957 SC 882; *New Prakash and Co.* v. *New Suwarna*, AIR 1957 SC 232; *Khardah* v. *Workmen*, AIR 1964 SC 719; *State of U.P.* v. *Ratan Shukla*, AIR 1956 All 258; *L.B. Workers Union* v. *2nd Industrial Tribunal*, AIR 1962 Cal 375; *Mehnga Ram* v. *Labour Appellate Tribunal*, AIR 1956 All 644; *Union of India* v. *T.R. Varma*, AIR 1957 SC 882 : 1958 SCJ 142.
19. *Sundara Ramier* v. *State of A.P.*, AIR 1958 SC 468.
20. *Sagar Singh Tyagi* v. *I.G. Police, Lucknow*, 1970 All LJ 1149; *Dharni Dhar Pather* v. *Railway Board*, (1967) 15 Fac LR 80; *Inwanggao Ka* v. *Union of India*, 1968 Lab IC 1145 (Manipur); *Hashomal Mulchand* v. *J.S. Bajaj*, ILR (1966) Bom 892; *Josodar Misra* v. *State of Bihar*, 1966 BLJR 825; *Subbiah Choudary* v. *State of A.P.*, (1960) 2 Lab LJ 464; *Maigur* v. *Divisional Operating Superintendent E. Railway*, (1959) 63 Cal WN 702; *Sisir Kumar* v. *State of West Bengal*, AIR 1955 Cal 183; *State of A.P.* v. *Kameswar Rao*, AIR 1957 AP 794 at 820; *State of Orissa* v. *Saila Pihari*, AIR 1963 Ori 73; *R. Arauamuda* v. *Commr. of Police*, ILR (1965) 2 Mad 508.
21. *Ahmed Hasan* v. *Chief Commissioner, Manipur*, AIR 1966 Mani 18.
22. *Kesoram Cotton Mill Ltd.* v. *Gangadhar*, AIR 1964 SC 708; *Central Bank of India* v. *Karunamoy*, AIR 1968 SC 266; *Employees of Firestone* v. *Workmen*, AIR 1968 SC 236.

judicial approach is objective exclusion of extraneous materials or consideration and observance of rules of natural justice. Fair play is the basis and if perversity or arbitrariness, bias or surrender of independence of judgement, vitiate the conclusion reached, such a finding even of a domestic tribunal cannot be held to be good. The simple point in all these is whether there was some evidence or there was no evidence, not in the sense of the technical rules governing court proceedings, but in a fair common sense way as men of understanding and worldly wisdom will accept. Sufficiency of evidence in proof of the finding by a domestic tribunal is beyond scrutiny by court while absence of any evidence in support of the finding is an error of law apparent on the record and the Court can interfere with the finding".

(g) A Sub-divisional Officer enquiring an election petition.[23]

(h) Authorities under the Income-tax Act.[24]

(i) Labour Courts.[25] (Authority can rely on hearsay evidence)

(j) Tribunal under the Motor Vehicles Act.[26]

(k) Proceedings under the Foreign Exchange Regulations Act.[27]

However Rule 3(5) under Section 27 of that Act has not the effect of rendering admissible evidence which was irrelevant or inadmissible under the Evidence Act.

(l) Commissioners under the Commissions of Inquiry Act, 1952.[28]

(m) Proceedings before a Collector under the Land Acquisition Act.[29] But a proceeding before Dy. Collector under Bengal Land Registration Act authorised to register the name of a rival claimant is a judicial proceeding and the Court is a Court.[30]

(n) An equiry under the Mysore (Personal and Miscellaneous *Inams* Abolition Act.[31]

(o) An enquiry under the Section 15(1) of A.P. Estates Abolition Act (26 of 1948).[32]

(p) *Jagir* Commissioner enquiring compensation claims under Section 32 of Rajasthan Act (6 of 1952) for payment of compensation payable to expropriates *Jagirdar*.[33]

(q) An enquiry under the Legal Practitioners' Act.[34]

(r) Enquiry u/s. 202 of Bengal Municipal Act.[35]

5. CONTEMPT PROCEEDINGS

Though the proceedings relating to contempt of Court are judicial in character, they are outside the scope of this Act.[36] It was held that the power of the High Court to take proceedings for contempt and punish the contemner is a special jurisdiction which is inherent in all Courts of record, that the Criminal

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23. *Mahadeo* v. *Sub-divisional Officer*, AIR 1959 All 43.
24. *State of Haryana* v. *Rattan Singh*, AIR 1977 SC 1512; *CIT* v. *Coast Commercial Co.*, AIR 1967 SC 768: *Anraj* v. *Commissioner of I.T.*, AIR 1952 Punj 46; *Gurmukh Singh* v. *Commissioner of I.T.*, AIR 1944 Lah 353 (FB); *Vimal Chandra Golecha* v. *I.T. Officer, Circle-I, Jaipur*, 1981, Tax LR 1239.
25. *Burrakay Coal Co.* v. *Labour Appellate Tribunal*, AIR 1958 Cal 226; *State of J.&K.* v. *Anwar Ahmed*, AIR 1965 J&K 75; *Fort William Jute Milling Co.* v. *First Labour Court*, (1963) 6 Fac LR 161; *Balakrishna Misra* v. *Presiding Officer, Industrial Tribunal, Orissa*, (1977) 35 Fac LR 11 (SC).
26. *Gopalkrishnan* v. *Sankara Narayana*, AIR 1968 Mad 436 **overrules on** another point in *Jayalakshmi* v. *R G Insurance Co.*, AIR 1971 Mad 143 (FB).
27. *Chandra Kishore* v. *Susendi Estate*, AIR 1962 SC 1764.
28. *Allenberry* v. *Bose*, AIR 1960 Punj 86 (Punjab Act); *State* v. *Anwar*, AIR 1965 J&K 75 (J&K Act).
29. *Ezra* v. *Secretary of State*, ILR (1902) 30 Cal 36; *Durga Das* v. *R.*, ILR 32 Cal 605; *Bast & Co. Ltd.* v. *Dy. Collector*, 36 IC 621.
30. *Rama Singh* v. *Harakhud*, 47 IC 710.
31. *State of Mysore* v. *P.T. Muniswami*, AIR 1971 SC 1363.
32. *Appadu* v. *S. Lakshminarayana*, (1972) 2 ALT 30.
33. *Thakur Bhanu Pratap Singh* v. *State of Rajasthan*, ILR (1964) 14 Raj 90.
34. *Nallasivam* v. *Ramalingam*, 32 MLJ 402.
35. *Nabadwip Municipality* v. *Puran*, 29 Cal WN 817.
36. *Brajnandan Sinha* v. *Jyothi Narain*, AIR 1956 SC 66; **reversing** *Jyoti Narain* v. *Brijnandan*, AIR 1954 Pat 289 and **overruling** *Kapur Singh* v. *Jagatnarain*, AIR 1951 Punj 49; **see** also *Sheoraj* v. *Batra*, AIR 1955 All 638; In re : *Basanta Chandra Ghosh*, AIR 1960 Pat 430 (FB); *State* v. *Padmakanta Malviya*, AIR 1954 All 523.

Procedure Code does not apply in the matter of contempt triable by a High Court as it can deal with contempt summarily and adopt its own procedure, that all that is required is that the procedure should be fair and the contemner should be made aware of the charge against him and he should be given a reasonable opportunity to defend himself.[37]

Usually proceedings under the Contempt of Courts Act are decided on the basis of affidavits. It is observed in HALSBURY'S LAWS OF ENGLAND (Vol. VIII, para 67): "It is therefore not true to say that contempt must be proved in the manner laid down in the Evidence Act; the Court undoubtedly has to satisfy itself that contempt has been committed, but is competent to adopt its own procedure for deriving satisfaction." But one has to see that the principles of natural justice are observed. The contemner must be made aware of the charge levelled against him and must be given an opportunity to defend himself.

Court.—The word includes judges and magistrates and all persons except arbitrators legally authorised to take evidence (*vide* Section 3).

6. AFFIDAVIT

This section specifically states that this Act is not applicable to affidavits. Affidavit means a statement or a declaration in writing on oath or affirmation before a person having authority to administer an oath or affirmation. It has already been pointed out that in contempt proceedings the hearing would normally take place based on the affidavits filed before the Courts. In any judicial proceeding, oral evidence will be taken in the presence of the opposite party who will have the right of cross-examination. But in the case of an affidavit the opposite party will not have an opportunity to cross-examine the deponent of the affidavit. In this Act the definition of the word 'Evidence' in Section 3 does not mention an affidavit, for it is specifically excluded by this section. Therefore, an affidavit cannot be taken as evidence except as provided in Order 19, C.P.C. Order 19, Rule (1) C.P.C. states that any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit or that the affidavit of any witnesses may be read at the hearing on such conditions as the Court thinks reasonable; provided that, where it appears to the court that either party *bona fide* desires the production of a witness for cross-examination and such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit. Affidavits cannot be taken as evidence unless permitted under Order 19, Rule 1 or 2, C.P.C.[38]

When affidavits are allowed to be filed one has to take note of the provisions of Order 19, Rule 3, CPC, where it is stated that every affidavit should carefully express how much of the statement is within the deponent's knowledge and how much of it is of his belief. And if some statements are given on belief, the grounds of such belief have to be stated. In *State* v. *Purushotham*,[39] it was held that when facts stated in the affidavit are not based on personal knowledge but based on belief the source of information should be clearly disclosed.[40]

A declaration in the shape of an affidavit cannot be received as evidence of the facts stated in it.[41] It is open to the Court to consider the facts alleged in the affidavit, if not controverted by any counter affidavit.[42] An affidavit can be taken as evidence if it is so ordered by the Court.[43] If the deponent dies before he is examined, it can be taken as a statement in writing of a dead man under Section 32 of this Act. If the person who gave the affidavit is not produced for cross-examination, the Court cannot take it as evidence.[44] An affidavit can be used as evidence if parties agree to treat it as evidence.[45] As an exception to the general rule, affidavits can be used in contempt proceedings as they are usually decided on the basis of affidavits.[46]

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37. *Sukhdeo Singh* v. *Judges of the Pepsu High Court*, AIR 1954 SC 186.
38. *Sudha Devi* v. *M.P. Narayanan*, AIR 1988 SC 1381; *Gopikaboi* v. *Narayan*, AIR 1953 Nag 135; *Shamsunder* v. *Bharat*, AIR 1964 Bom 38; *Paredu* v. *Kartick*, AIR 1968 Cal 532; ILR (1956) Patiala 302.
39. AIR 1952 SC 317.
40. **See also** *Bisakharani* v. *Satish*, AIR 1956 Cal 496; *Mothiram* v. *Union*, AIR 1965 Pepsu 318.
41. **In re** : *Iswar Chunder Guho*, ILR (1887) 14 Cal 653.
42. *State of U.P.* v. *Hiralal Chowdhary*, 1954 All LJ 228.
43. *Marneedi* v. *Masimukula*, AIR 1949 Mad 689.
44. *Miranjanlal Rathankumar* v. *River Steam Navigation Co. Ltd.*, AIR 1967 Assam 74, 77.
45. *Narayana* v. *Lakshmayya*, AIR 1939 Mad 927; **see** also AIR 1949 Mad 689 (*Supra*); *Parekh Bros* v. *Kartick Chandra Saha and others*, AIR 1968 Cal 532.
46. *Sheoraj* v. *Batra*, AIR 1955 All 638; *State* v. *Padmakant Malviya*, AIR 1954 All 523; In re : *Vasantha*, AIR 1960 Pat 430 (FB); *Sudhdev Singh* v. *Judges of Pepsu H.C.*, AIR 1954 SC 186.

The Madras High Court has held that an affidavit given by an employee of the Railways cannot be used as substantive evidence but can be used as an admission on the part of the Railway Administration.[47] Affidavits can be taken as evidence where a specific provision of an Act provides that a certain matter be supported by an affidavit.[48] Section 16A(7) of U.P. Intermediate Education Act makes provision for receiving affidavits as evidence in enquiries.[49] Section 45 of the Divorce Act provides for the Court to allow affidavit evidence but the deponents have to be present for cross-examination, if directed by the Court.[50] Section 30 of the Arbitration Act enables the Court to decide the question on affidavits and other evidence if the Court so directs.[51]

In the case of affidavit sworn in Foreign Countries, one has to prove the identity and the signature of the person swearing to the affidavit.[52] Reference to a Civil Court under Section 146(1) Cr.P.C. shows that the Civil Court has jurisdiction and is legally competent to require the person whose affidavit was filed before the Magistrate u/s. 145(1) Cr.P.C. to attend the Court for the purpose of cross-examination, though it is discretionary. Therefore, 'evidence' here includes, affidavit.[53]

7. PROCEEDINGS BEFORE ARBITRATOR

The Act is not applicable to proceedings before arbitrators as they have no powers to administer the oath and need not examine witnesses. But they should conform to the rules of natural justice and are unfettered by technical rules of evidence.[54] An award cannot be set a side on the ground that rules of evidence were not followed.[55]

As far as possible and practicable, rules of evidence must be followed by the arbitrator and he must not admit inadmissible evidence.[56] Evidence given in the previous infructuous arbitration proceedings can be accepted in proceedings.[57] Arbitrator honestly admitting inadmissible evidence, is not guilty of mis-conduct.[58]

Repeal of enactments.

S. 2 [Repealed by the Repealing Act, 1938 (1 of 1938), S. 2 and Sch.]

COMMENTS

The original Section 2 of the Act was repealed by the Repealing Act 1 of 1938. Original Section 2 was in the following terms: "2. On and from that day the following laws shall be repealed:—

(1) all rules or evidence not contained in any Statute, Act or Regulation in force in any part of British India;

(2) all such rules, laws and regulations as have acquired the force of law under the 25th section of the Indian Councils Act, 1861, insofar as they relate to any matter herein provided for; and

(3) the enactments mentioned in the schedule hereto, to the extent specified in the third column of the said schedule.

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47. *Dominion* v. *Rup Chand*, AIR 1953 Mad 169.
48. *Prakash Raj* v. *J.N. Dhar*, AIR 1977 Del 73; *Kailash Nath Agarwal* v. *Amar Nath Agarwal*, AIR 1969 All 82; *Shanti Prasad Jain* v. *Union of India*, (1966) 68 Bom LR 431; *Niranjanlal Ratan Kumar* v. *River Steam Navigation Co. Ltd.*, AIR 1967 Assam 74.
49. *Comka Intermediate College* v. *Regional Dy. Director of Education*, 1989 All LJ 259.
50. *Stone* v. *State*, 38 Cal WN 969. Such practice was not **approved** in *Kishore* v. *Sneha*, AIR 1943 Nag 185 (FB).
51. *Deokinandan* v. *Basant*, 46 Cal WN 881.
52. *Ghulam Mohd.* v. *Badshal Begum*, AIR 1970 J&K 159.
53. *Kailash Nath Agarwal* v. *Amarnath Agarwal*, AIR 1969 All 82.
54. *Haralal* v. *State Industrial Court*, AIR 1967 Bom 174; *Corporation of Calcutta* v. *Union Jute Co. Ltd.*, 1951 Cal 230; *Suppu* v. *Govindacharya*, ILR 11 Mad 35.
55. *Nandorani* v. *Satya Narayin*, AIR 1951 Cal 215; *Chandrabhan* v. *Ganapat Rai*, 51 Cal WN 74 (PC).
56. *Vellore E.C. Ltd* v. *State*, AIR 1959 Mad 351; *Kalyan People's Co-operative Bank Ltd* v. *Dulhanbibi Aqual*, (1963) 2 SCR 348 : (1963) 2 SCJ 176 : AIR 1966 SC 1072; *Nagakhushanam* v. *Sunihadri Appurao*, (1966) 2 An WR 284; *Shri Paamila Bala Neogi* v. *Panchanon Pal*, ILR (1960) 2 Cal 538.
57. *Vellore E.C. Ltd.* v. *State*, AIR 1959 Mad 351.
58. *Sheodutt* v. *Vishnudutta*, AIR 1955 Nag 116.

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed."

Some of the provisions relating to evidence contained in other enactments may be noted: Order 26, CPC relating to reports of commissioners appointed by the Court for local inspection or to examine accounts etc., special rules regarding medical witnesses who are not called as witness (Section 291, Cr.P.C.), reports of scientific experts (Section 293, Cr.P.C.), certificates of Jail Officers, certified orders of previous convictions etc., under Criminal Procedure Code; rules contained in Sections 59 and 123 of the Transfer of Property Act regarding execution and attestation of mortgages and gifts respectively, inadmissibility of certain documents not duly stamped under Section 35 of the Indian Stamp Act, admissibility of certain documents as per Sections 17, 49, 50 of the Indian Registration Act and rules in Bankers Books Evidence Act.

It can be seen that certain provisions relating to evidence contained in other enactments are saved. As the section as it originally stood was repealed it does not have the effect of bringing back the old rules which were repealed.[59] Section 8 of the Repealing Act of 1938 specifically saves the saving clause under the old Section 2 of the original Act.

Section 7 reads. "(1)In any (Central Act) or Regulation made after the commencement of this Act, it shall be necessary, for the purpose of reviving, either wholly or partially, any enactment wholly or partially repealed, expressly to state that purpose.

(2) This section applies also to all Central Acts made after the third of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1897."

Interpretation clause.

S. 3 In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—

"Court".

"Court" includes all Judges and Magistrates, and all persons, except arbitrators, legally authorised to take evidence.

"Fact".

"Fact" means and includes—

(1) any thing, state of things, or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

ILLUSTRATIONS

(a) That there are certain objects arranged in a certain order in a certain place, is a fact.

(b) That a man heard or saw something, is a fact.

(c) That a man said certain words, is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation, is a fact.

"Relevant".

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

"Facts in issue".

The expression "facts in issue" means and includes—any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

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59. *King* v. *King*, AIR 1945 All 190.

***Explanation.*—Whenever, under the provisions of the law, for the time being in force, relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.**

ILLUSTRATIONS

A is accused of the murder of *B*.

At his trial the following facts may be in issue :—

that *A* caused *B*'s death;

that *A* intended to cause *B*'s death;

that *A* had received grave and sudden provocation from *B*;

that *A*, at the time of doing the act which caused *B*'s death, was, by reason of unsoundness of mind, incapable of knowing its nature.

"Document". **"Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.**

ILLUSTRATIONS

A writing is a document;

Words printed, lithographed or photographed are documents;

A map or plan is a document;

An inscription on a metal plate or stone is a document;

A caricature is a document.

"Evidence". **"Evidence" means and includes—**

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) [60][*all documents including electronic records produced for the inspection of the Court;*] such documents are called documentary evidence.

"Proved". **A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.**

"Disproved". **A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.**

"Not proved". **A fact is said not to be proved when it is neither proved nor disproved.**

"India". **"India" means the territory of India excluding the State of Jammu and Kashmir.**

**[61][*the expressions "Certifying Authority," "digital signature," "Digital Signature Certificate," "electronic form," "electronic records," "information," "secure*

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60. Substituted by the Information Technology Act, 2000, S. 92, Sch. II (w.e.f. 17-10-2000).

61. Inserted by the Information Technology Act, 2000, S. 92, Sch. II (w.e.f. 17-10-2000).

electronic record," "secure digital signature" and "subscriber" shall have the meanings respectively assigned to them in the Information Technology Act, 2000.]

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COMMENTS

1. INSERTION OF A NEW CLAUSE TO SECTION 3

At the foot of Section 3, a new clause has been inserted by the Information Technology Act, 2000 which says that the expressions "Certifying Authority", "digital signature", "Digital Signature Certificate", "electronic form", "electronic records", "information", "secure electronic record", "secure digital signature" and "subscriber" shall have the same meanings as the said Act, 2000 assigns to them respectively.

2. INTERPRETATION CLAUSE

In this section certain words like Court, Fact, Relevant, Facts in issue, Document, Evidence, Proved, Disproved, Not proved and India, are defined subject to the qualification "Unless a contrary intention appears from the context". One would find generally in all statutes qualifying words like "Unless the context otherwise requires" or "Unless a contrary intention appears". The Supreme Court in *V.F.&G. Insurance Co.*, v. *Fraser Ross*,[1] stated that in view of this qualification the Court has not only to look at the words but also look at the context and object of such words relating to such matters and then interpret the meaning that was intended to be conveyed by the use of the words under the circumstances. All statutory definitions must be read subject to this qualification, even though the definition clause does not contain those qualifying words. Where those qualifying words are absent, little weight is to be attached to such absence, as some such words of qualification are to be implied.[2] CRAIES observes: "Another important rule with regard to the effect of an interpretation clause is that an interpretation clause is not to be taken as substituting one set of words for another or as strictly defining what the meaning of a term must be under all circumstances, but rather as declaring what may be comprehended within the term where the circumstances require that it should be so comprehended.[3] MAXWELL observes: "It is common for a statute to contain a provision that certain words and phrases shall, when used in the statute, bear a particular meaning. Sometimes, it is provided that a word shall 'mean' what the definition section says it shall mean; in this case, the word is restricted to the scope indicated in the definition section. Sometimes, however, the word 'include' is used in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, words or phrases must be construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. In other words, the word in respect of which

1. AIR 1960 SC 971.
2. *Knights Bridge* v. *Byrne*, 1940 AC 613, 621.
3. CRAIES STATUTE LAW, IVth Edn., p. 195.

'includes' is used, bears both its extended statutory meaning and its ordinary, popular and natural sense whenever that would be properly applicable. A provision defining the meaning of a word in a statute does not necessarily govern that word when it appears in regulations made under the statute".[4]

3. "COURT"

The word 'Court' is defined to include all judges and magistrates and all persons except arbitrators legally authorised to take evidence. The expression "include", would show that the Act is not meant to be exhaustive.[5] The Supreme Court has[6] held that the definition is necessarily not exhaustive but is framed only for the purposes of the Act, and as such cannot be extended where such extension is not warranted.[7]

Originally in England the word 'Court' meant the King's palace. Later it was given the meaning that a person or persons who administers justice and also a place where justice was administered. In the present Act the definition was framed only for the purpose of the Act and should not be extended beyond its legitimate scope and no exception to the rule should be permitted. WEST C.J. observed; "It is the object to which an enquiry before a Judge is directed which determines the nature of it; that an enquiry is judicial if the object of it is to determine a jural relation between one person and another or a group of persons or between a person and the community generally".[8] In order to be a Court, the person or persons who may be said to constitute it must be entrusted with judicial functions, which means deciding litigated questions according to certain rules of procedure prescribed by law and not arbitrarily but on evidence. With impartiality and fairness and it should be done normally in public and in the presence of both the parties concerned.[9]

According to the test propounded by the decision in[10], there must be a *lis* before the officer enquiring into the matter. But, according to SUNDARA AYYAR. J. of the Madras High Court, it is not always necessary to have a litigated question among the parties before the court. He gave an example in support of his observation stating that if the guardian of an infant, or a trustee makes an application before a court, for leave to sell certain properties of the ward or the beneficiary, there might have not be any respondent in the application; yet it cannot be doubted that the order passed would be that of a court. The learned Judge further added that a court must be armed with certain powers under the sanctions of law, like power to enforce attendance of witnesses, production of document, receiving evidence on the questions to be decided, to pronounce judgement with a power to enforce it between the parties. According to him a court must not only be empowered with judicial functions but must also be invested with judicial powers, and if a tribunal satisfies the above tests, though not exhaustive, it would be difficult to hold that it is not a court. In that case the learned Judge, repelling the contention that the Indian Legislature (then Governor General-in-Council) has power to create new Courts of Justice or limit the jurisdiction of existing courts, relying on[11] which in turn relied on the decision of the Privy Council in[12]. Accordingly, the learned Judge held that the Commissioner appointed under the Workmen's Compensation Act as a tribunal to settle the disputes between the workmen and the management is a Court[13].

In *Shell Company of Australia* v. *Federal Commr. of Taxation*[14] it was observed that the exercise of judicial power does not begin until, some tribunal which has power to give a binding and authoritative decision, is called upon to take action.[15] It was held that though the Sales Tax Officer was required to perform a *quasi*-judicial function, as his main purpose was to make assessment and collection of Sales Tax, under the U.P. Sales Tax Act and therefore it could not be said to be a Court[16].

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4. MAXWELL INTERPRETATION OF STATUTES, 12th Ed., pp. 270-271.
5. *Express* v. *Ashootosh Chuckerbutty*, ILR 4 Cal 483, 493 (FB).
6. *Braj Nandan Sinha* v. *Jyothi Narain*, AIR 1956 SC 66
7. **See also** *Rajwade* v. *Dr. Hasan*, ILR 1954 Nag 1.
8. *Queen Empress* v. *Tulja*, ILR 12 Bom 36.
9. FAZL ALI J. in *Dirji* v. *Shrimati Goalin*, AIR 1941 Pat 65.
10. *Rex* v. *Woodhouse*, (1906) 2 KB 501.
11. *Parameshwar Ahir* v. *Emperor*, AIR 1918 Pat 155.
12. *Empress* v. *Burah*, ILR 4 Cal 172 (PC)
13. *Re. Nataraja Iyer*, ILR 36 Mad 72.
14. 1931 LR AC 275 (PC).
15. *Jagannath* v. *State*, (1963) 2 SCR 850.
16. *Lalji Haridas* v. *State*, (1964) 6 SCR 700.

Under the Old Registration Act 3 of 1877 there was a provision (Section 75) which stated that a Sub-Registrar was to work as if he were a Civil Court. But, under the present Registration Act 1908, there is no such provision but the State can empower him to act as a Civil Court.[17]

It was held that though some bodies are not courts they decide questions judicially in the sense that they conduct the proceedings with fairness and impartiality.[18]

In the 69th Report the Law Commission of India has formulated five tests to determine whether a person or body of persons, is to be regarded as Court:

(1) Test of exercise of judicial functions under authority derived either immediately or mediately from the Sovereign.

(2) Test of definitive judgment.

(3) Test of legal power to take evidence.

(4) Test of judicial power, or of being a part of the judiciary.

(5) Test of exercise of power otherwise exercisable by civil and revenue courts.

4. *PERSONA DESIGNATA*

(a) Court-Tests.—In *Public Prosecutor (AP)* v. *Legisetty Ramayya,*[19] it was observed that the principles deduced from decided case law may be laid down as follows:—

(1) Where, by statute, matters are referred to the determination of a Court with no further provision, the necessary implication is that the Court will determine the matters as a Court. Its jurisdiction is enlarged with all the incidents of such jurisdiction.

(2) Where a person is indicated not by name but by official designation, the question whether such a person is a *persona designata* or not, depends upon the intention to be gathered from the words used, nature of the functions to be performed and object and purpose to be achieved.

(3) When a reference is made to an Officer presiding over a Court and not the Court itself, it does not necessarily follow that such a person is intended to act as a "*persona designata*" and not as a Court, because it is quite an ordinary practice for a reference to be made to the officer presiding over the Court even when the intention is to refer to the Court.

(4) When a statute confers authority on a judicial officer one should be slow in saying that the Legislature confers such authority on the said officer as a "*persona designata*".

(5) Where a Judicial Officer who presides over a Court is appointed to perform a function under any statute and he is intended by the statute to act not otherwise than in a judicial capacity, in the absence of any other indication to the contrary, he cannot come within the expression "*persona designata*" and he acts as a court only.

(6) When a Judicial Authority, like an Officer who presides over a Court, is appointed to perform a function, that is to judge and decide in accordance with law and nothing has been mentioned about the finality or otherwise of the decisions made by the authority, it is an indication that the authority is to act as a Court.

(7) Whether an authority functions as a "*persona designata*" or as a Court does not necessarily depend on the question whether it is acting against the decision of designated persons or Tribunals, or not. Statutes are full of instances where appeals or revisions to Courts are provided even as against the decisions of designated persons and Tribunals.

Under the Act, 'Court' includes Judges and Magistrates. The expressions judge and magistrate are not defined in the Act. Under Section 20 of the Indian Penal Code the word 'Court of Justice' is defined stating that a judge who is empowered by the law to act judicially alone, or a body of judges which is empowered by law to act judicially as a body, when such judge or body of judges is acting judicially.

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17. *Probhat Chandra Adhikari* v. *Emperor,* AIR 1930 Cal 366 **see also** *Rama Rao* v. *Narayan,* AIR 1969 SC 724.
18. *Ramarao* v. *Narayan,* AIR 1969 SC 724.
19. 1975 Cr LJ 144 (FB).

(b) Under Section 2(8), C.P.C.—Judge means the Presiding Officer of a Civil Court.

(c) Section 19, I.P.C.—"The word 'judge' denotes not only every person who is officially designated as Judge, but also every person,—who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such a judgment". Under Section 3(32) of the General Clauses Act, "Magistrate shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force."

5. JUDICIAL PROCEEDINGS HELD TO BE THAT OF A 'COURT'

(a) Where a Magistrate released an accused on bail and ultimately discharged the accused on submission of the final report by the police stating that the complainant made a false complaint against the accused, the question arose whether the magistrate acted judicially and was therefore, a Court. The Supreme Court held that while deciding a matter for granting bail, though the complainant made a false complaint, the Magistrate acts judicially and therefore it is a Court and taking of cognizance of any offence by a Magistrate under Section 190 Cr PC is not a condition precedent for him to be regarded as a Court.[20]

(b) A Magistrate making the enquiry for committing a case to the Court of Sessions.[21]

(c) The Coroner under the Coroner's Act is a Court.[22]

(d) Assistant Collector acting under Section 134 of the Excise Act is a Court within the meaning of Section 195 of Cr PC.[23]

(e) Where a person filed a false affidavit before a Rent Control Officer, the question arose in *Chandra Pal Singh* v. *Maharaj Singh* whether the Rent Control Officer is a 'Court' and a complaint by him is a precondition for taking cognizance of such an offence (filing false affidavit is an offence under Section 193, C.P.C.) by a Criminal Court. The Supreme Court reversing the decision of the Allahabad High Court in 1981 All Cr. R. 98 held that the Rent Controller, under the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 is a 'Court' and a complaint by the Court is a pre-condition for taking cognizance of such an offence by any Criminal Court that, if the pre-condition is not satisfied, the Criminal Court will not have any jurisdiction.

A Rent Controller acting under A.P. Buildings (Lease, Rent and Eviction) Control Act who is authorised to record evidence of the parties by virtue of rule 8(2) of the rules framed under the Act, is a Court.[24]

(f) Under the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956, the authorities under the Act constitute a 'Court' as the provisions of the Evidence Act, are applicable to the proceedings before them.

(g) **Tribunals:**—*Industrial Tribunal.*—(i) In the case of Industrial Tribunal under the Industrial Tribunals Act of 1947 it was first held that it is like a court but not a court in the technical sense.[25]

It was held that in an enquiry under Section 11, the Industrial Tribunal is a court, because Section 11(3) authorises it to take evidence, and it is granted powers as are vested in the Civil Courts.[26]

(ii) The Act was made applicable by Section 90(3) of the Representation of People Act, 1951 to Election Tribunals. So also it was made applicable to Railway Rate Tribunal but it was given discretion under rule 51 of the rules to relax any of the provisions.[27]

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20. *Kamalapati Trivedi* v. *State of West Bengal*, AIR 1979 SC 777, **reversing** the decision of the Calcutta High Court in Criminal Revision Number 1006 of 1970 and **overruling** AIR 1934 Mad 175 : AIR 1917 Cal 593 : AIR 1921 Pat 302 : AIR 1948 Lah 184 (FB).
21. *Atchayya* v. *Gangayya*, ILR 15 Mad 138 (1891) (FB); *Abdulla* v. *R.*, 14 Cal WN 132.
22. *Tanaji Rao* v. *H.J. Chinoy*, (1969) 71 Bom LR 732.
23. *Benj Prasad* v. *State of U.P.*, 1977 Cr LJ 1632 (All).
24. AIR 1976 AP 270 **see contra** 1966 All WR 753.
25. *Associated Cement Co. Ltd.* v. *P.N. Sharma*, AIR 1965 SC 1595; the **decision in** *E.M. Industries* v. *Industrial Tribunal*, AIR 1950 Mad 839 **was not approved. see also** *Raghu* v. *Burrakur*, AIR 1966 Cal 504.
26. *Burrakar Coal Co. Ltd.* v. *Labour Appellate Tribunal of India*, AIR 1958 Cal 226 **following** *Bharat Bank* v. *Employees*, AIR 1950 SC 188 **dissenting from** *E.M. Industrial* v. *Industrial Tribunal* AIR 1950 Mad 839; **see contra** AIR 1967 Pat 12.
27. *Hind Strip Mining Corporation* v. *Raj Kishore*, AIR 1967 Pat 12.

(iii) The Election Tribunal under U.P. Municipalities Act.[28]

(iv) The Supdt. of Former Mandi Estate settling the rights of villagers with powers as Collector.[29]

(v) Accident Claims Tribunal under Motor Vehicles Act of 1939, as it has the power to record evidence on oath.[30]

6. THE FOLLOWING WERE HELD TO BE NOT PROCEEDINGS IN A 'COURT'

(a) Proceedings under the Contempt of Courts Act—see Section 1 under the head 'Contempt proceedings'.

(b) Proceedings before the Income Tax Authorities.[31] (under Section 195 Cr.P.C.). See commentary under Section 1.

(c) Proceedings of the Collector of Central Excise.[32]

(d) Proceedings of Regional Transport Authority.[33]

(e) Proceedings of a Commissioner appointed to record evidence and submit a report.[34]

(f) Magistrate functioning under Section 37 of Rajasthan Co-operative Societies Act 13 of 1965.[35]

(g) Magistrate holding preliminary enquiry under Section 164 Cr.P.C. (See Section 164 Cr.P.C.[36])

(h) Proceedings of a Commissioner under Public Servants (Inquiries) Act of 1950.

It was held by the Supreme Court that a Commissioner appointed under Public Servants (Inquiries) Act 37 of 1950, is not a Court. It was pointed out that in order to constitute a court, apart from having some of the trappings of a judicial tribunal, he should have power to give a decision or a definitive judgment which has finality and authoritativeness.[37]

(i) Proceedings of *Jagir* Commissioner under R.J. Land Reforms and Resumption of *Jagirs* Act 6 of 1952;[38]

(j) Registrar's Nominee under the Maharashtra Co-operative Societies Act 24 of 1961, enquiring into offences committed by a party under secs. 465 and 471 I.P.C., is not a court within the meaning of Section 195 Cr.P.C.;[39]

(k) Proceedings of the Commissioner under the Workmen's Compensation Act of 1933.[40]

7. "LEGALLY AUTHORISED TO TAKE EVIDENCE"

Under the present section "court" includes all persons except Arbitrators who are empowered with a positive authorisation to take evidence. It was held by the Allahabad High Court that the words "legally authorised to take evidence" contemplate a positive authorisation and the District Magistrate hearing an

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28. *Prem Chand* v. *O.P. Trivedi*, 1967 All LJ 5.
29. AIR 1962 HP 28.
30. *Premier Insurance Co. Ltd.* v. *Githarani (Smt.)*, AIR 1975 Cal 239; *Municipal Committee* v. *Romesh Saggi*, AIR 1970 Punj 137.
31. *Chaparala Krishna Brahman* v. *Guduru Govardanaiah*, AIR 1954 Mad 832.
32. *Panduranga Bomamsh Vernekar* v. *Collector of Central Excise*, 1963 (2) Cr LJ 467.
33. *Brij Bushan Pandey* v. *State Transport Authority Lucknow*, AIR 1958 All 30.
34. *Janimal Budharmal* v. *Girdharidas Pakhardas*, AIR 1957 Nag 47.
35. *Kashinath Joshi* v. *Satishchandra Sharma*, ILR (1969) 19 Raj 60 : 1969 Cr LJ 1193.
36. *R.* v. *Bharma*, ILR 11 Bom 702 (1806) (FB).
37. *Brajnandan Sinha* v. *Jyothi Narain*, AIR 1956 SC 66, **reversing see also** *Maqbool Hussain* v. *State of Bombay*, AIR 1953 SC 325; *S.A. Venkataraman* v. *Union of India*, AIR 1954 SC 375 : AIR 1954 Pat 289 and **overruling** *Kapur Singh* v. *Jagat Narani*, AIR 1951 Punj 49.
38. *Thakur Bhanupratap Singh* v. *State*, ILR (1964) 14 Raj 90, **see contra** the **decision in**, AIR 1980 NOC 29 (Mad) under the T.N. Land Reforms (Fixation of ceiling on land) Act 58 of 1961.
39. *Ram Rao* v. *Narayan*, AIR 1969 SC 724 **overruling** *Thadi Subbi Reddi* v. *Emperor*, AIR 1930 Mad 869; *Velayudha Mudali* v. *Co-op. Rural Credit Society*, AIR 1934 Mad 40 (FB); *Mahabaleshwarappa* v. *Gopala Mudakar*, AIR 1935 Mad 673; *Nandolal Ganguli* v. *Mohan Ghose*, AIR 1918 Cal 932. It was held by the Supreme Court that is not a court.
40. *Kunchali Rudpani* v. *Baby*, 1979 Lab IC 415.

appeal under the U.P. Municipalities Act 2 of 1916 is not legally authorised to take evidence. The right to receive evidence is not an incident of an appellate court. Wherever the appellate court possesses the right to receive evidence it is by virtue of an express enactment such as those contained in Section 428 Cr.P.C. and Order 41, Rule 27 C.P.C.[41]

Note:—For other cases see Section 33 under the head: "Any person authorised by law to take evidence".

8. FACT

The definition under this section read with the illustrations refers to two kinds of facts, namely, physical fact and psychological fact. They can be proved either by direct or indirect evidence. This definition was taken from the classification of facts made by BENTHAM. According to him, physical facts are such as either have their seat in some inanimate being or if in one that is animate, then not by virtue of the qualities which constitute it such; while psychological facts are those which have their seat in an animate being by virtue of the qualities by which it is constituted animate". It is stated in the Draft Report of the Select Committee which was published in [Gazettee of India dated 1st July, 1871, part 5, p. 273], that each class of facts has in common one element which entitles them to the name of facts that can be directly perceived either with or without the intervention of senses. Clause (1) refers to external parts which can be perceived by the five senses [see ill. (a)(b) & (c)]. Clause (2) refers to internal facts which are the subjects of consciousness [see ill. (d) & (e)]. The state of man's mind is as much a fact as the state of his digestion per BOWEN LJ in.[42] A misrepresentation as to the intention of a person is a misrepresentation of fact [see ill. (d)][43] According to STEPHEN'S Introduction (P. 20) the word 'Fact' is sometimes opposed to theories, sometimes to opinion, sometimes to feeling but all these modes of using it are more or less rhetorical. According to BEST there are two other divisions of fact: (1) Events or states of things. (2) Positive or affirmative, and Negative. For example the fall of a tree is an event, whereas the existence of a tree is a state of thing. But both are facts. For the latter division, the existence of certain states of things is a positive or affirmative fact whereas the non-existence of it is a negative fact.[44] ; such as non-availability of an alternate accommodation to a tenant refers to a state of things, hence it is a positive fact coming within the definition of 'fact'. It is not absence of a fact.[45] The definition does not restrict a fact to something which can be exhibited as a material object.[46] Mental condition is a fact but inference arrived at by a person by a process of ratiocination, being not a mental condition of that person, is not a fact.[47] Question of prejudice is a fact.[48] Likewise question of intention is a fact.[49] 'Matter of fact' is anything which is the subject of testimony.

"..... the term "fact" is being used in three different senses :

- the information provided by witnesses and other evidence;
- the conclusions drawn by the trier of fact from the information presented in Court as to what actually happened;
- the legal concepts, facts in issue, that must be established if a particular party to legal proceedings is to succeed."[50]

'Matter of law' is the general law of the land of which the courts will take judicial cognizance.

Events and facts which are likely to occur in future do not fall within the definition of "facts".[51]

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41. *State of U.P.* v. *Ratan Shukla,* AIR 1956 All 258.
42. (1889) 29 Ch D 459, 483; **see also** *Sabhapathi* v. *Huntley,* AIR 1938 PC 91, 97.
43. *Re, Jaladu,* ILR (1911) 36 Mad 453; *Crown* v. *Mussamat Soma,* (1916) PR No. 17 of 1916; *Saleh* v. *Bhasetawar,* (1916) Pun. *Re,* No. 3 of 1917 (Civil).
44. **See** BEST ON EVIDENCE, 10th Edn. Sec. 13.
45. *Scariah Kuncheria* v. *K.A. Riyas,* 1999 AIHC 1924 (para 16) (Ker).
46. *Emperor* v. *Ramanuja,* AIR 1935 Mad 528 (FB).
47. *Anant Baburao* v. *State,* AIR 1967 Bom 109, 117.
48. *Wille* v. *State,* AIR 1956 SC 110.
49. *Talab Haji* v. *Mudhukar,* AIR 1958 SC 376.
50. STEVE UGLOW'S EVIDENCE : TEXT & MATERIALS, 1997, p. 16.
51. *Dueful Laboratory* v. *State of Rajasthan,* 1998 Cr LJ 4534 (para 33) (Raj).

9. RELEVANT

According to THAYER, "There is another precept which should be laid down as preliminary in stating the law of evidence, namely, that unless excluded by some rule or principle of law, all that is logically probative is admissible. This general admissibility, however, of what is logically probative is not, like, the former principle, a necessary presupposition in a rational system of evidence; there are many exceptions to it. Yet, in order to have a clear conception of law, it is important to notice this also as being a fundamental proposition. In a historical sense, it has not been the fundamental thing, to which the different exclusions were exceptions. What has taken place, in fact, is the shutting out by the Judges of one and another thing from time to time; and so, gradually, the recognition of this exclusion under a rule. These rules of exclusion have had their exceptions; and so the law has come into the shape of a set of primary rules of exclusion; and then a set of exceptions to these rules."

The way the word 'relevant' is defined would show no indication of the definiteness of that word; it simply says that one fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts. Sections 5 to 55 of the Act give the methods one should adopt to know whether a particular fact is relevant for the determination of the issues arising out of the list between the parties. Facts relevant to an issue are those facts which are necessary to prove or disprove the fact in issue.

The word 'relevant' means that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other.[52] Relevant, strictly speaking, means admissible in evidence. Erroneous admission of any evidence does not make it relevant.

The word 'relevant' is used in the Act with two meanings: (a) as connected; (b) as admissible. Firstly, it should have some connection with the issue. Secondly, such fact must be admissible. Thus in the first place it is logical and in the second place it is legal.[53] LORD HOBHOUSE said that the word 'relevant' in the Act means admissible. The Supreme Court has held that statement of witnesses to the effect that they heard from other persons at the scene of offence immediately after the occurence that the accused fired the gun is admissible as a relevant fact.[54] It may be remembered that every fact which is logically relevant having probative value is not legally admissible in evidence, because admissibility is based on certain principles of law, and not on logic. Of course, admissibility presupposes relevancy. For example, in a theft case other instances of theft by the accused may be logically relevant but not admissible if they are very remote in point of time, because it may create prejudice in the mind of the court. So also some relevant facts having logical probative value are excluded even in this Act in Sections 122, 123, 124 and 126 which deal with the disclosure of communications between husband and wife during marriage, disclosure of affairs of the state, or communications in official confidence, disclosure of communication made to a legal adviser in confidence.

Of all rules of evidence, the most universal and the most obvious is this,—that the evidence adduced should be alike directed and confined to the matters which are in dispute, or which form the subject of investigation. The theoretical propriety of this rule can never be a matter of doubt, whatever difficulties may arise in its application. The Tribunal is created to determine matters which either are in dispute between contending parties, or otherwise require proof; and anything which is neither directly nor indirectly relevant to those matters ought at once to be put aside as beyond the jurisdiction of the Tribunal, and as tending to distract its attention and to waste its time. Evidence may be rejected as irrelevant for one or two reasons: first, that the connection between the principal and evidentiary facts is too remote and conjectural; second, that it is excluded by the state of the pleadings or what is analogous to the pleadings; or is rendered superfluous by the admissions of the party against whom it is offered.[55]

"In later editions of the DIGEST STEPHEN abandoned the theory of causation as a test of relevance which he had previously held.[56] Instead, in Article 1, he defined the word "relevant" as meaning that :

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52. SIR JAMES FITZAMES STEPHEN'S DIGEST OF LAW OF EVIDENCE, 1893 Ed. p. 2.
53. *Lala Lakim Chand* v. *Sayed Haider Shah*, (1899) 4 CWN 82 (PC).
54. *Jetharam* v. *State of Rajasthan*, AIR 1979 SC 22.
55. BEST 12th Edn., ss. 251, 252, p. 232.
56. For a discussion of this theory, see the eleventh edition of PHIPSON (para 154).

"any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in conjunction with other facts, *proves or renders probable* the past, present, or future existence, or non-existence of the other,"

and in Article 2 he stated that :

"Evidence may be given in any proceedings of any fact relevant to any fact in issue, unless it is hereinafter declared to be deemed to be irrelevant, and of any fact hereinafter declared to be deemed to be relevant to the issue, whether it is, or is not, relevant thereto. Provided that the judge may exclude evidence of facts which, though relevant or deemed to be relevant to the issue, appear to him too remote to be material under all the circumstances of the case."

The phrases "deemed to be relevant" and "deemed to be irrelevant" appear to imply that law uses the *logical* concept of relevance and then artificially expands and contracts it by "deeming". This usage is confusing, however, since it is now accepted that many of the exclusionary rules that STEPHEN explained as instances of "deemed irrelevance", for instance the hearsay rule, are not associated with relevance at all.[57]

In Australia, Section 55(1) of the Evidence Act 1995 (Commonwealth) states that :

"The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding."

The phrase "could rationally affect [...] the assessment of the probability" might be thought preferable to STEPHEN'S "proves or renders probable" since the words "renders probable" might be thought to import the idea that evidence can only be relevant if it suggests a particular degree of likelihood. A similar deviation from STEPHEN'S definition is found in Rule 401 of the Federal Rules of Evidence (U.S.A.), which defines "relevant evidence" as "evidence having *any tendency* to make the existence of any fact [...] *more probable or less probable*" in order to avoid the same potential confusion."[58]

Drawing inference of "*participes criminis*"—*Factors relevant.*—In a bride burning case, the mother-in-law and the husband were accused. The mother-in-law was present in the house and there was possibility of presence of the husband also at the time of occurrence of the incident and thereafter his reaching in a nearby village could not be ruled out. Subsequent conduct of the accused was unnatural and inculpatory. In the facts and circumstances of the case it was not possible for the mother-in-law alone to commit the crime. An inference was drawn that accused/husband was *participes criminis* and his acquittal was converted into conviction.[59] Where no injury suffered by the victim was attributable to the weapon allegedly used by the accused, his participation in the commission of the crime was doubtful.[60]

The expression 'irrelevant' was used in secs. 24, 29, 43, 52, 54 and 165 of this Act.

10. RELEVANCY AND ADMISSIBILITY

More often the expressions 'relevancy' and 'admissibility' are used as synonyms but their legal implications are distinct and different for, more often than not, facts which are relevant may not be admissible, for example, communication made by spouses during marriage or between an advocate and his client though relevant are not admissible; so also facts which are admissible may not be relevant, for example, questions permitted to be put in cross-examination to test the veracity or impeach the credit of witnesses, though not relevant, are admissible.[61] The germane question is not as to in connection with what offence during the investigation the evidence had come to light, but whether the evidence so collected is relevant and admissible to establish the charge in the present case.[62] Evidence of a witness, who dies prior to his cross-examination, is admissible in evidence, though the evidentiary value will

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57. *R* v. *Blastland*, (1986) AC 41, 15, per Lord BRIDGE. "Hearsay evidence is not excluded because it has no logically probative value."
58. PHIPSON ON EVIDENCE, 15th Edn. (2000), pages 108-109 (paras 6-08, 6-09).
59. *Sarojini* v. *State of M.P.*, 1993 Cr LJ 1648 (para 10) (SC). **Also see** *Haramant Laxmappa Kukkadi* v. *State of Karnataka*, 1994 Cr LJ 1422 : AIR 1994 SC 1546.
60. *Babu Lal* v. *State of U.P.*, 1994 Cr LJ NOC 157 (All).
61. *Ram Bihari Yadava* v. *State of Bihar*, AIR 1998 SC 1850 : 1998 Cr LJ 2515 (para 6).
62. *Ronny* v. *State of Maharashtra*, AIR 1998 SC 1251 : 1998 Cr LJ 1638.

depend upon the facts and circumstances of the case.[63] If a lease deed, required to be registered, is not registered, it is inadmissible in evidence.[64] The contention, that the document which is required to be registered is not admissible in evidence at all, cannot be accepted. Such a contention is against the express provision of Section 49 of the Registration Act. The unregistered lease deed can certainly be looked into for collateral purpose of proving a party's character of possession.[65]

"*Relevancy* must be distinguished from *admissibility,* of which, though the primary, it is by no means the sole condition. A fact may be relevant and yet, on grounds of convenience or policy, evidence of it may be inadmissible. Indeed this exclusion of matter otherwise relevant has been called the distinguishing feature of the English law of evidence. It is correct then, in deciding whether evidence of a fact is admissible, to ask first whether the fact is *relevant*[66] and, thereafter, whether there are any rules or discretions, based on convenience or policy, which nonetheless make evidence of the *relevant* fact *inadmissible.*"[67]

"Evidence is relevant if it is logically probative or disprobative of some matter which requires proof."[68]

"Relevant evidence is *prima facie* admissible unless excluded for some other reason whereas irrelevant evidence is not admissible."[69]

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[70]

"Evidence is admissible if it may be lawfully adduced at a trial."[71]

"Litigants are not free to place whatever information they wish before the court to establish the facts. The information must be admissible evidence, often referred to as judicial evidence. Evidence is not admissible, if it is not relevant, if its prejudicial effect is greater than its probative value, if its admission would have an adverse effect on the fairness of the proceedings or if it is excluded by any other specific rule of evidence."[72]

"Not all admissible evidence is universally relevant. Admissible evidence may be relevant to one count of an indictment and not to another. It may be admissible against one accused (or party) but not another. It may be admissible to rebut a defence but inadmissible to reinforce the case for the prosecution."[73]

11. FACT IN DISPUTE—PROOF

The inference of proof of a fact in dispute, having been established, can be drawn from the given objective facts, direct or circumstantial.[74] Paper cutting cannot be relied upon as evidence in proof of sale deed.[75]

12. "FACTS IN ISSUE"

"Subject to the various qualifications in earlier chapters, the facts which may be proved in a judicial inquiry are *facts in issue* and *facts relevant to the issue,* and any facts, whether relevant to the issue or not, which affect the legal reception or weight of the evidence tendered.

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63. *Food Inspector, Thodupuzha Circle* v. *James N.T.*, 1998 Cr LJ 3494 (para 13) (Ker).
64. *State Bank of India* v. *Dr. Swaran Singh,* 1997 AIHC 2928 (para 10) (All).
65. *Kousalya Ammal* v. *Valliammai Ammal,* AIR 1998 Mad 287 (paras 8, 9 and 14). The Court **referred to** *Ugni* v. *Chowa Mahto (FB),* AIR 1968 Pat 302 (305); *Gangayya* v. *S.M.C. Samdaria,* AIR 1973 Mad 262 (para 3) and *Dodappa* v. *Basavanneppa,* AIR 1978 Kant 143 (para 17 at page 146).
66. The shorthand "*relevant* facts" is often used to cover all of the types of facts which may be proved in a judicial inquiry.
67. PHIPSON ON EVIDENCE, 15th Edn. (2000), page 106 (para 6-05).
68. PETER MURPHY : A PRACTICAL APPROACH TO EVIDENCE, 1985, 2nd Edn., p. 10.
69. STEVE UGLOW'S EVIDENCE : TEXT & MATERIALS, 1997, p. 17.
70. U.S. Federal Rules of Evidence, Rule 401.
71. PETER MURPHY & JOHN BEAUMONT'S EVIDENCE : MATERIALS FOR DISCUSSION, 1987, 2nd Edn., p. 3.
72. STEVE UGLOW'S EVIDENCE : TEXT & MATERIALS, 1997, p. 17.
73. PETER MURPHY & JOHN BEAUMONT'S EVIDENCE : MATERIALS FOR DISCUSSION, 1987, 2nd Edn., p. 4.
74. *R Puthunainar Alhithan* v. *P H Pandari,* AIR 1996 SC 1599 (paras 7 and 8).
75. *Ratan Kumar Tandon* v. *State of U.P.*, AIR 1996 SC 2710 (para 10).

Facts in issue, which are sometimes called "principal" facts, are those necessary by law to establish the claim, liability or defence, forming the subject-matter of the proceedings; and which are in dispute between the parties. In civil cases, the Court may give directions about the issues on which it requires evidence."[76]

'Facts in issue' are facts out of which some legal right, liability, or disability, involved in the inquiry, necessarily arises, and upon which, accordingly, decision must be arrived at. Matters which are affirmed by one party to a suit and denied by the other may be denominated as facts in issue; what facts are in issue in particular cases, is a question to be determined by the substantive law or, in some cases, by that branch of the law of procedure which regulates the law of pleadings, civil or criminal.[77]

"The facts in issue in a case, sometimes called ultimate facts, are the facts which a party to litigation (including the prosecution in a criminal case) must prove in order to succeed in his claim or defence and to show his entitlement to relief (or to obtain conviction)."[78]

"Facts in issue are as much legal concepts as they are facts and are normally to be found in the substantive law, in the statute or precedent which creates the offence or the cause of action. Sometimes the facts in issue are to be found in the pleadings or in the defences raised by the accused in a criminal case : was the defendant acting in self-defence, under duress or under a mental handicap?"[79]

"There are two principal types of facts in issue, those which are in issue as a matter of substantive law, and those which are in issue as a matter of law of evidence itself.

The main facts in issue are all those facts which the plaintiff in a civil action, or the prosecutor in criminal proceedings, must prove in order to succeed, together with any further facts that the defendant or accused must prove in order to establish a defence."[80]

This expression is used in secs. 5, 6, 7, 8, 9, 11 and illustrations (d) of Section 21 and Sections 36 and 43. Facts in issue can be divided into main facts in issue and subordinate or collateral facts. Main facts are those which are necessary under the rule of law to establish the claim, or the liability or the defence. They arise by the pleadings of the parties in dispute. Therefore, according to PHIPSON, facts in issue are determinable primarily by the substantive law and secondarily by the pleadings.[81] It was stated that, although all relevant facts are not necessarily facts in issue, still facts in issue cannot be other than relevant to the determination of the suit, and this is clear from the language of Section 6 of this Act.[82]

The explanation given under the definition of 'Facts in issue" contemplates the framing of issues under Order XIV, Rule 1 C.P.C. in Civil cases. In criminal cases the charge constitutes and includes "facts in issue" see Chapter XIII Cr. P.C., 1973. In criminal proceeding it is absolutely necessary to confine the evidence to the issue, namely, whether the accused is guilty or not, of the charges levelled against him. If precision is not observed while admitting the evidence, at times it would lead to enlarging the scope of the enquiry and finally may result in miscarriage of justice.

13. FACTS RELEVANT TO THE ISSUE

"Facts relevant to the issue, which are sometimes called "evidentiary" facts, are facts which tend, either directly or indirectly, to prove or disprove a fact in issue."[83]

14. DOCUMENT

"A document has been judicially defined as "any writing or printing capable of being made evidence, no matter on what material it may be inscribed."[84] It seems, however, that documents include many matters other than mere writings, as, for instance, tape recordings, or television film.[85]

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76. PHIPSON ON EVIDENCE, 15th Edn. (2000), page 105 (paras 6-01, 6-02).
77. STEPHEN'S INTRODUCTION, pp. 12, 13.
78. PETER MURPHY : A PRACTICAL APPROACH TO EVIDENCE , 1985, 2nd Edn., p. 7.
79. STEVE UGLOW'S EVIDENCE : TEXT & MATERIALS, 1997, p. 15.
80. CROSS & TAPPER ON EVIDENCE, 1995, 8th Edn., p. 20.
81. 13th Edn (para 6.01), p.74.
82. *Raghubusana* v. *Vidyavaradhi*, 34 IC 875.
83. PHIPSON ON EVIDENCE, 15th Edn. (2000), page 105 (para 6-03).
84. *R.* v. *Daye*, (1908) 2 KB 333.
85. *Grant* v. *South Western and Country Properties Ltd.*, (1975) Ch 185; *Senior* v. *Holds Worth, exp. Independent Television News Ltd.*, (1976) QB 23.

In statutes the term "writing," unless the contrary appears, includes typing, printing, lithography, photography and other modes or representing or reproducing words in a visible form."[86]

The definition of document under this section is similar to the definition in Section 29 of the Indian Penal Code.

In the term 'document' are properly included all material substances on which the thoughts of men are represented by writing, or any other species of conventional mark or symbol. Thus the wooden score on which bakers, milk-men, etc., indicate by notches, the number of loaves of bread or quarts of milk supplied to their customers are documents as much as the most elaborate deeds.[87]

According to STEPHEN, document is "Any substance having any matter expressed or described upon it by marks capable of being read". But this term document in this Act would show that the definition given here is wider than STEPHEN'S definition. According to WHARTON, document is an instrument on which is recorded by means of letters, figures or marks, matter which may be evidentially used.

If the Court is satisfied that there is no trick photography and the photograph is above suspicion, the photograph can be received in evidence. But the evidence of photographs to prove writing or handwriting can only be received if the original cannot be obtained and the photographic reproduction is faithful and not faked or false.[88] It was held that tape records of speeches are documents as they stand on no different footing from photographs provided that the accuracy of the recording is proved and the sounds recorded are identified. The Tripura High Court has held that document includes foreign currency as per Section 19 clause 3 of Foreign Exchange Regulation Act, 1947.[89]

In[90] it is observed: "Document" includes, in addition to a document in writing, any map, plan, graph, drawing, photograph, disc, tape, sound track or similar device, or any film, microfilm, tape or similar device: [The English] Civil Evidence Act, 1968, S. 10(1).[91] 'Document' means anything in which information of any description is recorded, and 'copy' in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly.[92] Special equipment for reproducing film not admissible as a document, but the Court, being master of its own procedure, could adapt to meet modern inventions.[93] Transcript of evidence of previous criminal proceedings[94] title documents.[95] Tape recording is a document provided that what is recorded is information. Document also includes 'electronic records produced for the inspection of the Court':[96]

For a case where tape recordings were admitted in a civil case.[97]

See also Section 3(18) General Clauses Act (10 of 1897) and Section 29 I.P.C. where 'document' is defined.

In *Grant* v. *South Western Properties*,[98] it was held that a tape recording was a 'document' which could be the subject matter of discovery. Though it did not provide information for the eye but only for the ear it was still a document liable for inspection which is not limited to ocular inspection but included scrutiny or examination by any of the senses.

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86. PHIPSON ON EVIDENCE, 15th Edn. (2000), page 1071 (para 40-01).
87. BEST 12th Edn. ss. 215, 216, pp. 199, 200.
88. *L. Choraria* v. *State of Maharashtra*, AIR 1968 SC 938; *Ziyauddin* v. *Brij Mohan*, AIR 1975 SC 1788 at 1795.
89. *Shyama Charan* v. *Sub-Divisional Magistrate*, AIR 1962 Tripura 50.
90. HALSBURY, 4th Edn., Vol. 17 (para 58), page 46.
91. See also *Senior* v. *Holdsworth, ex-parte Independent Television News Ltd.*, (1976) QB 23 : (1975) 2 All ER 1009 (CA).
92. [The English] Civil Evidence Act, 1995, S. 13.
93. *Taylor* v. *Taylor (Taylor intervening, Holmes cited)*, (1970) 2 All ER 609 : (1970) 1 WLR 1148 (CA).
94. *Knight* v. *David*, (1971) 3 All ER 1066 : (1971) 1 WLR 1671.
95. *Cf. Grant* v. *South Western and Country Properties Ltd.*, (1975) Ch. 185 : (1974) 2 All ER 465.
96. *Vide* the Information Technology Act, 2000, S. 92, Sch. II.
97. *Coca-Cola Co.* v. *William Struthers Ltd.*, AIR 1968 SC 214.
98. (1974) 2 All ER 465.

The Sea Customs Act, Section 138C (introduced by Art. 29/1988) and the Central Excise Act, Section 36B (introduced by Art. 29/1988) which are in almost identical terms provide that notwithstanding any other law for the time being in force:

(a) a micro film of a document or the reproduction of the image or images embodied in such micro film (whether enlarged or not),

(b) a fascimile copy of a document, or

(c) a statement contained in a document and included in printed material produced by a computer (subject to certain conditions laid down in the acts),

shall be deemed to be a document for the purposes of the Acts and admissible in any proceeding thereunder without further proof or production of the original as evidence of the contents of the original.

Where a document evidencing partition had no description of the property falling to the share of the respective parties, such a document was not a partition deed, requiring any registration and was admissible in evidence showing severance of the joint status of the parties.[1]

See also the Civil Evidence Act, 1968 in England which provides for the admissibility of statement produced by a computer subject to strict conditions to ensure that the information is reliable.

15. EVIDENCE

The word 'Evidence' in the popular sense means that by which facts are established to the satisfaction of persons enquiring into them—but narrowed down by certain legal rules contrived to secure as far as possible its sufficiency and credibility; that is, facts sufficient generally to satisfy or convince to prudent person of clear understanding, may not be sufficient to fulfil the requirements of the law in matters arising for judicial determination.[2] The word 'evidence', considered in relation to law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation.

The evidence of a fact is that which tends to prove it, Courts are usually to find that certain facts exist before pronouncing on the rights, duties and liabilities of the parties; which, in other words, may be called as "Judicial Evidence". According to STEPHEN who sponsored this Act it means "that part of the law of procedure which, with a view to ascertain the individual rights and liabilities in particular cases, decides what facts may or may not be proved in such a case; what sort of evidence has to be given of a fact which may be proved, by whom and in what manner the evidence must be produced relating to a fact which is to be proved". To put it in other words, the statements made by the witness in Court under the legal rules relating to the matters of fact under enquiry and or the documents produced for the inspection of the judge or the court may be termed as evidence.

"Evidence, as used in judicial proceedings, has several meanings. The two main senses of the word are : first, the means, apart from argument and inference, whereby the Court is informed as to the issues of fact as ascertained by the pleadings; secondly, the subject-matter of such means. The word is also used to denote that some fact may be admitted as proof and also in some cases that some fact has relevance to the issues of fact. In a real sense evidence is that which may be placed before the Court in order that it may decide the issues of fact. There also are other shades of meaning that it is not necessary to discuss here. (For example, it was held that "evidence" in the Inheritance (Family Provision) Act 1938 covers all the material that persons outside a Court of law take into consideration when deciding how to act.[3]) Evidence, in the first sense, means the testimony, whether oral, documentary or real, which may be legally received in order to prove or disprove some fact in dispute. In the second sense it means the content of that testimony."[4]

WIGMORE states that the term evidence means any knowable facts or group of facts, not a legal or a logical principle, considered with a view to its being offered before a legal tribunal for the purpose of

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1. *Purnabashi Mishra* v. *Raj Kumari Mishra*, AIR 1995 Ori 284 (para 8).
2. COCKLE'S EVIDENCE, 3rd Ed., p. 1.
3. *Re Vrindt, Vrindt* v. *Swain*, (1940) Ch 920.
4. PHIPSON ON EVIDENCE, 15th Edn. (2000), page 2 (para 1-03).

producing a persuasion, positive or negative, on the part of the tribunal as to the truth of a proposition, not of law, or of logic, on which the determination of the tribunal is to be asked.[5]

TAYLOR states that it includes all the legal means exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation.[6]

According to BENTHAM, "It is any matter of fact, the effect, tendency, or design of which, when presented to the mind, is to produce in the mind a persuasion concerning the existence of some other matter of fact—a persuasion either affirmative or dis-affirmative of its existence. Of the two facts so connected, the latter may be distinguished as the principal fact, and the former as the evidentiary fact.[7]

"Any specific facts or set of facts, employed for the purpose of inferring therefrom the existence of any other fact, is said to be evidence of that fact."[8]

"At its most general level, this term means those items of information which are presented to the court by the parties as a means of persuading the court that their argument is correct—in other words, information advanced to prove their case."[9]

"Evidence may be defined as any material which tends to persuade the court of the truth or probability of some fact asserted before it."[10]

"The evidence of fact is that which tends to prove it—something which may satisfy an inquirer of the fact's existence."[11]

This term and the word proof are often used as synonyms, but the latter is applied by accurate logicians rather to the effect of evidence than to evidence itself.

Under the present Act, matters other than statements of witnesses and documents produced for the inspection of the Court, *e.g.* (a) a confession or a statement of an accused in a trial; statements made by parties when examined otherwise than as witnesses; demeanour of any witness under examination; (b) the result of local investigation or local inspection and (c) material objects other than documents such as weapons, tools, stolen properties etc., are not 'evidence' according to the definition of the Act.

The juristic conception of the term 'evidence' in the case of the oral testimony of witnesses is that the party against whom it is used has had the right and opportunity of cross-examining the witnesses. So long as the accused is not allowed the right and opportunity of cross-examining the witnesses, any statements made by them can only be described as statements but cannot be dignified with the name of evidence.[12]

The definition of 'evidence' covers (a) the evidence of witnesses and (b) documentary evidence.

Therefore, a statement of a witness recorded under Section 154, Cr.P.C. is not evidence though it may be considered for other purposes.[13] Result of investigation is not a legal evidence.[14] Finding of the guilt of the accused can be based only on the evidence produced during trial and not on the result of investigation by the police.[15]

The word "evidence" includes statement of the witness which has not been tested on cross-examination. The Court, however, should exercise such power in the rarest of rare cases.[16] Where the

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5. WIGMORE Section 1, p. 3.
6. TAYLOR Section 1, p. 1.
7. BENTHAM'S JUDICIAL EVIDENCE, p. 17.
8. PETER MURPHY & JOHN BEAUMONT'S EVIDENCE : MATERIAL FOR DISCUSSION, 1987, 2nd Edn., p. 1.
9. STEVE UGLOW'S EVIDENCE : TEXT & MATERIALS, 1997, p. 14.
10. PETER MURPHY : A PRACTICAL APPROACH TO EVIDENCE, 1985, 2nd Edn., p. 1.
11. CROSS & TAPPER ON EVIDENCE, 1995, 8th Edn., p. 1.
12. *Syed Mohammad Hussain Afqar Mohani* v. *Mirza Fakhrullah Beg*, ILR (1932) 8 Luck 135. **See also** *Ripen Kumar* v. *Department of Customs*, 2001 Cr LJ 1288 (para 9) (Del).
13. *Bhuboni Sahu* v. *King*, AIR 1949 PC 257; *Brijbhushan Singh* v. *Emperor*, AIR 1946 PC 38; *Manbodh* v. *Emperor*, AIR 1944 Nag 274 (FB).
14. *Kaptan Singh* v. *State of M.P.*, AIR 1997 SC 2485 : 1997 Cr LJ 2987.
15. *Vijender* v. *State of Delhi*, (1997) 6 SCC 171 : 1997 SCC (Cri) 857. **Also see** *Dalip Singh* v. *State of Punjab*, AIR 1997 SC 2985 : 1997 Cr LJ 3647.
16. *Sivrani* v. *Suryanarain*, 1994 Cr LJ 2026 (All).

name of a person is mentioned in the F.I.R., the F.I.R. is evidence at this stage and can be taken into consideration for the purposes of summoning the said person as accused.[17]

The Privy Council observed: 'A statement made under Section 164, Cr.P.C. can never be used as substantive evidence of the facts stated, but it can be used to support or challenge evidence given in Court by the person who made the statement. The statement made by the approver under Section 164 plainly does not amount to the corroboration in material particulars which the courts require in relation to the evidence of an accomplice. An accomplice cannot corroborate himself; tainted evidence does not lose its taint by repetition. But in considering whether the evidence of the approver given before the committing Magistrate was to be preferred to that which he gave in the Sessions Court, the Court was entitled to have regard to the fact that very soon after the occurrence, he had made a statement in the same sense as the evidence which he gave before the Committing Magistrate.[18]

It was held by the Madras High Court that evidence in its ordinary sense signifies that which makes apparent the truth of the matter in question. It is no doubt more frequently applied to proof before a judicial tribunal, but it is not necessarily confined to this sense; it is used with equal correctness to express the information acquired by any person who undertakes an enquiry on the matter in question.[19]

The definition of evidence is considered to be incomplete as it does not include the whole material on which the decision of the judge may rest.

16. AFFIDAVIT

An affidavit can be termed to be an evidence within the ambit of Section 3 only in those cases where the same is filed at the instance or under the direction of the court[20] or law specifically permits for proof of anything by affidavit.[21] Affidavits are admissible in evidence and do not become inadmissible because the *ex parte* order is set aside. More so where the state amendments permit adducing of evidence by affidavit.[22] Where the police officials deposed in an affidavit that the sample seized from the accused under N.D. & P.S. Act was not tampered with till it reached the Forensic Science Laboratory which was neither assailed when tendered in evidence nor were the deponants cross-examined by the defence counsel, the contents of the affidavit would be deemed to be admitted by the accused.[23] The contention, that the decree, passed on the basis of the affidavit filed without permission which was no evidence, was a nullity, was taken to be not correct as other documents on record were also considered.[24]

17. FUNCTIONS OF THE LAW OF EVIDENCE

According to WHARTON the main function of the rules of evidence is to narrow down the matter which comes before the Court to the facts relating to those matters which have a logical probative value in determining the innocence or guilt of the accused and to prevent giving judgments based on illogical conclusions or prejudice, and as an aid to the administration of justice.[25]

18. CLASSIFICATION OF EVIDENCE

Broadly speaking, Evidence can be classified into (1) Direct and Indirect or circumstantial evidence.

(2) Primary and Secondary Evidence

(3) Oral and Documentary Evidence

(4) Real Evidence

(5) Original and Hearsay Evidence

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17. *Sivrani* v. *Suryanarain*, 1994 Cr LJ 2026 (para 16) (All).
18. *Bhuboni Sahu's* case, AIR 1949 PC 257.
19. *Madapusi Srinivasa Ayyangar* v. *Queen*, ILR 4 Mad 393.
20. *Delhi Lotteries* v. *Rajesh Aggarwal*, AIR 1998 Del 332 (para 53). The Court referred to *Sudha Devi* v. *M.P. Narayanan*, AIR 1988 SC 1381 : (1988) 3 SCR 756.
21. *Nirmala* v. *Hari Singh*, AIR 2001 HP 1 (para 21).
22. *Hakim Rafat Hussain* v. *Prescribed Authority, Dehradun*, 1998 AIHC 1386 (All).
23. *Krishna Lal* v. *State of Haryana*, 1996 Cr LJ 1401 (paras 11 and 12) (P&H).
24. *P.V. Thomas* v. *Tomy Mathew*, 2001 AIHC 3509 (paras 11 and 12) (Ker).
25. WHARTON ON EVIDENCE, Vol. 1, pp. 9, 10.

(6) Presumptive Evidence.

(a) Direct Evidence.—"By direct evidence is meant that the existence of a given thing or fact is proved either by its actual production, or by the testimony or admissible declaration of someone who has himself perceived it."[26]

"Direct evidence is evidence which, if believed, establishes a fact in issue."[27]

"Direct evidence is evidence which requires no mental process on the part of the tribunal of fact in order to draw the conclusion sought by the proponent of the evidence, other than acceptance of the evidence itself."[28]

Direct evidence consists either of the testimony of the witness who perceived the fact or the production of the documents which constitute the fact which is in question. This direct evidence is sometimes called original evidence which arises from the personal knowledge of the witness. Direct evidence, if believed, proves the existence of a fact in issue without any inference of presumption.

Pericipient Evidence.—"The term direct evidence has a second meaning in the usage of many writers. The alternative term pericipient evidence not only avoids any possibility of confusion, but is also more appropriate to describe the opposite of hearsay evidence... Pericipent evidence is evidence of facts which a witness personally perceives using any of his senses."[29]

(b) Indirect or Circumstantial Evidence.—Indirect Evidence otherwise known as circumstantial evidence is evidence that gives rise to a logical inference that such a fact does exist. Circumstantial evidence may be either conclusive or presumptive. It is conclusive when there is a connection between the principal fact and the evidentiary fact. It is presumptive where the fact rests on a greater or a less degree of probability. The effect of circumstantial evidence on consideration must be such as not to admit more than one solution, and must be inconsistent with any explanation that the fact is not true.

"By indirect or presumptive evidence is meant that other facts are thus proved, from which the existence of the given fact may be logically inferred."[30]

"Circumstantial evidence is evidence from which the desired conclusion may be drawn but which requires the tribunal of fact not only to accept the evidence presented but also draw an inference from it."[31]

"Circumstantial evidence ..... consists of evidence of circumstances, none of which speak directly to the facts in issue but from which those facts may be inferred. Feelings of animosity towards the victim, presence in the area of the attack, the victim's blood on the accused clothing—all these build up into a strong but inferential case."[32]

'Circumstantial evidence' ..... may be defined as any fact (sometimes called an 'evidentiary fact', 'factum probans' or 'fact relevant to the issue') from the existence of which the judge or jury may infer the existence of a fact in issue (sometimes called a 'principal fact' or 'factum probandum').[33]

The standard of proof required to convict a person on circumstantial evidence is well-established by a series of decisions of the Supreme Court. According to that standard the circumstances relied upon in support of the conviction must be fully established[34] and the chain of evidence furnished by those circumstances must be so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused[35] and further it must be such as to show that within all human probability the act must have been done by the accused[36] and, if two views are possible on such

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26. PHIPSON ON EVIDENCE, 15th Edn. (2000), p. 3 (para 1-06).
27. STEVE UGLOW'S EVIDENCE : TEXT & MATERIALS, 1997, p. 15.
28. PETER MURPHY : A PRACTICAL APPROACH TO EVIDENCE, 1985, 2nd Edn., p. 5.
29. PETER MURPHY : A PRACTICAL APPROACH TO EVIDENCE, 1985, 2nd Edn., p. 5.
30. PHIPSON ON EVIDENCE, 15th Edn. (2000), p. 3 (para 1-06).
31. PETER MURPHY : A PRACTICAL APPROACH TO EVIDENCE, 1985, 2nd Edn., p. 5.
32. STEVE UGLOW'S EVIDENCE : TEXT & MATERIALS, 1997, p. 15.
33. CROSS & TAPPER ON EVIDENCE, 1995, 8th Edn., p. 22.
34. *Govinda Reddy* v. *State of Mysore*, AIR 1960 SC 29.
35. *Deonandan Mishra* v. *State of Bihar*, (1955) 2 SCR 570. Chain of circumstancial evidence complete, conviction for murder proper. *Rajan Johnsonbhai Christy* v. *State of Gujarat*, 1997 Cr LJ 3702 (Guj).
36. *Bakshish Singh* v. *State of Punjab*, AIR 1971 SC 2016.

evidence, the view pointing towards the innocence of the accused is to be adopted.[37] However, this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must meet any and every hypothesis suggested by the accused, however extravagant and fanciful it might be. Further, it is not necessary that every one of the proved facts must in itself be decisive of the complicity of the accused or point conclusively to this guilt. Therefore, when deciding the question of sufficiency, what the Court has to consider is the total cumulative effect of all the proved facts each one of which re-enforces the conclusion of guilt.[38] It is the cumulative result of all the circumstances which must unerringly point to the guilt of the accused and not one circumstance by itself.[39] In such cases, the Court must guard against the danger of allowing conjecture or suspicion to take the place of legal proof.[40] Insufficient circumstantial evidence, benefit of doubt,[41] explains the requirements as to circumstantial evidence.[42] If any rational explanation is possible, then there is an element of doubt of which the accused must be given the benefit.[43]

Essential ingredients to prove guilt by circumstantial evidence are:

(1) Circumstances from which conclusion is drawn should be fully proved.

(2) Circumstances should be conclusive.

(3) All facts so established should be consistent only with the hypothesis of guilt and inconsistent with innocence of the accused.

(4) Circumstances should exclude the possibility of guilt of a person other than the accused.[44]

As evidence there is no difference between direct and circumstantial evidence. The only difference is in that as proof, the former directly establishes the commission of the offence whereas the later does so by placing circumstances which lead to irresistible inference of guilt.[45]

There is no difference between civil and criminal cases in the application of circumstantial evidence and their admissibility.[46] Regarding the appreciation of circumstantial evidence in civil cases, preponderance of probabilities should be looked at in deciding the cases, whereas, in criminal cases, strict scrutiny of each of the facts placed by circumstantial evidence and their cumulative effect has to be taken into consideration and if they are of such nature as to be incompatible with the innocence of the accused, then only conviction can follow.

Circumstantial evidence means communication of facts, creating a net work from which there is no escape for the accused, because the facts taken as a whole do not admit any inference except that of the guilt of the accused.[47]

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37. *State of H.P.* v. *Diwana*, 1995 Cr LJ 3002 (paras 10 and 11) (HP). **See also** *Omanakuttan* v. *State of Kerala*, 2000 Cr LJ 4893 (paras 5 and 6) (Ker), **relying on** *Earabhadrappa* v. *State of Karnataka*, 1983 Cr LJ 846 : AIR 1983 SC 446; *Sharad* v. *State of Maharashtra*, 1984 Cr LJ 1738 : AIR 1984 SC 1622 and *Ashok Kumar Chatterjee* v. *State of M.P.*, 1989 Cr LJ 2124 : AIR 1989 SC 1890.
38. *State of A.P.* v. *I.B.S.P. Rao*, AIR 1970 SC 648.
39. *Gade Lakshmi Mangraju* v. *State of A.P.*, 2001 Cr LJ 3317 (para 23) (SC) : AIR 2001 SC 2677.
40. *Charan Singh* v. *State of U.P.*, AIR 1967 SC 520.
41. *State of U.P.* v. *Sukhbasi*, AIR 1985 SC 1224; *Hukam Singh* v. *State of Rajasthan*, AIR 1977 SC 1063; *Mohmood* v. *U.P.*, AIR 1976 SC 69.
42. *Hanumant* v. *State of M.P.*, AIR 1952 SC 343; *Kedarnath Bajoria* v. *State of West Bengal*, AIR 1954 SC 660; *Kutubal Yadev* v. *State of Bihar*, AIR 1954 SC 720; *Manak Lal* v. *Dr. Premchand*, AIR 1957 SC 425; *Ramdas* v. *State of Maharashtra*, AIR 1977 SC 1164; *Pandu Dhondu* v. *State of Maharashtra*, (1968) 2 SC WR 363; *Krishnan Nair* v. *State of Kerala*, 1968 LAR 166 : ILR (1959) Ker 1094; *C.P. Fernandes* v. *Union Territory of Goa*, AIR 1977 SC 135; *Piyaio* v. *State*, 1958 Cr LJ 762 : AIR 1958 MP 144.
43. *Raghav Prapanna* v. *State of U.P.*, AIR 1963 SC 74; *M.G. Agarwal* v. *State of Maharashtra*, AIR 1963 SC 200.
44. *State of U.P.* v. *Dr. R.P. Mittal*, AIR 1992 SC 2045. **Also see** *Kartik Sahu* v. *State*, 1994 Cr LJ 102 (para 6) (Ori); *State of Maharashtra* v. *Vilas Pandurang Patil*, 1999 Cr LJ 1062, 1065 (Bom); *Thangaraj* v. *State by Inspector of Police*, 1994 Cr LJ NOC 16 (Mad).
45. *Makbul Ahammad* v. *Abdul Rahaman Akand*, ILR (1953) 1 Cal 348.
46. *Gulab Chand* v. *Kudilal*, AIR 1966 SC 1734.
47. *Raghav* v. *State*, AIR 1963 SC 74; **See also** *Anant Chintamani* v. *State of Bombay*, AIR 1960 SC 500. **See also** *Niranjan Lal* v. *State of Haryana*, 1995 Cr LJ 248 (para 11) (P&H); *N. Rajendra Prasad* v. *State of Karnataka*, 1996 Cr LJ 257 (Kant) (para 5); *Maharaj Deen* v. *State*, 1996 Cr LJ 506 (para 12) (All).

However where neither prosecution nor defence has come out with the whole and unvarnished truth, Courts can only try to guess or *conjecture* to decipher truth if possible.[48] However, prosecution is not the gainer and it sinks or swims on the basis of its own case.[49]

The fact in issue was whether liquor possessed was of illicit origin. The Excise Sub-Inspector was not examined to prove the fact in issue, but the excise clerk was examined to prove the report of the Excise Sub-Inspector who had been transferred. It was held that it could not take the place of the sworn statement of the maker thereof to prove that the liquor was of illicit origin, as the accused was deprived of the advantage of testing the accuracy of the Sub-Inspector's opinion by cross-examining him.[50]

Circumstantial evidence is sometimes more reliable than direct evidence.[51] Where the names and description of the accused were wanting in the F.I.R. but a witness identified them quarrelling with the deceased and other material on record also proved *prima facie* case against them, bail was not granted.[52]

In the case of circumstantial evidence, onus is on the prosecution to prove that the chain is complete. Infirmity or lacuna in prosecution cannot be cured by false defence or plea.[53]

It is the function of the court to separate the grain from the chaff and accept what appears to be true and reject the rest.[54] Where an open injury was caused to the accused but no blood was found at the spot of occurrence, the same does not improbabilise the prosecution story about the occurrence to have taken place at the place claimed by the prosecution. It depends on the facts and circumstances of each case.[55]

In a case of murder allegedly caused by poisoning, the medical evidence did not prove death by any poison whereas other circumstances warranted the guilt of the accused, the accused could be convicted even if the medical evidence was negative.[56] In a murder case, conviction cannot be based solely on the evidence of the accused and the deceased last seen together.[57]

Appreciation of circumstantial evidence cannot create presumption of guilt.[58] Standard of proof in incidential matters is the same as in other.[59]

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48. *Jamuna Chudhary* v. *State of Bihar,* AIR 1974 SC 1822 : (1974) 2 Cr LJ 890, **relied on in** *State of Maharashtra* v. *Shriram Gangaram Ghoderao,* 1997 AIHC 2324 (para 14A) (Bom); *Krishna Kumar Sinha* v. *Kayastha Pathshala Allahabad,* AIR 1966 All 570; *Shivnath Rai* v. *Union of India,* AIR 1965 SC 1666.

49. *State of Maharashtra* v. *Shriram Gangaram Ghoderao,* 1997 AIHC 2324 (para 14A) (Bom).

50. ***Raja Ram*** v. *State,* AIR 1954 All 214.

51. ***Shahbuddin*** v. *State of Rajasthan,* 1973 Cr LJ 723; *Bhagat Ram* v. *State of Punjab,* AIR 1954 SC 621; *Nandkishore* v. ***State,*** AIR 1952 Ajmer 60; *Akbar Shah* v. *State,* (1965) 2 Cr LJ 771; *Ali Shah* v. *State,* 1954 Cr LJ 1124; *Krishnabiharilal* v. *State,* AIR 1956 MB 86; *Jamnadas Parashram* v. *State of M.P.,* (1963) 1 Cr LJ 433; *Gulabchand Gambirmal* v. *Kudilal Govindram,* AIR 1959 MP 151; *Re, Periaswami and others,* 1960 Cr LJ 1100; *Kenche Gowda* v. *P. Channaiya,* AIR 1953 Mys 22; *Madan Gopal and another* v. *State,* 1955 Cr LJ 1385; *Kalu and Others* v. *State,* (1965) 1 Cr LJ 478; *Ouseph Varkey* v. *State,* 1954 Cr LJ 1604; *Mathai Matheur* v. *State,* 1952 Cr LJ 1304.

52. *Mohd. Kasim Abdul Latif Memon* v. *State of Gujarat,* 1993 Cr LJ 952, at p. 953 (Guj).

53. *Sharad Birdhi Chand Sarda* v. *State of Maharashtra,* AIR 1984 SC 1622; *Sardar Hussain* v. *State of U.P.,* AIR 1988 SC 1766; *Gambhir* v. *State of Maharashtra,* AIR 1982 SC 1157; *Sripad Shivram Kulkarni* v. *State of Maharashtra,* AIR 1981 SC 34; *Shankarlal Gyarasilal Dixit* v. *State of Maharashtra,* AIR 1981 SC 765; *Joga Gola* v. *State of Gujarat,* AIR 1982 SC 1227; *State of Maharashtra* v. *Champalal Punjaji Shah,* AIR 1981 SC 1675.

54. *Naunidh* v. *State of U.P.,* AIR 1982 SC 1299.

55. *Nanhakoo* v. *State,* 1998 Cr LJ 2890 (para 21) (All).

56. *State of Karnataka* v. *H. Koroji Naik,* 1995 Cr LJ 1964 (para 7) (Kant).

57. *Virendra Kumar Yadav* v. *State,* 1996 Cr LJ 231 (Del). **See also** *Chandraiahgari Anantharedd*i v. *State of A.P.,* 1996 Cr LJ 2109 (paras 14 and 19) (AP).

58. *Naresh Kumar* v. *State of Maharashtra,* AIR 1980 SC 1168; *State (Delhi Admn)* v. *V.C. Shukla,* AIR 1980 SC 1382.

59. *State (Delhi Admn)* v. *Sanjay Gandhi,* AIR 1978 SC 961; *Eradu and Others* v. *State of Hyderabad,* AIR 1956 SC 316; *Chandmal* v. *State of Rajasthan,* AIR 1976 SC 917; *Daram Das Wadhwani* v. *State of U.P.,* AIR 1975 SC 241; *Khashaba Maruti Shelke* v. *State of Mah.,* AIR 1973 SC 2474; *Abdul Ghani* v. *State of U.P.,* AIR 1973 SC 264; *Rahman* v. *State of U.P.,* AIR 1972 SC 110; *Raghubir Singh* v. *State of U.P.,* AIR 1971 SC 2156; *Bakshish Singh* v. *State of Punjab,* AIR 1971 SC 2016; *Balwinder* v. *State of Punjab,* AIR 1987 SC 350; *State of Mahrashtra* v. *Champalal,* AIR 1981 SC 1675; *Sankarlal* v. *State of Maharashtra,* AIR 1981 SC 765; *Shripad Shivram* v. *State of Maharashtra,* AIR 1981 SC 34; *State of Kerala* v. *Chellappan,* 1981 SCC (Cri) 614; *N.N. Naik* v. *State of Maharashtra,* AIR 1971 SC 1656; *State of A.P.* v. *I.B.S. Prasad Rao,* AIR 1970 SC 648; *India Electric Works Ltd* v. *James Mantosh,* AIR 1971 SC 2313; *Deonandan Mishra* v. *State of Bihar,* AIR 1955 SC 801; *Hanumant Govind Nargundkar* v. *State of M.P.,* AIR 1952 SC 343; *State Delhi Admn.* v. *V.C. Shukla,* AIR 1980 SC 1382; *Pohalya Motya Valvi* v. *State of Maharashtra,* AIR 1979 SC 1949; *Umedbhai Jadavbhai* v. *State of Gujarat,* AIR 1978 SC 424; *State of U.P.* v. *Lalla Singh,* AIR 1978 SC 368; *Chandmal* v. *State of Rajasthan,* AIR 1976 SC 917; *Charan*

JUSTICE HIDAYATULLAH observed "Circumstantial evidence in this context means a combination of facts creating a net-work through which there is no escape for the accused, because the facts taken as a whole do not admit of any inference but of his guilt."[60] He also quoted the following words of BARON PARKE J in *Towell's* case[61] "the circumstances may often be so clearly proved, so closely connected with it, or leading to one result in conclusion, that the mind may be as well convinced as if it were proved by eye-witnesses".

Cases — In a murder case the accused persons and the deceased were last seen boarding the taxi of the deceased at 4 a.m., the accused allegedly sold the wrist watch of the deceased at 1.30 p.m. the same day, the dead body of the deceased was found in the same taxi, the accused were identified by the witness in the T.I. parade held within two weeks of the incident, information given by the accused led to the recovery of the wrist watch of the deceased, the report of the finger print expert and the autopsy report were held to constitute circumstantial evidence sufficient to convict them.[62] In a case the police officials were charged to have killed the occupants of a speeding vehicle by fire-arms. They took the plea that the occupants of the vehicle also were firing from their fire-arms but the pistols shown to have been found near the dead bodies were found to be never used and defective by ballistic expert and the glasses

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Singh v. *State of U.P.*, AIR 1967 SC 520; *Nathu Naik* v. *State of Maharashtra*, AIR 1971 SC 1656; *Awadhi* v. *State of Bihar*, AIR 1971 SC 69; *Kusuma Kumari* v. *The Board of High School and Intermediate Education U.P. and another*, AIR 1973 All 513; *Tara Chand* v. *State*, 1973 Cr LJ 1098; *Om Prakash Kumar* v. *State of H.P.*, 1974 Cr LJ 556 : ILR (1973) HP 721; *State* v. *Zilla Singh*, 1973 Cr LJ 1384; *Re, Rayappa Asari*, 1972 Cr LJ 1226; *Narain Barak* v. *State*, 1972 Cr LJ 177 (Pat); *Irfan Ali* v. *State*, 1970 Cr LJ 603; *Palaniswamy Vaiyapuri* v. *State*, 1968 Cr LJ 453; *Bhula Kiram Koiri* v. *State*, 1970 Cr LJ 403; *Razak Khizar* v. *State*, 1967 Cr LJ 484; *Malsaram Lushai* v. *Manipur Administration*, 1966 Cr LJ 767; *Arakhitalm Coknath Sarangi* v. *State*, ILR (1970) Cut 649; *Karam Singh and others* v. *State*, 1969 Cr LJ 301; *State* v. *Juriamunda*, ILR (1969) Cut 401; *Manmohan Singh Johal* v. *State*, 1969 Cr LJ 932; *The Kumar Tripura and another* v. *State*, 1969 Cr LJ 1549; *M.G. Agarwal* v. *State of Maharashtra*, AIR 1963 SC 200; *Raghav Prapanna Tripathi* v. *State of U.P.*, AIR 1963 SC 74; *M.U. Sinai* v. *Union of India*, AIR 1975 SC 801; *State of Maharashtra* v. *Annappa*, AIR 1979 SC 1410; *S.P.Bhatnagar* v. *State of Maharashtra*, AIR 1979 SC 826; *Jaswant Singh* v. *State (Delhi Administration)*, AIR 1979 SC 190; *Mangaleshwari Prasad* v. *State of Bihar*, AIR 1954 SC 715; *Ram Bharosey* v. *State of U.P.*, AIR 1954 SC 704; *Bhagat Ram* v. *State of Punjab*, AIR 1954 SC 621; *Deonanda Mishra* v. *State of Bihar*, AIR 1955 SC 801; *Eradu and Others* v. *State of Hyderabad*, AIR 1956 SC 316; *Hanumant Govind Norgundkar* v. *State of M.P.*, AIR 1952 SC 343; *Anand Chintaman Lagu* v. *State of Bombay*, AIR 1960 SC 500; *Krishnan Nair* v. *State of Kerala*, ILR (1959) Ker 1094; *Rishipal and others* v. *State*, (1962) 1 Cr LJ 3 (All); *Amin and another* v. *the State*, 1958 Cr LJ 462; *State* v. *Anandilal and others*, 1957 Cr LJ 251; *Pershadi* v. *State*, 1955 Cr LJ 1125; *State* v. *Ram Autar Choudary and others*, 1955 Cr LJ 394; *Mohammad Sabir and others* v. *Rex*, 1952 Cr LJ 1277; *Jani Shah* v. *State*, 1958 Cr LJ 600; *Re, Cher Virala Narayan*, 1958 Cr LJ 476; *Re, Upputholla Sreenivasulu*, 1958 Cr LJ 18; *M. Chimpiramma* v. *Pabbisetti Subramanyam*, AIR 1957 AP 61; *Harendra Mohan Choudaury* v. *State*, ILR (1958) Assam 195; *Mangal Chand Gobardham Das* v. *Commissioner of Income tax*, AIR 1954 Assam 89; *Rameshwar Daga* v. *State of West Bengal*, AIR 1965 Cal 38; *Harbans Singh Cholan* v. *State*, 1960 Cr LJ 1577; *Rameshwar Daga* v. *State of West Bengal*, 1965 Cr LJ 26; *Dasondhi* v. *State*, 1953 Cr LJ 590; *Bhagoji* v. *Hyderabad Govt.*, 1954 Cr LJ 1378; *Narayani Amma Kamaladevi* v. *State of Kerala*, (1961) 2 Cr LJ 477 : AIR 1961 Ker 250; *Sivarajan* v. *State*, ILR (1959) Ker 319; *Thommen* v. *State of Kerala*, 1958 Cr LJ 509; *Karan Tulsidas* v. *The Kutch Govt.*, 52 Cr LJ 257; *Gangabhai Ratonshi Virdholi* v. *Malbai*, AIR 1950 Kutch 64; *Radhakrishna Nandagi* v. *State of M.P.*, (1962) 2 Cr LJ 694; *Padmalochari Sahu* v. *Lokhal (Halli) Sethi*, (1961) 1 Cr LJ 189; *Gulaschand Gamshirmal* v. *Kudilal Govindram*, AIR 1959 MP 151; *Re, Arcot Citizen Bank Ltd. by E. Chandrasekhar Arcot*, 1957 Cr LJ 1279; *State* v. *Thingnam Dhabalo Singh*, 1955 Cr LJ 139; *Ananta Kumar* v. *State*, (1962) 2 Cr LJ 179 : AIR 1962 Cal 428; *State of Mysore* v. *Dyavegowda, (Hegde J.)*, AIR 1962 Mys 124 : (1962) 1 Cr LJ 733; In re : *Govinda Reddy*, AIR 1958 Mys 150 : 1958 Cr LJ 1489; In re : *Made Gowda*, 1957 Cr LJ 521; In re : *Chikabyre Gowda*, 1955 Cr LJ 1274; *Re, Malayra seethu*, 1955 Cr LJ 372; *Re, Shivanna*, 1955 Cr LJ 360; *State* v. *Minaketan Pathaik*, 1952 Cr LJ 1393; *Krishna Murthy* v. *Jgarnath*, 1965 Cr LJ 194; *Bhagan* v. *State of Pepsu*, 1955 Cr LJ 537; *Jaswant Singh* v. *State*, 1966 Cr LJ 451; ILR (1956) Raj 1027; *State* v. *Bhawani Shanker*, 1953 Cr LJ 301; *Vaghari Madha Kana* v. *State*, 1955 Cr LJ 1240; *Kanbi Babu* v. *State*, 1955 Cr LJ 1522; *Re, Mrs. B. Gervase*, 1950 Cr LJ 1518; *Sharad Birdhi Chand Sarda* v. *State of Maharashtra*, AIR 1984 SC 1622; *Laxmi Raj Shetty* v. *State of Tamil Nadu*, AIR 1988 SC 1274; *Ramanand* v. *State of Himachal Pradesh*, AIR 1981 SC 738; *State of U.P.* v. *Dr. G.K. Ghosh*, AIR 1984 SC 1453; *Earabhadrappa* v. *State of Karnataka*, AIR 1983 SC 446; *Virbhan Singh* v. *State of U.P.*, AIR 1983 1002; *Kishanchand* v. *State of Rajasthan*, AIR 1982 SC 1511; *Pohalya* v. *State*, AIR 1979 SC 1949.

60. *Anant* v. *State of Bombay*, AIR 1960 SC 500 at page 523. **See also** *Laxman Naik* v. *State of Orissa*, 1995 Cr LJ 2692 (para 11) : AIR 1995 SC 1387.

61. (1854) 2 C&K 309.

62. *Ramzan Mbwana Mazuwa* v. *State of Maharashtra*, 1998 Cr LJ 3547 (Bom), **relying on** *Wasim Khan* v. *State of Uttar Pradesh*, AIR 1956 SC 400 : 1956 Cr LJ 790 and *Sunderlal* v. *State of Madhya Pradesh*, AIR 1954 SC 28 : 1954 Cr LJ 257 and **distinguishing** *Prem Thakur* v. *State of Punjab*, AIR 1983 SC 61 : 1983 Cr LJ 155 and *Kansa Behera* v. *State of Orissa*, AIR 1987 SC 1507 : 1987 Cr LJ 1852.

of the police vehicle were not broken. No damage was found in the vehicle in which the police officers were chasing whereas the glasses of the vehicle of the victims were broken and there were marks of firing on it. One of the accused police officials took away the station diary which was made available after four days and was found to be manipulated. It was held that the accused were liable to be convicted.[63] Where in a murder trial, the blood stained clothes of the deceased and an axe, the weapon of offence, were recovered on the pointing out of the accused, the dead body also was recovered from his house which he failed to explain and the motive was also proved, they all constitute circumstantial evidence sufficient to convict the accused.[64]

Where the main evidence against the accused persons was their identification by the victim for the first time in the Court and other evidence were recovery of the watch of the victim from the accused and their finger prints, the same was not found to be sufficient to convict them and they were given benefit of doubt.[65] Only a remote possibility of innocence in favour of the guilty person, cannot be a ground to allow him to escape punishment.[66]

(c) Direct and Indirect Evidence compared.—"The two forms are equally admissible, and the testimony, whether to the *factum probandum* or the *facta probantia,* is equally direct; but the superiority of the former is that it contains at most only one source of error, fallibility of assertion, while the latter has, in addition, fallibility of inference. Little is to be gained from a comparison of their weight, since, save in the case of actual production, both forms admit of every degree of cogency from the lowest to the highest."[67]

(d) Primary & Secondary evidence.—"As commonly used, these terms apply to the kinds of proof that may be given of the *contents* of a document, irrespective of the *purpose* for which such contents, when proved, may be received.[68] Primary evidence means the best or highest kind, that which the law regards as affording the greatest certainty of the fact in question: thus, production of the original document, or proof of an admission of its contents by the party against whom it is tendered, is considered primary in this sense. Secondary evidence means inferior or substitutionary evidence, that which itself

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63. *Brijlala Pd. Sinha* v. *State of Bihar,* AIR 1998 SC 2443 : 1998 Cr LJ 3611.

64. *Shankar Shridhar Kavale* v. *State of Maharashtra,* 1998 Cr LJ 4491 (para 16) (Bom). **See also** *Namdeo Satyagonda Patil* v. *State of Maharashtra,* 1994 Cr LJ 3493 (para 24) (Bom); *Uday Kumar* v. *State of Karnataka,* 1998 Cr LJ 4622 (SC); *Maideen Sab* v. *State of Karnataka,* 1993 Cr LJ 1430 (Kant); *Kundula Bala Subrahmanyam* v. *State of A.P.,* 1993 Cr LJ 1635 (para 14) (SC); *Phundi* v. *State of M.P.,* 1993 Cr LJ 1881 (MP); *Arakhit Jena* v. *State,* 1993 Cr LJ 1961 (Ori); *State of Rajasthan* v. *Mahavir,* AIR 1998 SC 3041; *State of M.P.* v. *Ratan Lal,* 1994 Cr LJ 131 (paras 4-5) : AIR 1994 SC 458; *V. Ravi* v. *State of Kerala,* 1994 Cr LJ 162 (para 34) (Ker); *Kamala Sethi* v. *State,* 1994 Cr LJ 197 (Ori); *Jagjit Singh* v. *State of H.P.,* 1994 Cr LJ 233 (paras 5 and 6) (SC); *Sushil Bhoi alias Sursingh alias Bundi Bhoi* v. *The State,* 1994 Cr LJ NOC 110 (Ori); *Upendra Nahak* v. *State,* 1994 Cr LJ NOC 166 (Ori); *Randhirsingh* v. *State of M.P.,* 1994 Cr LJ NOC 221 (MP); *Shanti Behal* v. *State (Delhi Admn.),* 1994 Cr LJ 2043 (Del); *Nawab Ali Jhinnu* v. *State of U.P.,* 1994 Cr LJ 2191 (SC); *Vinod* v. *State,* 1994 Cr LJ 2360 (All); *Swarna* v. *State of H.P.,* 1994 Cr LJ 3656 (paras 4 and 5) (HP); *Ramesh* v. *State of Karnataka,* 1994 Cr LJ 3798 (paras 21 and 23) (Kant); *James* v. *State of Kerala,* 1995 Cr LJ 55 (paras 31, 33 and 34) (Ker); *Ashok Gavade* v. *State of Goa,* 1995 Cr LJ 943 (Bom); *Shri Kishan* v. *State of Haryana,* AIR 1994 SC 1597 (para 4); *N. Rajendra Prasad* v. *State of Karnataka,* 1996 Cr LJ 257 (paras 7 to 15) (Kant); *Tola Ram* v. *State of Rajasthan,* 1996 Cr LJ 8 (paras 15-19, 24 and 25) Raj; *Biren Mandal* v. *State,* 1996 Cr LJ 3455 (Del).

65. *Ramzan Mbwana Mazuwa* v. *State of Maharashtra,* 1998 Cr LJ 3547 (Bom), **relying on** *Lakhanpal* v. *The State of Madhya Pradesh,* AIR 1979 SC 1620 : 1979 Cr LJ 1217; circumstantial evidence suffering from glaring infirmities and improbabilities, *Surinder Pal Jain* v. *Delhi Administration,* 1993 Cr LJ 1871 (SC) : AIR 1993 SC 1723; circumstances not forming complete chain, *Kailash* v. *State of U.P.,* 1994 Cr LJ 142 : AIR 1994 SC 470 (paras 4 and 5); *Lakshmi Kirsani* v. *State,* 2001 Cr LJ 3648 (paras 10, 11 and 12) (Ori); *State of H.P.* v. *Raj Kumar,* 1994 Cr LJ 894 (para 16) (HP); *State of Haryana* v. *Ved Prakash,* 1994 Cr LJ 140 (para 5) : AIR 1994 SC 468; *Bifal Bisi alias Harijan* v. *State of Orissa,* 1994 Cr LJ NOC 343 (Ori); *Tarseem Kumar* v. *Delhi Administration,* 1995 Cr LJ 470 : AIR 1994 SC 2585; *Ganpat Kishan* v. *State of Maharashtra,* 1995 Cr LJ 792 (para 11) (Bom); *Mandesan* v. *State of Kerala,* 1995 Cr LJ 61 (paras 14 and 15) (Ker); *Raisa* v. *State of M.P.,* 1995 Cr LJ 169 (paras 17 and 20 to 24) (MP); *State of M.P.* v. *Anil Kumar,* 1995 Cr LJ 735 (MP); *State of Maharashtra* v. *Prabhu Barku Gade,* 1995 Cr LJ 1432 (para 30) (Bom); *R.R. Chandak* v. *State of Maharashtra,* 1995 Cr LJ 2195 (Bom); *A. Jayaram* v. *State of A.P.,* AIR 1995 SC 2128 (paras 23 and 24); *Balvinder Singh* v. *State of Punjab,* 1996 Cr LJ 883 (paras 4 and 14) (SC); *C. Chenga Reddy* v. *State of A.P.,* 1996 Cr LJ 3461 (paras 52 and 54) (SC) : AIR 1996 SC 3390, **reversing** Cr A 22, 142, 240 of 1989 Dt. 27-11-91 (AP); *Raksha Ram* v. *State of U.P.,* 2001 Cr LJ 2052 (paras 7-9) (All). Circumstantial evidence not pointing to guilt of accused, *Bishikeshan Nag* v. *The State of Orissa,* 2001 Cr LJ NOC 76 (Ori) : (2000) 19 OCR 276.

66. *Hans Raj* v. *State of Rajasthan,* 1995 Cr LJ 1004 (para 18) (Raj).

67. PHIPSON ON EVIDENCE, 15th Edn. (2000), p. 3 (para 1-06).

68. Steph. Arts. 67, 74.

indicates the existence of more original sources of information; thus, a copy , or the testimony of a witness who has read the document, is secondary. In *Lucas* v. *Williams,*[69] Lord ESHER remarked : "Primary evidence is evidence which the law requires to be given first: secondary evidence is evidence which may be given in the absence of that better evidence, when a proper explanation of its absence has been given." This, however, is only approximately true, for the law in some cases requires secondary evidence to be given first, and in others allows the production of primary evidence to be optional. The terms "primary" and "secondary" are also occasionally applied to proof of handwriting, and attestation; and TAYLOR regarded depositions as secondary evidence of oral testimony."[70]

See also Chapter V, Sections 62-65.

(e) Oral Evidence.—See Chapter IV.

(f) Documentary Evidence.—PETER MURPHY defines documentary evidence as "Evidence afforded by any document produced for the inspection of Court, whether as direct or hearsay evidence of its contents."[71]

One of the essential elements of due execution of a document is that the document should be signed by the party or parties associated with it. The words "intended" to be used, or which may be used, in the definition of the word "document" in Section 3, Evidence Act necessarily imply that the document has to be used by some party against another. If it is to be so used there should be intrinsic evidence in the document itself of some particular party or parties being associated with the same. Where the document bears the signature of the executant this is undoubtedly evidence of such association. Where there is no such signature and the document stands completely detached from and unconnected with any person or party, there can be no question of the same being used by anybody against another. Again, before a person can be bound by a particular document, he must be proved to have 'executed' it.[72] The documents marked as exhibits without proof cannot form the basis of judgment.[73]

A certified copy from the school register regarding the age, and the affidavit by the father giving the date of birth, would amount to documentary evidence.[74]

Document procured by illegal means is no bar to its admissibility if it is relevant and its genuineness is proved. While examining its genuiness the circumstances under which it came to be produced in the court have to be taken into consideration.[75] Slips containing entries seized in search of the premises, if such entries therein are carried into account books seized along with them, are admissible.[76] Documents referred to in Section 173, Cr.P.C., are in a sense evidence, as both prosecution and accused can rely or refer to them in exercising the right of being heard under Section 251-A clauses 2 and 3 of Cr.P.C.[77] This is **reversed** on another point in *P. Sirajuddin* v. *State of Madras*.[78] Where the witness did not depose to the signature of the executant, nor was the document put to the executant, the document is not proved and therefore not admissible.[79] A Government resolution, dated 15-10-1970 repeatedly referred to an earlier resolution of 1963, which was not produced. It was held that the intrinsic evidentiary value of the 1970 resolution could be relied on, in proof of the 1963 resolution.[80] In land acquisition cases, the mere statement about the sales without the examination of vendees or persons attesting the sales, are not admissible in evidence for determining the value of the lands.[81] Where a document was not produced in

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69. (1892) 2 QB 113, 116.
70. PHIPSON ON EVIDENCE, 15th Edn. (2000), p. 4 (para 1-08).
71. A PRACTICAL APPROACH TO EVIDENCE, 1985, 2nd Edn., page 7.
72. *Mohd. Tahir* v. *Sardar Bano,* AIR 1952 All 782; *Hare Krishna,* ILR 19 Bom 635; *Panigrahj* v. *Jogeshwar Panda,* AIR 1939 Cal 688; *Angnu Ram* v. *Bhikhi,* AIR 1941 Oudh 89.
73. *A. Munuswami* v. *R. Sethuraman,* AIR 1995 Mad 375 (para 10).
74. *Mohd. Ikram Hussain* v. *State,* AIR 1964 SC 1625.
75. *Magraj Patodia* v. *R.K. Birla,* AIR 1971 SC 1295; *M.K. Annamalai Chettiar* v. *Dy Commr. Tax Officer,* (1965) 2 Mad LJ 406 : 1966 MWN 46 : 78 MLW 702.
76. *I.G.L. Gupta* v. *Asst. Collector, Customs,* AIR 1971 SC 28.
77. *Sirajuddin* v. *State,* 1968 Cr LJ 493.
78. AIR 1971 SC 520.
79. *Union of India* v. *Edwaset Kebenter etc.,* ILR 1972 (2) Del 92.
80. *State of Maharashtra* v. *Balchandra Khanderao Joshi,* AIR 1977 SC 1241.
81. *Collector, Raigarh* v. *Dr. Harisingh Thakur,* AIR 1979 SC 472.

Court but another document *viz.*, a settlement deed, in which a reference to the document was made, was filed, it was held that, it was not sufficient proof of the document.[82]

Non-registration is no ground for suspecting the genuineness of a document such as a lease deed which does not require registration.[83]

Where there is documentary evidence and also a mass of conflicting oral testimony, it is always desirable and indeed safe to let the documents speak for themselves.[84]

Where death of the injured person had occurred long before the commencement of the trial, his wound certificate cannot be brought on record.[85]

See also Chapter V.

(g) Real Evidence.—PHIPSON[86] states : "Material objects other than documents, produced for inspection of the Court, are commonly called real evidence. This, when available, is probably the most satisfactory kind of all, since, save for identification or explanation, neither testimony nor inference is relied upon. Unless its genuineness is in dispute, the thing speaks for itself.

Unfortunately, however, the term "real evidence" is itself both indefinite and ambiguous, having been used in three divergent senses :

(1) EVIDENCE FROM THINGS AS DISTINCT FROM PERSONS.

(2) MATERIAL OBJECTS PRODUCED FOR THE INSPECTION OF THE COURT. This is the second and most widely accepted meaning of "real evidence". It must be borne in mind that there is a distinction between a document used as a record of a transaction, such as a conveyance, and a document as a thing. It depends on the circumstances in which classification it falls. On a charge of stealing a document, for example, the document is a thing.

(3) PERCEPTION BY THE COURT (OR ITS RESULT) AS DISTINCT FROM THE FACTS PERCEIVED. Although the physical production of objects is a valuable factor in juridical proof and of use in technical classification, it is questionable whether the term "real evidence" is a very helpful one by which to express it. The phrase is hardly ever used in practice, material objects being referred to either by name, or, more loosely, as circumstantial evidence. In textbooks, especially when dealing with classification, the phrase is occasionally convenient. Which of its meanings then should be retained? It seems advisable to adhere to the more usual definition "material objects, other than documents, produced for the inspection of the Court."

"A term employed to denote any material from which the court may draw conclusions or inferences by using its own senses. The genus includes material objects produced to the court for its inspection, the presentation of the physical characteristics of any person or animal, the demeanour of witnesses (which may or may not be offered or presented to the court by design), views of the *locus in quo* or of any object incapable of being brought to court without undue difficulty and such items as tapes, films and photographs, the physical appearance of which may be significant over and above the sum total of their contents as such."[87]

"..... information can be presented to the court in different forms : through the oral evidence of a physically present witness, through documents or through real evidence such as material objects produced in court from the nature and condition of which the jury is invited to draw conclusions. But real evidence is not restricted to physical objects but also encompasses facts such as the demeanour of witnesses or visits to the site of an occurrence."[88]

"Although it was devised by Bentham and adopted by Best, 'real evidence' is not a term which has received the blessing of common judicial usage. There is general agreement that it covers the production

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82. *Kamarsu Venkata Subbamma* v. *Kamaraju Veerabhadra Rao*, AIR 1961 AP 495.
83. *Kompalli Nageshwara Rao* v. *Spl. Deputy Collector Land Acquisition Bapala*, AIR 1959 AP 52.
84. *Meena Alias Mota* v. *Kirpalani*, AIR 1960 Bom 148.
85. *Siddapuram Siva Reddy* v. *State of A.P.*, 1995 Cr LJ 701 (para 10) (AP).
86. PHIPSON ON EVIDENCE, 15th Edn. (2000), p. 4 (para 1-07).
87. PETER MURPHY : A PRACTICAL APPROACH TO EVIDENCE, 1985, 2nd Edn., p. 7.
88. STEVE UGLOW'S EVIDENCE : TEXT & MATERIALS, 1997, p. 169.

of material objects for inspection by the judge or jury in Court, but it is debatable how much further the term should be extended."[1]

(h) Hearsay Evidence.—"Hearsay evidence is given when a witness recounts a statement made (orally, in a document or otherwise) by another person and where the proponent of the evidence asserts that what the person, who made the statement, said was true."[2]

(i) Presumptive or *prima facie* Evidence.—"Presumptive or *prima facie* evidence is the evidence which is declared (usually by statute) to be sufficient evidence of a fact, unless and until an opponent adduces contradictory evidence, in which case the tribunal of fact must weigh all the evidence tendered by all parties, in order to decide whether the fact has been proved."[3] For example, the rule that a child aged between 7 and 12 is presumed to be *doli incapax*, since evidence to contradict the lack of capacity may be introduced by the prosecution.

19. OTHER EVIDENCE

(a) Conclusive Evidence.—"Conclusive evidence, which is rare, is tantamount to a rule of law, since it is evidence which no party is permitted to contradict by evidence. Conclusive evidence, therefore, is aptly named, and it would be preferable to state the fact so proved as a rule of law."[4]

For example, the rule that the child under the age of 7 years is to be taken as incapable of committing a criminal offence.

(b) Confessions of co-accused whether evidence.—The confession of an accused person against a co-accused is not evidence in the ordinary sense of the term. It does not come within the meaning of evidence contained in this section inasmuch as it is not required to be given on oath, nor in the presence of the accused, and cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of these infirmities. Such a confession can only be used to lend assurance to other evidence against a co-accused. The proper way to approach a case of this kind is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.[5]

The confessions of persons, jointly tried for the same offence with the accused, are not according to the Bombay High Court, technically evidence.[6] But the Calcutta High Court had held in a Full Bench case that, though the evidentiary value of such confessions may be but little, they are 'evidence'.[7]

(c) Evidence of a judge.—If, in a case, a judge wishes to give evidence and intends the Court to act on his statement of facts, he should make that statement in the same manner as any other witness and not merely introduce it in his judgment. A judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts.[8]

"Judges of the superior Courts cannot be compelled to testify to matters which have arisen before them in other trials[9] but this does not apply to collateral incidents occurring during such trials, such as the attempted rescue of a prisoner in Court.[10] It does not seem to apply to a judge of an inferior Court.[11] In practice, judges usually do not object to giving evidence as to what occurred in cases tried by them when they can assist subsequent litigation by doing so."[12]

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1. CROSS & TAPPER ON EVIDENCE, 1995, 8th Edn., p. 49.
2. PETER MURPHY : A PRACTICAL APPROACH TO EVIDENCE, 1985, 2nd Edn., p. 5.
3. PETER MURPHY : A PRACTICAL APPROACH TO EVIDENCE, 1985, 2nd Edn., p. 6.
4. PETER MURPHY : A PRACTICAL APPROACH TO EVIDENCE, 1985, 2nd Edn., p. 6.
5. *Kashmira Singh* v. *State of Madhya Pradesh*, 1952) SCR 526 : AIR 1952 SC 159.
6. *Queen Empress* v. *Khandiabin Pandu*, ILR (1890) 15 Bom 66; *Nga Tha Nyan* v. *Queen Empress*, (1897) PJ LB 368.
7. *Empress* v. *Ashootosh Chuckerbutty*, ILR (1878) 4 Cal 483 (FB).
8. *Harpurshad* v. *Sheo Dyal*, (1876) 3 IA 259; *Sadanand* v. *State*, (1968) 1 MLJ 9.
9. *R* v. *Gazard*, (1838) 8 C & P 595; *Buccleugh (Duke)* v. *Metropolitan Board of Works*, (1872) LR 5 HL 418, 433.
10. *R* v. *Thanet (Earl)*, 27 How St Tr 845.
11. *R* v. *Harvey*, (1858) 8 Cox CC 99; *McKinley* v. *McKinley*, (1960) 1 WLR 120.
12. PHIPSON ON EVIDENCE, 15th Edn. (2000), p. 625 (para 24-29).

According to WIGMORE, a judge should not use his opinion from the Bench under the guise of judicial knowledge, what he knows only as an individual observer outside the Court.[13]

A judge is not entitled to allow his view or observation to take the place of evidence, because such view or observation of his cannot be tested by cross-examination and the accused does not get an opportunity to furnish any explanation in regard to the same.[14] Where a permit was given to a lorry to ply along first class roads in the State and there was no record as to the classification of roads, in a prosecution case for plying the lorry on a road not classified as first class, the magistrate imported his personal knowledge as to the bad condition of the road and convicted the accused. It was held that the conviction is not legal as the magistrate cannot import his personal knowledge into the case.[15] No Court should go out of the record of the case and write a judgment importing its personal knowledge.[16] It would indeed be a travesty of all known principles of justice, if judges and magistrates are allowed to use their knowledge gained otherwise than by the means allowed to them by law in judging the truth of a case. Where even before the complainant was examined the magistrate admits that he had knowledge of the facts and was obviously using that knowledge, in dismissing the complaint, the procedure is illegal and cannot be approved.[17] In a case filed against an accused for possession of opium under the Opium Act, he was convicted by the magistrate on the basis of his observation and identification of the substance as opium, without having any chemical analysis or expert opinion. It was held that the conviction was illegal.[18] Where a trying magistrate himself took part in his executive capacity for obtaining chemical examiner's report on an article recovered from the accused he should not himself sit and try such accused person in his judicial capacity.[19]

A Court can take judicial notice of certain matters with which a common man of ordinary intelligence is acquainted.[20] While assessing the value to be attached to oral evidence, a judge is entitled to call into aid his experience of life and knowledge.[21]

(d) Evidence of witness belatedly examined.—Testimony of a witness cannot be discarded merely on the ground that his statement was recorded after sometime as he was not available being on duty.[22] Where the eye-witnesses before whom dying declaration was recorded were frantically busy to save the life of the deceased, their evidence could not be rejected on the ground of delay in their examination.[23] Where the evidence of the eye-witness was recorded belatedly, the witness did not report the matter to the family members of the deceased and the police immediately after the occurrence and his presence at the place of occurrence was doubtful, besides these was possibility of his being a chance witness, his evidence could not be relied upon.[24] Where the Investigating Officer stated that the eye-witnesses were examined late (8 days after the incident) as they were not available in the village and there was no proof that they disclosed the occurrence to any other person and the witnesses did not say that they were not available for examination, their evidence was rightly discarded.[25]

(e) Evidence of a witness, not cross-examined.—"Evidence" has been used in different context in different sections of the Cr.P.C. and therefore this term should be interpreted in the context it has been used in the relevant provision.

Section 299 of the Cr.P.C. permits recording of evidence in the absence of the accused in certain circumstances and such evidence of the witness who would not be cross-examined can be taken into consideration.[26]

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13. WIGMORE S. 2569.
14. *Pritam Singh* v. *State of Punjab*, AIR 1956 SC 415.
15. **See also** *Durga* v. *Ramdayal*, ILR 38 Cal 153 (1960) Ker LT 1107.
16. *Rattan Das* v. *Darshan Dass*, AIR 1950 HP 15.
17. *Sesha Reddy* v. *China*, AIR 1958 AP 595 : 1958 Cr LJ 1123.
18. *Re, Rampuram Ayyanna*, AIR 1963 AP 334.
19. 1965 All WR 836.
20. *Madho* v. *State*, AIR 1978 Pat 172.
21. *Chaturbhuj* v. *Collector*, AIR 1969 SC 255; **See also** *Mulpura* v. *Sri Rajha*, ILR 36 Mad 138.
22. *T.V. Naidu* v. *Public Prosecutor, A.P. High Court*, AIR 1997 SC 352.
23. *Malik Ram Bhoi* v. *State of Orissa*, 1993 Cr LJ 984 (para 8) (Ori).
24. *Mahendra Singh* v. *State of Rajasthan*, 1998 Cr LJ 1314 (para 16) (Raj).
25. *Jagabandhu Behera* v. *Dinabandhu Kabi*, 1993 Cr LJ 2512 (para 4) (Ori), **relying on** *Kara Pradhan* v. *State*, 1985 CLR (Cri) 164 (Ori).
26. *Ashok Kumar* v. *State of U.P.*, 1998 Cr LJ 2777 (paras 15 and 16) (All); **Contra** : *Nandram Khemraj* v. *State of M.P.*, 1995 Cr LJ 1270 (MP).

(f) Speeches of ministers and legislators.—It is well settled that the speeches by the Ministers and the Members of Assembly are inadmissible in the Court of Law, when the provisions of an enactment are being considered.[27]

(g) Last seen evidence.—Where there was a gap of two days between the date of incident and the witness seeing the accused, his evidence cannot be called the last seen evidence.[28]

(h) Instances of those considered as evidence.—The following are some instances of what were considered as evidence:

(1) Documents produced in enquiry under Section 207A, Cr.P.C. (1898).[29]

(2) Report of a public analyst under Food Adultration Act, 1964, though there is some failure to follow the procedure prescribed in Section 13, Cl. 2.[30]

(3) Any authority, sanction or empowerment necessary under law to initiate proceedings if filed into Court, is a piece of evidence on behalf of the Government.[31]

(4) Rent receipts mentioning the number of the land and *Patta* No. without mentioning the amount of rent, is evidence of possession, if not rebutted.[32]

(5) Original records of a proceeding before a Court.[33]

The following are some instances which were held "not evidence":

(1) Answers by the accused under Section 313, Cr.P.C.[34]

(2) A statement of the accused in the written statement filed by him is not strictly evidence though the Court may consider it.[35]

(3) Evidence collected by the police during investigation.[36]

(4) Where there was recovery of country liquor and opium during the search of the accused, two separate charge sheets were filed against him. Evidence was found unreliable in the opium case. In the second case concerning liquor, it was held that such evidence in the opium case is not evidence in the second case.[37]

(5) Suggestions made in cross-examination, when denied by the parties, cannot be substituted for evidence.[38]

(6) Newspaper item by itself does not constitute evidence.[39]

(7) Statement of witnesses in the first information report, or before police and identification parade held by the magistrate is not substantive evidence.[40]

(8) Statement of witnesses having no personnel knowledge or means of such knowledge—is no evidence.[41]

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27. *S.R. Mehrotra* v. *State of H.P.*, AIR 1997 HP 51.
28. *Uda alias Suda* v. *The State of Rajasthan*, 2001 Cr LJ NOC 28 (Raj) : (2001) 1 Raj Cri C 723.
29. (1962) 66 Cal WN 680.
30. *Municipal Committee Ambala* v. *Basaki Ram, Delhi Admn.* AIR 1963 Punj 175; *Prem Ballab* v. *State*, 1977 Cr LJ 12; *Raveendran* v. *Food Inspector*, 1977 KLT 155.
31. *Union Territory* v. *Marfat Ali*, AIR 1958 Tripura 26.
32. *Asab Ali* v. *Habib Ali*, ILR (1967) 19 Assam 160.
33. 1979 (2) Mah LR 132.
34. *Moral Majhi* v. *State*, AIR 1958 Cal 616; *Ajit Kumar Banerjee* v. *Union of India*, ILR (1957) 1 Cal 527; *Ranjit Singh* v. *State*, AIR 1952 HP 81; *S.K. Gosh* v. *State*, AIR 1969 Ori 228.
35. *Emperor* v. *Tuli Babu*, (1945) 25 Pat 33 : AIR 1946 Pat 373.
36. *Ranjit Singh* v. *State*, AIR 1952 HP 81; *Hazari Lal* v. *State (Delhi. Admn.)*, AIR 1980 SC 873; *Matadin* v. *State of U.P.*, AIR 1979 SC 1234; *Mohanlal* v. *Ital Ajit Singh*, AIR 1978 SC 1183; *P. Sirajuddin* v. *Govt. of Madras*, AIR 1968 Mad 117; But **overruled on** other point by AIR 1971 SC 520.
37. 1970 All Cr R 423.
38. 1969 All WR 369.
39. *Niranjan Lal Ratan Kumar* v. *River Steam Navigation Co. Ltd.*, AIR 1967 Assam and Nagaland 74, 77.
40. *Ajayab Singh* v. *State*, 1978 Raj LW 9.
41. *Duarka Das* v. *Ramlubhai*, (1969) 71 PLR 68.

(9) Conclusions of witnesses, including the police, are not evidence.[42]

(10) Pleadings do not constitute evidence.[43]

(11) Report of Medical Officer without statement on oath by the Medical Officer is not evidence.[44]

(12) The Court can only proceed on evidence given on oath in the witness box by the witness and not the statement made in a letter addressed to the court.[45]

The evidence given in one case upon the issues raised in that case cannot be taken into consideration in another case in which other issues arise, but parties may agree that evidence taken in one suit shall be treated as evidence in another.[46]

(13) A statement in an inquest report is not evidence by itself and cannot be pitted against the evidence of the medical witness in court.[47]

(14) Statements in an identification memo recorded by a magistrate under Section 164, Cr.P.C.[48]

(15) The writing obtained by the Court from the accused under Section 73 of this Act for purpose of comparison.[49]

(16) An affidavit of a person filed in one proceedings; such an affidavit cannot be treated as evidence in another suit or proceeding, when the deponent is alive and could be examined, or when the court did not direct proof of the facts by filing an affidavit and when the opposite party had no opportunity to cross-examine such deponent.[50]

Affidavit is no evidence unless ordered by the Court under Order 19, Rule 1, or when it is not properly drawn or verified as required under law.[51]

When the Civil Court sits in enquiry under Section 146, Cl. 1, Cr.P.C., it can use its discretion and require the person whose affidavit was filed before the magistrate under Section 145, Cr.P.C., to attend the Court for purpose of cross-examination. In such a case "evidence" includes the affidavit.[52]

Affidavit of a person not produced for examination in the court.[53]

(17) Judicial confession of a co-accused, though evidence in a generic sense, is not evidence under Section 3.[54]

(i) Panchnama.—Persons summoned as witness during police investigation are called *panchas*. A *panchnama* is merely a record of what a *panch* sees. The only use to which it can properly be put is that when the *panch* goes into the witness box and swears to what he saw, the *panchnama* can be used as a contemporary record to refresh his memory. If the police want to rely on a *panchnama* they must call a *panch* to prove it.[55] The *panchnama* of a search of premises is not evidence of what was found on the

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42. 1975 Mad LJ (Cri) 399.

43. *State of Punjab* v. *Ramjilal*, AIR 1971 SC 1228; *C.S. Rowjee by P.A. holder Sri Apparao*, AIR 1964 SC 962; *Rowjee* v. *State of A.P.*; *Pannalal Binjraj* v. *The Union of India*, AIR 1957 SC 397; *Ram Manohar Lohia* v. *State of Bihar*, 1966 SC 740; *Orissa State etc.* v. *V.S. Singh*, ILR 1973 Cut 1309.

44. *Reshmi* v. *Jai Singh*, 1975 Hindu LR 22.

45. *Ramjanam Singh* v. *State of Bihar*, AIR 1956 SC 643.

46. In re : *Lubeck*, (1905) 7 Bom LR 894 : 32 IA 217 : 33 Cal 151.

47. *Surjan* v. *State of Rajasthan*, AIR 1956 SC 425.

48. *Ram Sanalis* v. *State*, AIR 1963 All 308.

49. *Ram Swarup* v. *State*, 1958 All 119.

50. *R. Viswanathan* v. *Syed Abdul Vajid*, AIR 1963 SC 1; *Manoharlal* v. *Cantonement Board*, AIR 1956 Ajmer 35.

51. *Shamsunder Raj Kumar* v. *Bharat Oil Mills*, AIR 1964 Bom 38; 1944 Nag 161 were **over-ruled in** AIR 1954 Nag 260; *Bharat Bank Ltd* v. *K.S. Misra Official Liquidator*, 1953 Nag 228; *Federal India Assurance Co* v. *Anand Rao*, ILR (1944) Nag 436; *Sudha Devi* v. *M.P. Narayanan*, AIR 1988 SC 1381.

52. *Kailash Nath Agarwal* v. *Amarnath*, AIR 1969 All 82.

53. *Nirajan lal Ratan Kumar* v. *River Steam Navigation Co. Ltd. and another*, 1967 Assam 74.

54. *Re. Astavee and others*, (1965) 2 Cr LJ 566; *Re. Mustafa Maracair*, AIR 1951 Mad 787; *Bndu Gouda* v. *State*, AIR 1965 Ori 170.

55. *Emperor* v. *Mohanlal Bababhai*, (1940) 43 Bom LR 163.

search unless the *panchas* are examined as witnesses.[56] Where the articles were seized under N.D. & P.S. Act and sealed on the spot and then were brought to the police station and the crime register number was entered on the *panchnama* and the labels, the veracity of the prosecution story was not thereby affected.[57]

(j) Seizure Memo.—Where on search at the behest of jail authorities heroin was allegedly found in possession of the accused jail inmate but neither any seizure memo was prepared nor the material witness was examined, it was held that the conviction was liable to be set aside.[58] Where there was inconsistency in evidence of prosecuting witnesses in connection with spot sealing of the packets of heroin seized and their custody so as to wipe out the possibility of tampering, conviction of the accused was liable to be set aside.[59]

(k) Inquest Report.—Clinching and reliable evidence adduced by the eye-witnesses cannot be discarded simply because the Investigating Officer by mistake fails to mention the crime number in the inquest report.[60]

(l) Tape Recording.—Tape recorded conversation is admissible provided the conversation is relevant to the matters in issue, there is identification of the voice and the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape record.[61] Tape recording can be legal evidence by way of corroborating the statements of a person who deposes that the other speaker and he carried on that conversation or even of the statement of a person who may depose that he overheard the conversation between the two persons and what they actually stated had been tape recorded.[62] The time, place and accuracy of the recording must be proved by a competent witness and the voices must be properly identified.[63] The tape-recorded evidence, if it is to be acceptable, must be sealed at the earliest point of time and not opened except under the orders of the court.[64] A previous statement made by a person and recorded on tape, can be used not only to corroborate the evidence given by the witness in Court but also to contradict the evidence given before the Court as well as to test the veracity of the witness and also to impeach his impartiality.[65]

(m) Electronic Records.—Evidence will now include 'electronic records' also, as the meaning of document has been expanded to include them.[66]

(n) Tracker Dog.—Evidence of dog tracking, even if admissible, is not ordinarily of much weight.[67]

Judicial notice must be taken of the fact that the training skills and the special qualities that are found in the police dogs are now universally being recognised as being of such a high calibre that in cases such as detection of explosives, drugs etc. they are found superior and more effective than the most sophisticated instruments. In this background one needs to take cognizance of the fact that for the purpose of tracking down a criminal that special faculties, qualities and skills of the dog are aspects of which serious note must be taken. Where the police rely on such evidence, the courts would be more than fully justified in accepting it provided that it passes the test of complete scrutiny.[68]

Dog-tracking evidence must pass the test of scrutiny and reliability as in the case of any other evidence. The following guidelines must be borne in mind :

(a) That there must be a reliable and complete regard of the exact manner in which the tracking was done and the *panchnama* in respect of the dog tracking evidence will have to be clear and

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56. *Emperor* v. *Rustom Lam*, (1931) 34 Bom LR 267.
57. *Ali Husain Sayyed* v. *State of Maharashtra*, 1993 Cr LJ 277, at p. 279 (Bom).
58. *Nain Singh* v. *State*, 1995 Cr LJ 2774 (paras 5 and 6) (Del).
59. *R.K. Singhari* v. *State of Orissa*, 1995 Cr LJ 3083 (para 7) (Ori).
60. *Krishna Pal* v. *State of U.P.*, 1996 Cr LJ 1134 (para 9) (SC) : AIR 1996 SC 733.
61. *R M Malkani* v. *State of Maharashtra*, AIR 1973 SC 157 : 1973 Cr LJ 228. **Also see** *State of Maharashtra* v. *S P. Munje*, 1999 Cr LJ 1510, 1512 (Bom) and *State of Maharashtra* v. *Ramdas Shankar Kurlekar*, 1999 Cr LJ 196, at p. 204 (Bom), music heard before and after recording conversation, no plausible explanation, suspicion.
62. Per RAGHUBAR DAYAL and MUDHOLKAR JJ. in *Pratap Singh* v. *State of Punjab*, AIR 1964 SC 72.
63. *Yusufalli* v. *State of Maharashtra*, (1967) 70 Bom LR 76 (SC).
64. *C.R. Mehta* v. *State of Maharashtra*, 1993 Cr LJ 2863 (para 13) (Bom).
65. *Rama Reddy* v. *V.V. Giri*, AIR 1971 SC 1162.
66. *Vide* The Information Technology Act, 2000, S. 92, Sch. III (w.e.f. 17-10-2000).
67. *Abdul Razak* v. *State of Maharashtra*, (1969) 72 Bom LR 646 (SC) : AIR 1970 SC 283 : 1970 Cr LJ 373.
68. *Pandian K. Nadar* v. *State of Maharashtra*, 1993 Cr LJ 3883 (para 25) (Bom).

complete. It will have to be properly proved and will have to be supported by the evidence of the handler.

(b) There must be no discrepancies between the version as recorded in the *panchnama* and the evidence of the handler as deposed to before the Court.

(c) The evidence of the handler will have to independently pass the test of cross-examination.

(d) Material, such as the type of training imparted to the dog, its past performance, achievements reliability etc., supported, if possible and available, by documents, will have to be placed before the Court by the handler.[69]

There are some breeds of dogs and strains which are specially utilised for hunting and tracking because of their abnormally high talents. If the dog belongs to one of these categories and if it is shown to the Court that it has been specially trained for the purposes of detection, the dog-tracking evidence will have to be relied upon as being evidence of a very high calibre.[70] Where in the identification parade, held within twenty four hours of the incident, the tracker-dog, after smelling *chappal* and knife, found at the place of occurrence preserved with due caution, immediately picked up the two accused persons, it was held that the evidence provided by the dog was sufficient to link those two items with the accused.[71]

"In *R.* v. *Pieterson and Holloway,*[72] the Court of Appeal considered the admissibility of evidence that a tracker dog had traced from the crime scene to a particular individual. Lord TAYLOR C.J. stated that "if a dog handler can establish that a dog has been properly trained and that over a period of time the dog's reactions indicate that it is a reliable pointer to the existence of a scent from a particular individual, then that evidence should properly be admitted."[73] Detailed evidence will have to be given of the dog's training and of any tests to establish its reliability. Moreover, the trial judge should direct the jury on the need for caution in assessing the value of the evidence, because of the difficulties in investigating the accuracy and degree of certainty of the dog on the particular occasion."[74]

Also see under Section 45.

20. DIFFERENT CATEGORIES OF WITNESSES

(a) Relations.—It is an error to reject the evidence of witnesses on the ground they are related to the deceased. Close relatives of the deceased would normally be most reluctant to spare the real assailants and to falsely mention the name of another person.[75] There is no rule either of law or of prudence that family members of the deceased in a murder case are incompetent witnesses. There may be cases where only the family members will be the witness to the occurrence and their evidence is not to be jettisoned merely on the ground of interestedness, provided it is otherwise credible and fits in with the broad

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69. *Babu Magbul Shaikh* v. *State of Maharashtra,* 1993 Cr LJ 2808 (para 8) (Bom). The Court **referred to** *R.* v. *Montgomery,* 1866 NI 100.
70. *Babu Magbul Shaikh* v. *State of Maharashtra,* 1993 Cr LJ 2808 (para 9) (Bom).
71. *Pandian K. Nadar* v. *State of Maharashtra,* 1993 Cr LJ 3883 (para 24) (Bom).
72. (1995) 2 Cr App R 11 CA.
73. (1995) 2 Cr App R 11, 16 CA.
74. PHIPSON ON EVIDENCE, 15th Edn. (2000), p. 331 (para 14-34).
75. *Barati* v. *State of U.P.,* AIR 1974 SC 839; *Balakram* v. *State of U.P.,* AIR 1974 SC 2165; *Guli Chand* v. *State of Rajasthan,* AIR 1974 SC 276; *N.N. Naik* v. *State of Maharashtra,* AIR 1971 SC 1656; *Delip Singh* v. *State of Punjab,* AIR 1953 SC 364; *State of Punjab* v. *Ramji Das,* AIR 1977 SC 1085; *Molu* v. *State of Haryana,* AIR 1976 SC 2499; *State of U.P.* v. *Samman Dass,* AIR 1972 SC 677; *Bhupendra Singh* v. *State of Punjab,* AIR 1968 SC 1438; *Radha Kandi* v. *State,* 1973 Cr LJ 1320; *Chandmal* v. *State of Rajasthan,* 1971 Cr LJ 137; *Mahender Singh* v. *State,* 1972 Cr LJ 1590; *Paras Ram* v. *State of H.P.,* 1973 Cr LJ 428; *Ramdhani Pande* v. *State of M.P.,* 1973 Cr LJ 1880; *Ramchander* v. *State of Rajasthan,* 1970 Cr LJ 653; *Mukhtiar Singh* v. *State of Punjab,* 1975 Cr LJ 132; *Tikaram* v. *State,* 1957 Cr LJ 1200; *Re, Irala Palle Ramiah,* 1957 Cr LJ 815; *Ramesh* v. *State,* 1979 Cr LJ 727; *Md. Giasuddin Ahmed* v. *State of Assam,* 1977 Cr LJ 1656; *Gurubasavaiah* v. *State of Karnataka,* 1979 Cr LJ 603; *Santi* v. *State,* (1977) Cr LJ 2053; *Kiron Bahadur Singh* AIR 1972 All 369; *Jagabandhu Sonapath* v. *Bhagu Sonapath,* AIR 1974 Ori 120; *Hakim Singh* v. *State,* AIR 1958 J&K 23; *Dursingh Ghusla Bhulala* v. *State of Madhya Bharath,* AIR 1956 MB 25; *Ningappa Prabhu Sarvad* v. *State of Mysore,* 1961 Mad LJ (Cr) 705; *Raghunath Paramanik* v. *State,* AIR 1958 Ori 92; *Ishwar Devi Malik* v. *Union of India through the Secretary to the Ministry of Home-affairs Government of India, New Delhi,* AIR 1969 Del 183; *Hamid Mia* v. *Amu Bibi (Hajibi),* AIR 1958 Manipur 47; *Sher Singh* v. *State of Haryana,* 1994 Cr LJ 1980 (para 5) (SC); *Dhani* v. *State,* 1999 Cr LJ 2712 (para 7) (Ori). *Anuj* v. *State of H.P.,* 2000 Cr LJ 1103 (para 17) (HP).

probabilities of the case.[76] However, the Court should scrutinise the evidence of such witnesses carefully.[77] The mere fact that the prosecution witnesses were the parents of the deceased would not entitle the Sessions Judge to disbelieve their evidence unless there are features which are indicative of concoction and especially when nothing had been brought out in their cross-examination to suggest that they are speaking to something which had not been witnessed by them.[78]

The evidence of relatives in the same house when murder or dacoity takes place near about midnight, cannot be said to be interested as they are natural witness.[79]

Where the witness was the father of deceased and inimical to accused, his testimony had to be viewed with great caution but not rejected if there were no infirmities.[80] When the wife of the deceased was also travelling with him at time of the accident, her evidence cannot be brushed aside merely on the ground of her being the widow of the deceased.[81] Where all the witnesses who are relations reached the scene of offence, their residential tenements being in the vicinity, their evidence cannot be discarded on ground of relationship.[82]

Where the eye-witness is closely related to the victim, his evidence is to be closely scrutinised but corroboration is not necessary for acceptance of such evidence.[83] There is no reason to disbelieve the corroborated evidence of the relatives of the deceased who were natural injured eye-witnesses.[84] In cases of relation witness whether corroboration is necessary or not will depend on the particular facts and circumstance of each case.[85] The evidence of close relations has to be examined with great care and caution as they have tendency to exaggerate or add facts. It can be accepted if there is some corroboration.[86] It cannot be discarded mechanically.[87] In the case of witness related to the deceased the corroboration required is not the kind of corroboration necessary in the case of approvers.[88] Where the

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76. *State of Orissa* v. *Domana Majhi*, 1976 Cr LJ 605; *Gurucharan Singh* v. *State of Punjab*, AIR 1956 SC 460; *Sarwan Singh* v. *State of Punjab*, AIR 1976 SC 2304; *Narengbam Brajabidhu Singh* v. *Union Territory of Manipur*, AIR 1966 Manipur 8; *Sankaran Nair Chellappan Nair* v. *State of Kerala*, AIR 1965 Ker 248; *Suresh Chandra Bhowmik* v. *Haridas Deva Nath*, AIR 1960 Tripura 4; *Kanaran* v. *State*, ILR (1972) 1 Ker 476; *Motilal* v. *Guru Bachan Singh*, 1979 All LJ 222; Relationship is often a sure guarantee of truth *Dalip Singh* v. *State of Punjab*, AIR 1953 SC 364; *Chadrabhan Singh and others* v. *State*, 1971 Cr LJ 94; Re, *Lagama Appayya Naik*, 1966 Cr LJ 483; Unless there is something of motive showing that witness is unreliable. Firm *Bindeshri Prasad Bola Nath* v. *Raja Ram*, AIR 1961 All 198, *State of U.P.* v. *Samman Dass*, AIR 1972 SC 677; *Ramchander* v. *State of Rajasthan*, 1970 Cr LJ 653; *Karnail Singh* v. *State of Punjab*, AIR 1954 SC 204; *Narayan Nathu Naik* v. *State of Maharashtra*, AIR 1971 SC 1656; *Yahannan* v. *Hari Krishnan*, AIR 1992 Ker 49; *State* v. *Dhusa Kandy*, 1970 Cr LJ 1322; *Mahajan* v. *State of Hyderabad*, 1954 Cr LJ 767; *Abaji* v. *Hyderabad State*, 1952 Cr LJ 572; *State of Rajasthan* v. *Nathuram*, 1993 Cr LJ 533 (para 12) (Raj); *Pancham Yadav* v. *State of U.P.*, 1994 Cr LJ 848 (All); *Anil Kumar* v. *State*, 1996 Cr LJ 2491 (para 14) (Del); *Sunil Kumar* v. *State*, 1997 Cr LJ 3380 (para 21) (Del); *Ram Krishnan Nair* v. *State of Kerala*, 2000 Cr LJ 416 (para 10) (Ker); *Anuj* v. *State of H.P.*, 2000 Cr LJ 1103 (para 17) (HP); *Sudama Bind* v. *State of Bihar*, 2000 Cr LJ 2158 (paras 9, 11-13) (Pat); *Om Prakash* v. *State of H.P.*, 2000 Cr LJ 2675 (para 16) (HP).

77. *Ram Lakhan* v. *State of U.P.*, 1996 Cr LJ 3496 (para 6) (SC) : AIR 1996 SC 3429.

78. *Public Prosecutor* v. *Nandipatt Lachaiah*, ILR 1964 AP 286.

79. *Dalip Singh* v. *State of Punjab*, AIR 1953 SC 364; *State of U.P.* v. *Hakim Singh*, AIR 1980 SC 184; *State of U.P.* v. *Hakim Singh*, AIR 1977 SC 472; *Shyam Narayan Singh* v. *State of Bihar*, 1993 Cr LJ 772 (para 15) (Pat); *Ram Lal* v. *State*, 1994 Cr LJ 736 (J&K); *Chavda Jivanji Chelaji* v. *State of Gujarat*, 2001 Cr LJ 3299 (para 6) (SC).

80. *State of U.P.* v. *Sughar Singh*, AIR 1978 SC 191; *Abaji* v. *Hyderabad State*, 1952 Cr LJ 572.

81. *Kundan Bala Vora* v. *State of U.P. (Wife)*, AIR 1963 All 409; *Jamkhekhai Kuki* v. *State of Manipur (brother)*, AIR 1968 Manipur 7; In re : *Kasaboyina Muttiga (son)*, AIR 1958 AP 255; *Bhola Nath* v. *State (uncle)*, 1976 Cr LJ 1409.

82. *Om Prakash* v. *State of New Delhi*, AIR 1974 SC 1983.

83. *Darya Singh* v. *State of Punjab*, AIR 1965 SC 328; *Isar Nonia* v. *Karinan Pandey*, AIR 1958 Pat 353 : ILR 1952 (2) Raj 258; *Samai Hombram* v. *State*, 1994 Cr LJ NOC 205 (Ori).

84. *Arjun Ram* v. *State of Rajasthan*, 1996 Cr LJ 577 (paras 15 and 18) (Raj).

85. *Dalip Singh* v. *State of Punjab*, AIR 1953 SC 364; *Nagireddy* v. *State*, (1968) 1 Andh WR 178; *State of Bihar* v. *Lala Manto*, 1955 Cr LJ 597; *Darya Singh* v. *State of Punjab*, AIR 1965 SC 328; *Barjinder Singh* v. *State*, 1968 Cr LJ 712. **see contra**, The evidence should not be accepted without due care and caution and without corroboration. *Chakhey* v. *State of Allahabad*, 1968 Cr LJ 218; *Vaikuntam Chandrappa* v. *State of A.P.*, AIR 1960 SC 1340.

86. *Sharad Birdhichand* v. *State*, AIR 1984 SC 1622; *Jamu Majhi* v. *State*, 1989 Cr LJ 753; *Hemaraj Sharma* v. *Banwarilal*, 1985 Cr LJ 1887 (Ori); *Dayaram Singh* v. *State of M.P.*, 1981 Cr LJ 530; *Joginder Singh* v. *State of Punjab*, 1996 Cr LJ 2737 (para 8) (P&H).

87. *Ramesh Nana Ghorpade* v. *State of Maharashtra*, 1996 Cr LJ 2185 (para 9) (Bom). The Court referred to *Masalti* v. *The State of Uttar Pradesh*, AIR 1965 SC 202 : 1965 (1) Cr LJ 226 and *Darya Singh* v. *State of Punjab*, AIR 1965 SC 328 : 1965 (1) Cr LJ 350.

88. *Karnail Singh* v. *State of Punjab*, AIR 1954 SC 204.

related eye-witnesses withstood the test of cross-examination and their evidence was found to be reliable and not tainted, minor contradictions or omissions in their evidence were held to be immaterial.[1]

Testimony of eye-witnesses all related to deceased where enimity with accused was not proved can be relied on.[2] Eye-witnesses to the incident belonging to the deceased's caste or being his neighbours is no reason for disbelieving the witnesses.[3] When accused was charged with murder, evidence on the plea of insanity by near relations of accused, should be accepted with caution, specially when accused acted as normal man immediately.[4] Evidence of witnesses who are either tenants or relations of the deceased victim does not become unworthy of credit.[5]

Where ceremonies are to be proved, only relations who are invited can prove those ceremonies.[6] In proceedings for maintenance alleging illicit connection with other women, and cruelty, only relations of parties will know about it and their evidence is not to be rejected on ground of relationship.[7] No one else can prove a marriage better than the relation of the complainant.[8] Nearest relatives are those who can best depose about their blood relationship and to reject the testimony of a real brother because of his relationship or his residence in another village, is to ignore the basic principle of the law of evidence.[9]

In civil cases relationship cannot be a ground for discrediting a witness. Likewise, it is no argument that a witness must be believed just because the other side failed to show that the witness was interested in the party producing him. Such factors cannot determine the credibility of a witness.[10]

Evidence of possession of a house by relations cannot be discarded on account of relationship; their close relationship probabilises their personal knowledge.[11]

Where the prosecution witnesses are mother and brother of the accused, their evidence cannot be brushed aside as there is no reason for them to implicate him.[12] Where the eye-witnesses were the sons of the deceased but they made no attempt to help their father while he was being stabbed, raised no shouts and did not report the matter to the police, their testimony and presence was doubtful.[13]

(b) Interested or Partisan Witnesses.—The term 'interested' postulates that the person concerned must have some direct interest in seeing that the accused person is somehow or other convicted because he had some *animus* towards the accused. (evidence has to be weighed).[14] "Related" is not equivalent to "Interested". A witness may be called "interested" only when he or she derives some benefit from the result of a litigation *i.e.*, under a decree in a civil case or in seeing an accused person punished. A witness who is a natural one and is the only possible eye-witness in the circumstances of a case cannot be said to be interested.[15] Where the eye-witnesses were not that of the caste of the deceased nor were they in any

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1. *Bhanwara Ram* v. *State of Rajasthan*, 2001 Cr LJ 3230 (paras 14 and 15) (Raj).
2. *Re, Pallela Ramana*, 1969 Cr LJ 1453.
3. *State of U.P.* v. *Babbo*, AIR 1978 SC 1084; *Kashiram Kanaiyaram* v. *Lakhmi Chand Gangaram*, AIR 1958 MP 407.
4. *Hemu Bechar* v. *State*, AIR 1951 Sau 19.
5. *State* v. *Rambali*, 1953 Cr LJ 428.
6. *Sankara Warrier* v. *Sreedevi Warrasyar*, AIR 1973 Ker 250.
7. 1980 All Cr C 93.
8. *Alamgir* v. *State*, 1957 Cr LJ 653.
9. ILR 1959 Punj 1269.
10. *Tulsiram* v. *Shyameal Ganpatlal*, AIR 1960 MP 73.
11. *Avtar Sing* v. *Atma Singh*, AIR 1982 J&K 141.
12. *Boddu Murali* v. *State*, 1993 Cr LJ 2077 (para 13) (AP).
13. *Rishi Pal* v. *State*, 1994 Cr LJ 1343 (Del).
14. *Dalbir Kauur* v. *State of Punjab*, AIR 1977 SC 472 : 1977 Cr LJ 273; *Sarwan Singh* v. *State of Punjab*, AIR 1976 SC 2304; *Samson Hyam Kemkar* v. *State of Maharashtra*, AIR 1974 SC 1153; *Abdul Shukoor* v. *Union of India*, (1971) 1 MLJ 400; *Ramabhupala Reddy* v. *State of A.P.*, AIR 1971 SC 460; *Satrucherla Siva Srardarwaju* v. *Narasimha Pattamari*, AIR 1933 Mad 225; *Secretary of State* v. *Tulsidas Krishan Dial*, AIR 1928 Lah 56; *Biswanath Sinha* v. *S.K. Banerji*, AIR 1961 Cal 389; *Kartik Malhar* v. *State of Bihar*, 1996 Cr LJ 889.
15. *State of Rajasthan* v. *Kalki*, AIR 1981 SC 1390; *State of U.P.* v. *Suresh Alias Chhavan (wife of the deceased)*, AIR 1982 SC 1076; *Balwinder Singh* v. *State*, 1989 Cr LJ 718 (P&H) (wife & son of the deceased when the offence was in their compound); *Tellu* v. *State*, 1988 Cr LJ 1062 Del (wife of the deceased and neighbours); *Vasanta Tulshiram* v. *State of Maharashtra*, 1987 Cr LJ 901 (Bom) (near relations); *Shyama Devi* v. *State of W.B.*, 1987 Cr LJ 1163 (Cal); *Ajayab Singh* v. *State of Rajasthan*, 1986 Cr LJ 1495; *Sarbeswar Malik* v. *State*, 1986 Cr LJ 1721 (Ori); *Sashi Behera* v. *State*, 1986 Cr LJ 1145 (Ori); *State of Maharashtra* v. *Gopi Chand Uttam Chand Keswani*, 1985 Cr LJ 784 (Brothers of deceased); *Ori Tirau* v. *State*, 1985 Cr LJ 524 (occupants in the car); *Mahabir Prasad* v. *State*, 1987 Cr LJ 1545 (Brother of the deceased); *Madhuban Dharai* v. *State*, 1983 Cr LJ 1711 (Ori); *Chalku* v. *State*, 1983 Cr LJ

way related to him, they could not be called interested witnesses merely because they were related to the servant engaged by the deceased.[16] A witness cannot be called an interested one simply because he is the natural father of the adopted son.[17] Where the witness was known both to the victim and the accused, his evidence would be material and could not be criticized on the ground that, as he knew the father of the accused, he was an interested witness.[18] Where a witness, along with others of the locality, chased the accused and gave a report to the police, it was held that his conduct was not extraordinary and he cannot be called an interested witness.[19] The mere fact that the witness belongs to the same caste does not necessarily make him an interested witness, much less an untrustworthy or untruthful witness. So also, the mere fact that the witness is associated with the professional work of another witness does not necessarily make the former an untruthful witness. The evidence of each witness has to be weighed at its face value, and a conclusion reached on the credibility thereof in the light of the other admitted or proved circumstances.[20] Mere living in the same compound is no proof of interestedness.[21] To call a witness, supporting the case of one of the parties against his own interest, as an interested witness will be absolutely perverse.[22] If a *panch* witness occupying a respectable and disinterested position voluntarily helps the investigation by acting as a *panch* and his evidence appears to the Court to be wholly satisfactory, he cannot be considered as a partisan witness.[23]

Evidence of a witness cannot be discarded merely on the ground of his being an interested witness as a witness normally would not leave the real culprits and rope in innocent persons,[24] particularly when no material could be elicited from his cross-examination casting doubt on his credibility and his demeanour at trial also was not such as to discard his testimony[25] or otherwise his evidence is truthworthy.[26] However his evidence is to be scrutinised with caution.[27]

Evidence is first to be scrutinised on merits before investigating whether a witness is an interested witness.[28] The evidence of interested witnesses has to be tested in the light of the probabilities and the previous statements and the surrounding circumstances.[29]

Mere fact that a witness had good neighbourly relations with the deceased is no ground to discard his evidence.[30] Similarly the evidence of the eye-witnesses could not be discarded simply because they were known to the younger brother of the deceased.[31]

1717 (offence in a dwelling house); *State of Kerala* v. *Cleetun Thomas*, 1983 Cr LJ 1939; *State of Orissa* v. *Trinath Dash*, 1982 Cr LJ 942 (Ori); *Damu Santa* v. *State*, 1982 Cr LJ 1160; *Ram Ashrit* v. *State of Bihar*, AIR 1981 SC 942; *Samai Hombram* v. *State*, 1994 Cr LJ NOC 205 (Ori); *Kartik Malhar* v. *State of Bihar*, 1996 Cr LJ 889 (SC); *S.G. Gundegowda* v. *State*, 1996 Cr LJ 852 (para 16) (Kant); *Jageshwar Mahto* v. *State of Bihar*, 2001 Cr LJ 4589 (para 17) (Jharkhand).

16. *Rajaram* v. *State of M.P.*, AIR 1994 SC 846 (para 4).
17. *Vandavasi Karthikeya* v. *S. Kamalamma*, AIR 1994 AP 102 (para 22).
18. *Sandeep* v. *State of Haryana*, 2001 Cr LJ 1456 (para 13) (SC) : AIR 2001 SC 1103.
19. *Public Prosecutor A.P. High Court* v. *Ash Mohammed*, 1981 Cr LJ 646.
20. *V. Satyanarayana Sarma* v. *Vanapamula Sakkubai*, 1960 Andh LT 499.
21. *State* v. *Dukki Dei*, AIR 1963 Ori 144.
22. 1965 All Cr R 125.
23. *Jairamdas Jotsingh* v. *State*, AIR 1956 Bom 426.
24. *Battullah* v. *State of U.P.*, AIR 1997 SC 3946 (para 20) : 1997 Cr LJ 4644 (SC). The Court **referred to** *Arjun* v. *State of Rajasthan*, 1994 Supp (3) SCC 189 : 1994 AIR SCW 3540, at p. 3543. **Also see** *Dharampal Singh* v. *State of Rajasthan*, 1998 Cr LJ 3372 (para 62) (Raj); *Ram Sagar* v. *State*, 1994 Cr LJ 589 (All), **relying on** *Bhupendra Singh* v. *State of Punjab*, AIR 1968 SC 1438 : 1969 Cr LJ 6; *Gurucharan Singh* v. *State of Punjab*, AIR 1956 SC 460 : 1956 Cr LJ 827; *State of U.P.* v. *Samman Das*, 1972 SCC (Cri) 275 : 1972 Cr LJ 487 and *Janak Singh* v. *State of U.P.*, 1973 SCC (Cri) 128 : 1972 Cr LJ 1177; *Harabailu Kariappa* v. *State of Karnataka*, 1996 Cr LJ 321 (para 12) (Kant).
25. *State of Rajasthan* v. *Hanuman*, 2001 Cr LJ 485 (para 8) (SC), **reversing** DB Cri A No. 147 of 1985, Dt. 8-7-1987 : AIR 2001 SC 282.
26. *Munshi Prasad* v. *State of Bihar*, AIR 2001 SC 3031 (para 11) : 2001 Cr LJ 4708. **See also** *Ramji Singh* v. *State of Bihar*, 2001 Cr LJ 4740 (paras 11 and 12) (SC).
27. *Surendra Pratap Chauhan* v. *Ram Naik*, 2001 Cr LJ 98 (para 6) (SC) : AIR 2001 SC 164.
28. *Bobba Satyanarayana* v. *Meddineni Sree Ramulu*, AIR 1961 AP 461. **Also see** *Bolineedi Venkataramaiah* v. *State of A.P.*, 1994 Cr LJ 61 (para 5) : AIR 1994 SC 76; *Shaukat* v. *State of U.P.*, 1996 AIHC 634 (para 16).
29. *State of Punjab* v. *Jit Singh*, 1994 Cr LJ 1116 (para 3) (SC) : AIR 1994 SC 549.
30. *Khujji* v. *State of M.P.*, AIR 1991 SC 1853.
31. *Girish Yadav* v. *State of M.P.*, 1996 Cr LJ 2159 (para 18) (SC) : AIR 1996 SC 3098.

The testimony of an interested witness must be viewed with a high degree of caution and the Court must also look for independent corroboration.[32] However, there is no hard and fast rule that the evidence of a partisan witness cannot be acted upon without corroboration. It can be accepted if his presence at the scene of occurrence cannot be doubted and his evidence is consistent with the surrounding circumstances and the probabilities of the case and strikes the Court as true.[33] Where the witnesses belonged to the party of the deceased, it would not be safe to rely upon their evidence without finding independent corroboration for their testimony.[34] Where none else but the interested witnesses had seen the occurrence, non-production of independent witness would not affect the prosecution case.[35]

There is no rule of law to the effect that the evidence of partisan witnesses cannot be accepted. Interested evidence is not necessarily false, but is accepted with caution.[36] Testimony of such a witness cannot be equated with that of a tainted witness but it must be examined with more care and caution.[37] His testimony cannot be disbelieved in absence of any special reason of general unreliability.[38]

Merely because in a murder case, prosecution witnesses were interested and inimical, that by itself is no ground to reject their testimony *in toto*. The evidence of interested witnesses should however be scrutinised with care.[39] Close relationship of the witness with the injured is not sufficient to suspect

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32. *State of Karnataka* v. *Sheik Khader*, 2000 Cr LJ 430 (para 11) (Kant).

33. *Tameshwar Sahi* v. *State of U.P.*, AIR 1976 SC 59 : 1976 Cr LJ 6; *Barkau* v. *State of U.P.*, 1993 Cr LJ 2954 (para 19) (All); *Vinayak Govindrao Deshmukh* v. *State of Maharashtra*, ILR 1976 Bom 1256; *Bhagwanti Devi* v. *Ish Kumar*, 1975 Rajdhani LR 172; *Major E.G. Basay* v. *State of Bombay*, AIR 1961 SC 1762; *Madan Mohan* v. *State*, AIR 1956 Ori 171; *State* v. *Danpith Chamara*, AIR 1960 Pat 582; *State of Kerala* v. *Dasan*, 1986 Cr LJ 345 (Ker) (Witness and deceased ploughing their land together); *Md. Akram* v. *State*, 1984 Cr LJ 520 (Cal); *Sadasiva Jena* v. *State*, 1983 Cr LJ 521; *Ram Bali Thakur* v. *State of Bihar*, 1988 Cr LJ 764; *Piara Singh* v. *State of Punjab*, AIR 1977 SC 2274; *Agamma* v. *State of A.P.*, 1977 (1) APLJ 396; *Apren Joseph* v. *State of Kerala*, 1972 Cr LJ 1162; *Kalooram* v. *State of Rajasthan*, 1971 Raj LW 266; *Dinkar Bandhu Deshmukh* v. *State*, 1970 Cr LJ 1622; *Suhana S. Nagori* v. *S.B. Nagori*, 1997 Cr LJ 3388 (para 3) (Guj); *State of Gujarat* v. *Chavda Manaji Chelaji*, 2000 Cr LJ 1091 (para 9) (Guj); corroborated, *Bidhan Nath* v. *State of Assam*, 2000 Cr LJ 1144 (para 22) (Gau).

34. *State of Karnataka* v. *Bhemappa*, 1993 Cr LJ 2609 (para 17) (SC). **Also see** *State of A.P.* v. *Punati Ramulu*, 1993 Cr LJ 3684 (para 5) (SC) : AIR 1993 SC 2644.

35. *Pyra* v. *State of Rajasthan*, 1997 Cr LJ 1065 (Raj).

36. *State of U.P.* v. *Ram Swarup*, AIR 1988 SC 1028; *State of Gujarat* v. *Raghunath Vaman Rao Baxi*, AIR 1985 SC 1092; *State of U.P.* v. *Ballabh Das*, AIR 1985 SC 1384; Patisan evidence—Mere relationship is no ground for rejection of evidence. *Madhusudan Das* v. *Narayani Bai*, AIR 1983 SC 114; *State of Gujarat* v. *Naginbhai Dhulabhai Patel*, AIR 1983 SC 839; *State of U.P.* v. *Suresh alias Chavan*, AIR 1982 SC 1076; *State of U.P.* v. *Hari Ram*, AIR 1983 SC 1081; *State of J&K* v. *Hazara Singh and Hazara Singh* v. *State of J&K*, AIR 1981 SC 451; *Hari Obula Reddy* v. *State of A.P.*, AIR 1981 SC 82; *Ram Ashrit* v. *State of Bihar*, AIR 1981 SC 942; *State of Rajasthan* v. *Srimathi Kalki*, AIR 1981 SC 1390; *State of U.P.* v. *Manoharlal*, AIR 1981 SC 2073; *Nara Raghava Rao* v. *Nadiabasi Biswas*, AIR 1986 Ori 255; *Rajwanti* v. *Haryana State*, AIR 1985 P&H 71; *Kundan Bala Vora* v. *State of U.P.*, AIR 1983 All 409; *Vijaya Kari* v. *Kondamuri Swarnalatha*, AIR 1983 AP 181; *Avatar Singh* v. *Atma Singh*, AIR 1982 J&K 141; *Maricar Motors (Ltd.)* v. *Dr. Mrs. Neelam Bal Ramaswamy*, AIR 1982 Mad 65; *Hari Har Singh* v. *State of U.P.*, AIR 1975 SC 1501; *Ram Achar* v. *State of U.P.*, AIR 1979 SC 702; *Gopal Singh* v. *State of Uttar Pradesh*, AIR 1979 SC 1822; *Chandra Mohan* v. *State of M.P.*, AIR 1992 SC 891; *State of U.P.* v. *Vinod Kumar*, 1992 SC 1011; *Laxman Namdeo Gabale* v. *State of Maharashtra*, 1977 Cr LJ 2022; *Ghurphekan* v. *State of U.P.*, 1972 Cr LJ 746; *Ghurphe Khan* v. *State of U.P.*, AIR 1972 SC 1172; *Bishwanath* v. *Sachhidanand*, AIR 1971 SC 1949; *Ramabhupala Reddy* v. *State of A.P.*, AIR 1971 SC 460; *Dalip Singh* v. *Punjab*, AIR 1953 SC 364; *Darshanlal* v. *The Delhi Administration*, AIR 1974 SC 218; *Masalti* v. *State of U.P.*, AIR 1965 SC 202; (1) *Masalati*, (2) *Mongaram*, (3) *Bhagirath*, (4) *Chandan Singh* v. *State of U.P.*, AIR 1965 SC 202; *Babulal Hargovindas* v. *State of Gujarat*, AIR 1971 SC 1277; *Medical Officer of Health Municipal Corpn. Association* v. *Gulzar*, AIR 1965 Ass 170; *Public Prosecutor Andhra Pradesh* v. *Sarolla Gopala Rao*, 1971 Cr LJ 536; *Hazari Parida* v. *State of Orissa*, 1974 Cr LJ 1212; *Bakhtawar Singh* v. *State of Rajasthan*, 1975 Cr LJ 968; *Sheodan* v. *State of Rajathan*, 1974 Cr LJ 234; *Sarwan* v. *State of Rajasthan*, 1971 Raj LW 249; *Manka Hari* v. *State of Gujarat*, AIR 1968 Guj 88; *Sudhir Chandra Jana* v. *Amulya Chandra Misra and others*, 1969 Cr LJ 1079; *Wahengbam Nimai Singh* v. *Manipur Administration*, 1968 Cr LJ 1237; *Collector of Customs* v. *Sitaram Calcutta*, 1966 Cr LJ 722; *Purna Chandra Parida* v. *Ganeswar Parida*, 1970 Cr LJ 298; *Parikhita Jena* v. *State* 1970 Cut LT 750; *Kamaleshwari Thakur* v. *State of Patna*, 1970 Cr LJ 1578; In re : *Vuvvuri Ratna Reddi*, AIR 1963 AP 252; *Rekancham Reddy Chinna Ranga Reddy* v. *M.P.*, AIR 1962 AP 322; *State* v. *Kanu Dharma*, AIR 1955 Bom 390; *Syed Noor* v. *Qutbuddin*, AIR 1956 Hyd 114; *Saswati Bai* v. *Md. Idrakuddin*, AIR 1963 MP 234.

37. *Naurangi Lal* v. *State of U.P.*, 1996 Cr LJ 81 (All).

38. *Mahabir Harro* v. *State of Orissa*, 1996 Cr LJ 158 (para 6).

39. *Babu* v. *State of U.P.*, AIR 1980 SC 443; *State of U.P.* v. *Sughar Singh*, AIR 1978 SC 191; *Piara Singh* v. *State of Punjab*, AIR 1977 SC 2274; *Ravulappalli Kondaiah* v. *State of A.P.*, AIR 1975 SC 216; *Chetan Singh* v. *Hira Singh*, 1969 All LJ 190. **Also see** *Kailash* v. *State of U.P.*, AIR 1997 SC 2835 : 1997 Cr LJ 3511 and *Shivaji Ganu Naik* v.

credibility and desirability subjecting the testimony of the evidence of the relatives to close and severe scrutiny arises only when it is shown that there was likelihood of an attempt to falsely implicate an accused[40] but where the incident had taken place in the broad day-light and there was no reason to falsely implicate the accused, the testimony of the interested witness could not be brushed aside.[41] The evidence of the Food Inspector cannot be rejected only on the ground of his being an interested person unless his action is proved *mala fide*.[42]

A witness against whom the father of the accused filed a partition suit, cannot be termed a partisan or interested witness for the prosecution.[43] Where there was a free fight between two groups, entire evidence should not be rejected on the sole ground that it is partisan evidence.[44] Where a witness sustained an injury at the time of occurrence and gave consistent version as given in the F.I.R., and the accused also admitted his presence at the scene, his evidence cannot be rejected on the ground that he is an interested witness.[45] Merely because the witnesses are interested and had animus towards the accused, their testimony could not be rejected particularly when the occurrence took place inside the house around midnight[46] and no independent witness was examined.[47]

Where the eye-witnesses to the occurrence are interested persons, their evidence can be adequately corroborated by circumstances. The credibility of a witness depends upon his knowledge of the facts he testifies, his disinterestedness, his integrity and how he has stood the test of cross-examination.[48] Where nothing could be elicited in the cross-examination of the interested witnesses, the close friends of the victims, to shake their testimony, their testimony could not be discarded merely on the ground that they resided at far off places and there was no reason of their being present at the spot at the relevant time.[49]

Where the occular version given by the interested witnesses was totally contrary to the medical evidence, it was not relied upon[50]; so also where it was uncorroborated, infirm, inconsistent and tainted with interestedness.[51]

When the injuries found on a person lend assurance to his presence at the time and place of occurrence, and the evidence has a ring of truth, it cannot be easily brushed aside on the ground of his being an interested witness, if his deposition receives ample corroboration from the medical evidence as also from the circumstantial evidence.[52] The corroborated evidence of a partisan witness can be relied upon for reversing the order of acquittal.[53] Where the testimony of the interested witnesses was

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State of Maharashtra, 1999 Cr LJ 471, at p. 473 (Bom); one of the witnesses related to both parties equally, *Qaiyum Mian* v. *State of Bihar*, 1993 Cr LJ 1756 (para 20) (Pat); more so when witness is injured witness, *Paresh Kalyandas Bhavsar* v. *Sadiq Yakubbhai*, 1993 Cr LJ 1857 (para 6) (SC) : AIR 1993 SC 1544; *D.D. Suvarna* v. *State of Maharashtra*, 1994 Cr LJ 3602 (para 19) (Bom); *Jai Narain* v. *State of U.P.*, 1995 Cr LJ 2333 (paras 8-10) (All); not be mechanically rejected, *Anant B Kamble* v. *State of Maharashtra*, 1995 Cr LJ 2583 (para 12) (Bom); *Rataniya Bhima Bhil* v. *State of Gujarat*, 1997 Cr LJ 891 (para 9.1) (Guj); *State of Rajasthan* v. *Teja Ram*, 1999 Cr LJ 2588 (para 20) (SC) : AIR 1999 SC 1776.

40. *Bibhisan Barik* v. *State*, 1995 Cr LJ 390 (para 6) (Ori).
41. *Sayed Ahmad* v. *State of Maharashtra*, 1995 Cr LJ 3585 (para 10) (Bom), **relying on** *Masalti* v. *State of U.P.*, AIR 1965 SC 202 : 1965 (1) Cr LJ 226 and *Daryasingh* v. *State of Punjab*, AIR 1965 SC 328 : 1965 (1) Cr LJ 350.
42. *Galtu* v. *State of M.P.*, 1999 Cr LJ 3104 (para 4) (MP).
43. *Sadek Sk* v. *State*, 1984 Cr LJ 29 (Cal); *Hari Patbondha* v. *State*, 1988 Cr LJ 1614 (Cal).
44. *Akil Ali* v. *State of Assam*, 1981 Cr LJ 516.
45. *State of U.P.* v. *Jodha Singh*, AIR 1989 SC 1822. No infirmity in evidence of interested witnesses, can't be disbelieved merely for being related to deceased, *Narasingh Challan* v. *State*, 1997 Cr LJ 2204 (Ori); *Bishnu Sethi* v. *State of Orissa*, 1994 Cr LJ NOC 246 (Ori); *Muniappan* v. *State*, 1994 Cr LJ 1309 (Mad); *Ram Sanjiwan Singh* v. *State of Bihar*, 1996 Cr LJ 2528 (para 12) (SC) : AIR 1996 SC 3265; *Sita* v. *State of U.P.*, 2000 Cr LJ 2818 (para 18) (All); *Sk. Usman Sk. Raheman* v. *State of Maharashtra*, 2000 Cr LJ 3301 (para 19) (Bom).
46. *Chandra Mohan Tiwari* v. *State of M.P.*, (1992) 2 SCC 105 : 1992 Cr LJ 1091; *Valummel Thommachan* v. *State*, 1994 Cr LJ 1738 (Ker).
47. *Mahinder Kumar* v. *State*, 1996 Cr LJ 2945 (paras 12, 15 and 16) (Del).
48. *Mangal Singh* v. *State of M.P.*, AIR 1957 SC 199.
49. *Asha* v. *State of Rajasthan*, 1997 Cr LJ 3508 : AIR 1997 SC 2828; *Rachamreddi Chenna Reddy* v. *State of Andhra Pradesh*, AIR 1999 SC 994 (para 5).
50. *Paramjit Singh* v. *State of Punjab*, 1998 Cr LJ 2600 (para 24) (P&H).
51. *Panchanan Muduli* v. *State*, 2001 Cr LJ NOC 81 (Ori) : (2000) 1 Ori LR 595.
52. *Vishvas Aba Kurane* v. *State of Maharashtra*, AIR 1978 SC 414. **Also see** *Prakash Datu Kamble* v. *State of Maharashtra*, 1999 Cr LJ 431, at p. 431 (Bom).
53. *Harpal Singh* v. *Devinder Singh*, AIR 1997 SC 2914 : 1997 Cr LJ 3561. Corroborated evidence cannot be rejected merely on the ground of it being that of a partisan witness, *Hari Singh* v. *State of Rajasthan*, 1997 Cr LJ 733 (SC)

corroborating with each other, it could not be rejected on the ground of interestedness.[54] Testimony of eye-witnesses cannot be discarded merely because of their being interested witnesses.[55] Where the evidence of eye-witnesses was consistent, the same could not be discarded on the ground of their being interested witnesses or the co-accused having be acquitted on self-same evidence or there being minor variations.[56]

Merely because witnesses are closely associated with or interested in the deceased, their evidence does not necessarily require corroboration before being acted upon.[57] Evidence of interested witnesses is to be considered with care and caution. The evidence of an interested witness is not like that of an approver which is presumed to be tainted and requires corroboration, but it is as good as any other evidence.[58] Evidence of eye-witnesses cannot be rejected on the ground that the prosecution party and the accused belong to two different factions, as long as their evidence is consistent and trustworthy and corroborated by medical evidence.[59] Where the evidence of the interested eye-witness was uncorroborated by any evidence and there was possibility the injuries to be fabricated, the accused was entitled to benefit of doubt as mere recovery of weapons itself is of no consequence.[60]

When the witness is an eye-witness, interested and inimical to the accused, one has to approach his evidence with some caution but it cannot be discarded merely on the ground that the evidence is of a partisan nature.[61] Where in a case of dowry death, the accused husband produced witness from his vicinity to support his defence, he, being interested to save the accused, was not relied upon.[62]

When the witness who is interested in the deceased made improvements in the prosecution case propounded by them from the time of the investigation stage, their evidence cannot be relied upon.[63] but merely the witnesses attempting to suppress their relationship with the deceased cannot by itself be fatal.[64] In the case of dacoity, the testimony of the inmates of the house cannot be disregarded as interested witnesses as the accused are strangers to them.[65]

Where there is a melee, and a large number of assailants and a number of witnesses claim to have witnessed the occurrence at different stages of the occurrence, and where the evidence is undoubtedly partisan evidence, the distinct possibility of innocent persons being falsely included along in the guilty cannot be easily ruled out. In a faction-ridden society, where an occurrence takes place in a village, the evidence would be of a partisan nature. In such a situation, to reject the entire evidence on the sole ground that it is partisan is to shut one's eyes to the realities of the rural life in our country. A large number of accused would go unpunished if such an easy course is charted. Simultaneously, it is to be borne in mind that in such a situation the easy tendency to involve as many persons of the opposite faction as possible, by merely naming them as having seen in the melee, is a tendency which is more often discernible and is to be eschewed; therefore, the evidence has to be examined with utmost care and caution.[66]

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54. *Malla Govindarajulu* v. *State of A.P.*, 1995 Cr LJ 3255 (para 17) (AP).
55. *Sita Kandi* v. *State*, 1999 Cr LJ 1642, at 1644 (Ori), **relying on** *State of Punjab* v. *Jagir Singh*, AIR 1973 SC 2407 : 1973 Cr LJ 1589; *Masalti* v. *State of U.P.*, 1964 (8) SCR 133 : AIR 1965 SC 202 : 1965 (1) Cr LJ 226 and *Vadivelu Thevar* v. *The State of Madras*, AIR 1957 SC 614 : 1957 Cr LJ 1000. **Also see** *Rajju* v. *State of M.P.*, 1994 Cr LJ 2167 (para 6) : 1994 AIR SCW 902 : AIR 1994 SC 1459.
56. *Suraj Pal* v. *State of U.P.*, 1994 Cr LJ 928 (para 8) : AIR 1994 SC 748.
57. *Siddappa* v. *State* ILR 1979 (2) Kant 2358; *State of Hyd.* v. *Hanannttha*, ILR 1956 Hyd 755.
58. *State of U.P.* v. *Ballabh Das*, AIR 1985 SC 1384.
59. *Gurdev Singh* v. *State of Punjab*, AIR 1992 SC 1924. **See also** *Bhikari Behera* v. *State of Orissa*, 1995 Cr LJ 2998 (para 9) (Ori).
60. *Swaram Singh* v. *State of Punjab*, 1994 Cr LJ NOC 397 (P&H).
61. *State of U.P.* v. *Manoharlal*, 1981 SC 2073; *Sudhir Mahanta* v. *State*, 1985 Cr LJ 1918 (Ori); *Rajendra Singh* v. *State of U.P.*, 1984 Cr LJ 1164; *State of M.P.* v. *Ramcharan*, 1986 Cr LJ 424; *Union of India* v. *Savita Sharma*, AIR 1979 J&K 6; *Kulamani Sahu* v. *State of Orissa*, 1994 Cr LJ 2245 (para 7) (Ori); *Jayalal Sahu* v. *State of Orissa*, 1994 Cr LJ 2254; *Patel Chela Viram* v. *State of Gujarat*, 1994 Cr LJ 2252 (para 5) : AIR 1994 SC 1250; *Bhagwati Prasad* v. *State*, 1994 Cr LJ 2310 (All).
62. *Ajay Kumar* v. *State of M.P.*, 1994 Cr LJ NOC 238 (MP).
63. *Badruddin* v. *State of Maharashtra*, AIR 1981 SC 1223.
64. *Markanda Naik* v. *State*, 1993 Cr LJ 3328 (paras 8 and 9) (Ori), **relying on** *Bankim Chander* v. *Matagini*, AIR 1919 PC 157.
65. *Ram Deo Yadam* v. *State of Bihar*, 1988 Cr LJ 1431 (Pat).
66. *Muthu Naiker* v. *State of T.N.*, AIR 1978 SC 1647; *State of Gujarat* v. *Nanu Singh*, 1979 Cr LJ 627; *Mangulu Mallick* v. *State*, (1971) 37 Cut LT 1264; *Het Ram Lallu Singh*, 1970 Cr LJ 352; *Basappa* v. *State*, 1960 Mys 228; *Madan Mohan Mahopatra* v. *State*, 1956 Cr LJ 1083; *Hari Karan* v. *State*, 1962 (28) Cut LT 488.

Where the offence was the outcome of faction and the eye-witnesses are interested, persons their evidence has to be examined in the light of other evidence.[67] Where plaintiff's witness was inimical towards one of the defendants, it was held that no reliance should be placed on the statement of such a witness.[68] Evidence of a solicitor on behalf of his client cannot be rejected on the ground that he is interested.[69] In an election the witnesses on either side belong to one party or the other; thus they are interested to see that their party wins the case. Their evidence however cannot be rejected merely because they are interested witnesses, where there are good grounds for accepting their evidence. Their evidence has to be scrutnised, carefully and rejected if it is tainted with falsehood.[70] Polling agent of a rival party candidate deposed that he witnessed a candidate coming with 50 or 60 persons to polling booth and telling his polling agent that he was leaving certain persons behind and the agents should see that no body voted for rival party candidate. As the witness is an interested witness his evidence does not carry any weight.[71]

(c) Independent Witness.—Examination of independent witnesses in a case is a rule of prudence, but it cannot be the rule of law, which depends on whether the independent witnesses were present and had seen the occurrence, but they are not supporting the prosecution story or that they are withheld by the prosecution.[72]

Where murder was committed in broad day-light in the vicinity of a number of houses and shops, it was the duty of the prosecution to examine independent witnesses present there and adverse inference could be drawn for non-examination of any independent witness. It was held to be fatal to the prosecution case as the witnesses examined were not reliable.[73] But the prosecution cannot be expected to examine any independent witness on the point of occurrence taking place in side a house in the late hours of night.[74] Where the Court accepted the evidence of a highly interested witness, the daughter of the deceased and rejected the contradictory evidence of two other witnesses one of whom was wholly an independent witness, the Court was grossly unjustified in doing so.[75] The evidence of the independent witness who is neither connected with the accused nor to witnesses, cannot be doubted.[76] The testimony of the independent witnesses has to pass the test of probabilities and trustworthiness.[77] Where the evidence of the independent witness was cogent and clear and stood the cross-examination, her evidence could not be discarded on the ground that she was a chance witness.[78] Where the statement of the independent witness regarding extra-judicial confession of the accused regarding his involvement in the dacoity-cum-murder case at 9 p.m. on the same day when he was called to the police station for interrogation after which he was let off with direction to come at 10 a.m. the next day, was found to be reliable and free from any contradiction, it could not be rejected merely on the ground that the accused was not arrested during the same night.[79] Where the evidence of natural and independent witness was corroborated by the presence of injuries on the person of the victim, his testimony could not be rejected.[80] In a case involving police raid and search, it was held that acquaintance of the independent witness with the police and the fact that he helped the police in the action would not by itself discredit his

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67. *Leela Shamji* v. *State*, AIR 1992 SC 950.
68. *Mahendra Singh* v. *Achal Trvet, Agra*, ILR 1970 (2) All 94.
69. *Gostho Behari Sirkar* v. *Surs' Estates Ltd.*, AIR 1960 Cal 752.
70. *Baburao Bagaji Karemore* v. *Govind*, AIR 1974 SC 405; *Khaje Khananas* v. *Siddavanahalli*, AIR 1969 SC 1034; *Punjabrao Rao* v. *Dr. D.P. Mesharam*, AIR 1965 SC 1179; *Ramprasad* v. *State*, AIR 1959 SC 200; *Pirthvi Singh Azad* v. *Ajaib Singh Sindhu*, AIR 1965 Punj 463.
71. *Ram Singh* v. *Col. Ram Singh*, AIR 1986 SC 3; *Vinod Chaturvedi* v. *State of M.P.*, AIR 1984 SC 911; *Sharad Birdi Chand Sarda* v. *State of Maharashtra*, AIR 1984 SC 1622; *Badruddin Rukondduim Karpude* v. *State of Maharashtra*, AIR 1981 SC 1223; *Sevi and Koodakkal Karian* v. *State of T.N.*, AIR 1981 SC 1230.
72. *Nand Kishore Prasad* v. *State of Bihar*, 2000 Cr LJ 5079 (para 13) (Pat).
73. *Murugan* v. *State*, 1993 Cr LJ 1259, at p. 1270 (Mad).
74. *Naresh Yadav* v. *State of Bihar*, 2000 Cr LJ 2041 (para 10) (Pat).
75. *Machindra Babu Salve* v. *State of Maharashtra*, 1997 Cr LJ 486 (Bom).
76. *K. Naga Subba Reddy* v. *Public Prosecutor, A.P. High Court*, 2000 Cr LJ 3452 (para 17) (SC) : AIR 2000 SC 3480. **See also** *State of M.P.* v. *Sardar*, 2001 Cr LJ 3984 (paras 18 and 21) (SC).
77. *Chunni* v. *State*, 1996 Cr LJ 489 (para 16) (All).
78. *Ganga* v. *State*, 1999 Cr LJ 488, at p. 489 (Ori). **Contra :** *Rajendra Prasad* v. *State of M.P.*, 1993 Cr LJ 750, at p. 759 (MP).
79. *Sanjay* v. *State (N.C.T. of Delhi)*, 2001 Cr LJ 1231 (paras 12 and 13) (JC) : AIR 2001 SC 979.
80. *State of Maharashtra* v. *Datta Maruti Salagar*, 1998 Cr LJ 3756 (paras 9 and 10) (Bom).

evidence.[81] Where in a case of recovery of contraband under the N.D. & P.S. Act, the only independent witness joined by the prosecution consistently denied the recovery of the contraband, recovery consequent to the disclosure statement of the accused could not be relied upon.[82] On the other hand, the evidence of the independent witness given up by the prosecution coming up as a defence witness, could not be discarded on the sole ground of his joining hands with the defence.[83] Where the evidence of eye-witnesses was found creditworthy, non-examination of independent persons does not affect the prosecution case more so when the incident had taken place suddenly and the people in the nearby shops might not have seen the actual attack and might not have known the assailants as they belonged to another village.[84] Turning hostile of the independent witnesses itself cannot be a ground for the acquittal of the accused.[85]

The evidence of the owner of the shop, the place of occurrence, cannot be dubbed as evidence of an interested and partisan witness as he was an independent witness without any motive to falsely implicate the accused persons.[86] Where the witness who was examined by the accused was not shown by the accused to be interested in prosecution and inimical to him, he must be held to be disinterested witness.[87]

(d) Child witness.—See Commentary under head "Child Witness" in Section 118.

(e) Women witness.—In a case where the witnesses are women the fact that the lives of a number of accused depend on their testimony, is not a valid reason to say that corroboration is necessary to act on their evidence.[88]

In the absence of any substantial discrepancy evidence of women witnesses in a rural area cannot be discarded.[89]

(f) Rustic witness.—The testimony of an ignorant and rustic woman hailing from country side cannot be judged by the same standard of exactitude and consistency as that of an urban sophisticated witness. Such an evidence has necessarily to be tested on an anvil of objective circumstances of the case.[90] Slight discrepancies in the statements of eye-witnesses are not uncommon in the testimony of most truthful witnesses. They indicate truth rather than falsehood of their version. Village people have little ideas of time and distance. The evidence of village folk cannot be taken with an exactitude regarding time and distance.[91]

(g) Police and other officers.—VENKATARAMA IYER J. stated[92] that the presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not a judicial approach to distrust and suspect him without good grounds there for.[93] The statements of the police witnesses are entitled to the same weight and the same consideration which is attached to the statement of a member of the public. It must inspire confidence to be relied upon.[94] Where no independent witness

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81. *State of U.P.* v. *Zakaullah*, 1998 Cr LJ 863 (SC) (para 10).
82. *Sarabjit Singh* v. *State of Punjab*, 1998 Cr LJ 2231 (P&H).
83. *Harbans Singh* v. *State of Punjab*, 1994 Cr LJ NOC 357 (P&H).
84. *Lakhbir Singh* v. *State of Punjab*, 1994 Cr LJ 1374 : AIR 1994 SC 1029. **See also** *Ram Sanjiwan Singh* v. *State of Bihar*, 1996 Cr LJ 2528 (para 11) (SC) : AIR 1996 SC 3265.
85. *Bhola Ram Kushwaha* v. *State of M.P.*, 2001 Cr LJ 116 (para 4) (SC) : AIR 2001 SC 229.
86. *Kunwar* v. *State of U.P.*, 1993 Cr LJ 3421 (para 47) (All).
87. *Kasam Abdulla Hafiz* v. *State of Maharashtra*, 1998 Cr LJ 1422 (para 11) (SC).
88. *Dilep Singh* v. *State of Punjab*, AIR 1953 SC 364.
89. *Surendranath Samantaray* v. *State of Orissa*, (1975) 41 Cut LT 1251.
90. *Man Singh* v. *State*, 1980 Raj. LR 126.
91. *Ram Sagar* v. *State*, 1994 Cr LJ 589 (All), **relying on** *Sheo Darshan* v. *State of U.P.*, 1972 SCC (Cri) 394 : 1971 Cr LJ 1306; *Shivali Saheb Rao Bobade* v. *State of Maharashtra*, 1973 Cri App R (SC) 410 : 1973 Cr LJ 1783; *Yeshwant* v. *State of Maharashtra*, 1972 SCC (Cri) 684 : 1972 Cr LJ 1254 and *State of Assam* v. *Krishna Rao*, 1973 SCC (Cri) 222 : 1973 Cr LJ 169.
92. *Aher Raja Khima* v. *State of Saurashtra*, AIR 1956 SC 217.
93. *Tarsemlal* v. *State*, (1965) 1 Cr.LJ 76; In re : *Batrula Atchireddy*, (1966) 2 AWR 338; 1973 Cut LR (Cri) 254; *State of Punjab* v. *Rameshwar Dass*, 1975 Cr LJ 1630, *State of Gujarat* v. *Raghunath Vamanrao*, 1985 SC 1092; *Ajit Singh* v. *State of Punjab*, 1982 Cr LJ 522 (P&H); *Ranjodh Singh* v. *State of Punjab*, 1989 Cr LJ 1993 (P&H); (Police Officials of different district) *Sujarat* v. *Vrajlal Arjanbhai*, 1981 Cr LJ 3527 : *State of Mysore* v. *Koti Poojary*, 1965 2 Cr LJ 517 : 965 Mys 264; *Udham Singh* v. *State of Punjab*, ILR (1975) 2 Punj 601, *Babulal Hargovindas Das* v. *State of Gujarat*, AIR 1971 SC 1277; *State (Delhi Admn)* v. *Sube Singh*, 1985 Cr LJ 1190, *Gopal Mahadeo Tambada* v. *State of Maharashtra*, 1997 Cr LJ 2425 (Bom).
94. *Gurucharan Singh* v. *State*, 1993 Cr LJ 1622 (para 18) (Del).

was available and other witnesses had turned hostile, the evidence of the police witnesses, being reliable, could form basis of conviction.[1] The statement of the police officer that he failed to examine the wife of the deceased on the day of occurrence as she was weeping, was held to be perfectly plausible.[2] The evidence of the Senior Police Officers that on examination of the case diary prepared by the I.O. and after interrogation of some of the accused, they found them innocent, could not be taken into consideration. The Court cannot rely on investigation or the result thereof.[3]

No general rule can be laid down that an Investigating Officer's evidence cannot be relied upon unless it is corroborated; it depends on the facts of each case.[4] The mere fact that the prosecution witnesses are police officers is not enough to discard their evidence in the absence of their hostility to the accused.[5] In a case where the police officer gave evidence regarding the meetings held by a candidate in an election petition, under the Representation of Peoples Act, it was held by the Supreme Court that it can not be a reason to disregard that evidence.[6] Where the investigating officer recovered weapons at the instance of the accused, and recovery memos were attested by police officers and also independent search witnesses, and only police officers were examined to prove the search, and other independent witnesses were not examined, it was held by the Supreme Court that this by itself did not introduce any serious infirmity in the evidence furnished by the recoveries, which at best were only corroborative pieces of evidence.[7]

Non-examination of such material witness as the Investigating Officer is a serious omission which cannot but throw suspicion on the whole prosecution case.[8] An accused is entitled to know from the Investigating Officer what witnesses have been examined in the course of investigation, whether the witnesses examined in the Court were examined by him or not, what story the witnesses told before him and whether same is consistent with the evidence given before the Court. Non-examination of the I.O. in this case also is a serious omission on the prosecution.[9] Where out of witnesses the named in the F.I.R. some of the witnesses had not been examined and those examined had not supported the case of the prosecution and further there was material contradiction in the evidence of the witnesses examined as regards the manner or occurrence and the weapons used by the accused, the Court observed :[10] "Non-examination of the Investigating Officer is a serious lapse on the part of the prosecuting agency....." Non-examination of the Investigating Officer is a serious lacuna. Adequate explanation for his non-production in the Court has not been given. Even the case diary has not been proved on the record and in the circumstance it has rightly been urged that serious prejudice has been caused to the accused.[11] If Investigating Officer is not examined, prejudice to the accused as claimed by the defence has to be considered and looked into and even after perusal of the diary the element of prejudice persists, benefit should be given to the accused, of course depending upon the facts and circumstances of each case.[12]

The Patna High Court has observed[13] : "During the recent times, it has been noticed that the Court has to face tremendous difficulties in procuring the attendance of the Investigating Officer for the reasons that they are transferred frequently and the sessions trial is taken up after some delay from the time when the investigation had been completed in the case. The problem has to be faced in case the I.O. is dead or he retires from service and in the case of the later in spite of prolonged adjournments the evidence is not proceeded." In another case a Division Bench of Patna High Court observed :[14] "True,

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1. *Ritakatalikhan* v. *State of Maharashtra*, 1993 Cr LJ 3844 (para 15) (Bom). **See also** *Ram Kumar* v. *State (NCT) of Delhi*, 1999 Cr LJ 3522 (para 2) (SC) : AIR 1999 SC 2259.
2. *Gopal Mahadeo Tambada* v. *State of Maharashtra*, 1997 Cr LJ 2425 (Bom).
3. *Dalip Singh* v. *State of Punjab*, AIR 1997 SC 2985 : 1997 Cr LJ 3647, **relying on** *Vijender* v. *State of Delhi*, (1997) 3 JT (SC) 131.
4. *Girdhari Lal Gupta* v. *D.N. Mehta*, AIR 1971 SC 28.
5. *Nathu Singh* v. *State of M.P.*, AIR 1973 SC 2783. **Also see** *State of U.P.* v. *Zakaullah*, AIR 1998 SC 1474 : 1998 Cr LJ 863; *Prithvi Nath Pandey* v. *State of U.P.*, 1994 Cr LJ 3623 (para 30) (All).
6. *Kanwar Lal Gupta* v. *Amarnath Chawla*, AIR 1975 SC 308.
7. *Dalbir Kaur* v. *State of Punjab*, AIR 1977 SC 472.
8. *Nitu Bhagat* v. *Emperor*, AIR 1922 Pat 582, at 585 : 1923 (24) Cr LJ 91, at pp. 93-94 (DB).
9. *J.K. Devaiya* v. *The State of Coorg*, AIR 1956 Mys 51, at 55 : 1956 Cr LJ 904, at 908.
10. *Brahmdeo Hajra* v. *Harendra Prasad*, 1987 BBCJ (HC) 340 : 1988 Cr LJ 734, at p. 737 in (para 11).
11. *Rajawa Kebat alias Rajendra Mandal* v. *State of Bihar*, 1988 BLJ 60, at p. (2) in (para 5); 1988 Cr LJ 1288, at p. 1289.
12. *Basant Singh* v. *State of Bihar*, 1985 Cr LJ 1406, at p. 1410 (para 2(d)) (Pat).
13. *Basant Singh* v. *State*, 1985 Cr LJ 1406, at p. 1409 (Pat).
14. *Sk. Rashid* v. *State of Bihar*, (1987) BBCJ (HC) 151, at p. 155.

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non-examination of investigating officer is not fatal to the prosecution. A Court has to see whether the evidence of the Investigating Officer is essential for the case of the prosecution to succeed or not. The Court has to see at the same-time that accused is not harassed and unless it sees that for inevitable reasons the prosecution fails to produce the Investigating Officer, it may pronounce the judgment without the evidence of the Investigating Officer." Where there was no demonstrable prejudice likely to be caused to the accused rather there was only apprehension of prejudice and supposed unfairness by non-examination of the Investigating Officer, it was held that otherwise reliable and trustworthy evidence could not be discarded merely on that ground.[15] Where there was no contradiction between the statements of the prosecution witnesses given in the Court and that of earlier ones made before the Investigating Officer and they were not cross-examined regarding their earlier statements, non-examination of the I.O. was not fatal.[16] Absolutely, no contradiction has been pointed out and thus no case of prejudice has been made out in the absence of the examination of the I.O. and therefore, his non-examination cannot be said to have prejudiced the defence to the extent that the allegation directed against the appellant has to be rejected.[17] Non-examination of the I.O. is of no consequence when the defence has failed to shake the credibility of the eye-witnesses or to point out any material contradiction in the prosecution case.[18]

Under the Prevention of Food Adulteration Act, the Food Inspector and the Sanitary Inspector cannot be treated as interested witnesses. Their being concerned with investigation and prosecution of offenders, which are their essential duties, does not exclude them from the category of competent witnesses.[19]

Where there was no animosity of the accused persons with the Police Inspector brought to the notice of the Court and he made no suggestion that the recoveries persuant to the statements of the accused were hoisted by him, it would be safe to believe his uncorroborated statement in respect of the recoveries.[20] Where the finding of the Excise Sub-Inspector that the seized illicit distilled liquor was based on blue litmus and hydrometer test, the unsubstantiated plea that he had grudge against the accused was not sufficient to discredit otherwise credible witness, though uncorroborated by an unofficial witness.[21] The evidence of the Intelligence Officer who had searched and arrested the accused under the N.D. & P.S. Act that the accused was informed about his right to be searched in the presence of a Gazetted Officer or Magistrate was found reliable and it was irrelevant that that officer after 10 years was found involved in a corruption case and it does not render her evidence inadmissible.[22] Where the police constables were not authorised to seize the contraband, it was held to be extremely hazardous to place reliance of their evidence, uncorroborated by that of independent witnesses.[23] There being discrepancy in the depositions of the two police officers as to the number of cartridges recovered and the independent witnesses, though available, having not be examined, such a discrepancy would not inspire confidence about the reliability of the prosecution case.[24]

(h) Stock witness.—Where the evidence of the witnesses lacked credibility and one of them admitted to have given evidence in favour of police 23 times, meaning thereby he was a stock witness and there was no other evidence to connect the accused with the crime, he was entitled to acquittal.[25] Where the investigating officer has taken pliable witnesses as *panch* witnesses knowingly, the entire raid would become suspect and evidence of police witnesses by themselves would not be sufficient to base a conviction.[26]

(i) Experts.—See Commentary under Section 45.

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15. *Shyam Narayan Singh* v. *State of Bihar*, 1993 Cr LJ 772 (Pat).
16. *Harku* v. *State of Rajasthan*, 1994 Cr LJ 2141 (para 11) (Raj).
17. *Basant Singh* v. *State of Bihar*, 1985 Cr LJ 1406, at p. 1410 in (paras 31) (DB).
18. *Bahadur Naik* v. *State of Bihar*, 2000 Cr LJ 2466 (para 2) (SC) : AIR 2000 SC 1582.
19. *Public Prosecutor A.P.* v. *Pasala Ramarao*, 1967 Cr LJ 154.
20. *Bhimsha Subanna Pawar* v. *State of Maharashtra*, 1996 AIHC 1 (para 17).
21. *Raju Sahu* v. *State of Orissa*, 1994 Cr LJ NOC 439 (Ori).
22. *Pon Adithan* v. *Deputy Director, Narcotics Bureau, Madras*, 1999 Cr LJ 3663 (para 6) (SC) : AIR 1999 SC 2355.
23. *Rangilal* v. *State of M.P.*, 1994 Cr LJ NOC 337 (MP). **See also** *Gangaram* v. *State of M.P.*, 1994 Cr LJ NOC 381 (MP).
24. *Megha Singh* v. *State of Haryana*, AIR 1995 SC 2339 (para 4).
25. *Madan* v. *State*, 1997 Cr LJ 3921 (Mad).
26. *Mohd. Hussain B. Ramzan* v. *State of Maharashtra*, 1994 Cr LJ 1020 (para 8) (Bom); *State of Gujarat* v. *K.P. Singh*, 1995 Cr LJ 3623 (para 2) (SC).

(j) Accomplice and approver.—See Commentary under Section 133 and under Section 118.

(k) Trap, decoy and raid witnesses.—See commentary under Section 133.

(l) Hostile witness.—See commentary under Section 154.

(m) Poor, illiterate witness.—Fabric of truth should be the guiding factor, and not the village or rustic background of the witness.[27] The question of weight to be attached to a particular piece of evidence is a matter on which decided cases cannot be of much help. The weight of the testimony of a witness does not depend upon his social strata. The Supreme Court did not approve the rejection of the evidence of a poor teacher or a peon. The fact that the eye-witnesses are day labourers and landless, does not by itself make their evidence unreliable.[28] Respectability and veracity of a witness is not necessarily dependent upon the status in life. It is not proper to presume that persons holding clerical posts cannot act as independent witnesses.[29] Birth is a matter independent of the volition of a person, and simply because birth takes place in a particular community, it is not a circumstance either in favour of or against the evidence of that person. Evidence has to be judged on merits, and it does not matter whether the witness is a poor or wealthy person.[30]

The evidence of illiterate and ignorant eye-witness shall not be rejected on the ground that they are minor contradictions in the evidence.[31] The fact that a witness is illiterate should not induce the Court to ignore the infirmities in his evidence and to fill the lacuna in the prosecution case. There is a limit to extend the benefit of illiteracy to such a witness.[32]

The expression 'Respectable inhabitants of the locality' under Section 103 Cr.P.C. means that the person selected by the police to act as a witness should be absolutely unprejudiced and uninterested. Once having been a prosecution witness, is not sufficient to deprive one of one's title to respectability.[33]

The Courts should not indulge in hair-splitting of the evidence of any witness much less the evidence of rustic witnesses. It must be borne in mind that these witnesses are not familiar with the subtilities of the language employed in the court, where they are in an artificial surrounding.[34] Persons from villages, most of whom are illiterate and ignorant, who figure as witnesses, try, while giving truthful evidence, to supply some answer or the other to questions put in cross-examination for fear that their inability to give an answer would be put down to their lack of knowledge of the incident of which they were giving evidence, and thus they have an adverse reflection on their truthfulness. That is why some care has to be taken by Courts of law in scrutinising as well as appreciating and assessing the value to be attached to the evidence given by such witnesses.[35] The witnesses from the villages are usually ignorant about the dates and months. So, if one such witness says that the occurrence took place in BAISAKH month, it cannot discredit the prosecution case that the offence took place in JESTA month.[36] Villagers generally do not keep clocks or watches. And so they may not be able to give a correct idea of time. Therefore, when there is some little variance in chair evidence, regarding the exact time of occurrence, it cannot be taken as a discrepancy.[37] It is not usual for *Adibasis* to disclose the occurrence until they are questioned by the police, because it is their natural tendency. That cannot be a ground for not giving credence to their evidence.[38] Where the evidence was of witnesses who were mostly illiterate,

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27. *Shivaji* v. *Maharashtra*, AIR 1973 SC 2622. *Charan Singh* v. *Punjab*, AIR 1975 SC 246. *Sat Paul* v. *Delhi Admn.* AIR 1976 SC 294, though it was a trap case and the Court said that evidence of trap witnesses should be scrutinised with extra care. **See also** *Mahal Singh* v. *State (Delhi Admn.)*, AIR 1976 SC 449; *R.P. Arora* v. *Punjab*, AIR 1973 SC 498.
28. *State of Assam* v. *Bhabananda Sharma*, 1972 Cr LJ 1552.
29. *Hazari Lal* v. *State*, AIR 1980 SC 873.
30. *State of Mysore* v. *Koti Poojary*, AIR 1965 Mys 264 : (1965) 2 Cr LJ 517; (a case of Gurkha Night Watchmen); *Deonath Dudhnath Mishra Amravati* v. *State of Maharashtra*, AIR 1967 Bom 1 : 1967 Cr LJ Bom 21.
31. *Boyaganganna* v. *State of A.P.*, AIR 1976 SC 1541, **relied on in** *Zamir Ahmad* v. *State*, 1996 Cr LJ 2354 (para 14) (Del); *State of Rajasthan* v. *Ganesh Das*, 1995 Cr LJ 25 (Raj); *State* v. *Dukhi Devi*, AIR 1963 Ori 144.
32. *Mohinder Singh* v. *State*, AIR 1974 SC 873.
33. *Re, Rajabather*, AIR 1959 Mad 450 : 1959 Cr LJ 1189.
34. ILR 1961 Mys 605.
35. *Ilia Sury Anarayana* v. *State*, 1958 Andh LT 856.
36. *Budhan Singh* v. *State*, 1960 Cr LJ 1485 (Pat).
37. *State* v. *Ruplal Koeri*, 1953 Cr LJ 1809 : AIR 1953 Pat 394.
38. *Chintamani Das* v. *State*, 1970 Cr LJ 906 : 1970 Ori 100.

it was held that their evidence as to the time and date cannot be expected to be arithmetically correct and therefore, cannot be discarded.[39]

(n) Habitual Criminal—Previous Convict.—A previous convict can testify.[40] A witness was convicted 43 years ago. His testimony was not allowed to be rejected on that ground alone.[41] The mere fact that a prosecution witness was convicted for an offence of dacoity does not render his evidence unbelievable when he had been acquitted in appeal. The fact that the police subsequently initiated proceedings against him for good behaviour under Section 108, Cr.P.C., would also not justify total rejection of his evidence.[42] Where a witness stated that the accused sold goods to him, his testimony cannot be disregarded merely on the ground that he was a habitual receiver of stolen property.[43]

The evidence of a public servant should not be discarded as unreliable merely because he was previously suspended.[44]

(o) Eye witness.—The Court cannot proceed on the hypothesis that eye-witnesses are implicitly reliable. Every piece of evidence has to be subjected to the test of objectivity.[45]

In assessing the value of the evidence of an eye-witness the two principal considerations are: (i) whether, in the circumstances of the case, it is possible to believe his presence at the scene of occurrence or in such situations as would make it possible for him to witness the fact deposed by him and (ii) whether there is anything inherently improbable or unreliable in his evidence.[46] Where the eye-witnesses were most natural witnesses, giving benefit of doubt to one accused and acquitting him would not affect the evidence of those witnesses.[47] Absence of test identification parade by itself is not fatal and *ipso facto* it does not bring discredit to the claim of witnesses. Eye account is to be appreciated taking into account the attending and other circumstances.[48] Where the presence of the eye-witnesses on the spot was found to be natural and there was nothing to show that they were deposing falsely, their testimony could not be discarded even though they had bad antecedents.[49]

Ordinarily, the evidence of a truthful eye-witness is sufficient without anything more, to warrant a conviction, and it cannot be made to depend for its acceptance on the truthfulness of other items of evidence, such as recovery of weapons etc., at the instance of the accused by the police. The evidence of the eye-witness, if accepted, is sufficient to warrant a conviction, though in appropriate cases the Court may, as a measure of caution, require some confirming circumstances by way of corroboration;[50] where it is not fully satisfied regarding the credibility of a witness.[51] Where the testimony of the eye-witnesses is clear, cogent and creditworthy, non-explanation of some minor injuries on the person of the accused, not certainly received in the same transaction, does not affect the prosecution case.[52]

Where the eye-witness succeeded escaping unhurt from the scene of occurrence and there were some discrepancies in their statements, it was held that there was no ground for holding that they were not eye-witnesses, when their evidence on material particulars was satisfactory.[53] The presence of the eye-witness on the scene of occurrence cannot be doubted merely because they saw lesser number of blows being dealt than actually found on the person of the victim.[54]

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39. *Bishwanath Gosin* v. *Duehin Lalmuni*, AIR 1968 Pat 481.
40. *Varghese Thomas* v. *Kerala*, AIR 1977 SC 701.
41. *Arumuga Nadar* v. *T.N.*, AIR 1976 SC 2588.
42. *State of Mysore* v. *Kanthappa*, (1964) 1 Mys LJ 393.
43. *State of Mysore* v. *Rangaiah*, 1966 Cr LJ 848 (Mys).
44. *State* v. *Sant Prakash*, 1976 Cr LJ 274.
45. *Hallu* v. *M.P.*, AIR 1974 SC 1936.
46. *State of Mysore* v. *Raju Shetty*, (1961) 1 Cr LJ 403; *Surendran* v. *State*, 1977 Cr LJ 1197; *State of U.P.* v. *Nooric*, AIR 1996 SC 3073 (para 7).
47. *Krishna Ram* v. *State of Rajasthan*, 1993 Cr LJ 1056 (para 4) (SC) : AIR 1993 SC 1386.
48. *Prem* v. *State of Maharashtra*, 1993 Cr LJ 1608 (para 5) (Bom).
49. *Ram Sanjiwan Singh* v. *State of Bihar*, 1996 Cr LJ 2528 (para 18) (SC) : AIR 1996 SC 3265.
50. *Shrishail Nageshi* v. *State of Maharashtra*, AIR 1985 SC 866; *Ramji Suriya* v. *State of Maharashtra*, 1983 SC 810; *Banshidher Swain* v. *State of Orissa*, 1987 Cr LJ 1819 (Ori).
51. *State of Gujarat* v. *Balubhai Madhabhai Zala*, 1995 Cr LJ 2588 (para 6.5) (Guj).
52. *Pyara* v. *State of Rajasthan*, 1997 Cr LJ 1065 (Raj).
53. *State of Punjab* v. *Wassan Singh*, AIR 1981 SC 697. **Also see** *Nonappa Poojari* v. *State of Karnataka*, 1994 Cr LJ 2185 : AIR 1994 SC 1581; *Nafe Singh* v. *State of Haryana*, 1996 AIHC 3825 (para 16) (P&H).
54. *Govind* v. *State of M.P.*, 1996 Cr LJ 305 (MP), **distinguishing** *Narsibhai Haribhai Prajapati* v. *Chhatrasingh*, AIR 1977 SC 1753.

Where no explanation of the bleeding wound on the head of the accused was given by the eye-witnesses, it was held to be sufficient for acquittal.[55] Where the defence failed to explain how the eye-witnesses sustained injuries, conviction was not interfered with.[56] Where the evidence is of the only witness to connect the accused with the crime and when the witness gives different version in the Committing Court and in the Sessions Court, it would be a good ground for acquitting the accused.[57] The fact that the police had asked the eye-witnesses to affix their finger impressions on the statements made by them at the inquest, cannot cast any doubt on the reliability of their evidence.[58]

It is not safe to base the conviction on the sole evidence of an eye-witness unless some corroboration is found in the other evidence or material record.[59] As regards the safety in convicting an accused on the evidence of a single witness there is no computerised rule. Nor are the judges computers. It must always depend on the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected.[60] Where the sole eye-witness, who was the brother of the deceased, stated that the hands of the deceased were bound forcibly by the accused and shot dead, and the medical evidence by the doctor was that he did not note or find any imprint of a rope on the wrist of the dead body, it was held by the Supreme Court, that it was hardly a ground for rejecting the evidence of the eye-witness.[61] Where the evidence of the sole eye-witness was found be infirm, accused was entitled to acquittal.[62]

It is not proper for the Court to disregard the evidence of important eye-witnesses on general grounds or broad probabilities, without examining the intrinsic merits of their evidence.[63] Where the deceased and the injured witnesses had taken shelter in a house in whose roof the accused numbering 13 or 14 variously armed forming an unlawful assembly made a big hole and attacked the victims and the witnesses failed to give consistent and detailed account of their injuries and made improvements, the same was held to be no ground to acquit the accused.[64] The evidence of an eye-witness cannot be disregarded only on the ground that he did not intervene to save the deceased.[65] Evidence of eye-witness cannot be discarded on the basis of vague evidence of the other witness who was subsequently treated as hostile.[66] Where the presence of eye-witnesses at the place of occurrence was proved, their evidence could not be disbelieved merely because they happened to be relation of the deceased.[67] An eye-witness cannot be disbelieved merely because he has not been examined by the prosecution or that he had not given any statement to the police[68] before he was examined in the case.[69] In the face of evidence of eye-witnesses mere suspicion that the grandson of the deceased had the motive to commit the offence as he wanted to get the property of the deceased old woman was held not sufficient to discredit the eye-witnesses.[70]

When the version of the eye-witness was corroborated by the report of forensic expert about the cartridge, and the motive behind the offence was found to be strong, it was held that the accused was

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55. *Sarjerao Sahedeo Gaikwad* v. *State of Maharashtra*, 1997 Cr LJ 3839 (Bom), **relying on** *Lakshmi Singh* v. *State*, AIR 1976 SC 2263 : 1976 Cr LJ 1736.
56. *Dalip Singh* v. *State of Punjab*, AIR 1997 SC 2985 : 1997 Cr LJ 3647.
57. *Periyasami* v. *State of Madras*, AIR 1967 SC 1027.
58. *Gurnam Kaur* v. *Bakshish Singh*, AIR 1981 SC 631.
59. *Satyanarain* v. *State of M.P.*, AIR 1972 SC 1309.
60. *Mohan Lal* v. *State of Delhi*, 1978 Cr LJ 1832 (Del-DB).
61. *Maharaj Singh* v. *State of Rajasthan*, AIR 1981 SC 936.
62. *State of Rajasthan* v. *Bhola Singh*, AIR 1994 SC 542.
63. *State of U.P.* v. *Sahai*, AIR 1981 SC 1442.
64. *Navganbhai Somabhai* v. *State of Gujarat*, 1994 Cr LJ 1103 (para 6) : AIR 1994 SC 1187.
65. *Angad* v. *State of Maharashtra*, AIR 1981 SC 1227; *Mulia Kusari* v. *State*, 1984 Cr LJ 123 (Ori).
66. *Ram Bhukan* v. *State of U.P.*, 1994 Cr LJ 596 (para 7) : AIR 1994 SC 561.
67. *Sunadhar Bariha* v. *State of Orissa*, 1994 Cr LJ NOC 41 (Ori). **Also see** *Aleksis Dongaria* v. *State of Orissa*, 1994 Cr LJ 85 (Ori); *Babu Lal* v. *The State of U.P.*, 1994 Cr LJ 157 (All); *Jeet Singh* v. *State of Delhi*, 1995 Cr LJ 1537 (para 12) (Del); *Rajinder Singh* v. *State of Bihar*, AIR 1998 SC 2903 (para 3). **Contra :** *Shyma* v. *State*, 1994 Cr LJ NOC 46 (All).
68. *Fizabai* v. *Nami Chand*, AIR 1993 MP 79.
69. *Fizabai* v. *Nemichand*, AIR 1993 MP 79 (para 3) **relying on** *Varadamma* v. *H. Mallappa Gowda*, 1972 ACJ 375 (Mys).
70. *Kirtan Bhuyan* v. *State of Orissa*, AIR 1992 SC 1579.

liable to be convicted.[71] The corroborated evidence of eye-witnesses cannot be discarded merely because of some contradictions in their depositions.[72] Evidence of eye-witnesses who stood the test of cross-examination and were trustworthy, could not be discarded on the ground that another witness had given inconsistent version with it[73] or that they were of bad character.[74] Where the evidence of eye-witness is in accord with medical evidence and corroborated by recovery of weapons of attack at the instance of the accused, there is no reason to disbelieve his evidence.[75] Where the medical evidence noted lacerated wounds and abrasions on the dead body; it was held that as the witnesses stated that the deceased was struck with the *lathi* portion of the spears, there is no inconsistency between the ocular and medical evidence; that mere non-mention, in the F.I.R., that the *lathi* portion was used, was immaterial, as they had stated during investigation that the *lathi* portion was used.[76] In case of inconsistency of evidence of eye-witnesses with the medical evidence, their evidence should not be rejected *in toto*. The Court is duty bound to scrutinise their evidence carefully and accept the acceptable evidence.[77] In a criminal case the medical evidence is a very safe yardstick for measuring the veracity of the occular account. If it corroborates the same, unless it suffers from some inherent improbabilities or intrinsic infirmities it would, ordinarily, be accepted by the Court. On the converse, if it is belied by the medical evidence in the absence of some in-built guarantees which demonstrate the truthfulness of the prosecution case, like the spot arrest of the accused persons, the Court normally would be loath to accept it.[78] If the High Court thought it unsafe to convict any of the accused on the uncorroborated evidence of a single eye-witness, it does not mean that the evidence of the witness stands castigated. It is no stigma against the evidence of any eye-witness if the Court only wanted re-assurance from other sources.[79] Where the accused was prosecuted for hunting and killing a bison in a forest area, it was held that the evidence of a forest officer can be relied on without corroboration.[80]

The ocular version of a person injured in the same incident is of great value.[81]

It is always advisable to test the evidence of a witness on the anvil of objective circumstances in the case.[82]

Where an eye-witness to a murder kept silent as to the occurrence out of fear and later gave statement under Section 164 Cr.P.C. only after being questioned by the police, without any undue pressure, and maintained the same in his deposition before the Court, it was held that his statement need not be looked at with suspicion, and separate corroboration is also not necessary.[83] Evidence of the eye-

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71. *Karnail Singh* v. *State of Punjab*, 1982 Cr LJ 1364; *Jarnail Singh* v. *State of Haryana*, 1993 Cr LJ 1656 (para 10) (SC); *Basheer* v. *State*, 1993 Cr LJ 2173, at p. 2178 (Mad); *Rajdeo Paswan* v. *State of Bihar*, 1994 Cr LJ NOC 65 (Pat); *Gurdeep Singh* v. *State of Haryana*, 1994 Cr LJ NOC 225 (P&H); *Gorey Lal* v. *State of U.P.*, 1994 Cr LJ 1337 (All). Eye-witness an independent witness, *Dharam Deo Singh* v. *State of U.P.*, 1993 Cr LJ 3676 (para 5) (SC) : AIR 1993 SC 2654; *Mohan* v. *State of Rajasthan*, 1994 Cr LJ NOC 413 (Raj); *Pularu* v. *State of Madhya Pradesh*, AIR 1993 SC 1487 (para 6); *Kathi Ramku Aligbhai* v. *State of Gujarat*, AIR 1993 SC 2473 (para 3); *Tajinder Singh* v. *State of Haryana*, AIR 1994 SC 503 (para 3); *Malook Singh* v. *State of Punjab*, 1996 Cr LJ 3423 (para 6) (P&H); *Bhagirath* v. *State of Haryana*, 1996 Cr LJ 3499 (para 8) (SC) : AIR 1996 SC 3431; *Krishnaswami* v. *State*, 1996 Cr LJ 3372 (Mad); *Raja Sharnappa* v. *State of Maharashtra*, 1997 Cr LJ 450 (para 11) (Bom).

72. *Bagirath* v. *State of Haryana*, AIR 1997 SC 234 : 1997 Cr LJ 81. Eye-witnesses giving details of part played by each assailant, some minor *inter se* contradictions in their testimony deserves to be ignored. *Asha* v. *State of Rajasthan*, AIR 1997 SC 2828 : 1997 Cr LJ 3508. **See also** *Munni Devi* v. *State of Bihar*, 2001 Cr LJ NOC 98 (Pat) : (2000) 2 East Cri C 1375.

73. ***State of Rajasthan* v. *Chathu Ram*, 1998 Cr LJ 1528 (para 27) (Raj).**

74. ***Noor Baksh* v. *State of U.P.*, 1996 AIHC 1349 (para 8) (All).**

75. *Asa Singh* v. *State of Punjab*, AIR 1973 SC 512. Evidence of eye-witness, the son of deceased, natural, corroborated, relieable, *Sewa Kaur* v. *State of Punjab*, 1997 Cr LJ 1883 (SC) : AIR 1997 SC 1843; *Yashpal* v. *State of Rajasthan*, 1995 Cr LJ 2038 (Raj); *State of M.P.* v. *Tantoo*, 1999 Cr LJ 2913 (paras 7,) 9-12 (MP).

76. *State of U.P.* v. *Harnam*, AIR 1983 SC 1081; *Rammal Samat* v. *State of Gujarat*, 1993 Cr LJ 1734 (para 5) (SC) : AIR 1993 SC 1676.

77. *State of Gujarat* v. *Gandabhai Govindbhai*, 2000 Cr LJ 92 (paras 7-10) (Guj).

78. *Shankar Shridhar Kavale* v. *State of Maharashtra*, 1998 Cr LJ 4491 (para 12) (Bom).

79. ***Balo Yadawa* v. *State of Bihar*, AIR 1997 SC 2678 : 1997 Cr LJ 3395.**

80. ***Forest Range Officer* v. *Aboobacker*, 1989 Cr LJ 2038 (Ker).**

81. *Ramaswami* v. *State of T.N.*, AIR 1976 SC 2027.

82. *Hallu* v. *State of M.P.*, AIR 1974 SC 1936.

83. *Satyanarayan Reddy* v. *State of Hyderabad*, AIR 1956 SC 379. **Also see** *Kanwar Pal Singh* v. *State of Haryana*, 1994 Cr LJ 1392 (para 5) : AIR 1994 SC 1045. **Contra :** *Diraviyan* v. *State of represented by Inspector of Police*, 1994 Cr LJ NOC (Mad).

witness cannot be rejected on the ground that she did not give details of occurrence in her evidence under Sections 161 and 164 Cr.P.C.[84] Where evidence of the eye-witness was found to be totally reliable and sufficient to prove the guilt of the accused beyond doubt, it cannot be rendered to be unreliable for not disclosing the names of assailants in her earlier version or be discarded for her failure to mention the source of light enabling her to identify the assailants or that she was adolescent.[85] Where the witness, who knew that the deceased had gone to the place of the accused on the day of murder, did not disclose this fact when he was informed about the disappearance of the deceased, his evidence could not be discarded only on that ground as people do not want to get embroiled in such cases.[86] In a case where a person has witnessed the crime but did not give information, there should be corroboration of the material part of the story connecting the accused with a crime as will satisfy reasonable minds that the man can be regarded as a truthful witness.[87] Where an eye-witness did not come forward and tell the Investigating Officer, but gave evidence long after in Court, it was held that his omission to inform the Investigating Officer condemns his testimony as an after thought.[88] Where the eye-witness disclosed the incident to police seven days after the incident and when the long delay was not explained, his testimony cannot be accepted.[89] Where the eye-witness, the mother of the deceased, who claimed to have witnessed the accused assaulting somebody through a hole in the door did not divulge the fact to anybody even after she was told that it was her son that was killed by the accused and when her statement was recorded by the investigating officer, a week after the offence, it was held that her evidence could not be relied.[90] Where the eye-witness were tortured and assaulted by the Investigating Officer, their evidence could not form the basis of conviction.[91]

Failure of the eye-witness to identify the accused, is a serious lacuna in his evidence.[92] Where the eye-witness failed to identify one of the nine accused persons, benefit of doubt should go to that one accused and not to others.[93] Where the only eye-witness committed error in identifying the accused and the extra-judicial confession was found not worthy of belief, it was held that the uncorroborated evidence of the sole witness is itself not sufficient to warrant the conviction.[94] Where none of the witnesses gave any description of the dacoits in their statements to the police or in oral evidence nor gave any identification marks such as stature, whether they were fat or thin, or fair or black in colour and when only one witness identified the dacoits after sometime in the identification parade, it was held that conviction cannot be based only on the identification by a single witness.[95] Where in case of docoity with murder, the evidence of the eye-witness account was highly improbable, inconsistent and uncorroborated by medical or independent evidence, conviction of the accused was held to be liable to set aside.[96] Where it was found that the eye-witness put pressure on the victim to prosecute the accused and the medical evidence did not support the prosecution case, it was held that the eye-witness cannot be said to an independent witness and his evidence cannot be relied upon.[97] Veracity of an eye-witness cannot be doubted on the ground that no independent witnesses from the nearby place were examined by the prosecution.[98] Where the sole alleged eye-witness of murder, a close relative of the deceased, made no attempt to save him and his statement about the time of occurrence was contradictory to the medical

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84. *Govind* v. *State of M.P.*, 1994 Cr LJ 938 (para 4) : AIR 1994 SC 826.
85. *State of M.P.* v. *Samaylal*, 1994 Cr LJ 3407 (paras 6,) 7 and 9 (MP).
86. *Vasudevan* v. *State*, 1993 Cr LJ 3151 (para 23) (Ker).
87. *Vemireddy Satyanarayan* v. *State of Hyderabad*, AIR 1956 SC 379; *Narayanan* v. *State*, ILR (1964) 2 Ker 185.
88. *Kondaiah* v. *State of A.P.*, AIR 1975 SC 216. **See also** *Chunni* v. *State*, 1996 Cr LJ 489 (para 14) (All).
89. *Sobrati Mian* v. *State of Bihar*, 1986 Cr LJ 1226 (Pat). **See also** *State of Maharashtra* v. *Bhanudas Sommanna Sangolkar*, 1997 Cr LJ 3205 (Bom).
90. *Malsingh* v. *State of Rajasthan*, 1983 Cr LJ 1411 (Raj). **Also see** *Bellana Kannam Naidu* v. *State of A.P.*, 1994 Cr LJ 1146 (para 5) (AP); *Ram Narain Singh* v. *State of Rajasthan*, 1995 Cr LJ 2847 (paras 6 and 7) (Raj).
91. *Muralidhar Sahu* v. *The State*, 1994 Cr LJ NOC 19 (Ori).
92. *S.P. Tigare* v. *State of Maharashtra*, 1997 Cr LJ 157 (Bom).
93. *Satbir* v. *Surat Singh*, AIR 1997 SC 1160, **reversing** M.R.No. 6 of 1985 and Cri. A. No. 447-DB of 1985, **decided on** 20-2-1985 (P&H).
94. *Heramba Brahma* v. *State of Assam*, AIR 1982 SC 1595. **See also** *Dhoba alias Brindaban Meher* v. *State of Orissa*, 1994 Cr LJ NOC 344 (Ori); unreliable eye-witnesses, *Surjit Singh* v. *State of Punjab*, 1995 Cr LJ 1059 (P&H).
95. *Wakil Singh* v. *State of Bihar*, AIR 1981 SC 1392. **See also** *State of Bihar* v. *Kali Das Manjhi*, 2001 Cr LJ 1103 (Pat).
96. *Parsu Ram* v. *State of U.P.*, 1996 Cr LJ 2316, (paras 18, 19, 21 and 23) (All).
97. *Sukbahadur Subba* v. *State of Sikkim*, 1988 Cr LJ 1453.
98. *State of Bihar* v. *Ram Padarath Singh*, AIR 1998 SC 2606 (para 10) : 1998 Cr LJ 4007.

evidence, his evidence could not be relied upon without some independent corroboration.[1] Assuming that the eye-witness tried to improve his evidence in a case, with a view to falling in line with the wound *mahazar* by adding a third stab, that by itself is no good reason to discard his entire testimony as against the accused. So much of his evidence as is corroborated by other direct evidence or circumstances can be acted upon.[2] The veracity of the evidence of the eye-witness, fully corroborated by the evidence of the independent witness, cannot be doubted only on the ground the brother of the accused once lost election against him.[3]

Where an eye-witness gave a dramatic account of the incident with minute details of attack on each victim, but admitted in the cross-examination that he was also attacked simultaneously, it was held such evidence of the eye-witness cannot be relied on.[4]

Where there was contradiction between the medical evidence and the sole eye-witness regarding the fatal injuries, it was held that the medical evidence is to be accepted and the accused is entitled for an acquittal.[5] But where the evidence of eye-witnesses is unimpeachable, it should be preferred to the hypothetical answers given by the Medical Officer.[6] Where direct evidence is cogent, reliable and unimpeachable, the medical evidence cannot override.[7] Where the medical evidence is totally in conflict with the oral evidence of the eye-witnesses and the medical officer asserted that the injuries could have been caused only by a stabbing instrument and not by a weapon like 'Aruval', as deposed by the eye-witnesses, it was held that the evidence of eye-witnesses cannot be relied upon as no clarification is obtained from any experienced expert doctor and the accused was entitled to the benefit of doubt.[8]

Where the eye-witness was found to have been fully intoxicated and was not in his sense, it was held that such evidence of the eye-witness cannot be relied.[9] Where the testimony of the eye-witness was clouded with grave suspicion and discrepancy in material particulars, it was unsafe to record conviction on his testimony.[10] Where the complainant reported the dacoity in his house at night, giving identification of the accused in the light of a torch focused by the accused but, in the court, he stated that he identified them in the light of the lantern, it was held that his evidence is unreliable.[11] Where both the eye-witnesses were victims of an assault, it was held that their evidence cannot be discarded on the ground of slight discrepancy regarding the number of lathi blows given by the accused on the deceased.[12] Where there is no serious discrepancy between the testimony of the eye-witness and the facts given in the F.I.R., regarding time, place, and the manner of occurrence including the name of the assailant, and the evidence of the eye-witness was corroborated by medical evidence, it was held that the witness was reliable and the small discrepancy does not warrant rejection of his evidence.[13] The evidence

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1. *Anil Phukan* v. *State of Assam*, 1993 Cr LJ 1796 (para 4) (SC) : AIR 1993 SC 1462.
2. *Lukka Ulahannan* v. *Travancore Cochin State*, 1955 Cr LJ 852 : 1955 Tra/Co 104; *Kitab Ali Munshi* v. *Santi Ranjan Deb*, (1965) 2 Cr LJ 134; *Ramshetty Butchaiah* v. *State*, 1969 Cr LJ 542 (AP); *State of Assam* v. *Bhabananda Sarma*, 1972 Cr LJ 1552; *The Thipanna*, 1971 Cr LJ 1640 (DB).
3. *Leela Ram* v. *Sarjerao Sahedeo Gaikwad* v. *State of Maharashtra*, 1997 Cr LJ 3839 (Bom), **relying on** *Lakshmi Singh* v. *State*, AIR 1976 SC 2263 : 1976 Cr LJ 1736. *Sate of Haryana*, AIR 1999 SC 3717 (para 17).
4. *Sevi* v. *State of T.N.*, AIR 1981 SC 1230.
5. *Ashim Das* v. *State of Assam*, 1987 Cr LJ 1533 (Gau); *Satyanarain* v. *State*, 1985 Cr LJ 966 (All); *Chandoo* v. *State of U.P.*, 1996 Cr LJ 2496 (All) (found the witnesses as interested); *Vijay Kumar* v. *State*, 1996 Cr LJ 2429 (paras 23 and 43) (Del) (material contradiction in evidence).
6. *Kedar Behera* v. *State*, 1993 Cr LJ 378 (Ori), **following** *State of U.P.* v. *Krishna Gopal*, AIR 1988 SC 2154 : 1989 Cr LJ 288. **Also see** *Markanda Naik* v. *State*, 1993 Cr LJ 3328 (paras 7 and 7-A) (Ori); *State of Rajasthan* v. *Ganesh Das*, 1995 Cr LJ 25 (paras 36 and 41) (Raj).
7. *State of Mahrashtra* v. *Vithal*, 1993 Cr LJ 2285 (para 21) (Bom); *Sankar Rana* v. *Lohor Rana*, 1995 Cr LJ 3570 (para 5) (Ori), **relying on** *State of U.P.* v. *Krishna Gopal*, AIR 1988 SC 2154 : 1989 Cr LJ 288.*Govind* v. *State of M P.*, 1996 Cr LJ 305 (MP), **distinguishing** *Narsibhai Haribhai Prajapati* v. *Chhatrasingh*, AIR 1977 SC 1753.
8. *Soundara Pandi* v. *State*, 1983 Cr LJ 1199 (Mad). **See also** *Mani Ram* v. *State of Rajasthan*, 1994 Cr LJ 3770 (paras 21-23) (Raj); *Bimla Sinha* v. *State of Tripura*, 1996 Cr LJ 3437 (paras 12, 14 and 15) (Gau), (circumstances also belying version of eye-witnesses).
9. *Joda Sabaran* v. *State*, 1982 Cr LJ 1926.
10. *Jagdish Prasad* v. *State of M.P.*, 1994 Cr LJ 1106, (paras 7 and 8) : AIR 1994 SC 1251.
11. *Basudev Yadav* v. *State of Bihar*, 1988 Cr LJ 1408 (Pat).
12. *Jagat Singh* v. *State*, 1984 Cr LJ 1551 (Del).
13. *Rajesh Thakur* v. *State*, 1988 Cr LJ 1477. **Also see** *Balbir Singh* v. *State of Punjab*, 1994 Cr LJ 1206 : AIR 1994 SC 969. **Contra :** *Khuman Singh* v. *State of Rajasthan*, 1994 Cr LJ 1661 (Raj). Presence of sole eye-witness at place of occurrence improbable, acquittal, *Jai Singh* v. *State of Rajasthan*, 1994 Cr LJ 1689 (Raj); *Ram Lakhan* v. *State of U.P.*, 1996 Cr LJ 3496 (para 9) (SC).

of eye-witnesses as regards time of occurrence of the incident and that of the doctor as regards the time of death, cannot be discarded merely on a theoretical consideration of the process of digestion of food.[14] The evidence of the eye-witness otherwise found reliable could not be rejected merely on the ground that the said eye-witness lodged the F.I.R. the next morning.[15] Where the two eye-witnesses contradicted each other on material particulars of the offence, and their subsequent behaviour was also abnormal, it was held that conviction based on their evidence could not be sustained.[16]

Where the eye-witness informed the parents of the deceased about the occurrence, and the F.I.R., was also lodged on the basis of his information, his evidence could not be rejected.[17] An otherwise truthful and reliable evidence of eye-witness cannot be discarded on the only ground that they were interested witness.[18] The evidence of the eye-witnesses, the close relatives of the victims of murder shocked seeing the dastardly attacks on them, could not be discarded for their statement were taken in piecemeal here and there.[19] Where nothing could be elicited in the cross-examination of the eye-witnesses to impeach their testimony, it could not be discarded merely on the ground of their being relatives of the deceased.[20]

Where the prosecution had proved its case through other evidence and by surrounding circumstances, the turning hostile of the eye-witness cannot demolish prosecution version nor can it be said that the Investigating Officer had not acted impartially in investigating the offence and collecting the evidence.[21]

Non-examination of eye-witness.—Where the informant/elder brother of deceased, an eye-witness to the occurrence was not examined by the prosecution and he did not mention that incident to anyone, which was not natural, his evidence did not inspire confidence.[22]

(p) Injured witness.—Omissions in the testimony of an injured witness are material only when they amount to contradictions that militate against the meat or core of the prosecution.[23] Where the evidence of injured eye-witness is cogent and acceptable, it cannot be rejected for little discrepancies[24] and also where it is corroborated.[25] There is no immutable rule that evidence of injured witness should be mechanically accepted.[26] Before the evidence of an injured witness can be accepted, the Court should be satisfied that he is a truthful witness and the account furnished by him is in consonance with probabilities.[27] Simply because the injured witness failed to identify the co-accused due to darkness, his identification of the accused who was already known to him and who gave him the dagger-blow, could not be doubted.[28] The witness who himself received injuries of serious nature during assault would not normally let go the real culprits.[29] Where the injured eye-witness stated that after witnessing the incident, he developed fear and went to his mother-in-law's place and did not disclose the commission of the offence to the Investigating Officer, the said conduct of his does not falsify his evidence as people are scared to figure as witnesses.[30] Evidence of injured eye-witnesses cannot be rejected merely on the

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14. *State of Gujarat* v. *Chavda Manaji Chelaji*, 2000 Cr LJ 1091 (paras 8-3 and 8-4) (Guj).
15. *Sahab Singh* v. *State of Rajasthan*, AIR 1997 SC 945 : 1997 Cr LJ 1188.
16. *Naravanan* v. *State of Kerala*, 1984 Cr LJ 528. **See also** *Pabitra Pradhan* v. *State of Orissa*, 2001 Cr LJ 3798 (paras 9 and 11) (Ori), conflicting versions of eye-witnesses as to time and place of occurrence and nature of injuries to deceased.
17. *Poosaram* v. *State of Rajasthan*, 1984 Cr LJ 1848 (Raj).
18. *Arjunan* v. *State*, 1993 Cr LJ 3113 (para 30) (Mad).
19. *Arjunan* v. *State*, 1993 Cr LJ 3113 (para 26) (Mad).
20. *Rachamreddi Chenna Reddy* v. *State of Andhra Pradesh*, 1999 Cr LJ 1445, 1446 (SC) : AIR 1999 SC 994.
21. *State of M.P.* v. *Nisar Ahmad*, 1997 Cr LJ 3055 (MP).
22. *Bishwanath Chaudhary* v. *The State of Bihar*, 2001 Cr LJ NOC 32 (Pat) : (2000) 3 East Cri C 1953.
23. *State of Maharashtra* v. *Harishchandra Tukaram Awatade*, 1997 Cr LJ 612 (Bom). Injured witness failing to notice manual ejecting of empty cartridge, concerned to his injury, honest omission, *Ved Prakash* v. *State of Haryana*, AIR 1996 SC 2795 (para 5).
24. *Sham* v. *State of Maharashtra*, 1997 Cr LJ 581 (Bom).
25. *Kuriakose* v. *State of Kerala*, 1995 Cr LJ 2687 (para 11) (SC).
26. *Narayan Kanu Datavale* v. *State of Maharashtra*, 1997 Cr LJ 1788 (Bom).
27. *Tulshiram Bhanudas Kambale* v. *State of Maharashtra*, 2000 Cr LJ 1566 (para 16) (Bom), **following** *Vijai Shanker Misra* v. *The State*, 1984 All LJ 1316 (para 22).
28. *Ami Chand* v. *State*, 1996 Cr LJ 2807 (Del).
29. *State of Karnataka* v. *Bhemappa*, 1993 Cr LJ 2609 (para 17) (SC).
30. *Boddu Murali* v. *State*, 1993 Cr LJ 2077 (para 11) (AP).

ground that they were interested witnesses[31] and were not examined.[32] There is no justification in drawing a hiatus between injured witnesses and non-injured witnesses for the capacity to identify the assailants while in action.[33] Where the investigating agency failed to seize the blood-stained clothes of the witness who helped the injured to reach the hospital, it was held to be no ground to infer that he did not see the occurrence.[34] Injuries on the person of a witness at the best may ensure his presence at the scene of occurrence, however his truthfulness has to be ascertained to the satisfaction of the Court.[35] Where the version of the injured and independent witnesses clearly revealed the incident and role played by the accused and there was nothing to show their interestedness, their version was held reliable.[36] The testimony of an injured witness inspiring confidence can be sufficient for sustaining the finding of conviction.[37]

Where the injured witness shifted his stand regarding the identity of the accused, place of occurrence and number of other facts from the statements recorded by the police, his statement could not be treated as simple and straightforward and was not reliable.[38]

(q) Chance Witness.—If, by co-incidence or chance, a person happens to be at the place of occurrence at the time it is taking place, he is called a chance witness. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'.

A chance witness is a witness who should not normally be where and when he professes to have been; from that point of view one may be a chance witness even at one's own house if, for instance, one should at that hour have been in one's office. Even a person in the desolation of Sahara may not be a chance witness if his being there and then was on his itinerary.[39] Where the witness belonging to another village stated his presence near the place of occurrence but did not state the fact regarding the alleged assault on the deceased by the accused, he could not be said to be a chance witness.[40]

When the evidence is that of a chance witness, such evidence would necessarily require corroboration by independent evidence.[41] Evidence of chance witnesses, corroborated and without any material contradictions or infirmity found to be truthful and reliable, could not be set aside on the ground of their being chance witnesses.[42] When the occurrence was not very late in the night, though people would not be passing on the road in the village, the evidence of the witnesses who had given reasons as to why they were there could not be discarded by merely dubbing them as chance witnesses.[43] Unless evidence of witnesses is otherwise assailable, it cannot be whittled down merely on the ground that they are chance witnesses.[44]

In the case of dowry death due to burn injuries, the sister of the deceased and her father-in-law who lived in the opposite house who rushed to the house and witnessed the incident of burning are natural

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31. *Nallamsetty Yanadaiah* v. *State of A.P.*, 1993 Cr LJ 408 (para 4) (SC) : AIR 1993 SC 1175; *Brijpal Singh* v. *State of U.P.*, 1994 Cr LJ 2082 (para 6) : AIR 1994 SC 1624; *Wariyam Singh* v. *State of U.P.*, AIR 1996 SC 305 (para 13).
32. *Nafe Singh* v. *State of Haryana*, 1996 AIHC 3825 (para 16) (P&H).
33. *Binay Kumar Singh* v. *State of Bihar*, AIR 1997 SC 322 : 1997 Cr LJ 362.
34. *Harpal Singh* v. *Devinder Singh*, AIR 1997 SC 2914 : 1997 Cr LJ 3561.
35. *S.G. Sohatre* v. *State of Maharashtra*, 1997 Cr LJ 454 (Bom), **relying on** *Vijay Shankar Misra* v. *State*, 1984 All LJ 1316. **Also see** *Ramesh Bhagwan Manjrekar* v. *State of Maharashtra*, 1997 Cr LJ 796.
36. *State* v. *Selvaraj*, 1994 Cr LJ 705 (Mad).
37. *Bhimsha Subanna Pawar* v. *State of Maharashtra*, 1996 AIHC 1 (paras 12-14).
38. *Kishansingh* v. *State of Rajasthan*, 1994 Cr LJ 3503 (paras 17 and 19) (Raj).
39. *Rana Pratap Singh* v. *State*, AIR 1983 SC 680; *Joga Gola* v. *State of Gujarat*, AIR 1982 SC 1227 : 1957 All 809; *Sunder* v. *State*, 1957 Cr LJ 1378; *Bahal Singh* v. *State of Haryana*, AIR 1976 SC 2032; *Dargahi* v. *State*, AIR 1973 SC 2695; **see also** *Ashok* v. *State*, 1980 Cr LR 205 SC.
40. *Meleka Nidi* v. *State of Orissa*, 1996 Cr LJ 3304 (para 8) (Ori).
41. *Mangovi Nola Mandal* v. *Gangadhar Gri*, (1967) 71 Cal WN 781.
42. *Sanjay Ramchandra Tarare* v. *State of Maharashtra*, 1996 Cr LJ 713 (paras 16-18) (Bom), **following** *Rana Pratap* v. *State of Haryana*, AIR 1983 SC 680 : 1983 Cr LJ 1272.
43. *State of Bihar* v. *Ram Balak Singh*, AIR 1966 SC 1441 : 1966 Cri App R 409 (SC). **Also see** *Lakhbir Singh* v. *State of Punjab*, 1994 Cr LJ 1374 (SC) : AIR 1994 SC 1029.
44. *Himirika Loknath* v. *State*, 1964 1 Cr LJ 114; *Jagabandhu Behera* v. *Kshetrabasi Samal*, 1968 Cr LJ 205 : AIR 1968 Ori 26; *Khetra Basi Samal* v. *State of Orissa*, AIR 1970 SC 272; *Kishore* v. *State*, 1967 Cr LJ 1155 : AIR 1967 Ori 118; *G.S. Walia* v. *State of Punjab*, 1998 Cr LJ 2524 (para 10) (SC) : AIR 1998 SC 2857; *Manorama Swain* v. *Giridhari Swain*, 1993 Cr LJ 2595 (para 6) (Ori).

witnesses.[45] When the presence of an eye-witness at the place of occurrence was established and others came there as a result of his cries for help and, it was he who lodged the complaint within minutes of the occurrence, it would indicate that the eye-witness was not a chance witness.[46] Where a witness had no particular work in any of his fields, but went from one field to another he cannot be considered as a chance witness, as it is for a person owning more than one field to visit all his fields on a particular day, to give instructions to the workmen.[47] The house of the witness being near the place of occurrence, he is not a chance witness.[48] When an incident takes place in broad day light, different persons who follow their respective avocations are likely to come accross incidents which, in the ordinary course, they never contemplated to see.[49] Persons present at a bus stand to catch a bus when the accused was apprehended and opium was recovered from him, cannot be said to be chance witnesses.[50] A person who attended the chamber of an advocate who advised the preparation of a will, when, the offence took place, cannot be called a chance witness.[51] Where a witness went to the house of the deceased and then followed him to the spot of occurrence, his evidence cannot be thrown out by characterising him as a chance witness.[52] When the occurrence took place in agricultural land, due to land disputes, during the ploughing hours in the morning, and the witness was fishing in the nearby drain and another witness was ploughing his land which was near the place of occurrence, their evidence could not be discarded on the ground that they are chance witnesses.[53] Where a '*halla*' takes place, people come to see its occurrence. It is not proper to reject the evidence of such people as chance witnesses.[54]

If a person by chance happens to be at the place of occurrence at the time of its taking place, and if such person happens to be a relative or friend of the victim or is inimically disposed towards the accused, then his being a chance witness is viewed with suspicion. Such a piece of evidence is not necessarily incredible or unbelievable, but does require caution and close scrutiny.[55] The mere fact that an attesting witness of a will is a chance witness, is no ground for disbelieving his evidence. Though it is usual for witness to be called when a person is intending to execute a will, there is nothing improvable in taking advantage of the accidental presence of witnesses in that connection.[56]

Though a chance witness is not necessarily a false witness, it is proverbially rash to rely upon such witness.[57]

(r) Natural witness.—The witnesses, the sister and the father-in-law of the deceased, living in the house opposite to that of the deceased and entering her house by breaking open the gate of the compound and witnessing the incident, are natural witnesses and are to be believed.[58]

(s) Staff Member.—Where the witnesses were the staff members/employees of the Bank working under the accused Branch Manager, their evidence could not be brushed aside only on that ground.[59]

(t) Witnesses of Locality.—Where the evidence adduced by the prosecution is found to be reliable, non-examination of the witnesses of locality does not by itself render the conviction unsustainable.[60]

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45. *Om Prakash* v. *State of Punjab*, AIR 1993 SC 138.
46. *Chamanlal* v. *State*, 1976 Cr LJ 1310.
47. *State of Mysore* v. *Kantappa*, (1964) 1 Mys LJ 393.
48. *Barkau* v. *State of U.P.*, 1993 Cr LJ 2954 (para 21) (All).
49. 1974 Punj LJ 1630.
50. *State of Punjab* v. *Rameshwar Dass*, 1975 Cr LJ 1630 **following** 1968 Cr LJ 205; *Jagabandhu Behera* v. *Kshetrabasi Samal*, AIR 1968 Ori 26; *Fateh* v. *State of Punjab*, (1972) 74 Punj LR 8387 (a person returning home from his fields).
51. *Alok Kumar Aich* v. *Asoka Kumar*, AIR 1982 Cal 599 (DB).
52. *Harihar Paik* v. *State of Orissa*, 1985 Cr LJ 432 (Ori-DB).
53. *Sambhu Bora* v. *State of Assam*, 1987 Cr LJ 1027 (Gau).
54. *Srichandra Sarda* v. *D.C. Choudhury*, ILR (1967) 19 Assam 521.
55. *Balal Singh* v. *State of Haryana*, AIR 1976 SC 2032.
56. *Shashi Kumar Banerjee* v. *Subodh Kumar Banerjee*, AIR 1964 SC 529.
57. *Gulu Chand* v. *State of Rajasthan*, AIR 1974 SC 276; *Ismail Ahmad* v. *Momin Bibi*, AIR 1941 PC 11; *Subrata Kumar* v. *Dipti Banerji*, AIR 1974 Cal 61 (SB); *Shri Ram* v. *State*, 1973 Cr LJ 1443; *State of Rajasthan* v. *Teka*, 1978 Cr LJ (NOC) 241 (JB); *Rajinder Singh* v. *State*, ILR (1974) 1 Delhi 277.
58. *Om Prakash* v. *State of Punjab*, AIR 1993 SC 138 (para 10).
59. *P.S. Rao* v. *State of A.P.*, 1994 Cr LJ 2102 (para 4) : AIR 1994 SC 1407.
60. *Anant B. Kamble* v. *State of Maharashtra*, 1995 Cr LJ 2583 (para 14) (Bom).

21. WITNESS AGAINST ONESELF

The evidence of specimen handwriting, finger prints, blood or hairs will incriminate an accused only if on comparison with certain other handwritings, finger prints, blood or sample of hairs, identity between the two sets is established. By themselves they do not incriminate an accused. Again by themselves they are of no assistance at all to establish the charge against an accused. Thus by taking the sample of hairs of the accused for comparison with the hairs of the assailant found in the hand of the deceased, he does not thereby become witness against himself.[61]

22. CIRCUMSTANCES ADVERSE TO WITNESS

It is a settled law that no circumstance can be read adverse to the witness or the case of the prosecution unless that is put to the concerned witness and his explanation is obtained.[62]

23. NUMBER OF WITNESSES

Even if a case against the accused hangs on the evidence of a single eye-witness it may be enough to sustain the conviction given on sterling testimony of a competent, honest man, although, as a rule of prudence, courts call for corroboration. Witnesses have to be weighed and not counted since the quality matters more than quantity in human affairs.[63]

The Supreme Court has held that the fact, that the prosecution is able to examine only one eye-witness to the occurrence cannot detract from the strength of its case; what is important is not how many witnesses are examined by the prosecution, but what is the nature and quality of evidence on which it relies.[64] The evidence of a single witness, may sustain a sentence to death, whereas a host of vulnerable witnesses may fail to support a simple charge of hurt.[65] The testimony of solitary eye-witness should be wholly reliable.[66] Conviction can be based on the wholly reliable testimony of a sole witness.[67] If the evidence of the witness is partly reliable and partly unreliable, it cannot be relied upon, unless it is corroborated in material particulars, by reliable evidence[68]; so also where the solitary eye-witness was highly interested, inimical to the accused and the identification of the accused was doubtful.[69]

See also commentary under Section 134.

24. INJURIES ON THE PERSON OF THE ACCUSED

Failure to explain the injuries on the person of the accused by the prosecution is not always fatal[70] and the whole case does not become doubtful thereby.[71] Where there was no proof that the injuries on

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61. *Neeraj Sharma* v. *State of U.P.*, 1993 Cr LJ 2266 (paras 4 and 6) (All), **relying on** *State of Bombay* v. *Kathi Kalu*, AIR 1961 SC 1808 : 1961 (2) Cr LJ 856 (para 11).
62. *Naurangi Lal* v. *State of U.P.*, 1996 Cr LJ 81 (para 28).
63. *Shivaji Sahebrao Bobade* v. *State of Maharashtra*, AIR 1973 SC 2622; *Muluwa* v. *State of M.P.*, AIR 1976 SC 989; *Nepal Hait* v. *State of West Bengal*, AIR 1973 SC 466; *State of U.P.* v. *Hakim Singh*, AIR 1980 SC 184 (two eye witnesses sufficient); *Narayana Pillai Vasudevan Pillai* v. *State of Kerala*, 1968 Cr LJ 1362 (Ker); *Baishnab Charan Mohanty* v. *Madan Sahu*, ILR 1967 Cut 616; *Islamuddin* v. *State*, 1975 Cr LJ 841 (Del); *Ram August* v. *Bindeshwari*, AIR 1972 Pat 142; *Maqsoodan* v. *State of U.P.*, AIR 1983 SC 126; *State of U.P.* v. *Jageshwar*, AIR 1983 SC 349; *Bhugdomal Gangaram* v. *State of Gujarat*, AIR 1983 SC 906; *Phahi Bhushan Gupta* v. *State*, AIR 1968 Tripura 57; failure of prosecution to examine other persons present nearby, *Sheelam Ramesh* v. *State of A.P.*, 2000 Cr LJ 51 (para 18) (SC) : AIR 2000 SC 118.
64. *Chuhar Singh* v. *State of Haryana*, AIR 1977 SC 386.
65. *Joginder Singh* v. *State*, AIR 1968 Raj 63 : 1968 Cr LJ 378; *Mulk Raj Des Raj* v. *State*, 1969 Cr LJ 94.
66. *Kathi Odhabhai Bhimabhai* v. *State of Gujarat*, 1993 Cr LJ 187 (para 4) (SC) : AIR 1993 SC 1193.
67. *Bachchu* v. *State of U.P.*, 1999 Cr LJ 1967, at 1969 (All).
68. *Masalti* v. *State of U.P.*, (1972) 2 MLJ 376 : 1973 Cr LJ 1301 **following** 1957 Cr LJ 1000 (SC) and (1965) 1 Cr LJ 226 (SC).
69. *Dhana Harijan* v. *State*, 2001 Cr LJ NOC 128 (Ori).
70. *Ram Sunder Yadav* v. *State of Bihar*, 1998 Cr LJ 4558 (para 3) (SC) : AIR 1998 SC 3117, **following** *Baba Nanda Sarma* v. *State of Assam*, AIR 1977 SC 2252 : (1977) 4 SCC 396 and *Vijayee Singh* v. *State of U.P.*, AIR 1990 SC 1459, at pp. 1465 and 1466 : (1990) 3 SCC 190, *Nanhakoo* v. *State*, 1998 Cr LJ 2890 (paras 29) (All), **relying on** *Lakshmi Singh* v. *State of Bihar*, AIR 1976 SC 2263 : 1976 Cr LJ 1736 and *State of U.P.* v. *Mukunde Singh*, (1994) 2 SCC 191.
71. *Nafe Singh* v. *State of Haryana*, 1996 AIHC 2825 (para 15) (P&H).

the person of the accused were caused in the very incident in which the murder was committed, prosecution is not bound to explain them.[72]

25. INJURIES ON THE VICTIM'S BODY

Where the fracture of the ribs had no corresponding external injuries on the victim's body, it could be due to violent fall also and not only due to blows with blunt weapons.[73] Non-explanation of injuries on the person of the accused assumes greater importance where evidence consists of interested or inimical witnesses or where defence gives a version which competes with that of prosecution but where evidence is clear, cogent and trustworthy and where the Court can separate truth from falsehood, it itself cannot be a sole basis to reject such evidence, and consequently the whole case.[74] Where the alleged eye-witness was absolutely silent about one of the two massive injuries sustained by the deceased and there was no explanation of that injury in the prosecution evidence, it was held to be not safe to rely on the account furnished by the said witness.[75]

26. APPRECIATION OF EVIDENCE

In a country like India, it is difficult to find a witness who has not made any embellishment or exaggeration and, therefore, the Court would be justified in separating the chaff from the grain and then act upon the grain. But where the evidence consists of only chaff, the question of separating the chaff from the grain would not arise. In the present case all the eye-witnesses suffered infirmities.[76]

The Court has to decide on the basis of the evidence adduced before it by the parties whether the guilt of the accused is made out beyond reasonable doubt and whether, in a civil case, on a balance of probabilities, the plaintiff has made out a case for relief. The governing principle is known as that of "standard of proof". Appreciation of evidence is a very difficult and delicate task. A testimony without a fringe or embroidery of untruth is rare. The Court can reject it only when it is tainted to the core, that is, where falsehood and truth are inextricably intertwined. If this is not so, the Court must separate the grain from the chaff.[77] Where the story told by the witnesses in the Court was consistent with the medical evidence and the contents of the F.I.R., it warranted implicit reliance, notwithstanding different statements were obtained by the police under S. 162, Cr.P.C.[78] The reliable and corroborated testimony of the first informant on whose testimony the formal F.I.R. was registered could not be discredited on account of mere acquittal of some of the accused nominated by him as being present along with the convicted accused at the time of occurrence.[79] Where in the F.I.R. it was stated that the assailants assaulted the deceased with '*Kanta*' and '*Kulhari*' without stating that the back side of the weapons also fell on the victim and the informant witness stated in the Court that the assailants hit the victim with blunt side of the weapons, it cannot be said to be a material inconsistency in his testimony and his evidence could not be discarded as it was not possible to ascertain the same where the attacks were in quick succession[80] but where the witness testified that the victim wife was subjected to cruelty by her husband and in-laws, but no such version was given by him during investigation, it was unsafe to rely upon such testimony.[81] The Courts and tribunals have to judge the evidence before them by applying the test of human probabilities.[82]

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72. *Mohd. Islam* v. *State of U.P.*, 1993 Cr LJ 1736 (para 30) (All).
73. *Kathi Odhabhai Bhimabhai* v. *State of Gujarat*, 1993 Cr LJ 187 (para 4) : AIR 1993 SC 1193, **reversing** the decision of Gujarat High Court convicting for fracture of ribs. **See also** *D.D. Suvarna* v. *State of Maharashtra*, 1994 Cr LJ 3602 (paras 18 and 19) (Bom).
74. *Sankar Rana* v. *Lohor Rana*, 1995 Cr LJ 3570 (para 6) (Ori), **relying on** *Rai & Bareth Rai* v. *State of Bihar*, AIR 1968 SC 1281 : 1968 Cr LJ 1479; *Lakshmi Singh* v. *State of Bihar*, AIR 1976 SC 2263 : 1976 Cr LJ 1736 and *Vijayee Singh* v. *State of U.P.*, 1990 II SVLR (Cri) 109 : 1990 Cr LJ 1510.
75. *Ganpat Kisan* v. *State of Maharashtra*, 1995 Cr LJ 792 (para 8) (Bom), **relying on** *G.B. Patel* v. *State of Maharashtra*, AIR 1979 SC 135 : 1979 Cr LJ 51.
76. *Mohd Iqbal M Shaikh* v. *State of Maharashtra*, 1998 Cr LJ 2537 (para 19) (SC) : AIR 1998 SC 2864.
77. *State of U.P.* v. *Shanker*, AIR 1981 SC 897.
78. *Gurnam Kaur* v. *Bakshish Singh*, AIR 1981 SC 631.
79. *Sheikh Ishaque* v. *State of Bihar*, 1995 Cr LJ 2682 (para 6) (SC).
80. *Barkau* v. *State of U.P.*, 1993 Cr LJ 2954 (para 31) (All). **See also** *Kishore Kumar* v. *State of U.P.*, 2000 Cr LJ 552 (para 5) (All).
81. *Jyotilal Chakraborty* v. *Dipak Dutta*, 1995 Cr LJ 930 (para 15) (Cal).
82. *I T Commr., W.B.* v. *D.P. More*, AIR 1971 SC 2439.

Law does not make any distinction in the matter of appreciation of evidence in a case under TADAA or under normal criminal law.[83] Where there was hostility between the deceased and accused and all the members of the family of the deceased were interested in implicating them and the prosecution evidence suffered from fairly serious infirmities, conviction and sentence was set aside.[84]

Witnesses are expected to depose what they have seen and heard and not to draw inference from what they see. The privilege of drawing inferences is given to Courts and not to witnesses.[85]

Where the prosecution had examined the lone independent witness available, the evidence showed that no other independent witness was available whom the prosecution did not examine and the accused also in his counter-case did not mention about any outsider being present and seeing the incident, no adverse could be drawn against the prosecution on that ground.[86]

Where the facts which the prosecution themselves do not controvert in the witness-box are found to accord with the accused's story, the Court should not overlook such facts.[87] Where the prosecution witness stated that the disputed land has been in the possession of the accused for a number of years, there was no reason to disbelieve him. He was not treated as a hostile witness.[88]

The mere fact that out of many accused some are acquitted is not sufficient to entail the rejection of the entire prosecution case.[89] It is a settled law that witnesses can be believed in part and disbelieved in part. Disbelieving a witness against the co-accused can be no ground for the acquittal of the accused.[90] Where the Investigating Officer did not produce the injury report of the accused, it was held that he conducted the investigation in a tainted and partisan manner.[91]

Presence of the accused in the hospital where the deceased was admitted with burn injuries cannot absolve him because it can also be for eliminating all suspicion against him.[92]

Where the witness whose testimony was essential for unfolding the narrative was not examined for which no explanation was given, the prosecution case stood vitiated.[93] Court would be perfectly justified in brushing aside the evidence of the prosecution witnesses who apparently are not truthful witnesses, besides being very inimically disposed towards the accused[94] but where there was clinching oral and documentary evidence establishing the scene of occurrence, the mere fact that the blood-stained earth was not sent for chemical examination, was no ground to doubt the scene of occurrence and reject the prosecution story.[95]

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83. *Mohd. Iqbal M. Shaikh* v. *State of Maharashtra*, 1998 Cr LJ 2537 (para 18) (SC) : AIR 1998 SC 2864, **following** *Dilawar Husain* v. *State of Gujarat*, AIR 1991 SC 56 : (1990) 4 JT (SC) 282.
84. *Gurdial Singh* v. *State of Punjab*, 1994 Cr LJ 1231 : AIR 1994 SC 1072.
85. *Babuli* v. *State of Orissa*, AIR 1974 SC 775.
86. *Kasam Abdulla Hafiz* v. *State of Maharashtra*, 1998 Cr LJ 1422, (para 11) (SC).
87. *Hate Singh Bhagat Singh* v. *State of M.B.*, AIR 1953 SC 468; *Bandi Mallaiah* v. *State of A.P.* AIR 1980 SC 1160.
88. *Ramanlal* v. *Karthikeyan*, 1994 Cr LJ 3720 (para 7) (Mad).
89. *Molu* v. *State of Haryana*, AIR 1976 SC 2499.
90. *Vithal Mahadev Patil* v. *State*, 1996 Cr LJ 1796 (para 4) (Kant). **See also** *Hari Chand* v. *State of Delhi*, 1996 Cr LJ 1701 (paras 24-26) (SC) : AIR 1996 SC 1477; *Anil Kumar* v. *State*, 1996 Cr LJ 2491 (para 15) (Del); *Balbir Singh* v. *State of Haryana*, 1996 Cr LJ 2663 (para 12) (P&H).
91. *Shivaji Guru Naik* v. *State of Maharashtra*, 1999 Cr LJ 471, at p. 476 (Bom).
92. *Akbar Ashraf Khan* v. *State of Maharashtra*, 1995 Cr LJ 3575 (para 16) (Bom).
93. *Ashraf Hussain Shah* v. *State of Maharashtra*, 1996 Cr LJ 3147 (para 15) (Bom), **relying on** *The State of U.P.* v. *Jaggo*, AIR 1971 SC 1586 : 1971 Cr LJ 1173 (para 15). The Court referred to *Haseeb Mohammad* v. *The State of Hyderabad*, AIR 1951 SCR 475 : AIR 1954 SC 51 : 1954 Cr LJ 3338.
94. *Ramshankar Singh* v. *State of U.P.*, AIR 1956 SC 441; *State of Punjab* v. *Sohan Singh*, AIR 1974 SC 300; *Dargahi* v. *State of U.P.*, AIR 1973 SC 2695; *Ganga Ram* v. *State of M.P.*, AIR 1973 SC 852; *Wilayat Khan* v. *State of U.P.*, AIR 1953 SC 122; *Prem Datta Gautam* v. *State of U.P.*, AIR 1973 SC 2496; *Nanhku Singh* v. *State of Bihar*, AIR 1973 SC 491; *Raman Kalia* v. *State of Gujarat*, AIR 1979 SC 1261; *Sadhu Singh* v. *State of U.P.*, AIR 1978 SC 1506; *Tahsildar Singh* v. *State*, 1958 Cr LJ 324; *State* v. *Ram Autar Chaudhary*, 1955 Cr LJ 394; *Sankaran Nair Chellappen Nair* v. *State of Kerala*, (1965) 2 Cr LJ 647; *Kala Singh* v. *State*, 1957 Cr LJ 1138; *Re. Perumal Goundan*, 1954 Cr LJ 1654; *Padmanabha Rao* v. *State of Mysore*, 1953 Cr LJ 1514; *Arur Singh Fathen Singh* v. *State*, 1957 Cr LJ 532; *Jamser Ali* v. *State*, 1954 Cr LJ 1816; *State of Punjab* v. *Rameshwar Dass*, 1975 Cr LJ 1630.
95. *Kunwar* v. *State of U.P.*, 1993 Cr LJ 3421 (para 24) (All), **following** *Ramesh Chander* v. *State (Delhi Administration)*, 1992 (4) JT 405 : 1992 Cr LJ 3584.

Evidence of untruthful witness cannot be utilised to discredit another witness.[1]

It is a well-settled law that evidence may be accepted partially or in the whole and where there are certain infirmities, the evidence would be of restrictive use.[2] Merely because a portion of the evidence of a witness is found to be not acceptable, the whole of his evidence cannot be rejected[3] and partially acceptable oral evidence can be used to the limited extent of filling in the gaps in the prosecution evidence.[4] Evidence of witness should be read as a whole when a comparison is made with that of another.[5]

In a criminal trial, the whole of the evidence in chief and cross-examination has to be read together to find out the truth therefrom. Mere reading of a portion of the cross-examination, ignoring the chief examination, would be misleading, particularly in a case of murder.[6] Where in a cross-criminal complaint, only the complainant and the other person who himself was accused in the complaint by the complainant, were examined, both being interested witnesses, non-examination of any other material eye-witness, was fatal for the prosecution story.[7] Where there was no complaint about torture by the victim wife but there was evidence that she was subjected to torture, the evidence was not reliable.[8] The deposition that the two accused were having guns and the witness identified them by flashing torch towards them at a distances of 8-10 paces was held to be unreliable as the accused/robbers did no harm to the witness whereas they shot dead the neighbour of the person in whose house they were committing robbery allegedly at dark night.[9] In a criminal trial even if the investigation is illegal or even suspicious, the rest of the evidence must be serutinised independently of the impact of it. Otherwise, the criminal trial will plummet to the level of the Investigating Officers ruling the roost. Criminal justice should not be made the casualty for the wrongs committed by the Investigating Officers.[10] With respect to an offence under Section 498-A, I.P.C., the evidence of wife has to be considered with reference to the surrounding circumstances. In the instant case the wife alleged harassment, demand of dowry and cruelty after four years from marriage and husbanded wanted to remarry suspecting his wife to suffer from cancer which he considered to be a virulent disease which might have led to the said allegation. It was held that offence of cruelty was not made out.[11]

A party who produces witnesses in court produces them as witnesses of truth; and simply because portions of their statements are not favourable to the party producing them, they cannot be condemned as biased witnesses.[12]

A witness who is brought to the court under arrest is an unwilling witness and his evidence can have little value.[13] When a witness voluntarily appears before the court to give evidence, his evidence cannot be rejected on the ground that he was not summoned by the Court. In fact, it is the duty of every citizen, who is in the know of things concerning a crime to appear before the Court and give evidence.[14] Damaging statements cannot be got rid of merely by stating that they were slips of tongue.[15] Testimony of a particular witness cannot be thrown overboard merely because of the said witness being a person of easy virtue.[16]

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1. *Chuhar Singh* v. *State of Haryana*, AIR 1977 SC 386.
2. *Turner Morrison & Co., Bombay* v. *K.N. Tapuria*, 1993 Cr LJ 3384 (para 45) (Bom).
3. *V. Viswambharan* v. *State of Kerala*, 1994 Cr LJ 1522 (para 24) (Ker).
4. *Turner Morrison & Co., Bombay* v. *K.N. Tapuria*, 1993 Cr LJ 3384 (para 45) (Bom).
5. *Andalmmal* v. *Rajeswari Vedachalam*, AIR 1985 Mad 321.
6. *Badhna, Kharia* v. *State of Assam*, 1988 Cr LJ 1412 (Gau); *Gunanidhi Sundara* v. *State of Orissa*, 1984 Cr LJ 1215.
7. *Ramanlal* v. *Karthikeyan*, 1994 Cr LJ 3720 (para 9) (Mad).
8. *Jyotilal Chakraborty* v. *Dipak Dutta*, 1995 Cr LJ 930 (para 13) (Cal).
9. *Lal Man* v. *State of U.P.*, 2000 Cr LJ 3336 (para 9) (All).
10. *Jai Narain* v. *State of U.P.*, 2000 Cr LJ 3808 (para 53) (All), **applying** *State of Karnataka* v. *Yarappa Reddy*, AIR 2000 SC 185 : (1999) 8 JT (SC) 10 : 1999 AIR SCW 4276.
11. *Ch. Narender Reddy* v. *State of A.P.*, 2000 Cr LJ 4068 (para 4) (AP).
12. *Gulabchand Ganbhiramal* v. *Kudilal Govindram*, AIR 1959 MP 151 : 1961 Cr LJ 55 (FB).
13. *Anantam Veeraju* v. *Valluri Venkayya alias Vankamma (Died)*, AIR 1960 AP 222.
14. *Ladies Corner* v. *State of Karnataka*, 1987 Cr LJ 2078 (Kant); *Rahimkhan* v. *Khurshid Ahmed*, AIR 1975 SC 290.
15. *Yunus (Md.)* v. *Nabi Hossain*, AIR 1982 Cal 488.
16. *Shyam Sunder* v. *State*, 1997 Cr LJ 35 (para 15) (Del).

A mere suggestion made in cross-examination which was denied is not at all evidence.[17]

When the offence is established by unimpeachable corroborative evidence, namely, the report lodged with the police and the medical evidence, there is no need to go in search of elusive independent witness.[18]

When light was enough to enable the assailants to identify their victims and kill them, it could hardly be contended, much less accepted, that the light was not enough to identify the assailants.[19] Where the identification of the acused assailants was doubtful and four out of the five accused were acquitted, it was held that the general grounds on which the evidence of the eye-witnesses has been rejected would equally apply to the case of the convicted accused also.[20]

Where the High Court, acquitted three out of the six accused by giving benefit of doubt to them, the Supreme Court, while dismissing the appeals preferred by the convicted accused, held that the evidence of the eye-witnesses was not found to be absolutely false; that the number of injuries and the number of victims clearly indicated that more than three accused persons participated in the attack, that the evidence of the eye-witnesses which was not false on material facts did not entitle the other accused to be acquitted.[21] Where the accused was absconding after being named in the F.I.R. and proceedings under Sections 82 and 83, Cr.P.C. were started against him, it was held to be a circumstance against him.[22]

Where the prosecution clearly stated that the blunt side of the weapon was used, there is no scope for believing that the sharp side was in fact used. The prosecution must elicit the opinions of the doctor, whether a particular injury alleged to have been caused by a blunt side was possible by showing the weapon to him.[23] Where the prosecution rested its case on the evidence of the eye-witnesses and not on circumstantial evidence, failure on its part to prove to whom the pair of shoes found near the dead body belonged did not impair the prosecution story.[24] Where the chemical analyser gave acknowledgement receipt of the sample packets and recorded that seals thereon were found intact, it was held that the question of not examining the police constable who took the sample to the chemical analyser was not relevant as in transit tampering with the sample was altogether excluded.[25]

Where the witnesses, though strangers to the accused did not disclose the incident of brutal assault on the deceased to anybody for two days, their testimony was held to be not reliable.[26] Where in a patricide case, the evidence of the witnesses was inconsistent and uncorroborated by medical evidence, the credibility of the F.I.R. was doubtful and the case of the accused was not distinguished from that of other co-accused who were acquitted by accepting evidence in part, the remaining one accused could not be convicted on the same set of evidence by making out a new case.[27] Where it was alleged that accused, aged 50 years, came on foot from his village situated at the distance of 40 kms from the place of occurrence and killed the deceased in the day light in the presence of three eye-witnesses, who were younger in age, and ran away to his village, uncaught by them, the testimony of the witnesses to this effect was held to be unbelievable.[28] Where the doctor who examined the head injury of the victim had considerable experience, his opinion that it was an incised wound, could not be rejected merely on the

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17. *Parameshwari Bai* v. *Muthijirao Scindia*, AIR 1981 Kant 40 (case referred AIR 1978 SC 557 : AIR 1971 SC 1542: *Lallthama S.N.* v. *T.S. Ramaswamy*, ILR 1975 Kant 1973; *Rajagopal Pillai* v. *Pakkiam Pillai*, 1968 (2) Mad LJ 411.
18. *Vilas Jagganath Dere* v. *Ramesh Dnyandoba*, 1989 Cr LJ 1281 (Bom).
19. *State of U.P.* v. *Nahar Singh*, AIR 1998 SC 1328 (para 20) : 1998 Cr LJ 2006.
20. *Hardial Singh* v. *State of Punjab*, AIR 1992 SC 1871.
21. *Suresh Pal* v. *State of U.P.*, AIR 1981 SC 1161. **See also** *Jamuram* v. *State of Rajasthan*, 1995 Cr LJ 1333 (Raj).
22. *Barkau* v. *State of U.P.*, 1993 Cr LJ 2954 (para 33) (All).
23. *Gurmej Singh* v. *State of Punjab*, AIR 1992 SC 214.
24. *Jagdish Narain* v. *State of U.P.*, AIR 1996 SC 3136 (para 11).
25. *Meena Gopakrishna Mudiliyar* v. *State of Maharashtra*, 1993 Cr LJ 3634 (para 7) (Bom).
26. *Audambar Digambar Jagdane* v. *State of Maharashtra*, 1999 Cr LJ 1936, 1943 (Bom). **Also see** *Jaysing* v. *State of Maharashtra*, 1999 Cr LJ 1687, 1690 (Bom) and *State of Orissa* v. *Brahmananda Nanda*, AIR 1976 SC 2488 : 1976 Cr LJ 1985. So many infirmities in prosecution case besides conduct of children of deceased (the eye-witnesses) and that of wife unnatural, their testimony could not be relied upon. *State of Karnataka* v. *Babu*, 1994 Cr LJ 18 : AIR 1994 SC 31. **Also see** *Harban Sahai* v. *State of U.P.*, 1994 Cr LJ 23 (All); *Udai Lal* v. *State of Rajasthan*, 1994 Cr LJ 509 (Raj); *Arumugham* v. *State*, 1994 Cr LJ 520 (Mad); *Ramesh Maruti Patil* v. *State of Maharashtra*, 1994 Cr LJ 8 : AIR 1994 SC 28.
27. *Chinnasamy* v. *State*, 1994 Cr LJ 882 (para 21) (Mad). **Also see** *Hari Singh* v. *State of Punjab*, 1994 Cr LJ 2072 (para 20) (P&H).
28. *Didar Singh* v. *State of Punjab*, 2001 Cr LJ 289 (para 15) (P&H).

ground that he had not examined it with a lens and had given a general opinion.[29] Where the post-mortem was conducted by two doctors but the major work was done by one of them who was examined, non-examination of the other doctor would be of no relevance.[30] Where a victim who stated that he was travelling the bus whose conductor was killed, after purchasing a certain particular type of fertilizer whereas he produced the bill for some other type, it was held that such a discrepancy was not sufficient to prove that he was not travelling by that bus.[31] Where murder was committed by pouring petrol in the room of the victims and the rickshaw-puller who, after reading the news item, deposed about hiring his rickshaw by the accused on the day of the incident to the petrol pump and then to the place of incident, there being no enmity between him and the accused, his evidence could not be discarded merely because he deposed seven days after the incident.[32] In a case of dacoity, the eye-witnesses identified the accused in the electric light of the bulbs on two poles but the High Court discarded their evidence on the ground that the accused were wearing '*khaki*' uniform and hats and hats must have cast shadows on their faces. It was held to be not proper as when they could recognise the colour of the dress, they could recognise their faces also as there was possibility light from bulb on one of the poles falling on their faces in the context of the direction they proceeded more so when the accused were known to them so their evidence deserved to be believed.[33] In *State of U.P.* v. *Bhoora*[34], the conduct of the person at whose house dacoity was committed, first going to the tubewell of a certain person who had a licensed gun and then to the police was held to be not unnatural. Where the opinion of the doctor that the multiple injuries and fractures caused to the ribs of the deceased could be due to scooter accident was belied by the absence of the corresponding external injuries and only minor damage to the vehicle, the accident theory was rejected.[35] The plea that the witness, the wife of the younger brother of the accused, gave her statement to the police under threat, hence her statement in the Court should not be believed, cannot be the ground for discarding her statement in the Court as she would have preferred to depose only about the facts which she could not have denied.[36]

In the absence of any convincing evidence, possibility of exchange of words between the husband and wife and also beating by him, is not a sufficient basis to presume that the accused committed murder of his wife.[37] Where death was caused by administering potassium cynide, rejection of the evidence of the prosecution witness, a goldsmith, from whom the poison of obtained on the ground that he had no licence to possess the said poison and that he had not disclosed the fact of giving the poison to the accused to any other person, was held to be not proper.[38] The history of assault contained in the medical papers is not substantive evidence and can only be used to contradict the person who has given it.[39] Where in a case under Section 307, I.P.C., relationship between the victim and the accused was hostile, the crime was registered promptly, the victim's evidence was unimpeached in the cross-examination and was corroborated by medical evidence, the evidence of the victim was held to be reliable to prove occurrence of the incident.[40] The evidence of the eye-witness could not be rejected on the ground that the brother-in-law of the complainant, an advocate, who had accompanied him to the police station had not signed the complaint as there was no reason for him to sign that complaint. Further, non-examining of the said advocate by the prosecution was not fatal as he could not be regarded a material witness.[41] Where in a murder trial neither the prosecution was coming with true facts nor the defence, the gainer would be the defence and not the prosecution.[42] Where the wife, who committed suicide, wrote letters

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29. *Vishnu Daga Pagar* v. *State of Maharashtra,* 1997 Cr LJ 2430 (Bom).
30. *State of Gujarat* v. *Anirudhsing,* AIR 1997 SC 2780 : 1997 Cr LJ 3397.
31. *Haricharan* v. *State of Rajasthan,* AIR 1998 SC 244 : 1998 Cr LJ 398 (SC).
32. *Amir Jamal Khan* v. *State of Maharashtra,* 1995 Cr LJ 1956 (para 13) (Bom).
33. *State of U.P.* v. *Bhoora,* AIR 1998 SC 254 : 1998 Cr LJ 478, at p. 480 : Cri. A No. 905 of 1983, Dt. 20-9-1988 (All), **reversed**.
34. AIR 1998 SC 254 : 1998 Cr LJ 478, at p. 481 (SC), Cri A No. 905 of 1983, Dt. 20-9-1988 (All), **reversed**.
35. *Teja Singh* v. *State of Punjab,* AIR 1997 SC 921 : 1997 Cr LJ 1175, **reversing** Cri A No. 534 - DB of 1987, **decided on 5-10-1989 (P&H)**.
36. *Lekhraj* v. *State of Gujarat,* AIR 1998 SC 242, at p. 244 : 1998 Cr LJ 396.
37. *Udiya* v. *State of Rajasthan,* 1997 Cr LJ 516 (Raj).
38. *Ammini* v. *State of Kerala,* AIR 1998 SC (FB) 260 : 1998 Cr LJ 481, at p. 487 (SC).
39. *S G Sohatre* v. *State of Maharashtra,* 1997 Cr LJ 454 (Bom).
40. *Manik Bandu Gawali* v. *State of Maharashtra,* 1998 Cr LJ 2246 (Bom).
41. *State of Bihar* v. *Ram Padarath Singh,* AIR 1998 SC 2606 (para 16) : 1998 Cr LJ 4007.
42. *State of Maharashtra* v. *Tanaji Dagadu Chavan,* 1998 Cr LJ 4515 (para 12) (Bom), **relying on** *Jamuna* v. *State of Bihar,* AIR 1974 SC 1822 : 1974 Cr LJ 890 (para 12) and *Subrati* v. *State,* 1959 All LJ 423, at pp. 423-424. **Also see** *State of U.P.* v. *Bhagat Singh,* 1999 Cr LJ 2333 (para 20) (All).

disclosing cruelty to her at the hands of the husband, the handwriting of the letters was not disputed by him and the contents of the letters were corroborated by oral evidence, it was held to be sufficient to prove the charge under Section 498-A, I.P.C.[43] Where the Food Inspector purchased the samples of milk from the accused for analysis under the Prevention of Food Adulteration Act and the Public Analyst detected formaline in the milk samples but his report was not challenged, besides the general evidence also corroborated the prosecution case, the plea that formaline was added by the Food Inspector himself in the milk sample as a preservative, was not sustained.[44] The data given in the authorities on Medical Jurisprudence which relate to standard factory made guns and cartridges cannot be applied in respect of country made firearms.[45] Where there was overwhelming evidence that the occurrence took place inside the bus, the fact that the investigating officer did not remember to take the sample of blood-stains from inside the bus was not sufficient to throw doubt on the said evidence.[46] Mere recovery of guns from the possession of the accused in the absence of the ballistic report that it was in working order does not connect him with the crime.[47]

Where the witness, the daughter of deceased father, dared not to make any statement to the police during investigation as she suffered in the custody of and lived with her licentious mother and one of the accused, her corroborated deposition is the Court after 2½ years after the incident could not be discarded on that ground.[48] Where the discrepancy regarding the age of the deceased between the post-mortem report and that that of the witnesses was not brought to the notice of either the doctor or the witnesses, the discrepancy was held to be not pertinent to throw away the prosecution case.[49] Where the injuries caused to the deceased were sufficient to cause his death in the ordinary course of nature, subsequent development of septicaemia could not be taken into account.[50] Where neither the inquest report nor the memos vide which the police lifted blood-stained earth from the spot was attested by the eye-witnesses, it could not be a ground to hold that they had not actually witnessed the incident because the said documents were attested by the other witnesses who were also close relatives of the deceased.[51]

In a case, a tenant went abroad and stayed there for six years. In his tenanted shop, the tenant's nephew, paying rent on the tenant's behalf, conducted the business which the tenant did. The nephew gave returns of the shop to the tenant's wife and children for their subsistence and the tenant had every intention to return back. It was held that the nephew's possession, being on behalf of the tenant, the tenant could not be evicted for sub-letting.[52]

Evidence of the claimants claiming compensation under the Land Acquisition Act is not to be accepted without any corroboration. Intrinsic worth of their evidence should be tested by the principles governing appreciation of evidence.[53] In the construction of a will, the Court should ascertain the real intention of the testator appearing from the plain language of the entire instrument. In the instant case, the testator had bequeathed his properties to his daughter and her husband with no right of alienation to her husband without her consent and with a specified condition that the both shall live with cordial terms. However, both were not at cordial terms and were living separately. It was held that the husband would not be entitled to decree for partition and half share in properties covered under the will.[54]

(a) Presence at the scene of occurrence.—Presence of fingerprints at the scene and time of occurrence is a positive evidence of the presence of the person concerned (here accused) there but absence of his fingerprints there at the relevant time is not enough to exclude his presence there.[55]

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43. *Balkrishna Pandurang Moghe* v. *State of Maharashtra*, 1998 Cr LJ 4496 (para 29) (Bom).
44. *State of Gujarat* v. *Khimabhai Nathabhai Bharwad*, 1993 Cr LJ 1084 (Guj).
45. *Mohd. Islam* v. *State of U.P.*, 1993 Cr LJ 1736 (para 28) (All).
46. *Sarafat Ali* v. *State of Assam*, 1993 Cr LJ 1943 (para 25) (Gau).
47. *Lakhasingh* v. *State*, 1994 Cr LJ 2952 (Raj).
48. *Pathan Fathima* v. *State of A.P.*, 1995 Cr LJ 3613 (para 4) : AIR 1995 SC 1958.
49. *Poolin Haldar* v. *State*, 1996 Cr LJ 513 (para 9) (Cal).
50. *State of Haryana* v. *Pala*, 1996 Cr LJ 1872 (para 3) (SC) : AIR 1996 SC 2962.
51. *Nirjal Singh* v. *State of Punjab*, 1996 Cr LJ 3734 (para 19) (P&H).
52. *V.K. Jayakrishnan* v. *A.M. Vrindha*, 1998 AIHC 1856 (Ker).
53. *Special Deputy Collector (L.A.O.), Anakapalli* v. *Padala Venkata Ramana*, 1999 AIHC 2612 (para 33) (AP).
54. *Andalammal* v. *K.N. Gopal Naidu*, 2000 AIHC 217 : AIR 2000 NOC 11 (Mad).
55. *Gade Lakshmi Mangraju* v. *State of A.P.*, 2001 Cr LJ 3317 (para 21) (SC) : AIR 2001 SC 2677.

Where the brother of the deceased, following him, found him dead when he reached near him, his not taking him (deceased) to the hospital could not give rise to inference of his not being present at the spot.[56]

Presence or absence of bloodstains on the relatives or eye-witnesses is not the sole criterion for ruling out or dis-believing their presence.[57]

(b) Source of light.—Where the evidence established that the deceased and his father were having meals and his mother and sister were serving the meals when the deceased was assaulted, it should be inferred that they had put source of light at that place. Non-seizure of lanterns from the place of occurrence is not material.[58]

(c) Dacoity and murder.—No water-tight compartment or computerised formula can be made for making a distinction between a case of dacoity and murder. No hard and fast rule can be laid down for appreciation of evidence demarcating a line between the cases of dacoity and murder.[59]

27. RE-APPRECIATION OF EVIDENCE

Where there was concurrent finding regarding reliability of the evidence of the eye-witnesses, their evidence could not be re-appreciated merely on the ground of some discrepancies in their testimony which did not appear to be material or serious.[60] The Supreme Court will not embark upon re-appreciation of evidence except in peculiar facts and circumstances of the case.[61] Such as a case where there was no direct evidence available on record connecting any of the accused persons with the commission of the crimes alleged against them and the entire case hinged on circumstantial evidence and neither the trial Court nor the High Court had catalogued the circumstances relied upon by the prosecution against the accused persons except for broad generalisation on the basis of the charges framed against them, the Supreme Court examined some of the evidence principally influencing both the Courts.[62]

28. MISAPPRECIATION OF EVIDENCE

Mere misappreciation of evidence alone would not be a ground to set aside the judgment of acquittal in revision, that too by a private party, in the absence of any appeal against it.[63]

29. PROBATIVE VALUE OF EVIDENCE

The probative value of evidence is the weight to be given to it which has to be judged having regard to the facts and circumstances of each case.[64] The totality of the evidence of a witness has to be taken into consideration for fixing its probative value.[65]

30. APPRECIATION OF THE TESTIMONY OF VICTIM OF SEXUAL ASSAULT

Where in a rape case, the evidence of the prosecutrix was reliable, precious little would turn on innocuous circumstances like non-examination of the doctor and her father[66] and mere absence of injury on her private parts and the breast, cannot lead to a conclusion that it was a consented affair.[67]

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56. *Vishnu* v. *State (N.C.T. of Delhi)*, 2001 Cr LJ 4006 (para 26) (Del).
57. *Vishnu* v. *State (N.C.T. of Delhi)*, 2001 Cr LJ 4006 (para 27) (Del).
58. *Ram Gulam Chaudhary* v. *State of Bihar*, AIR 2001 SC 2842 (para 32) : 2001 Cr LJ 4632.
59. *Parsu Ram* v. *State of U.P.*, 1996 Cr LJ 2316 (para 11) (All).
60. *Binay Kumar Singh* v. *State of Bihar*, 1997 Cr LJ 362 : AIR 1997 SC 322. **See also** *A.S. Joshi* v. *State of Maharashtra*, AIR 1994 SC 2582 (para 2).
61. *State of Karnataka* v. *Bheemappa*, 1993 Cr LJ 2609 (para 16) (SC).
62. *C. Chenga Reddy* v. *State of A.P.*, 1996 Cr LJ 3461 (para 5) (SC) : AIR 1996 SC 3390.
63. *Juli John* v. *Raman*, 1999 Cr LJ 2174 (paras 14 and 15) (Mad).
64. *Ram Bihari Yadawa* v. *State of Bihar*, AIR 1998 SC 1850 : 1998 Cr LJ 2515 (para 6).
65. *Sooraj* v. *State*, 1994 Cr LJ 1155 (para 10) (Ker).
66. *State of Maharashtra* v. *Savala Sagu Kokare*, 1997 Cr LJ 786 (Bom). Evidence of victim corroborated, belated disclosure about rape cannot militate against her, *Majidkhan* v. *State of Karnataka*, 1993 Cr LJ 907 (Kant). **Also see** *Ramroop Das* v. *State*, 1993 Cr LJ 1000, at p. 1003 (Ori).
67. *Master Mirdha* v. *State of Bihar*, 2000 Cr LJ 5086 (paras 10 and 11) (Pat).

Conviction can be based on the sole testimony of the prosecutrix, if the same is found to reliable and corroboration of her evidence is not required as a rule of law.[68] Where the prosecutrix, the victim of rape, did not disclose the incident to her husband and the medical evidence showed abrasions about 2-7 days old whereas the incident had taken place about 15 days back, conviction could not be based solely on her evidence.[69] Where the testimony of the prosecutrix bristles with infirmities and improbabilities, it cannot be relied upon so as to sustain conviction.[70] Where the testimony of the victim of kidnapping and rape was inconsistent with medical evidence and chemical examiner report and the witnesses had made a false statement in the Court regarding her literacy, it was held to be not trustworthy.[71] Where the minor prosecutrix recognised the accused rapist in dark night from his voice, stature and features and immediately after the occurrence saw him running away in the moonlight but the distance was not mentioned, it was held that recognition from voice and stature was a feeble type of evidence and the accused was given benefit of doubt.[72]

Discrepancy of shifting of place of occurrence by the prosecutrix/the victim of rape from main road to 20 feet away from it, is minor and does not amount to contradiction.[73]

31. IMPROPER PROCEDURE

Where certain letters were not adduced as evidence in the case through any procedure known to law nor any affidavit was filed by anyone at least formally proving them in evidence, using part of the said letters by the Court against the accused was illegal.[74]

32. DETERMINATION OF AGGRESSOR

For judging the question of being aggressor in cases of bi-lateral clash, the number of injuries found on the side of the complainant or the accused cannot be the basis.[75]

33. DELAY OR DISCREPANCY IN F.I.R.

Where there was a delay of three days in lodging the F.I.R., and the gun shot injury was found on the back of the victim whose statement was recorded 17 days after the occurrence, it was held that the identity of the assailant is suspicious and the conviction cannot be sustained.[76] Where the testimony of the witnesses and materials indicated that the earlier version of the incident was suppressed by the prosecution and there was probability of the F.I.R. coming into existence only after deliberation with the Police Inspector besides there being an inordinate delay of 10 hours in lodging the same, these things were held to be fatal to the prosecution case.[77]

Where there is no explanation for the delay of 2 days in sending the F.I.R., to the Magistrate's Court, the circumstance gives rise to suspicion about the offence.[78]

The fact that there was delay in recording or preparing the F.I.R. and that the earliest version was not before the Court, was not sufficient to reject the prosecution evidence.[79]

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68. *Satpal* v. *State of Rajasthan*, 2001 Cr LJ 564 (paras 7 and 15) (Raj), however in the instant case her evidence was corroborated.
69. *Shiv Kumar* v. *State of Rajasthan*, 1994 Cr LJ NOC 282 (Raj).
70. *Jayasena Pradhan* v. *State*, 2001 Cr LJ 1953 (para 10) (Ori).
71. *Niranjan alias Tima Jena* v. *State of Orissa*, 2001 Cr LJ NOC 18 (Ori).
72. *Mazid Ali* v. *State of Assam*, 1994 Cr LJ NOC 326 (Gau). prosecutrix accompanying unknown accused to movie, taking meal and staying in hotel with him, no hue & cry raised when raped, no injury on her private parts, no spermatozoa or semen discharge detected, offence not proved. *Nachhatar Singh* v *The State*, 1994 Cr LJ NOC 327 (J&K).
73. *State of H.P.* v. *Lekh Raj*, AIR 1999 SC 3916 (paras 7 and 9) : 2000 Cr LJ 44.
74. *Kalpnath Rai* v. *State*, AIR 1998 SC 201 : 1998 Cr LJ 369.
75. *Ram Swarup* v. *State of Haryana*, 1993 Cr LJ 3540 (para 8) (SC). **Contra** : *State of Maharashtra* v. *Shriram Gangaram Ghoderao*, 1997 AIHC 2324 (para 12A) (Bom).
76. *Sathir* v. *State of U.P.*, AIR 1982 SC 1216; *Hardial Singh* v. *State of Punjab*, AIR 1992 SC 1871 (delay of 22 hours). *Shankar Shridhar Kavale* v. *State of Maharashtra*, 1998 Cr LJ 4491 (para 10) (Bom). delay of 10 hours.
77. *Murugan* v. *State*, 1993 Cr LJ 1259, at p. 1266 (Mad).
78. *Balkrishan Sitaram Pandit* v *State*, 1987 Cr LJ 479; unexplained delay of 11 hours in sending F.I.R. to Court at the distance only one km., *Thyagarajan* v. *State*, 1993 Cr LJ 1933 (para 33) (Mad).
79. *Sarafat Ali* v. *State of Assam*, 1993 Cr LJ 1943 (para 23) (Gau).

Where the witness stated that he identified the accused in the light of a torch, it was held that the evidence of eye-witnesses cannot be discarded on the ground that there was no mention of the torch in the F.I.R. or in the statements given before the police.[80] Suppression of the fact by the complainant in the F.I.R. that there was also an unknown person among the assailants, might lead to presumption that he could not identify anybody and had incorrectly named the assailants in the F.I.R.[81]

Where there was omission of minute details in the F.I.R., it was held that giving minute details in the F.I.R. cannot be expected nor is it possible and that, when there were consistent statements of the informant and other witnesses during the trial, mere omission of minute details in the F.I.R., does not discredit their evidence.[82]

34. F.I.R. AT UNCONCERNED POLICE STATION

Where the victim with gunshot injuries died on the way to a place where better medical facilities were available and F.I.R. was lodged at that place, no adverse inference could be drawn against the prosecution for not lodging the F.I.R. at the concerned police station.[83]

35. INTERPOLATED F.I.R.

Where the names of two accused persons and the used of swords and soda water bottles in assaults, not mentioned in the Emergency Police Report lodged earlier, were interpolated in the F.I.R. as a result of afterthought, it was most fatal to the prosecution and it was likely that the informant had not seen the incident.[84]

36. DISCREPANCIES—CONTRADICTIONS, OMISSIONS AND IMPROVEMENTS IN ORAL EVIDENCE

Where all the witnesses gave a consistent account of the happening which was sufficient in itself to convict, it was immaterial that there were slight discrepancies in examination-in-chief and cross-examination, or that there was one more witness who was not produced.[85] Witness showed slight discrepancies as to the number of blows and whether the victim was at the time in a standing or lying posture. The Supreme Court observed that such discrepancies in matters of detail may occur even in the evidence of truthful witnesses.[86] Such variations creep in because there are always natural differences in the faculties of different individuals in the matter of observation, perception and memorisation of details. That is hardly a ground for rejecting their evidence when there is consensus as to the substratum of the case.[87] Minor contradictions in the testimony of illiterate and ignorant women who were eye-witnesses were held to be not material.[88] Accuracy could not be expected from witnesses as to the number of injuries, shots, etc. But unexplained discrepancies in the statement of witnesses would give benefit of doubt.[89] A person who witnessed a murder was so upset and shocked that he could not speak anything on reaching home until he recovered his breath. This did not destroy the value of his testimony.[90] Where a witness contradicted himself, his first statement should be preferred.[91] An *Adivasi* woman showed some

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80. *Shakti Patra* v. *State of W.B.*, AIR 1981 SC 1217.

81. *Bachchu* v. *State of U.P.*, 1999 Cr LJ 1967, 1970 (All).

82. *Ramudgar Jha* v. *State of Bihar*, 1987 Cr LJ 113 (Pat). Some omission in F.I.R. does not make otherwise corroborated evidence unreliable, *State of M.P.* v. *Dhirendra Kumar*, AIR 1997 SC 318. **Contra :** F.I.R. attributing overt acts to each accused, minute details, attributing each and every injury to several accused, does not inspire confidence. *Dharam Singh* v. *State of Punjab*, 1993 Cr LJ 150 (SC) : AIR 1993 SC 319; *Meharban* v. *State of M.P.*, AIR 1997 SC 1528 (para 7).

83. *Shashidharsingh* v. *State of M.P.*, 1998 Cr LJ 2676 (para 18) (MP).

84. *D.D. Suvarna* v. *State of Maharashtra*, 1994 Cr LJ 3602 (paras 17 and 18) (Bom).

85. *State of Maharashtra* v. *Krishnamurti*, AIR 1981 SC 617.

86. *S.T. Shinde* v. *Mahrashtra*, AIR 1974 SC 791.

87. *Boya Ganganna* v. *State of A.P.*, AIR 1976 SC 1541.

88. *Narpal Singh* v. *Haryana*, AIR 1977 SC 1066.

89. *Ajmer Singh* v. *Punjab*, AIR 1977 SC 1078; *Bava Hajee* v. *Ker.*, AIR 1974 SC 902.

90. *Narayan Singh* v. *M.P.*, AIR 1985 SC 1678; *Ram Avtar* v. *Delhi Admn.*, AIR 1985 SC 1692.

91. *Mohan Lal* v. *Maharashtra*, AIR 1982 SC 839.

discrepancies in her evidence, her evidence was even so accepted.[1] Minor discrepancies,[2] improvements made by a witness in his testimony and variations in earlier and later statements do not by therefore make his testimony infirm.[3] The fact that a witness improves his testimony at the trial or that he was not reliable at one point does not ruin the value of his testimony in its entirety.[4]

Much importance should not be given to minor discrepancies and technical errors or details. Minor discrepancies which do not go to the root of the matter and shake the basic version on the witness cannot be given undue importance. Minor discrepancies in respect of minor details of the incident, including the sequence of events and overt acts, are possible even in the version of a truthful witness. No criminal case can be free of such minor discrepancies and inconsistencies.[5] Minor contradictions in the statement of witnesses under S. 161, Cr.P.C. and the depositions made by him during investigation and the statement made before the trial Court, are not fatal for the prosecution.[6] Discrepancies in matters of details regarding the blows given by the assailant, occur even in the evidence of truthful witnesses, and they are hardly a ground for rejecting their evidence when there is consensus as to the substratum of the case.[7]

Where the injuries were caused by a lethal weapon and the evidence was inconsistent with the medical evidence and of the ballistic expert, the accused is entitled to acquittal.[8] Where a complainant gave the assailants' names in the F.I.R. but in the evidence he deposed at one place that he did not know the assailants and at another place he said that he knew them for the last two or three years, it was held that such evidence is not worthy of credence.[9] Where the prosecution gave two sets of evidence, one set condemning the other, such evidence is unreliable.[10] Where the evidence led before the trial court was at variance with the pleadings, and conflicting versions were given by interested witnesses, it was held that the witnesses were unreliable.[11] Where there are two irreconcilable versions of a case or an event, neither of the versions could be accepted, and the Court should not be called upon to choose between the two irreconcilable versions.[12] When the witness has spoken to that which is inherently improbable and contrary to what he stated on oath on a previous occasion, his evidence has to be rejected.[13] If

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1. *Beti Padia* v. *Orissa*, AIR 1981 SC 1163.
2. *Jagdish* v. *M.P.*, AIR 1981 SC 1167.
3. *Maqsoodan* v. *U.P.*, AIR 1983 SC 126.
4. *Bhimrao* v. *Mahrashtra*, AIR 1980 SC 1322. **see also** *Kuleshwar* v. *U.P.*, AIR 1980 SC 1534, where the Court said that acquittal of all the accused because prosecution case is unreliable but convicting one on the ground that there were injuries on his person was wrong. *Bhagwan* v. *M.P.*, AIR 1980 SC 1750 on appreciation of evidence.
5. *State of U.P.* v. *M.K. Anthony*, AIR 1985 SC 48; *Bharwada Bhoginbhai Hirjibhai* v. *State of Gujarat*, 1983 SC 753; *Aher Pitha Vajshi* v. *State of Gujarat*, 1983 SC 599; *Sidhan* v. *State of Kerala*, 1986 Cr LJ 470 (Ker); *Krishna Pillai Sree Kumar* v. *State of Kerala*, 1981 SC 1237; *Maqsoodan* v. *State of U.P.*, AIR 1983 SC 126; *Kishan Chand Mangal* v. *State of Rajasthan*, AIR 1982 SC 1511; *State of Maharashtra* v. *Krishna Murty Laxmipati Naidu*, AIR 1981 SC 617; *State of U.P.* v. *C. Shanker*, AIR 1981 SC 897; *Suresh Pal* v. *State of U.P.*, AIR 1981 SC 1161; *Betipadia* v. *State of Orissa*, AIR 1981 SC 1163; *Jagadish* v. *State of M.P.*, AIR 1981 SC 1167; *State of Rajasthan* v. *Srimathi Kalki*, AIR 1981 SC 1390; *State of Punjab* v. *Wassan Singh*, AIR 1981 SC 697; *Parlhad* v. *State of Maharashtra*, 1981 SC 1241; *Shakti Patra* v. *State of W.B.*, AIR 1981 SC 1217; *Mohanlal Gangaram Gehani* v. *State of Maharashtra*, AIR 1982 SC 839; *Gurnam Kaur* v. *Bakshish Singh*, AIR 1981 SC 631; *Maharaj Singh* v. *State of Rajasthan*, AIR 1981 SC 936; *Angad* v. *State of Maharashtra*, AIR 1981 SC 1227; *Pralhad* v. *State of Maharashtra*, AIR 1981 SC 1241; *Manorama Srivastava* v. *Saroja Srivastava*, AIR 1989 All 17; *Kiran Mandal* v. *Mohini Mandal (Smt)*, AIR 1989 P&H 310 (DB); *State of Gujarat* v. *Naginbai Dulabhai Patel*, AIR 1983 SC 839; *Kundan Bala Vora* v. *State of U.P.*, AIR 1983 All 409; *Alok Kumar Aich* v. *Ashoka Kumar Aich*, AIR 1982 Cal 599; *Baikunthanath Mohanty* v. *State of Orissa*, 1985 Cr LJ 563 (Ori); *Ibrahim Kuthy* v. *State of Kerala*, 1984 Cr LJ 221; *State (Delhi Administration)* v. *Laxman Kumar*, AIR 1986 SC 250, at p. 264 : 1986 Cr LJ 155, at p. 169, (para 43); *Appabhai* v. *State of Gujarat*, AIR 1988 SC 696, at p. 700 : 1988 Cr LJ 848, at p. 852, (para 13); *Qaiyum Mian* v. *State of Bihar*, 1993 Cr LJ 1756, (para 16) (Pat); *Bidhan Nath* v. *State of Assam*, 2000 Cr LJ 1144, (para 23) (Gau).
6. *Narayan Chetanram Chaudhary* v. *State of Maharashtra*, 2000 Cr LJ 4640 (paras 40 and 41) (SC) : AIR 2000 SC 3352; *State (Delhi Administration)* v. *Laxman Kumar*, AIR 1986 SC 250, at p. 264 : 1986 Cr LJ 155, at p. 169 (para 43); *Appabhai* v. *State of Gujarat*, AIR 1988 SC 696, at p. 700 : 1988 Cr LJ 848, at p. 852 (para 13); *Qaiyum Mian* v. *State of Bihar*, 1993 Cr LJ 1756 (para 16) (Pat); *Bidhan Nath* v. *State of Assam*, 2000 Cr LJ 1144 (para 23) (Gau).
7. *Sampath Tatyada Shinde* v. *State of Maharashtra*, AIR 1974 SC 791. **See also** *Bhanwara Ram* v. *State of Rajasthan*, 2001 Cr LJ 3230 (paras 12 and 13) (Raj).
8. *Ram Narain Jaggar Singh* v. *State of Punjab*, 1975 Cr LJ 1500 : AIR 1975 SC 1727 (Ker).
9. *Dharmvir* v. *State of M.P.*, AIR 1974 SC 1156.
10. *Harchand Singh* v. *State of Haryana*, AIR 1974 SC 344.
11. *Prabodh Chandra* v. *Mohinder Singh*, AIR 1971 SC 257.
12. *Alapati Shivaramakrishnayya* v. *Alapati Kasivishwanadham*, AIR 1957 AP 584.
13. *Rangaswami Gounder* v. *State*, ILR 1958 Ker 420.

contradictory statements are made at various stages of the case, it would affect the reliability of the witness.[14] Where there are conflicting theories even as to the time and place of the occurrence, the conviction cannot stand.[15] Where the allegation was that the accused used a penknife and even the inquest report shows recovery of penknife steeped in blood but the chemical examinors certificate shows absence of blood on it, it was held that the discrepancy throws suspicion on the entire evidence connecting the acused with the crime.[16] Where in the seizure list there was mention of four receptacles and three accused concerned with them, but the prosecution witnesses stated that one particular accused alone produced all the four receptacles from inside the hay stack, it was held that their evidence was contradicted by the earlier documentary record to which both the witnesses are parties; and so should not be relied upon.[17]

Minor variance in evidence cannot dislodge the prosecution version which is proved beyond reasonable doubt.[18] Variance about the time of occurrence given in the F.I.R. and in the dying declaration, or disparity in the statements about the exact nature of the weapons used are not matters sufficient to discard the main version of the injured person with regard to the commission of the crime by the accused.[19]

The mere fact that the evidence of eye-witnesses is inconsistent with the medical evidence will not by itself render the former unreliable.[20] Where the evidence of eye-witnesses was beyond doubt as to the fact that the accused committed the murder by firing the gun shots, the inconsistency between the opinion of the expert and the prosecution evidence relating to the distance from which gun shots were fired carries no weight.[21]

Where there are contradictions or inconsistent statements of the witnesses, the court is not justified in discarding all the evidence without any attempt at evaluation of the inherent quality of the evidence.[22] The fact that there is a great discrepancy between the evidence of witnesses A and B as to the distance between A's house and the house of the accused, is no ground for holding, that A is not a truthful witness, especially when the distance has no relevance in the case.[23] It is not possible for every witness to remember all the details; some differences in the details are generally found even in the case of honest witnesses and unless the contradictions are material, the evidence need not necessarily be disbelieved.[24]

In a criminal trial, discrepancies do not necessarily demolish the testimony; delay does not necessarily spell unreliability and tortured technalities do not necessarily upset conviction when the Court has had a *perspicacious*, sensitive and correctly oriented view of the evidence and probabilities to reach the conclusion, proof of guilt can be sustained despite little infirmities, tossing peccadilloes and peripheral probative shortfalls.[25] Eye-witness deposing before police about presence of a certain person at the deceased's house but denying his presence before trial court; the testimony cannot be rejected merely on the ground of that discrepancy.[26] In a case of dacoity, contradictions among the prosecution witnesses as to the weapons possessed by the accused do not discredit the testimony of such witnesses.[27] In all rioting cases where people observe under stress and emotion, an occurrence for a short space from different angles and they have different temperaments, capacity to observe, intelligence, and memory powers, discrepancies are bound to occur. In such cases broad probabilities have got to be considered.[28]

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14. *Jiwaram* v. *State*, (1965) 1 Cr LJ 219 : AIR 1965 Raj 32; *State* v. *Sardara Singh*, 1970 Cr LJ 558 (Raj).
15. *Heersingh* v. *State of Rajasthan*, 52 Cr LJ 1024 : AIR 1951 Raj 135.
16. *Neelakantan Vasu* v. *State*, AIR 1954 Cr LJ 658 : 1954 Tra/Co 282.
17. *Ahmed Noor Khan* v. *State of Assam*, 1972 Cr LJ 779 (Assam) : AIR 1972 Gau 7.
18. *Sheo Darshan* v. *State of U.P.*, AIR 1971 SC 1794; *Bharosa* v. *State*, (1965) 2 Cr LJ 331 : AIR 1965 All 417; *Himachal Pradesh Administration* v. *Shiv Devi (Mr.)*, AIR 1959 HP 3.
19. *Raghunath Singh alias Manna* v. *State of U.P.*, (1969) 3 SCC 188.
20. *Bajwa* v. *State of U.P.*, AIR 1973 SC 1204.
21. *Karnail Singh* v. *State of Punjab*, AIR 1971 SC 2119.
22. *Bhagwanbhai* v. *State of Maharashtra*, (1963) 2 Cr LJ 694 : 1964 2 SCJ 263.
23. *State of U.P.* v. *Samman Dass*, AIR 1972 SC 677.
24. *Amar Singh* v. *State*, 52 Cr LJ 276 : AIR 1951 Raj 42.
25. *Narotham Singh* v. *State of Punjab*, AIR 1978 SC 1542.
26. *Shivaji Sahebrao Bobade* v. *State of Maharashtra*, AIR 1973 SC 2622; *Vamanappa Madar Shankarappa Ravanappa Kaddi* v. *State of Mysore*, AIR 1979 SC 1831.
27. *Bharat Singh* v. *State of U.P.*, 1972 Cr LJ 1704 : AIR 1972 SC 2478.
28. *Arumugam Solathirayar* v. *Ponnalagu Pandarar*, AIR 1958 Mad 127.

The slight discrepancy as to the time when a will was executed is not so serious as to destroy the evidence when it is given eight or nine years after the execution of the will.[29] Mere discrepancy about the date on which her (eye-witness) evidence was actually recorded would not be sufficient to hold that she was a planted witness as the testimony of the eye-witnesses corroborated each other's on material aspects.[30] In a case of awarding compensation, when the presence of witnesses at the scene of accident, is not doubted, minor contradictions would not make their evidence unreliable.[31]

Where there was variance in the evidence of witnesses in regard to the particulars of distribution of a pamphlet, it was held that the evidence need not be disbelieved.[32]

Where there was heavy traffic on the road according to one witness and there was no heavy traffic according to another, it was held that, as one spoke about the time of accident while the other spoke of the time immediately after the accident, when naturally a crowd had gathered, the evidence could not be ignored as contradictory.[33] Where a large number of accused persons are involved in the occurrence of a crime, the witness who is also injured in the incident, can naturally get confused and his testimony cannot be rejected on the ground of contradiction.[34]

Unless the discrepancies and contradictions are so material and substantial and that too in respect of vitally relevant aspects of the facts deposed, the witnesses cannot be straightaway condemned and their evidence discarded in its entirety.[35]

Where the contradictions and omissions in the statement of each witness are verbatim the same as that of the others, even narrations and the sequence of events are the same, it is not safe to rely on the evidence of such witnesses.[36] Where the eye-witness made contradictory statements, his testimony was not reliable.[37] Where the eye-witnesses gave contradictory statements, it created doubt about their presence at the scene of occurrence. Conviction was set aside.[38] In a case of brutal assault the victim failed to disclose the names of certain accused as he had not completely recovered when his statement was recorded. He was under apprehension of those accused as he stated in his examination and cross-examination. In the circumstances his substantive version of testimony implicating those accused as assailant could be accepted.[39]

Where the injured witness, giving consistent version of the occurrence, tried to implicate more persons as assailants in his later version, it was held that unless identity of other implicated persons as participants in crime is conclusively established, they would be entitled to benefit of doubt.[40] Where 10 to 12 armed persons assaulted the victim party and the witnesses gave a graphic account of who injured whom and on what part of body the weapons struck, the embellishments were to be ignored when they do not affect the substratum of the prosecution case.[41] Where the witness changed her statement easily at her convenience, her evidence inspired no confidence and no implicit reliance could be placed on such witness.[42] Where the statements of the witness were motivatedly improved and deviated from his earlier statements, his evidence could not be relied upon.[43] Where the eye-witnesses did not give the names of two of the accused in their initial version to the police and the doctor though all the accused were known

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29. *Shashi Kumar Banerjee* v. *Subodh Kumar Banerjee*, AIR 1964 SC 529.
30. *Vishnu* v. *State (N.C.T. of Delhi)*, 2001 Cr LJ 4006 (para 34) (Del).
31. *Ramesh* v. *State*, 1979 Cr LJ 727; *M.K. Narayanappa* v. *Geetha Stores*, 1980 (2) Kant LJ 347; *State of Karnataka* v. *Kamalaksha*, 1978 Cr LJ 290 (Kant-DB); *Basit Ali* v. *State of M.P.*, 1976 Cr LJ 776; *Shanti* v. *State*, 1977 Cr LJ 2053 (Ori-FB); *State of U.P.* v. *Sughar Singh*, 1978 Raj Cri 141.
32. *Shiv Kirpal Singh* v. *V.V. Giri*, AIR SC 2097.
33. *T.V. Gnanavelu* v. *D.P. Kahnayya*, AIR 1969 Mad 180.
34. *Banwari* v. *State of Rajasthan*, 1979 Cr LJ 161 (Raj).
35. *Joseph* v. *State of Kerala*, 2000 Cr LJ 2467 (para 13) (SC) : AIR 2000 SC 1608.
36. *Dharam Singh* v. *State of Punjab*, 1993 Cr LJ 150 (para 7) (SC) : AIR 1993 SC 319.
37. *Murugan* v. *State*, 1993 Cr LJ 1259, at P. 1269 (Mad).
38. *Nathia* v. *State of Rajasthan*, 1999 Cr LJ 1371, 1372 (Raj); Investigating Officer and his witnesses giving contradictory statements, unreliable. *State of H.P.* v. *Edward Samual Charcton*, 2001 Cr LJ 1356 (para 18) (HP).
39. *Prem* v. *State of Maharashtra*, 1993 Cr LJ 1608 (para 7) (Bom).
40. *State of Karnataka* v. *Bheemappa*, 1993 Cr LJ 2609 (para 17) (SC).
41. *State of Karnataka* v. *Bheemappa*, 1993 Cr LJ 2609 (para 17) (SC).
42. *Kishori Lal* v. *Mahadeo*, 1993 Cr LJ 1173 (para 25) (All). **See also** *Tej Singh* v. *State of Rajasthan*, 1995 Cr LJ 1944 (para 10) (Raj); *Maharaj Deen* v. *State*, 1996 Cr LJ 506 (para 20) (All).
43. *State of H.P.* v. *Jagroop Singh*, 1993 Cr LJ 2766 (para 9) (HP).

to them and subsequently they improved their version and gave no explanation of the injuries on the body of the deceased, conviction could not be based on their evidence.[44] Where an approver was deposing with respect to events which took place over a period of three years, it was natural to occur some inconsistencies of minor nature in her evidence. Giving more details while deposing before the Sessions Court' are not improvements of such a nature as would create any doubt regarding her trustworthiness.[45]

37. *FALSUS IN UNO, FALSUS IN OMNIBUS*

Witnesses cannot be branded liars *in toto* and their testimony rejected outright even if parts of their statements are demonstrably incorrect or doubtful. It is sound common sense to refuse to apply mechanically the maxim "*falsus in uno, falsus in omnibus*". The Court has to assess the worth of necessarily imperfect human testimony.[46]

This maxim means "false in one thing, false in everything". It is now well accepted that this maxim is not acceptable as a sound principle in our country.[47] It was observed: "The maxim '*falsus in uno, falsus in omnibus*' is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore the duty of the Court to scrutinise the evidence carefully and, in term of the felicitous metaphor, separate the grain from the chaff." But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest.

The maxim '*falsus in uno, falsus in omnibus*' has not received general acceptance in different jurisdictions in India; nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to is that in such cases the testimony *may* be disregarded and not that it *must be* disregarded. The doctrine merely involves the questions of weight of evidence which a court may apply in a given set of circumstances. But it is not what may be called 'a mandatory rule of evidence'.[48]

The principle of '*falsus in uno, falsus in omnibus*' does not apply to criminal trials and it is the duty of the court to separate the grain from the chaff instead of rejecting the prosecution case on general grounds.[49] The Court can sift the deposition of any witness and accept a part thereof while rejecting the other part.[50] When the believable part of the testimony is not separable from the rest of unbelievable part, the entire testimony is liable to be rejected.[51] In the undermentioned cases, the maxim was held not applicable.[52]

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44. *Pandit Ram Prakash Sharma* v. *Kharaiti Lal,* 1998 Cr LJ 1410 (SC) (para 4). Witness modulating his statement before Court to suit medical evidence, untrustworthy, *Chunni* v. *State,* 1996 Cr LJ 489 (para 13) (All).
45. *Ranadhir Basu* v. *State of W.B.,* 2000 Cr LJ 1417 (para 8) (SC) : AIR 2000 SC 908.
46. *Laxman* v. *Maharashtra,* AIR 1974 SC 308. **see** *also Kaur Sain* v. *Punjab,* AIR 1974 SC 329 where the Court said that there is no presumption that all defence witnesses are liars.
47. *Ugar Ahir* v. *State of Bihar,* AIR 1965 SC 277. **See also** *Prithvi Nath Pandey* v. *State of U.P.,* 1994 Cr LJ 3623 (para 30) (All); *Anant B Kamble* v. *State of Maharashtra,* 1995 Cr LJ 2583 (para 12) (Bom); *K. Mallikarjuna* v. *State of A.P.,* 1995 Cr LJ 3100 (para 49) (AP); *Poolin Haldar* v. *State,* 1996 Cr LJ 513 (para 17) (Cal).
48. *Nasir Ali* v. *State of U.P.,* AIR 1957 SC 366.
49. *Bhe Ram* v. *State of Haryana,* AIR 1980 SC 957; *Razik Ram* v. *Choudhan,* AIR 1975 SC 667; *Gulshan Kumar* v. *State,* 1993 Cr LJ 1525 (para 23) (Del).
50. *S.G.P. Committee* v. *M.P. Dass Chela,* AIR 1998 SC 1978 (para 20).
51. *Jyotilal Chakraborty* v. *Dipak Dutta,* 1995 Cr LJ 930 (para 16) (Cal).
52. *Milkiyat Singh* v. *State,* AIR 1981 SC 1579; *State* v. *Shankar,* AIR 1981 SC 897; *Brahandeo Yadav* v. *State,* ILR (1979) 58 Pat 637; *Gurubasavaiah* v. *State of Karnataka,* 1979 Cr LJ 603; *State* v. *Lalla,* AIR 1978 SC 368; *Keshoram* v. *State,* AIR 1978 SC 1096; *Menat Ramji* v. *State of Gujarat,* 1977 Cr LJ 59; *Hajilal* v. *State,* 1977 Cr LJ 538 (J&K); *Mazidar Rahman* v. *State of Assam,* 1977 Cr LJ 1293; *Ghisa* v. *State of Rajasthan,* 1976 Cr LJ 39; *Razik* v. *Chowhan,* AIR 1975 SC 667; *Soma* v. *State,* AIR 1975 SC 1453; *Laxman* v. *State,* AIR 1974 SC 308; *Bhaguan Tana* v. *State,* AIR 1974 SC 21; *Bava* v. *State,* AIR 1974 SC 902; *Jagdip* v. *State,* AIR 1974 SC 1978; *State of Punjab* v. *Hari Singh,* AIR 1974 SC 1168; *Ranabir* v. *State,* 1973 SC 1409; *Sohrab* v. *State,* AIR 1972 SC 2020; *Rai Singh* v. *State,* AIR 1971 SC 2505; *Gallu* v. *State,* AIR 1958 SC 813; *Brij Bhukhan* v. *State,* AIR 1957 SC 476; *Sukha* v. *State,* AIR 1956 SC 513; *Abdul Gani* v. *State,* AIR 1954 SC 31.

The Supreme Court[53] held : "The mere fact that the evidence of the prosecution witnesses is not firm and safe enough to be relied upon with regard to the part assigned to the acquitted accused in the occurrence, is no ground to reject it mechanically against the other accused also. The maxim '*falsus in uno falsus in omnibus*' is not to be blindly invoked in appraising evidence adduced in our courts, where witnesses seldom tell the whole truth but often resort to exaggerations, embellishments and 'padding up' to support a story however true in the main. It is the function of the court to disengage the truth from falsehood and to accept what it finds to be true, and reject the rest. It is only where truth and falsehood are inextricably mixed up, polluting beyond refinement, the entire fabric of the narration given by a witness that the Court might be justified in rejecting his evidence in toto."

An absurd embellishment in evidence does not call for discarding that part of it which may be true.[54] The mere omission of an eye-witness to mention all the details of the occurrence in his statement before the police cannot be a good ground for brushing aside his sworn testimony in Court. If the evidence of the witness is inconsistent with respect to the weapon in the hand of a particular accused person, then his evidence may be disregarded only with respect to the weapon with which that accused was armed with, but that cannot justify the rejection of his evidence even with regard to the identification of a particular accused person as a member of the mob.[55] Where some of the accused are acquitted on the evidence of the prosecution witnesses, it is no ground for rejecting the trustworthy part of the evidence of those witnesses in respect of the other accused.[56] Where some of the accused were falsely implicated in the crime, that itself cannot be a ground of applying this principle in respect of other accused.[57] Where a witness does not depose to some facts to be truthful, it is not a ground for rejecting his whole testimony.[58] Where a witness had falsely deposed about the assault launched by three accused who were acquitted, there can be no guarantee of truth in her claim that she saw the other accused assaulting the deceased.[59] Where the witness was trying to suppress the facts with a view to suggest falsehood, her evidence was rightly not accepted.[60]

This principle does not come to the rescue of a witness if the major part of his testimony is found to be false and only a small part may be true. It may come to his rescue in the converse situation.[61]

38. ENMITY OF THE WITNESSES WITH THE ACCUSED

Enmity of the eye-witnesses with the accused cannot be a ground to reject their testimony outright. Such testimony has to be scrutised with greater care and caution.[62] Enmity between the witness and the accused has to be so grave that false implication may be the result. But mere, hostility cannot be sufficient to show that a person would make a false allegation against his own brother. It is a double edged sword. In a given case, it may be the basis of false implication; whereas in another it may be foundation of crime.[63] The mere existence of enmity, particularly when it is alleged as a motive for the commission of the crime, cannot be made a basis to discard or reject the testimony of the eye-witnesses.

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53. *Bhagwan Thana Patil* v. *State of Maharashtra*, AIR 1974 SC 21; *Nadodi Jayaraman* v. *State of T.N.*, 1993 Cr LJ 426 (SC) : AIR 1993 SC 777. **See** *also Gulab Singh* v. *State of Rajasthan*, 1975 Cr LJ 695 and *Bikkar Singh* v. *State*, (1971) 2 Punj 369.
54. *Bhupathi Gosh* v. *King*, AIR 1950 Cal 327.
55. *Noyeem Miom* v. *State*, ILR (1963) 42 Pat 293.
56. *M Apparao* v. *State of Orissa*, 1983 Cr LJ 953 (Ori); *Ram Narain* v. *State of Haryana*, 1993 Cr LJ 1343.
57. *State of Karnataka* v. *Bhemappa*, 1993 Cr LJ 2609 (para 19) (SC).
58. *Razik Ram* v. *J.S. Chouhan*, AIR 1975 SC 668.
59. *S.P. Tigare* v. *State of Maharashtra*, 1997 Cr LJ 157 (Bom), **relying on** *Balak Singh* v. *State of Punjab*, AIR 1975 SC 1962 : 1975 Cr LJ 1734. **Also see** *S.G. Sohatre* v. *State of Maharashtra*, 1997 Cr LJ 454 (Bom).
60. *Gurubasawwa* v. *Irawwa*, AIR 1997 Kant 87.
61. *State of Maharashtra* v. *Bhanudas Sommanna Sangolkar*, 1997 Cr LJ 3205 (Bom).
62. *Raj Mandal Thakur* v. *State of Bihar*, 1993 Cr LJ 1090 (Pat). **Also see** *Malkhan Singh* v. *State of U.P.*, 1993 Cr LJ 1145 (All); *Dharam Singh* v. *State of Punjab*, 1993 Cr LJ 150 (para 7) (SC) : AIR 1993 SC 319; *Karuppiah* v. *State*, 1993 Cr LJ 1688 (para 25) (Mad); *Gour Gadtia* v. *State of Orissa*, 1994 Cr LJ NOC 178 (Ori); *Kulamani Sahu* v. *State of Orissa*, 1994 Cr LJ 2245 (para 7) (Orissa); *Arjun* v. *State of Rajasthan*, 1995 Cr LJ 410 (para 12) : AIR 1994 SC 2506. Eye-witness deposing falsely on account of enmity with accused, medical evidence conflicting with ocular testimony, acquittal, *Nalli* v. *State*, 1993 Cr LJ 1409 (Mad) Witnesses making themselves handy to police in becoming eye-witnesses in order to wreck vengeance against accused, conviction set aside, *Rajinder Singh* v. *State of Punjab*, 1993 Cr LJ 3336 (para 21) (P&H).
63. *Ramsai Bhumji* v. *State of Orissa*, 1994 Cr LJ NOC 348 (Ori).

the deposition of whom is otherwise consistent and convincing.[64] Where one of the accused did not join the other accused in attacking the deceased, there was possibility of his being falsely implicated due to past enmity.[65] Where independent witnesses deposed the fact of enmity between the accused and the victims and there was no animosity between those witnesses and the accused persons, their evidence was held to be trustworthy.[66]

39. CORROBORATION

"The word 'corroboration' connotes support or confirmation, and indicates, in relation to the law of evidence, that certain evidence (the evidence to be corroborated) is confirmed in its tenor and effect by other admissible and independent evidence (the corroborating evidence)."[67]

Lord READING said that corroborative evidence is evidence ". . . . . which confirms in some material particulars not only the evidence that the crime has been committed but also that the prisoner committed it."[68]

Corroboration is a rule of prudence and evidentiary value of a deposition which is otherwise admissible is not just wiped out in the absence of corroboration.[69] The rule of corroboration is only a rule of prudence. Where the sole evidence of the complainant is found to be thoroughly reliable and acceptable, there is no rule of law precluding the Court from convicting the accused solely on the basis of such evidence.[70] It is highly unsafe to convict the accused solely on the basis of uncorroborated evidence as to the recovery of the stolen property at the instance of the accused.[71]

"Independent witness" is not a technical rule of evidence which compels the Court to accept any testimony, however false, improbable, or absurd. It is only a fact raising a presumption of truthfulness which is rebuttable. What is vital is not the witness himself but his testimony.[72] Where there was evidence about physical and mental torture of the deceased, newly wedded wife from her mother, elder brother and other close relations, such depositions need not be discarded simply on the score of absence of corroboration by independent witness.[73]

The corroboration must be by independent testimony confirming in some material particulars not only that the crime was committed but also that the accused committed it. It is not necessary to have corroboration of all the circumstances. It would be sufficient if there were corroborations as to the material circumstances of the crime.[74] Where the witness is neither wholly reliable nor wholly unreliable, the Court seeks corroboration from some independent evidence or from circumstances. There can be no corroboration of a false or doubtful witness by another witness of the same character.[75]

In regard to the evidence of accomplice and evidence of partisan witnesses the former needs corroboration for conviction while no corroboration is necessary in the latter case.[76]

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64. *Anil Rai* v. *State of Bihar*, 2001 Cr LJ 3969 (para 29) (SC).
65. *Mander Singh* v. *State of Punjab*, 1995 Cr LJ 2119 (para 5) (SC).
66. *Mirza* v. *State of U.P.*, 1996 Cr LJ 472 (para 26) (All).
67. PETER MURPHY : A PRACTICAL APPROACH TO EVIDENCE, 1985, 2nd Edn., p. 406.
68. *R.* v. *Baskerville*, [1916-17] All ER Rep 38.
69. *Pattu Lal* v. *State of Punjab*, 1996 Cr LJ 2446 (para 6) (SC) : AIR 1996 SC 3197.
70. *Ouseph Varkey* v. *State*, 1954 Tra/ Co 492; *Shakila Banu* v. *Gulam Mustafa*, AIR 1971 Bom 166; *Antoniswamy* v. *Anna Manickam*, AIR 1970 Mad 91.
71. *Meghaji Godadji Thakore* v. *State of Gujarat*, 1993 Cr LJ 730 (para 23), **relying on** *State of Punjab* v. *Gurnam Singh*, AIR 1984 SC 1799.
72. *Nana Gangaram* v. *State*, 1970 Cr LJ 621 (Bom); *Shree Padachar* v. *Vasantha Bai*, AIR 1970 Mys 235; *Jagdeo Singh* v. *State*, 1979 Cr LJ 236 (All); *Narengbam Brajabidhu Singh* v. *Union Territory of Manipur*, 1966 Cr LJ 772 : AIR 1966 Manipur 8.
73. *State of W.B.* v. *Orilal Jaiswal*, 1994 Cr LJ 2104 (para 13) : AIR 1994 SC 1418.
74. *Major E.G. Barsay* v. *State of Bombay*, AIR 1961 SC 1762; *Lachman Singh* v. *State*, AIR 1952 SC 167; *R. Pande* v. *State of M.P.*, 1973 Cr LJ 1880; *Sarala Devi* v. *Birendrasingh*, AIR 1961 MP 127; *Karnail Singh* v. *State of Punjab*, 1954 SC 204.
75. *Vadivelu Thevar* v. *State*, 1957 SC 614 : 1957 Cr LJ 1000. **Also see** *Ayodhya* v. *State of U.P.*, 1997 Cr LJ 2654 (All); *Thommi Anthoni* v. *Sirkar*, 1950 Tra/Co 41; *Mangat* v. *State*, 1967 Cr LJ 598; *Jabbar* v. *State*, 1966 Cr LJ 1363; *State of Karnataka* v. *K.S. Ramdas*, 1976 Cr LJ 228; *Kandhai* v. *State of U.P.*, 1953 Cr LJ 1193.
76. *Bhanuprasad Hariprasad* v. *State of Gujarat*, AIR 1968 SC 1323. **Also see** *A. Deivendran* v. *State of Tamil Nadu*, 1998 Cr LJ 814 (SC) : AIR 1998 SC 2821.

The corroboration that is required in the case of the testimony of a witness who is the relation of the deceased in a murder case, is not what would be necessary to support the evidence of an approver, but what would be sufficient to lend assurance to the evidence before the Court and satisfy the Court that the particular persons were really concerned in the murder of the deceased.[77] There is no general rule of prudence requiring corroboration of the evidence of eye-witnesses. In a given case, a judge for reasons special to that case and to that witness, can of course say that he is not prepared to believe, unless he is corroborated.[78] Discrepancies in the evidence of eye-witnesses, unless they are very vital, cannot affect the credibility of their evidence and corroboration of evidence with mathematical niceties cannot be expected in criminal cases.[79]

The statement of an eye-witness can well be corroborated by the Medical evidence.[80]

In a case under the Arms Act, it was held that conviction even on uncorroborated police evidence is not *per se* illegal as no corroboration can reasonably be expected.[81] In a case of seizure under Excise Act independent corroboration of the deposition of the official witness is necessary when it suffers from infirmity.[82] Corroboration to the evidence regarding the demand and the acceptance of bribe (Anti-corruption Act) need not be direct. It can be by way of circumstantial evidence also.[83]

Under Section 288 of the (old) Cr.P.C. (now omitted in the 1973 Code) it is held that the corroboration of evidence admitted is not always necessary.[84]

The evidence of witnesses who came several hours after the occurrence of the crime has ordinarily got to be excluded being of no corroborative value.[85]

40. CORROBORATION IN CIVIL CASES

Mere publication of report of a meeting in local newspapers is not sufficient to corroborate testimony of witnesses who depose that the impugned statement was made by a particular speaker at the meeting.[86]

In a suit by a mother on behalf of a minor son claiming a share in property of a '*sudra*' joint family, on the basis that the minor son was the illegitimate son of the deceased member, she deposed that she was a concubine of the deceased in his continuous and exclusive keeping at the time of the birth of the child. It was held that testimony of the woman alone without corroboration is not sufficient for holding that she was such a concubine.[87] The omission of corroborative evidence of the mother of the adopted son and of the priest who officiated at the ceremonies is not fatal to the plaintiff's case of adoption when the evidence of other witnesses is unchallenged.[88]

Evidence of conversion of a member of a scheduled caste to Budhism in a case may be corroborated by evidence of his conduct subsequent to conversion.[89]

A *Kabuliat* can be used as corroborative evidence of oral lease for less than a year.[90]

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77. *Karnail Singh* v. *State of Punjab*, AIR 1954 SC 204.
78. *State* v. *Inder*, (1965) 2 Cr LJ 670; *State of Orissa* v. *Chhaganlal Sumparka*, ILR (1975) Cut 1384; *State of Orissa* v. *Chaganlal Sundarka*, 1977 Cr LJ 319.
79. *Leela Ram* v. *State of Haryana*, AIR 1999 SC 3717 (para 9), **relying on** *State of U.P.* v. *M.K. Anthony*, AIR 1985 SC 48 : 1985 Cr LJ 493.
80. *Banwari* v. *State of Rajasthan*, 1979 Cr LJ 161. Evidence of eye-witnesses corroborated, conviction, *Rameshwar* v. *State of M.P.*, 1993 Cr LJ 2004 (MP); *Panchiya* v. *State of Rajasthan*, 1993 Cr LJ 2036 (paras 6 and 7) (Raj).
81. 1971 All Cr R 334.
82. *Lambodhar Nath* v. *State of Orissa*, 1993 Cr LJ 2505 (Ori), **relying on** *Krushna Chandra Sahu* v. *State*, 1976 CLR (Criminal) 81 and *Bhajan Sahu* v. *State of Orissa*, (1989) 67 CLT 620 : 1989 Cr LJ (NOC) 156.
83. *Ramesh Kumar Gupta* v. *State of M.P.*, AIR 1995 SC 2121 (para 7).
84. *State of Orissa* v. *Banshi Nayak*, AIR 1954 Ori 163.
85. *Bhupathi Gosh* v. *King*, AIR 1950 Cal 327.
86. *Baburao Bagaji Karemore* v. *Govind*, AIR 1974 SC 405.
87. *Thakar Prasad* v. *Mt. Godhavari Devi*, AIR 1951 Pat 514.
88. *Madharao* v. *Netram*, AIR 1957 Mad. B. 179.
89. *Punjabrao* v. *Meshram*, AIR 1965 SC 1179.
90. *Ramnath* v. *Neta*, AIR 1962 All 604.

41. CREDIBILITY

The question of credibility of a witness has primarily to be decided by referring to his evidence and finding out as to how the witness has fared in cross-examination and what impression is created by his evidence taken in the context of the other facts of the case.[1] In considering the question as to whether evidence given by the witness should be accepted or not, the Court has to examine whether the witness is an interested witness and to enquire whether the story deposed to by him is probable and whether it has been shaken in cross-examination. It would be unsafe to discard the evidence of a witness which appears otherwise to be reasonable and probable, merely because some suggestions were made to him without those suggestions being proved to be true.[2] The respectability and veracity of any witness does not necessarily depend upon his status in life, *e.g.*, the witness being a school teacher, it cannot be presumed that whatever he deposes is gospel truth.[3]

Cross-examination is not the only method of discrediting a witness. Courts are not bound to accept the testimony merely because there was no cross-examination. The Court has to see the intrinsic merits of the evidence in the chief examination, depending on the probabilities of the case.[4] Where the sole interested eye-witness of the incident, the wife of the deceased, gave a different statement in her cross-examination but afterwards she reconciled her evidence stating that her statement in the examination-in-chief was correct, the veracity of her version was not affected as the statement during cross-examination was made in an unguarded moment.[5] Minor discrepencies shown in the cross-examination are of no consequence and show that the witness was not tutored. The evidence of such a witness is reliable.[6] Committing mistakes on certian irrelevent points is no ground for complete rejection of the evidence of a witness.[7]

Although defence witnesses are often untrustworthy, it is wrong to assume that the prosecution witnesses are always right and trustworthy.[8] Credibility and trustworthiness ought also be attributed to the defence witnesses at par with that of the prosecution their lapses are also to be treated equally.[9] Even though the Court is unable to rely fully on the evidence of prosecution witnesses with regard to some of the accused, it can still accept the evidence of those witnesses with regard to other accused.[10] Where a person appeared as prosecution witness four or five times in police cases pertaining to a particular police station, it was held that evidence of such witness does not carry any value.[11]

The evidence of eye-witness, if accepted, is sufficient to warrant conviction though in appropriate cases the Court may, as a measure of caution, seek corroboration by some confirmed circumstances from other sources.[12] Where the sole eye-witness is a near relation of the deceased and there was delay in filing F.I.R. it was held that it required some corroboration.[13] Where the first informant lodged the F.I.R. after 24 hours and not only that she made material omissions in it but also in her statement to the

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1. *Charan Singh* v. *State of Punjab*, AIR 1975 SC 246. **See also** *State of U.P.* v. *Noorie*, AIR 1996 SC 3073 (para 7).
2. *Ishwar Prasad Misra* v. *Mohammad Isa*, AIR 1963 SC 1728.
3. *Bhimabai Eknath Shejwal* v. *Suresh Dayanand Kasab*, AIR 1999 Bom 379 (paras 12 and 13).
4. *Juwarsingh* v. *State of M.P.*, AIR 1981 SC 373; *Sevi, Koodakkal Karian* v. *State of T.N.*, AIR 1981 SC 1230; *Heramba Brahma* v. *State of Assam*, AIR 1982 SC 1595; *Mohanlal Gangaram Gehani* v. *State of Maharashtra*, AIR 1982 SC 839; *Sanwat* v. *Deputy Director of Consolidation*, 1984 SC 1413; *Bali Ahir* v. *State of Bihar*, AIR 1983 SC 289; *State of U.P.* v. *Jageshwar*, AIR 1983 SC 349; *Ram Singh* v. *Cal Ram Singh*, AIR 1986 SC 3; *Badruddim Rukonddin Karpude* v. *State of Maharashtra*, AIR 1981 SC 1223; *Wakil Singh* v. *State of Bihar*, AIR 1981 SC 1392; *S.K.A.R.S.M. Ramanathan Chettiar* v. *National Textile Corp., New Delhi*, AIR 1985 Ker 262; *Jeeth Kaur* v. *P. Kondallamma*, AIR 1983 AP 219; *D.R. Punjab Montogomery Transport Co.* v. *Raghuvanshi Pvt. Ltd.*, AIR 1983 Cal 343.
5. *Gollari Sonia* v. *The State*, 1994 Cr LJ NOC 245 (Ori).
6. *Chhuttan* v. *State of U.P.*, 1996 Cr LJ 649 (para 26) (All).
7. *P. Subramanian* v. *Ramachandran*, AIR 1996 Ker 64 (para 10).
8. *Kaur Sain* v. *State of Punjab*, AIR 1974 SC 329.
9. *Munshi Prasad* v. *State of Bihar*, AIR 2001 SC 3031 (para 3) : 2001 Cr LJ 4708.
10. *Ahmed Suleman Bhorat* v. *State of Gujarat*, AIR 1971 SC 991.
11. *Hiralal* v. *State of Haryana*, AIR 1971 SC 356.
12. *Shrishail Nageshi Pare* v. *State of Maharashtra*, AIR 1985 SC 866 (DB); *State of U.P.* v. *Hari Ram*, AIR 1983 SC 1081; *Bharwada Bhoginbhai Hirjibhai* v. *State of Gujrat*, AIR 1983 SC 753; *Sampath Reddy* v. *Guda Meddisuchi Venkatamma*, AIR 1989 AP 337.
13. *Ramji Surjya* v. *State of Maharashtra*, AIR 1983 SC 810; *State of Punjab* v. *Gurnam Singh*, AIR 1984 SC 1799; *Satbir* v. *State of U.P.*, AIR 1982 SC 1216.

Investigating Officer, the witness was not reliable.[14] It was held that the evidence of hostile witnesses is not sufficient to corroborate evidence of partisan witnesses.[15] The fact that the F.I.R. was lodged within 35 minutes of the occurrence at the police station at a distance of 2 miles from the place of occurrence, and the fact that in the F.I.R. the names of the accused and the names of the eye-witnesses were mentioned, lends considerable corroboration to the testimony of the witness regarding the participation of the accused in the occurrence.[16] Where the circumstances justify it, a court may refuse to act upon the uncorroborated testimony of a trap witness. On the other hand, a Court may well be justified in acting upon the uncorroborated testimony of a trap witness, if the Court is satisfied that the witness is a truthful witness.[17]

A witness who goes to the extent of making intentionally false statement cannot be relied upon for purpose of convicting the accused.[18] Dismissal of a previous complaint of a witness against some other persons or false statement of a witness in an earlier case cannot be grounds of disbelieving the witness in a subsequent case. If truth is separable from falsehood, Courts can act on that part of the evidence which is truthful.[19] The fact of failure of a witness' married life with her husband and her subsequent living with another man cannot be a ground to discard her evidence.[20]

The hostility between the parties as a motive to murder, or the fact that the accused had absconded, may be erroneous tests to weigh the credibility of witness. If the version of the witness is corroborated by a medical witness, it can be no ground to discard the sole evidence just because he happens to be a brother of the deceased.[21]

Very serious injuries on the person of the witness could not be taken as self-inflicted. They rather establish his presence at the occurrence.[22] The ocular version of a witness who is injured in the incident is of great value.[23] An injured witness, would not easily substitute a wrong person for his actual assailant and his credibility cannot be doubted.[24]

Where the son of the victim promptly reported to the police about the occurrence and gave names of 15 out of 19 accused, it was held that his evidence cannot be rejected merely on the ground that his evidence did not fully accord with the sequence of events given by other witnesses.[25] Where a *chaukidar* of the locality had lodged a report of the incident with details, in the police station, before the murder was discovered and before even any one had suspected that the accused had a hand in the crime, it was held that the credibility of the evidence of the *chaukidar* cannot be challenged.[26] The mere fact that some complaints were made against a senior officer, cannot lead to the inference that he is not a very truthful witness, especially when no substance was found in the complaint by the higher authorities[27]; but where the court made adverse observations against a witness in earlier cases, his evidence has to be viewed cautiously.[28]

Where a person was summoned by police for committing breach of peace, it cannot be said that such person is not a reliable witness in a criminal case, as breach of peace is not such a thing as to tarnish the image and veracity of a witness in any manner.[29] The mere fact that a witness was told to be in the police station does not suggest that he was an accused person. Similarly, the testimony of the prosecution

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14. *Babaji Charan Barik* v. *State*, 1994 Cr LJ 1684 (para 7) (Ori).
15. *Harnam Singh* v. *State of H.P.*, AIR 1975 SC 236.
16. *Dargahi* v. *State of U.P.*, AIR 1973 SC 2695.
17. *Prakash Chand* v. *State*, AIR 1973 SC 400.
18. *State (Delhi Admn.)* v. *V.C. Shukla*, AIR 1980 SC 1382.
19. *Vishnu Narayan Moger* v. *State of Karnataka*, 1996 Cr LJ 1121 (para 18) (Kant).
20. *Vishnu Narayan Moger* v. *State of Karnataka*, 1996 Cr LJ 1121 (para 20) (Kant).
21. *Shamu Balu Chaugule* v. *State of Maharashtra*, 1976 SC 557.
22. *Nand Singh* v. *Punjab*, AIR 1980 SC 2128. **see also** *State of U.P.* v. *Dr. G.K. Ghose*, AIR 1984 SC 1453, evidence of complainant relied upon as against the trap witness who turned hostile. *Somabhai* v. *Gujarat*, AIR 1975 SC 1453, prosecution leaving out one witness and the witnesses produced partially lying does not destroy the prosecution case.
23. *Ramaswami* v. *State T.N.*, AIR 1976 SC 2027.
24. *Jamuna Chaudhary* v. *State of Bihar*, AIR 1974 SC 1822.
25. *State of U.P.* v. *Ranjha Ram*, AIR 1986 SC 1959.
26. *Mulkhraj Sikka* v. *Delhi Administration*, AIR 1974 SC 1723.
27. *Mohandas Lalwani* v. *State of M.P.*, AIR 1973 SC 2679.
28. *Darshank Kumar* v. *State of Punjab*, 1988 Cr LJ 1446 (P&H).
29. *Rajinder Kumar* v. *State*, 1983 Cr LJ 1338 (P&H).

witness stating that he, along with the driver was taken by the Investigating Officer to the police station along with the car, could not be disbelieved.[30]

Where the incident occurred in the moon-lit night, there was no material to support the impossibility or improbability of witnessing the incident and there was no animosity between the accused and the eye-witness, the version of the eye-witness could not be doubted.[31]

In a case of robbery, the witness identified the accused during T.I. Parade but failed to identify him at trial. He testified that the accused used torch but did not mention it in his statement to the police. Other evidences were not probable. The accused was entitled to benefit of doubt.[32]

42. DEMEANOUR

"In considering the credit of a witness and the weight to be given to his evidence the Court may consider not only what is said, but the way in which it is said. This includes the attitude of the witness to the Court, his general demeanour, his apparent frankness, evasiveness or other reaction to questioning (particularly hostile, in cross-examination) and his apparent power or lack of power of recollection."[33]

"The Courts have always accepted that the demeanour of witnesses (their frankness, anxiety, evasiveness or attitude to the Court) is an element of information that can be used to give greater or lesser weight to the credibility of the testimony."[34]

"If a witness gives his evidence in a forthright way, unperturbed by cross-examination, the Court will no doubt be more disposed to believe him than would be the case with a halting and prevaricating witness."[35]

Order 18, Rule 12 C.P.C., and Section 280, Cr.P.C. provide authority for the trial court Judge to record, if he thinks it material for the purpose of the case, remarks as to the demeanour of the witness during the course of his examination. The object is that the trial judge would have an opportunity to observe the conduct and behaviour of the witness while under examination, and if he makes a record of it, it would be useful for the trial court as well as the appellate court to assess the veracity and credibility of the witness. Unless the witness is a skilled actor, very often his demeanour gives the judge a clue to assess the weight of his testimony. That is why the appellate courts would be reluctant to interfere with such remarks as to demeanour, as the trial judge would have all the advantage of closely observing the witness in the witness box, which facility is not available to the appellate court.

The demeanour may be recorded contemporaneously when the witness is in the witness box[36] or in the judgment if written immediately after the evidence was taken and before the recollection of the judge has become dim.[37] If the judge records the demeanour in the judgment, he has to give reasons for doing so. Otherwise, such remarks would not only lose their weight but would give rise to a comment of bias.[38] Where a tribunal did not make any note about the demeanour of the witness in his deposition but made a note that the witness sometimes smiled and sometimes laughed while giving evidence, the Mysore High Court held that as there was no material to show as to why the witness behaved in such a manner, the tribunal erred in disbelieving the witness on account of the deameanour of his witness, in the judgement given after a long delay.[39]

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30. *Dhananjaya Reddy* v. *State of Karnataka*, 2001 Cr LJ 1712 (para 36) (SC) : AIR 2001 SC 1512.
31. ***Madakami Ganga* v. *State of Orissa***, 1994 Cr LJ NOC 165 (Ori).
32. *Kharaiti Lal* v. *Union Territory of Chandigarh*, 1994 Cr LJ NOC 181 (P&H). **Also see** *Kunjavyappakutty* v. *State of Kerala*, 1994 Cr LJ NOC 199 (Ker) : (1993) 2 Ker LT 64; *Har Dayal* v. *State of U.P.*, 1994 Cr LJ 216 (All).
33. PETER MURPHY : A PRACTICAL APPROACH TO EVIDENCE, 1985 2nd Edn., p. 445.
34. STEVE UGLOW'S EVIDENCE : TEXT AND MATERIALS, 1997, p. 171.
35. CROSS & TRAPPER ON EVIDENCE, 1995, 8th Edn., p. 50.
36. In re : *Venkataramana*, AIR 1957 AP 441.
37. *Seebhalaxshmi* v. *Venkata*, AIR 1930 PC 170.
38. *Ganeshbai* v. *State*, AIR 1972 SC 1618; **see** *also Amar* v. *State*, AIR 1954 Punj 282; *Harbans* v. *Daroga*, AIR 1957 Pat 661.
39. *Sangappa Siddappalyaswamy* v. *Shivamurthy Swamy*, AIR 1961 Mys 106.

43. POSSIBILITY OF APPROACHING AND INTIMIDATING THE COMPLAINANT AND THE WITNESSES

There is always the possibility of approaching and intimidating the complainant and the witnesses by the relatives of the accused though the accused remains in custody. Therefore, the police and administration should provide some protection to them.[40]

44. MISLEADING BY ACCUSED

An offender who attempts to mislead others need not necessarily be armed with a ready foolproof explanation to any cross-question from his listeners. Quite often such offenders might try to advance explanations which strike them momentarily when they are compelled to explain incongruous aspects. If the explanation offered by the offender appeared incredible to the listeners that is hardly a ground to conclude that the offender would not have given such explanation.[41]

45. JUDICIAL SCRUTINY OF DEPOSITIONS OF WITNESSES

Depositions of witnesses, whether they are examined on the prosecution side or defence side or as Court witnesses, are oral evidence in the case and hence the scrutiny thereof shall be without any predilection or bias. No witness is entitled to get better treatment merely because he was examined as a prosecution witness or even as a Court witness. It is judicial scrutiny which is warranted in respect of the depositions of all witnesses for which different yardsticks cannot be prescribed as for those different categories of witnesses.[42]

It may not be proper for any judge either to accept or disbelieve the evidence of a witness from the manner alone in which the witness is giving evidence before him. The demeanour of the witness can only be an additional factor which can be taken note of by the judge apart from the evidence placed before him. The judge must give reasons for accepting the evidence of one party and rejecting that of the other.[43]

46. WITNESS NOT MENTIONED IN F.I.R., INQUEST OR REQUISITION MEMO ETC.

Where the name of a witness is not given in the F.I.R. but he is examined at the trial, though the non-mention of the name may have some relevance, it would not be sufficient for rejection of that evidence.[44] Merely because the informant did not men-tion in the F.I.R. the names of some of the witnesses not known to him, there is no justification for rejecting that evidence.[45] The Andhra Pradesh High Court, following the decision in AIR 1953 SC 364, held that the circumstance that a witness' name was not mentioned in the F.I.R. is not a ground for disregarding his evidence as he was examined on the next day after the occurrence.[46] In a case of murder the son-in-law though not an eye-witness lodged the complaint without mentioning the name of the daughter of the deceased who was an eye-witness. It was held that her evidence cannot be doubted as she was examined by the investigating officer immediately after the occurrence.[47] Where the F.I.R. disclosed the names of the eye-witnesses and the police examined them two days after the occurrence, it was held that the evidence of the witnesses could not be rejected merely because of the delay in recording their statements.[48] An F.I.R. is not an encyclopaedia of the entire case and is not even substantive evidence. Where a murder is committed at night the wife and

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40. *Babbu* v. *State of M.P.*, 2000 Cr LJ 1123 (para 9) (MP).
41. *State of U.P.* v. *Babu Ram*, 2000 Cr LJ 2457 (para 16) (SC) : AIR 2000 SC 1735.
42. *State of U.P.* v. *Babu Ram*, 2000 Cr LJ 2457 (para 23) (SC) : AIR 2000 SC 1735.
43. *Navaneetham* v. *S.S. Jayarama Pillai*, 1996 AIHC 1849 (paras 5 and 6) (Mad).
44. *Narpal Singh* v. *State of Haryana*, AIR 1977 SC 1066; *Malik Ram Bhoi* v. *State of Orissa*, 1993 Cr LJ 984 (para 9) (Ori); *Babu Singh* v. *State of Punjab*, 1996 Cr LJ 2503 (para 7) (SC) : AIR 1996 SC 3250.
45. *State of U.P.* v. *Nagu*, AIR 1979 SC 1568. **Also see** *Sahab Singh* v. *State of Rajasthan*, AIR 1997 SC 945 : 1997 Cr LJ 1188.
46. *Re, Vayyuri Ratna Reddy*, AIR 1963 AP 252.
47. *Taga* v. *State of Rajasthan*, 1977 Cr LJ (NOC) 240 (Raj).
48. *Balkari* v. *State of Rajasthan*, 1976 Cr LJ 828 (Raj).

nephew are natural witnesses and their omission in the F.I.R. is not fatal.[49] Where the first informant was not an eye-witness himself and there was no evi-dence to show who disclosed the names of the assailants to the first informant, still the evidence of those who disclosed the names cannot be disbelieved on the ground that their names were not mentioned in the F.I.R.[50]

It is not necessary to give the names of eye-witnesses in the F.I.R. According to old Section 154 Cr.P.C. under which F.I.R. is made, what is required, is that information relating to the commission of a cognisable offence should be given. The words 'relating to the commission of a cognisable offence' do not and cannot mean that the information must give details of all the elements of the offence or give the names of the witnesses. Therefore, the fact that the name of the witness is not mentioned in the F.I.R. does not affect the evidence.[51] The Allahabad High Court held, in a motor accident case, that the evidence of a witness whose name was not found in the F.I.R. cannot be rejected.[52] When the informant of the occurrence mentioned that there were other persons besides those mentioned by him at the scene of occurrence, the testimony of the witness is not unworthy of credit because his name is not mentioned in the F.I.R.[53]

When there is an omission of names in the F.I.R., whether the Court can take or reject the evidence of a witness not named in the F.I.R. must depend upon not only on all the circumstances of the case, but also on the probabilities of the matter.[54]

Where the name of the witness was not given in the F.I.R. or in the inquest report, and he is the only witness examined as to the occurrence, it was held that such evidence could not be considered trustworthy.[55] The Rajasthan High Court, following an observation of the Supreme Court in 1971 Cr.L.J. (Notes) 39, held that the omission of the name of the witnesses in the F.I.R. is of a very serious nature which cannot be ignored by the Court, while assessing the worth of the evidence produced at the trial. The Himachal Pradesh High Court held that the credibility of such a witness is doubtful.[56] Where no explanation was given of recording the statement of the eye-witness after a long delay, his name was not disclosed in the F.I.R. though he was known to the complainant and he had no opportunity to identify the accused, his evidence could not be relied upon.[57]

The testimony of eye-witnesses could not be discarded merely because their names were not mentioned in the inquest memo or the places where they were standing were not indicated in the site plan. Moreover, their names were mentioned in the promptly lodged F.I.R.[58] The accused cannot be convicted on the lone testimony of the eye-witness, particularly when his name was not mentioned in the F.I.R. or the inquest memo.[59]

47. APPLICABILITY—DISCIPLINARY PROCEEDINGS

Rules of evidence are not applicable to inquiries under Art. 311 of the Constitution.[60]

In a case of removal of a bus conductor for not collecting fare from certain passengers, the Supreme Court held that strict rules of the Evidence Act were not applicable to a domestic inquiry. Unrecorded statements of passengers reproduced by the Inspector of the flying squad were held to be sufficient.[61]

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49. *Surjit Singh* v. *State of Punjab*, AIR 1992 SC 1389.
50. *Prahlad* v. *State of Maharashtra*, AIR 1981 SC 1241.
51. *Khalaksingh* v. *State*, AIR 1957 MP 153.
52. *Motilal* v. *Gurubachan Singh*, 1979 All LJ 222. **Also see** *State of Bihar* v. *Ram Padarath Singh*, AIR 1998 SC 2606 (para 11) : 1998 Cr LJ 4007.
53. *State* v. *Rambali*, 1953 All 163.
54. *Tahsildar Singh* v. *State*, 1958 All 214.
55. *State* v. *Jase Gasper Noronha*, AIR 1971 Goa 3.
56. *Ramanand* v. *Krishan Chand*, AIR 1954 HP 61.
57. *Ramesh Jogi* v. *State of U.P.*, 1998 Cr LJ 3861, at page 3869 (All).
58. *Purkha Ram* v. *State of Rajasthan*, 1998 Cr LJ 918 (Raj), at p. 921. **Also see** *Shashidharsingh* v. *State of M.P.*, 1998 Cr LJ 2676 (paras 20 and 21) (MP).
59. *Nallamsetty Yanadaiah* v. *State of A.P.*, 1993 Cr LJ 408 (para 7) (SC). F.I.R. on written complaint, some of eye-witnesses not mentioned in complaint, their presence rightly disbelieved, *Bhimappa Jinnappa Naganur* v. *State of Karnataka*, 1993 Cr LJ 1801 (para 6) (SC) : AIR 1993 SC 1466.
60. *K.L. Shinde* v. *Mysore*, AIR 1976 SC 1080.
61. *State of Haryana* v. *Rattan Singh*, AIR 1977 SC 1512.

48. APPELLATE COURT—APPRECIATION OF EVIDENCE

The uniform practice in the matter of appreciation of evidence has been that if the trial court has given cogent and detailed reasons for not accepting the testimony of a witness, the appellate court, in all fairness to it, ought to deal with those reasons before proceeding to form a contrary opinion about accepting the testimony which has been rejected by the trial court.[62]

When the appellate court is appreciating the evidence, it has to reject the entire evidence if such evidence of the prosecution witnesses is not separable in truth and falsehood.[63]

Where, the sessions judge acquitted the appellant as some of the eye-witnesses had not stated in their statements to police that it was the appellant who exhorted the accused to assault the deceased, and the High Court reversed the acquittal, the Supreme Court observed that, even if the High Court did not agree with the view taken by the sessions judge, that was no ground to reverse the order of acquittal particularly in view of the improbabilities of the case against the appellant.[64]

Where the Sessions Court and the High Court accepted the dying declaration of the deceased that it was the accused who committed the offence; and spoke about his motive, the Supreme Court held that, as there was a concurrent finding of both the courts regarding the motive of the accused, it had no reason to take a different view.[65]

Dealing with the rules framed by the High Court of Allahabad laying down the rules to be followed by the subordinate courts, the Full Bench of the Allahabad High Court observed: "After a witness has been found to be competent to give evidence and has made a statement which is admissible in evidence, the question whether it should be believed or not is essentially a question of fact. Neither the Evidence Act nor any other Act lays down any law governing the question which statement of a witness should be believed or should not be believed. Whether a statement of a witness should be believed or not depends upon so many circumstances and it is impossible to lay down any hard and fast rules. When the legislature itself has left these matters at the discretion of the court without attempting to fetter it by laying down any hard and fast rules, it is not open even to the highest court to fetter the discretion of not only lower courts, but also of itself, by laying down hard and fast rules, because it would be tantamount to legislating. Such an attempt is to be deprecated."[66]

Appellate Court cannot ordinarily interfere with the finding of the lower court based on the testimony of a witness.[67]

49. PROVED

The word 'proof' seems properly to mean anything which serves, either immediately or mediately, to convince the mind of the truth or falsehood of a fact or proposition; and the proofs of matters of fact in general are our senses, the testimony of witnesses, documents, and the like. "Proof does not mean proof to rigid mathematical demonstration, because that is impossible; it must mean such evidence as would induce a reasonable man to come to the conclusion."[68] Proof beyond reasonable doubt does not mean perfect proof, as it may sound artificial[69]. The degree of certainty which must be arrived at before a fact is said to be proved is that is described in this section.[70] In human affairs every thing cannot be proved with mathematical certainty and the law does not require it[71]. The definition of "proof" centres round probability. Thus an accused in establishing his plea of private defence may discharge his burden by

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62. *Gopalan* v. *Commissioner of Hindu Religious and Charitable Endowments, Madras*, AIR 1972 SC 1716.
63. *Kanbi Nanji Virji* v. *State of Gujarat*, 1970 Cr LJ 363 : AIR 1970 SC 219.
64. *Joshu Khan* v. *State of Assam*, AIR 1979 SC 1549.
65. *Keshav Dev* v. *State of U.P.*, AIR 1973 SC 482.
66. *Jwala* v. *State*, AIR 1963 All 161 (FB).
67. *Anasuyamma* v. *District Judge, West Godavari District*, AIR 1991 AP 47.
68. *Hawkins* v. *Powells Tillery Steam Coal Company Limited*, (1911) 1 KB 988, 995, *Emperor* v. *Shafi Ahmed*, (1925) 31 Bom LR 515.
69. *Inder Singh* v. *State (Delhi Admn.)*, AIR 1978 SC 1091.
70. *Abdul Karim* v. *Crown*, (1979) PR No. 32 of 1878 (Cr)
71. *Emperor* v. *Shafi Ahmed*, (1925) 31 Bom LR 515, 516.

evidence satisfying the jury of the probability of his defence.[72] "It is necessary to occasionally remind ourselves of this interpretation clause in the Evidence Act lest we act on artificial standard of proof not warranted by the provisions of the Act."[73]

"To prove something is to demonstrate that a fact or a state of affair exists."[74]

"Proof" is an ambiguous word. We sometimes use it to mean evidence, such as testimony or documents. Sometimes, when we say a thing is "proved" we mean that we are convinced by the data submitted that the alleged fact is true. Thus, "proof" is the end result of conviction or persuasion produced by the evidence.[75]

"Evidence is not proof. The trier of fact, having heard the evidence, decided on relevant facts, must come to a conclusion as to whether the facts in issue exist or not."[76]

"The rules of *procedure* regulate the general conduct of litigation; the object of *pleading* is to ascertain for the guidance of the parties and the Court the material facts in issue in each particular case; *proof* is the establishment of such facts by proper legal means to the satisfaction of the Court, and in this sense includes disproof. The first-mentioned term is, however, often used to include the other two."[77]

Every fact including the orders and judgments/decrees of the Courts must be proved by producing the 'best evidence' which may be available. The 'best evidence rule' is one of the most important rules whenever the question of proving a fact arises.[78]

JUSTICE MUKHERJI in *Shard Birdhi Chand* v. *State*[79] pointed out reiterating the cardinal principle of law, that where the facts placed before the court point out two views, one to the guilt of the accused and another to his innocence, the court should give the benefit of the view which is favourable to the accused.

Where the handwriting of the deceased in her letter was proved by the testimony of her brother and the accused made no effort to get the same compared with the admitted one, the handwriting was held to be proved. The mere fact the prosecution did not produce other letters written by her would not amount to suppression of evidence and over-writing on the top of the said letter regarding its date was held to be of no use to the accused.[80] In a case under the Prevention of Food Adulteration Act it was held that mere production of the copy of the covering letter will not be sufficient to prove that the Public Analyst's report has been delivered to the accused.[81]

Proof by circumstantial evidence.—See Notes under circumstantial evidence under the head "Evidence" (*Supra*).

50. SUSPICION OR CONJECTURE CANNOT TAKE THE PLACE OF PROOF

It is a fundamental maxim of criminal jurisprudence administered in this country that suspicion and conjecture are no substitute for proof.[82] Suspicion by itself however strong it may be, is not sufficient to

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72. *Government of Bombay* v. *Samuel*, (1946) 48 Bom LR 746 (SB); *Yogendra Morarji* v. *Gujarat*, AIR 1980 SC 661.
73. *Murarilal* v. *State of M.P.*, AIR 1980 SC 531 at 535. Further vividly explained by the Supreme Court in *Yogendra Morarji* v. *State of Gujarat*, AIR 1980 SC 661.
74. STEVE UGLOW'S EVIDENCE : TEXT AND MATERIALS, 1997, p. 60.
75. MC CORMICK ON EVIDENCE, 1984, 3rd Edn., p. 947.
76. STEVE UGLOW'S EVIDENCE : TEXT AND MATERIALS, 1997, p. 24.
77. PHIPSON ON EVIDENCE, 15th Edn. (2000), p. 1 (para 1-01).
78. *Bhano* v. *Babu Singh*, 1998 Cr LJ 4768 (para 6) (Raj).
79. AIR 1984 SC 1622.
80. *State of U.P.* v. *Hari Mohan*, 2001 Cr LJ 170 (para 15) (SC) : AIR 2001 SC 142.
81. *Punpri Chinchwad Nagarpalika* v. *Giriraj Chiranjilal Sharma*, 1998 Cr LJ 4354 (para 5) (Bom).
82. *Atar Singh* v. *Takhar Singh*, 35 Cal 1039 (PC); *Kedar* v. *Emperor*, AIR 1944 All 94; *Bhugdomal* v. *State*, AIR 1983 SC 903; *J.A. Naidu* v. *State*, AIR 1979 SC 1537; *Delhi Administration* v. *Gulzarilal*, AIR 1979 SC 1382; *Fernandes* v. *Union Territory Goa*, AIR 1977 SC 135; *Gain Mahanti* v. *State*, AIR 1971 SC 1898; *Charan Singh* v. *State*, AIR 1967 SC 520; *Shivnath* v. *Union*, AIR 1965 SC 1666; *Hanumant* v. *State*, AIR 1952 SC 343; *Palvinder* v. *State*, AIR 1952 SC 354; *Swaran Singh* v. *State*, AIR 1957 SC 637; *State* v. *Bhajan*, AIR 1975 SC 258; *State* v. *Madhukar*, AIR 1967 Bom 61; *Sudhakar Nath* v. *State*, 1983 Cr LJ 299 (Ori); *Varkey Joseph* v. *State of Kerala*, 1993 Cr LJ 2010 (para 12) (SC); *Lakhwinder Singh* v. *State of Punjab*, 1998 Cr LJ 468 (para 30) (P&H); *Jagga Singh* v. *State of Punjab*, AIR 1995 SC 135 (para 10); *Chandraiahgari Anantharedd* v. *State of A.P.*, 1996 Cr LJ 2109 (para 21) (AP).

take the place of proof.[83] In the absence of reliable evidence it is unwise to act on mere suspicion.[84] Mere recovery of articles alleged to have been stolen by a person charged with murder after a long time does not establish the guilt of the accused when there is no other connecting evidence. On mere suspicion however strong a conviction cannot be based.[85] Where the prosecution of the accused was for smuggling some goods, but it was not proved that all the goods which were produced were smuggled, conviction of the accused was not justified because suspicion cannot take place of proof.[86]

Where the opinion of witness as to condition of goods was based on guess work and not on personal knowledge, it was held that such an evidence was not acceptable.[87]

The Court's decision must not rest upon suspicion but must rest upon legal grounds established by legal testimony. Between "May be true" and "Must be true" there is inevitably a long distance to travel and the whole of the distance is to be covered by legal, reliable and unimpeachable evidence by the prosecution.[88]

The primary duty of the prosecution is to prove its case beyond all reasonable doubt, and it cannot be relieved of its duty by creating suspicion in the mind of Court or by proving suspicious circumstances against the accused in the case, because suspicion, however grave, cannot be taken to be sufficient for convicting the accused.[89]

The rules of evidence cannot be departed from, because there may be a strong moral conviction of guilt; for a judge cannot set himself above the law which he has to administer or make it or mould it to suit the exigencies of a particular occasion.[90] Suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify an inference of a particular fact (*Ibid*). Suspicion, though a ground for scrutiny, cannot be made the foundation of a decision.[91] The gravest suspicion against an accused will not suffice to convict him of a crime unless evidence establishes it beyond doubt.[92] "The sea of suspicion has no shore and the Court that embarks upon it is without rudder and compass".

Where there was loss of many consignments on account of looting of wagons, but the complaining appellant's consignment was not proved to have been lost whereas other consignments were lost, it was held that even the appellant's consignment which was not delivered was also lost through the looting.[93] While dealing with a case relating to corrupt practices in elections,[94] it was held that *mens rea* or Criminal intention was not necessary to establish under the Indian law relating to corrupt practices, but it does not mean that the charges of corruption can be held established without their being proved beyond

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83. *State of Punjab* v. *Bhajan Singh*, AIR 1975 SC 258; *Bhagwan Das* v. *State of Rajasthan*, AIR 1957 SC 589; *State (Delhi Admn.)* v. *Gulzarilal Tondon*, AIR 1979 SC 1382; *Vindo Samuel* v. *Delhi Administration*, AIR 1992 SC 465; *Sarwan Singh Rattan Singh* v. *State of Punjab*, 1957 Cr LJ 1014 : AIR 1957 SC 637; *Radha Kishan* v. *State*, AIR 1951 Ajmeer 15; *I.T. Commissioner* v. *Sodra Devi*, AIR 1957 SC 832; *Parthasarathy* v. *Ramachandrarao*, AIR 1956 AP 65; *Ranjitsingh* v. *State*, AIR 1954 Pepsu 69; *Netarpal Jhuna Mal* v. *State*, AIR 1964 Punj 397; *Mis. Sitaram Gurdas Mal* v. *Collector*, AIR 1958 Punj 35; *Babusingh* v. *State of Punjab*, (1964) 1 Cr LJ 566; *State* v. *Mohanlal*, AIR 1958 Raj 338; *State* v. *Mothia*, AIR 1955 Raj 82; *Mani Joseph* v. *State*, AIR 1954 Trav/Co 396; *State of U.P.* v. *Ch. Laiq*, AIR 1968 All 170; *Mangat* v. *State*, AIR 1967 All 204; *State* v. *Madhukar Gopinath*, AIR 1967 Bom 61; *Ibrahim Hussain* v. *State*, AIR 1969 Goa 68; *Podyami Joga* v. *State of M.P.*, (1964) 1 Cr LJ 455; *Thaniki Chalam Pillai* v. *Dakshayani Ammal*, 1966 Cr LJ 221; *Sivar Ajan* v. *State*, ILR (1959) Ker 319; *Jitan* v. *State*, ILR (1965) 1 Punj 677; *Dandun ales Biyaya Bank* v. *State*, ILR 1970 Cut 142; *Krushna Chandra Naik* v. *S.K. Mak Bul*, ILR 1970 Cut 649; *State* v. *Roop Singh*, ILR (1966) 16 Raj 252.

84. *State of Maharashtra* v. *Sukhedeo Singh*, AIR 1992 SC 2100.

85. *Babuda* v. *State of Rajasthan*, AIR 1992 SC 2091 (Raj).

86. *Gian Mahtani* v. *State of Maharashtra*, AIR 1971 SC 1898. **Also see** *Pulicherla Balaraju* v. *State of A.P.*, 1994 Cr LJ NOC 38 (AP).

87. *Sitaram Srigopal* v. *Daulati Devi*, AIR 1978 SC 1225.

88. *Sarwan Singh* v. *State*, AIR 1957 SC 637; *Mina Kumari* v. *Bijoy*, AIR 1916 PC 238; *Maniklal* v. *Bijoy*, AIR 1921 PC 69; *Motibai* v. *Jamsetjee*, AIR 1924 PC 28; *Brijbhusan* v *Emperar*, AIR 1946 PC 38.

89. *Datar Singh* v. *State*, AIR 1974 SC 1193; *Bhug Domal* v. *State*, AIR 1983 SC 906; *Gambhir* v. *State*, AIR 1982 SC 1157; *State of Haryana* v. *Harpal Singh*, 1979 SCC (Cr) 86 : AIR 1978 SC 1530; *Ramesan Singh* v. *State*, AIR 1977 SC 2018; *Sarwan Singh* v. *State*, AIR 1957 SC 637; *State of Bihar* v. *Ramesh Singh*, AIR 1956 SC 654.

90. *Barindra Kumar Ghose* v. *Emperor*, 1909 ILR 37 Cal 467, 508.

91. *Mohammad Mehdi Hasan Khan* v. *Mandir Das*, (1912) 39 IA 184, 190 : 34 All 511 : 14 Bom LR 1073, **quoted** in *Hari Krishna* v. *King Emperor*, ILR (1935) 11 Luck 327, 335.

92. *Hawaldar Singh* v. *King-Emperor*, ILR (1932) 7 Luck 623.

93. *Shivnath Rai Ram Dhari* v. *Union of India*, AIR 1965 SC 1666.

94. SARKAR J. in *Dr. Y.S. Parmar* v. *Hirasingh Pal*, AIR 1959 SC 244.

the possibility of a reasonable doubt. The test in weighing the evidence led in such cases is generally similar to the one applied in criminal trials.

51. 'MATTERS BEFORE IT'

The expression 'matters before it' includes matters which do not fall within the definition of 'evidence' in S. 3. Therefore, in determining what is evidence other than evidence within the phraseology of the Act, the definition of 'evidence' must be read with that of 'proved'. It would appear, therefore, that the Legislature intentionally refrained from using the word 'evidence' in this definition, but used instead the words, 'matters before it'. For instance, a fact may be orally admitted in Court. The admission would not come within the definition of the word 'evidence' as given in this Act, but still it is a matter which the Court before whom the admission was made would have to take into consideration in order to determine whether the particular fact was proved or not.[95] Similarly, the result of a local investigation under the Civil Procedure Code must be taken into consideration by the Court though not 'evidence' within the definition given by the Act.

The result of a local enquiry by a presiding judicial officer, although it does not come under cls. (1) and (2) of the definition of the word 'evidence', falls within the meaning of the word 'proved' which comes immediately after. (*Ibid*)

The use of the word "proved" does not enable the Court to take into consideration matters including statement whose use is absolutely barred.[96]

52. DIFFERENCE BETWEEN EVIDENCE IN CIVIL AND CRIMINAL PROCEEDINGS

The rules of evidence are in general the same in civil and criminal proceedings, and bind alike the State and the citizen, the prosecutor and the accused, the plaintiff and the defendant, the counsel and the client. There are, however, some exceptions, *e.g.* the doctrine of estoppel applies to civil proceedings only (BEST, 12th Edn., S. 94, p. 81), the provisions relating to confessions (Ss. 24-30), character of persons appearing before Courts (Ss. 53, 54), and incompetence of parties as witnesses (S. 120), are peculiar to criminal proceedings.

In a civil case, a judge of fact must find for the party in whose favour there is a preponderance of proof, though the evidence is not entirely free from doubt. In a criminal case no weight of preponderant evidence is sufficient, short of that which excludes all reasonable doubt. Unbiased moral conviction is no sufficient foundation for a verdict of guilty unless it is based on substantial facts leading to no other reasonable conclusion than that of guilt. In cases dependent on circumstantial evidence, the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis than that of his guilt. Circumstantial evidence not furnishing conclusive evidence against an accused, though forming a ground for grave suspicion against him, cannot sustain a conviction. To justify the inference of guilt from circumstances, the inculpating facts must be shown to be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis than that of guilt.[97] Circumstances which throw suspicion about the genuineness of a will for civil purposes may not be enough to sustain a criminal charge.[98] No man can be convicted of an offence where the theory of his guilt is no more likely than the theory of his innocence.[99] In a criminal trial the degree of probability of guilt has got to be very much higher—almost amounting to a certainty—than in a civil proceeding, and, if there is the slightest reasonable or probable chance of innocence of an accused, the benefit of it must be given to him. But that is quite a different thing from contending that even where the burden of proof, say of proving an exception, is on the accused, the term "proved" should be differently and more liberally construed than when the burden of proof is on the prosecution. The Evidence Act does not contemplate and does not lay down that the satisfaction which is required to be

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95. *Joy Coomar* v. *Bundhoo Lall*, ILR (1882) 9 Cal 363, 366.
96. *Hazarilal* v. *State (Delhi Admn.)*, AIR 1980 SC 873.
97. *Emperor* v. *Kangal Mali*, (1905) 41 Cal 601; *Emperor* v. *Parbhoo*, (1941) All 843 FB; *Pritam Singh* v. *Tilak Singh*, ILR (1953) 2 Patiala 187. Circumstances which throw suspicion about the genuineness of a will for civil purposes may not be enough to sustain a criminal charge. *Arjan Singh* v. *Hazara Singh*, AIR 1979 SC 1236 : 1979 Cr LJ 1029; *A. Jayaram* v. *State of A.P.*, AIR 1995 SC 2128 (para 22).
98. *Arjun Singh* v. *Hazara Singh*, 1979 Cr LJ 1029 SC.
99. *Emperor* v. *Shivdas Omkar*, (1912) 15 Bom LR 315.

caused in the mind of a prudent man before acting on or accepting the prosecution story is to be of a different kind or degree from the satisfaction which is required when the accused has to discharge the burden which is cast upon him by law.[1] In a criminal trial, the degree of proof is stricter that what is required in a civil proceeding.[2] The standard of proof required in election matters in proving corrupt practices is the same as that for a criminal offence.[3]

The onus of proof in criminal cases never shifts to the accused, and they are under no obligation to prove their innocence or adduce evidence in their defence or make any statement.[4]

In a civil case, it is the duty of the parties to place their case before the Court as they think best, whereas in a criminal case it is the duty of the Court to bring all relevant evidence on the record and to see that justice is done.[5] In a criminal trial, it is for the Court to determine the question of the guilt of the accused and it must do this upon the evidence before it, independently of decisions in a civil litigation between the same parties. A judgment or decree is not admissible in evidence in all cases as a matter of course, and, generally speaking, a judgment is only admissible to show its date and legal consequence.[6]

The rules regulating the admissibility of evidence are, in general, the same in civil as in criminal proceedings.

53. PROOF IN CRIMINAL CASES

There are two levels of proof in criminal cases : for the prosecution, that level of persuasion is that proof must be beyond reasonable doubt; for the defence, that standard is proof on the balance of probabilities.[7]

When dealing with the serious question of the guilt or innocence of persons charged with crime, the following general rules have been suggested for the guidance of Tribunals:—

1. The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecutor.
2. The evidence must be such as to exclude, to a moral certainty, every reasonable doubt of the guilt of the accused.
3. In matters of doubt it is safer to acquit than to condemn, since it is better that several guilty persons should escape than that one innocent person should suffer.
4. There must be clear and unequivocal proof of the *corpus delicti* (substance of the offence).
5. The hypothesis of delinquency should be consistent with all the facts proved.[8]

DENNING J. elaborated on the nature of proof beyond reasonable doubt in these terms :

> "It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable,' the case is proved beyond reasonable doubt, but nothing short of that will suffice."[9]

The burden of proof is always on the prosecution to establish beyond reasonable doubt all ingredients of an offence with which the person accused is charged[10] and it cannot fall back solely upon

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1. *State* v. *Harprasad Ghashiram Gupta*, (1951) 53 Bom LR 938.
2. *Jahed* v. *State*, 1995 Cr LJ 3451 (para 61) (Cal).
3. *C. Subba Rao* v. *K. B. Reddy*, AIR 1967 AP 155.
4. *Binayendra Chandra Pande* v. *Emperor*, ILR (1936) 63 Cal 929.
5. *Emperor* v. *Janki Prasad*, ILR (1920) 43 All 283.
6. *Trailokyanath Das* v. *Emperor*, AIR 1932 Cal 293 : ILR (1931) 59 Cal 136.
7. *R.* v. *Carr-Briant*, [1943] 2 All ER 156.
8. BEST, 12th Edn., Ss. 439, 440-451, pp. 372- 382.
9. *Miller* v. *Minister of Pensions*, [1947] 2 All ER 372, at 373.
10. *Labhshanker Maganlal Shukla* v. *State of Gujarat*, AIR 1979 SC 1012; *Mathura Prashad* v. *State of M.P.*, AIR 1992 SC 49 : Guilt of accused proved beyond reasonable doubt. *Kuldip Sharma* v. *State*, 1996 Cr LJ 244 (Del) Guilt not proved beyond doubt, acquittal. *Mahendra* v. *The State*, 1994 Cr LJ NOC 47 (All); *Chander Prakash* v. *State (Delhi*

the evidence adduced by the accused persons in their defence.[11] Falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused.[12] Where the accused was a previous convict, the prosecution is not relieved of its duty to prove its case beyond reasonable doubt.[13] Where the question in an offence was dishonesty of the accused, it was held that the burden to prove the fact of dishonesty lay heavily on the prosecution, because of the basic presumption of innocence of the accused.[14] To throw the burden on the accused to prove his innocence would go against the basic presumption of innocence of the accused. The oral evidence has to be considered, irrespective of the explanation by the accused, to arrive at a conclusion.[15]

The evidence of the prosecution must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused.[16] The requirement of proof beyond reasonable doubt does not stand altered even after the introduction of Section 498-A, I.P.C. and Section 113-A of Indian Evidence Act.[17]

An accused need not prove his case to the same extent as the prosecution in order to succeed in his defence.[18]

Proof beyond reasonable doubt is a guideline, not a fetish, and a guilty man cannot get away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounts for police presentation of fool-proof concoction.[19]

Normally, when a witness says that an axe or a spear is used, there is no warrant for supposing that what the witness means is that the blunt side of the weapon was used; if that be the implication it is the duty of the prosecution to obtain, a clarification from the witness as to whether the sharp-edged or a piercing instrument was used as a blunt weapon.[20]

It is the obligation of the prosecution to explain the injury on the accused.[21]

It is not obligatory on the prosecution counsel to produce all witnesses who speak to the facts which the prosecution desires to prove. But the Court can, however, take into consideration absence of witnesses, whose testimony would be expected in adjudging on evidence as a whole.[22] The court has to consider the weight of the evidence given by the prosecution witnesses and not the number of witnesses to be examined by the prosecution *i.e.*, evidence has to be weighed and not counted. It is the quality that counts.[23]

Where a person gives evidence on oath, the presumption is that he has spoken the truth. The burden is on the opposite party who challenges the veracity of the statement made on oath.[24]

Administration), 1995 Cr LJ 3028 (Del); *Subhash Chand* v. *State of H.P.*, 1995 Cr LJ 3460 (HP); *Kagen Bera* v. *State of W.B.*, AIR 1994 SC 1511 (para 4); *Bhagat Bahadur* v. *State*, 1996 Cr LJ 2201 (Del).

11. *Jarnail Singh* v. *State of Punjab*, 1996 Cr LJ 1139 (para 8) (SC) : AIR 1996 SC 755.
12. *Shankarlal Gyarasilal Dixit* v. *State of Maharashtra*, AIR 1981 SC 765; *Madkomi Baja* v. *State*, 1986 Cr LJ 433 (Ori); *State of Orissa* v. *Chakradhar Sahu*, 1983 Cr LJ 532 (Ori); *Moti Gouduni* v. *State*, 1982 Cr LJ 2342 (Ori); *Mahadev Ghosh* v. *State*, 1983 Cr LJ 1854 (Cal); **Contra** : *Panchunahak* v. *State*, 1985 Cr LJ 1633 (Ori); *Prakash Sen* v. *State*, 1988 Cr LJ 1275 (Cal).
13. *Ibrahim Husain* v. *State*, 1969 Cr LJ 739 : AIR 1969 Goa 68.
14. *Sita Ram* v. *State*, AIR 1968 All 207; *Leofred Lobo* v. *State*, AIR 1967 Goa 60 : 1967 Cr LJ 746; *Dewa Kalu Balai* v. *State of Madhya Pradesh*, 1959 MP 418; *V.S. Iyer* v. *State of Kerala*, ILR (1967) 1 Ker 640.
15. *Nemai Adak* v. *State*, (1965) 1 Cr LJ 160 Cal; *Rajkishore Rabidas* v. *State*, AIR 1969 Cal 321.
16. *Data xiva Naique Desai* v. *State*, AIR 1967 Goa 4 : 1967 Cr LJ 52 (Goa-FB).
17. *State of W.B.* v. *Orilal Jaiswal*, 1994 Cr LJ 2104 (para 14) : AIR 1994 SC 1418. **See also** *Kalia* v. *State of Rajasthan*, 1995 Cr LJ 2833 (Raj).
18. *Garib Singh* v. *State of Punjab*, AIR 1973 SC 460.
19. *Inder Singh* v. *State (Delhi Administration)*, AIR 1978 SC 1091.
20. *Hallu* v. *State of M.P.*, AIR 1974 SC 1936.
21. *Jagdish* v. *State of Rajasthan*, AIR 1979 SC 1010; *Mohar Rai & Bharath Rai* v. *State of Bihar*, AIR 1968 SC 1281; *State* v. *Vithal Pandurang Bharat*, 1985 Cr LJ 664 (Bom); *Sarjug Pd. Singh* v. *State*, 1984 Cr LJ 1086 (Pat).
22. *Abdul Gani* v. *State of M.P.*, AIR 1954 SC 31.
23. *Muluwa* v. *State of M.P.*, AIR 1976 SC 989; *Maqsoodan* v. *State of U.P.*, AIR 1983 SC 126; In re : *Repona Naganna alias Nagula*, AIR 1961 AP 70 : (1961) 1 Cr LJ 218; *Rameshwar* v. *State of U.P.*, 1987 Cr LJ 442 (All); *State of Orissa* v. *Dilip Kumar Chand*, 1987 Cr LJ 1242 (Ori).
24. *Tahafildar Singh* v. *State*, AIR 1958 All 255 : 1958 Cr LJ 324; *Chandrashan Singh* v. *State*, 1971 Cr LJ 94; *Jabbar* v. *State*, AIR 1966 All 590.

Plea of *Alibi* can be accepted only when it is shown that it was impossible for the accused to be present at a place where the offence was committed.[25]

The evidence of a complainant is admissible as evidence under S. 245(3), Cr.P.C. even if the complainant is not subjected to cross-examination.[26]

54. BENEFIT OF DOUBT

The Court considers the evidence and decides whether that evidence proves a particular fact or not. When it is held that a certain fact is proved, the question arises whether the fact leads to the inference of guilt of the accused person or not; and in dealing with this aspect of the problem, the doctrine of benefit of doubt would apply and an inference of guilt can be drawn only if the proved fact is wholly inconsistent with the innocence of the accused and is consistent with the guilt.[27] Where the evidence showed that the murder was not caused in the way suggested by the prosecution, the accused was entitled to benefit of doubt.[28]

In a case under Section 302/34 I.P.C. the material prosecution witness vividly described the assault on the deceased. The name of accused No. 3 was not mentioned in F.I.R. In the absence of corroboration of involvement of accused No. 3, it was held that accused No. 3 was entitled to benefit of doubt.[29] Where there was infirm testimony of witness as to identity and connection of accused with crime, and there was absence of independent evidence of confirming testimony, it was held that benefit of doubt should be given to the accused.[30] Where two views are deducible from the conflicting evidence on record, the accused is to be given benefit of doubt.[31] Where the evidence of the prosecution witness shows that they had not come out with the true story, it was held that the accused must be given the benefit of doubt and acquitted.[32]

The fact that some of the accused have been given benefit of doubt is not sufficient ground to discredit the complainant's testimony with regard to the other accused persons who were convicted.[33]

In cases of group rivalries and enmities, there is general tendency to rope in as many persons as possible as having participated in an assault. The Court should therefore, scrutinize the evidence carefully and if there arises any doubt, benefit should be given to the accused. Where, in a case, the eye-witnesses were not able to give correct version as to when the deceased was given *lathi* blows, and there was serious discrepancy in their evidence on important points held, there was good reason to doubt their evidence.[34] In case of doubt arising with regard to any material fact in a criminal case, the accused is always entitled to benefit of such doubt.[35] Where there was inconsistency between ocular and medical evidence, it was held that conviction cannot be based on the ocular evidence and the accused has to be given benefit of doubt.[36] In a case under N.D. & P.S. Act it was held that if the police seals were not decipherable when the case property, the recovered contraband, was produced in the Court, the possibility of tampering with the property could not be ruled out and benefit of doubt must go to the accused.[37] Where the *corpus delicti* was not traceable and the prosecution was solely dependent on the retracted confession of the accused and the improbable manner the offence was committed, it was held

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25. *Keshab Choudhury* v. *State of Assam*, 1987 Cr LJ 1742 (Gau).
26. *Santosh De* v. *Archana Guha*, 1995 Cr LJ 2640 (para 11) (SC).
27. *M.G. Agarwal* v. *State of Maharashtra*, AIR 1963 SC 200.
28. *Sakal Deep* v. *U.P. State*, 1993 Cr LJ 551, at p. 556 (All).
29. *Muthu Naicker* v. *State of Tamil Nadu*, AIR 1978 SC 1647. **Also see** *Ravipalli Paramesu* v. *State of A.P.* 1994 Cr LJ 931 (AP).
30. *Phool Chand* v. *State of Rajasthan*, AIR 1977 SC 315.
31. *Pravakar Pati* v. *Ajaya Kumar Das*, 1996 Cr LJ 2626 (paras 8-10) (Ori).
32. *Sheikh Hafeez* v. *State of Bihar*, (1970) 3 SCC 790.
33. *Sat Kumar* v. *State of Haryana*, AIR 1974 SC 294; *Dalbir Kaur* v. *State of Punjab*, AIR 1977 SC 472; *Ramratan* v. *State of Rajasthan*, AIR 1962 SC 424; *M. Prakku* v. *State of Madras*, AIR 1954 SC 648; *Arjun* v. *State of Rajasthan*, 1995 Cr LJ 410 (para 14) : AIR 1994 SC 2506.
34. *Baldev Singh* v. *State of Bihar*, AIR 1972 SC 464.
35. *Mangulu Kanhar* v. *State of Orissa*, 1995 Cr LJ 2036 (para 12) (Ori).
36. *Mohar Singh* v. *State of Punjab*, AIR 1981 SC 1578. **See also** *Hasan Mohd.* v. *State of Rajasthan*, 1994 Cr LJ NOC 364 (Raj).
37. *Sarabjit Singh* v. *State of Punjab*, 1998 Cr LJ 2231 (para 15) (P&H), **relying on** *Surjit Singh* v. *State of Punjab*, 1996 (4) RCC 419.

that the accused was entitled to benefit of doubt.[38] Where there was contradictory oral evidence as to who took the deceased to hospital and the prosecution failed to examine the alleged eye-witness and the inspector who filed the charge-sheet, the accused was given benefit of doubt.[39] Where in murder case out of six accused persons two were given benefit of doubt on a certain ground which was available to two more accused also and participation of those two accused in crime was not established beyond reasonable doubt, these two accused were also held entitled to benefit of doubt.[40] Non-mentioning of dimension of bloodstains on the clothes in the seizure memo of the recovery of the bloodstained clothes, was held to be not sufficient to claim any benefit by the accused.[41]

55. PROOF IN CIVIL CASES OF CRIMINAL CHARACTER

In civil cases which involve allegations of criminal and fraudulent character, insistence on those charges being proved clearly and beyond reasonable doubt was held to be wrong.

The fact that the party is alleged to have accepted bribe in a civil case does not convert it into a criminal case and the ordinary rules applicable to civil cases would only apply. The contention that when bribery is to be inferred from the circumstantial evidence, the circumstances must be such so as to exclude any other reasonable possibility, cannot be accepted.[42]

Under the Representation of People's Act, for proving the corrupt practices in the election, the standard of proof required, is the same as that for a criminal offence.[43]

So also in the case of penalty proceedings under the Income-tax Act as the proceedings are of a penal nature, the proof is to be as that of a criminal prosecution.[44]

An illicit article seized under the N.D. & P.S. Act from the person of an accused, during a search conducted in violation of the safeguards provided in Section 50 of the said Act, cannot by itself be used as admissible evidence of proof of unlawful possession of the contraband on the accused. Any other material article recovered during that search may, however, be relied upon by the prosecution in other/independent proceedings against an accused notwithstanding the recovery of that material during an illegal search and its admissibility would depend upon the relevancy of that material and the facts and circumstances of that case.[45] Proof of the fact depends upon the degree of probability of it having existed. The standard required for reaching the supposition is that of a prudent man acting in any important matter concerning him.[46]

56. PROOF IN CIVIL CASES

". . . . . The case must be decided according to the preponderance of probability. If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of doubt."[47]

Where both parties have let in evidence, the burden of proof assumes secondary importance.[48]

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38. *Ramchandra* v. *State of U.P.*, AIR 1957 SC 381.
39. *Ravirajan* v. *State*, 1998 Cr LJ 3086 (para 6) (Mad),
40. *Ch Pulla Reddy* v. *State of A.P.*, 1993 Cr LJ 2246 (para 9) (SC) : AIR 1993 SC 1899, **partly reversing** the judgment of A.P. High Court. **Also see** *Gurucharan Singh* v. *State of Haryana*, 1994 Cr LJ 1710 (P&H); *Hira Lal* v. *State of Haryana*, 1994 Cr LJ 2471 (P&H).
41. *Gura Singh* v. *State of Rajasthan*, 2001 Cr LJ 487 (para 23) (SC) : AIR 2001 SC 330.
42. *Gulabchand* v. *Kudilal*, AIR 1966 SC 1734; **reversing** *Gulabchand* v. *Kudilal*, AIR 1959 MP 151.
43. *Chadalavada Subba Rao* v. *Kasu Brahmananda Reddy*, AIR 1967 AP 155 : 1967 Cr LJ 691; *S.L. Saraf* v. *M.S. Qureshi*, AIR 1969 J&K 36; *Hari Ram Singh* v. *Kamta Prasad*, AIR 1966 MP 255.
44. *Commissioner of Income-tax M.P., Nagpur and Bhandara* v. *Punjabhai Shah Chindwara*, AIR 1968 MP 103.
45. *State of Punjab* v. *Baldev Singh*, 1999 Cr LJ 3672 (para 53) (SC) : AIR 1999 SC 2378, **distinguishing** *Pooran Mal* v. *Director of Inspection (Investigation), New Delhi*, (1974) 1 SCC 345 : AIR 1974 SC 348 : 1974 Tax LR 340 and **holding** *State of H.P.* v. *Pirthi Chand*, AIR 1996 SC 977 : 1996 Cr LJ 1354 : (1996) 2 SCC 37 : 1996 AIR SCW 422 and *State of Punjab* v. *Jasbir Singh*, (1996) 1 SCC 288 : 1996 SCC (Cri) 1 not good law in view of AIR 1974 SC 348 (*Pooran Mal's* case).
46. *M Narsinga Rao* v. *State of A.P.*, 2001 Cr LJ 515 (para 15) (SC) : AIR 2001 SC 318.
47. *Miller* v. *Minister of Pensions*, [1947] 2 All ER 372, per DENNING J.
48. *Ramji Dayawala and Sons Pvt. Ltd.* v. *Invest Import*, AIR 1981 SC 2085.

It is not open to a court or a Tribunal determining a matter judicially, to insist on a particular mode of proving that matter and to exclude all other modes of proof, unless there is a law requiring it to do so. This will be particularly so when it is not within the power of the person concerned to obtain the proof as directed.[49]

Allegation as to bad faith or indirect motive or purpose cannot be held established except on clear proof thereof.[50]

Suit cannot be decreed on the basis of presumption under the Negotiable Instruments Act, as the initial burden is on the plaintiff who comes to court to prove the execution of the pro-note on which the suit is filed.[51]

The day or date of adoption is a material fact for its proof by omission to state which adoption becomes doubtful. It also becomes doubtful in absence of evidence of consultation between the natural and the adoptive father, non-examination of material witnesses and inconsistency about the ceremonies performed.[52]

57. PROOF OF PATERNITY

Where an illegitimate child was claiming maintenance from an alleged father and the paternity of the child was disputed, it would not be safe to accept the evidence of the mother regarding the child's paternity without proper corroboration.[53]

58. DISPROVED

A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence, so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist. On the other hand a fact is said to be not proved when it is neither proved not disproved.[54] The word "disproved" is akin to word "false." What is 'disproved' is normally said to be false thing. A fact is disproved normally by the person, who claims that an alleged fact is not true.[55]

This is merely the converse of the definition of 'proved'.[56]

59. NOT PROVED

The definition of 'proved' is the embodiment of a sound rule of commonsense. It describes what degree of certainty must be arrived at before a fact can be said to be proved. Proof means anything which serves, either immediately or mediately, to convince the mind of the truth or falsehood of a fact or proposition. It is apparent from the definitions of the words "proved", "disproved" and "not proved" in this section that the Act applies the same standard of proof in all civil cases.[57] The term 'not proved' indicates a state of mind between two states of mind ("proved" and "disproved") when one is unable to say precisely how the matter stands.[58] A fact which is not proved does not necessarily mean that it is a false one. A fact not proved is not necessarily a fact disproved. A fact is said "not proved" when it is neither proved or disproved. A fact which is not proved may be true or may be false. A doubt lingers about its truth.[59] Failure to prove a plea cannot be a ground to award compensatory cost as there is a distinction between the facts not proved and the facts proved or disproved.[60]

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49. *A.N. Saxena* v. *D.R.C.S., U.P.*, 1969 All LJ 652.
50. *Barium Chemicals Ltd.* v. *Company Law Board*, AIR 1967 SC 295.
51. *G. Vasu* v. *Syed Yaseen Sifnddin*, AIR 1986 AP 139 (FB).
52. *Sivaram Sahu* v. *Purusottam*, AIR 1994 NOC 42 (Ori).
53. *Chaya* v. *K.G. Channappa Gowda*, 1993 Cr LJ 767 (para 14) (Kant).
54. *Shrikrishn* v. *Bhauwarlal*, AIR 1974 Raj 96; *Naval Kishore Somani* v. *Poonam Somani*, AIR 1999 AP 1 (para 13).
55. *Naval Kishore Somani* v. *Poonam Somani*, AIR 1999 AP 1 (para 13).
56. *Emperor* v. *Shafi Ahmed*, (1925) 31 Bom LR 515.
57. *Gulabchand* v. *Kudilal*, AIR 1966 SC 1734.
58. *Emperor* v. *Shafi Ahmed*, (1925) 31 Bom LR 515.
59. *Naval Kishore Somani* v. *Poonam Somani*, AIR 1999 AP 1 (para 13).
60. *Bhagwati Lal* v. *Shri Krishan Chandra*, AIR 1994 NOC 331 (Raj).

Where there was no evidence to show that a message was sent by the person by whom it was purported to have been sent and on the other hand he specifically denied it, it was held that the message was not proved.[61] In a case of theft of a vehicle, the accused allegedly changed its engine, colour etc. and got it re-registered in the new owner's name. There was no evidence as to who or at whose instance the said acts were done. So the issue against the accused could not be said to be proved.[62]

Where the provisions of the Rajasthan Premises (Control of Rented Eviction) Act conferred discretion upon the Court to strike out defence, if in the facts and circumstances of the case, the Court feels it proper to do so which the Court did in this case of default in payment of rent when the petitioner failed to prove the payment of rent, it was held that the case of the petitioner about the payment of rent was of 'not proved' and of not 'disproved' and the defence could be struck off in case of 'disproved'.[63]

Mere fact that some male relation writes improper letters to a married woman, does not necessarily prove that there was illicit relationship between the writer of the letters and the married woman who received them.[64] In a trial of M and S for causing death of one P by a pistol, the prosecution relied on the evidence of two witnesses who stated that accused M and S were seen with P, for the last time in a room on the night of the occurrence, there was evidence relating to the recovery of cartridge from the scene of occurrence, the seizure of pistol from the person of M, and the deposition of a ballistic expert. But the expert gave contradictory evidence to his earlier opinion in the witness box. The Supreme Court held that it was not established to whom the seized pistol belonged and hence the case against them was not established.[65]

60. STANDARD OF PROOF

"The phrase "standard of proof" is used to describe the degree to which the proof must be established."[66]

"May presume". **S. 4. Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it:**

"Shall presume". **Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved:**

"Conclusive proof". **When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.**

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61. *Kishore Chandra Singh Deo* v. *Babu Ganesh Prasad Bhagat*, AIR 1954 SC 316; intention to cause death not proved. *Shyamji* v. *State of Rajasthan*, 1993 Cr LJ 2458, at p. 2460 (Raj).
62. *Public Prosecutor, A.P. High Court* v. *B. Ramkrishna*, 1997 Cr LJ 3940 (AP).
63. *Amar Singh* v. *Doongar Singh*, 1997 AIHC 2065 (paras 8 and 9) (Raj), **relying on** *Ramesh Chandra* v. *Man Mohan Singh*, 1988 (2) RLR 194 and *Vishandas* v. *Savitri Devi*, 1988 (1) RLR 1. The Court referred to *D.L.F. Housing and Construction C. (P) Ltd.* v. *Sarup Singh*, AIR 1971 SC 2324 (para 8).
64. *Chandra Mohini Srivastava* v. *Avinash Prasad Srivastava (Sri)*, AIR 1967 SC 581.
65. *Mohan Singh* v. *State of Rajasthan*, AIR 1978 SC 1511.
66. PHIPSON ON EVIDENCE, 15th Edn. (2000), p. 55 (para 4-01).

COMMENTS

1. MEANING OF PRESUMPTION

This section empowers the Court to presume certain facts. The term 'presumption', in its largest and most comprehensive sense, may be defined to be an inference, affirmative or disaffirmative, of the truth or falsehood of a doubtful fact or proposition, drawn by a process of probable reasoning from something proved or taken for granted. (BEST, 12th Edn. Section 299, p. 267).

"Presumptions operate where certain facts may be presumed to exist even in the absence of complete proof."[67]

"A presumption is a rule of law by virtue of which, where a party proves one fact (the primary fact) a second fact (the presumed fact) will also be taken to have been proved, in the absence of evidence to the contrary."[68]

"The structure of all true presumptions requires first the proof of a basic fact or facts. Once this has been done different consequences follow so far as the presumed fact is concerned. In the weakest form of presumption the only effect of proving the basic fact is that the presumed fact may be found by the trier of fact. In other words the logical inference of the presumed fact from proof of the basic fact attracts a measure of formal endorsement."[69]

". . . . ., where a party is seeking to establish a relevant fact, he or she may be unable to do so but will be permitted to prove another fact from which that relevant fact will be presumed. There is a *basic* fact (the seven year absence, the birth during wedlock) and a *presumed* fact (the person's death, the plaintiff's legitimacy). When we use the word "presumption" in an evidentiary sense, this is what it means."[70]

" . . . . . a presumption is a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts."[71]

"Unfortunately, the term 'presumption' is also frequently applied to rules of law which are in reality quite distinct from presumptions, and for the purpose of distinguishing these false presumptions, true presumptions are then unnecessarily referred to as 'rebuttable presumptions of law'. Rules of law provide that some fact shall be taken in all cases to be true, without proof of any primary fact, until the contrary is proved *e.g.* 'presumptions' of innocence and sanity."[72]

A presumption means a rule of law that Courts and Judges shall draw a particular inference from a particular fact, or from a particular evidence, unless and until the truth of such inference is disproved.

2. CLASSIFICATION OF PRESUMPTIONS

Presumptions are of two kinds. (1) Presumptions of fact, (2) Presumptions of law. Presumptions of fact are those where the Court may presume a fact. These are also sometimes called material presumptions. Instances of such presumptions are found in sections 86 to 88, 90 and 114 of the Act. The second category relates to presumptions of law. This can again be divided into rebuttable presumptions of law and irrebuttable presumptions of law. In the first case, the court shall presume a fact. Instances of such presumptions are to be found in sections 75 to 85, 89 and 105 of the Act. In the case of irrebuttable presumptions of law, one fact is declared to be conclusive proof of another. Instances of irrebuttable presumptions of law are found in sections 41, 112 and 113 of the Act and Section 82 of I.P.C.

Presumptions of fact or natural presumptions are inferences which are naturally and logically drawn from experience and observation of the course of nature, the constitution of human mind, the springs of human action, the usages and habits of society. These presumptions are generally rebuttable. Clause (1) of the section appears to point at presumptions of facts.

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67. STEVE UGLOW'S EVIDENCE : TEXT AND MATERIALS, 1997, p. 686.
68. PETER MURPHY : A PRACTICAL APPROACH TO EVIDENCE, 1985, 2nd Edn., p. 455.
69. CROSS & TAPPER ON EVIDENCE, 1995, 8th Edn., p. 136.
70. STEVE UGLOW'S EVIDENCE : TEXT AND MATERIALS, 1997, p. 686.
71. MC CORMICK ON EVIDENCE, 1984, 3rd Edn., p. 965.
72. PETER MURPHY : A PRACTICAL APPROACH TO EVIDENCE, 1985, 2nd Edn., p. 456.

Presumptions of law are based, like presumptions of fact, on the uniformity of deduction which experience proves to be justifiable; they differ in being vested by the law with the quality of a rule, which directs that they must be drawn, they are not permissive like natural presumptions, which may or may not be drawn, and presumptions of law again differ in their force, according as they are rebuttable or irrebuttable. As to the former, the presumption shall stand good only until it is disproved. The latter class, or irrebuttable presumptions, the law holds conclusive.[73]

See sections 79 to 90 and Section 105 as to presumptions of fact and rebuttable presumptions of law.

The Supreme Court has classified, the presumptions as (1) Permissive presumptions or presumptions of fact, (2) Compelling presumptions or presumptions of law (rebuttable presumption), (3) Irrebuttable presumptions of law or conclusive presumptions.[74]

Disputable Presumption.—The conclusive presumptions, normally may arise out of consent of the parties or sometimes expressed in statutes. (TAYLOR 8th Ed, 90). There is yet another category known as disputable presumption of law. For example, under criminal law every accused is presumed to be innocent. So evidence is to be received to repel this presumption.

Distinction between Presumption of Law and Fact.—According to WIGMORE (Section 2491) the distinction between presumptions 'Of Law' and presumptions 'Of Fact' is in truth the difference between things that are in reality presumptions, and things that are not presumptions at all. According to STEPHEN, Presumption of Law in reality are rules of law and part of the law itself and the court may draw the inference whenever the requisite facts are before it. (5th Ed., pp. 391, 392).

"Traditionally there was a distinction between presumptions of law and presumptions of fact. There is no difficulty with the first category. Presumptions of law are arbitrary consequences expressly annexed by law to particular facts; and may be either *conclusive,* as that a child under a certain age is incapable of committing any crime; or *rebuttable,* as that a person not heard of for seven years is dead, or that a bill of exchange has been given for value. The term "presumption of fact" however is misleading. Its only use is to describe inferences which the mind naturally and logically draws from given facts, irrespective of their legal effect. Not only are they always rebuttable, but the trier of fact may refuse to make the usual or natural inference notwithstanding that there is no rebutting evidence."[75]

"Presumptions of fact" are inferences of certain fact patterns drawn from the experience and observation of common course of nature, the constitution of mind, the springs of human act, the usages and habits of society and the ordinary course of human affairs. If is not obligatory for the Court to draw the presumption of facts and the Act allows the Judge discretion in each case but in case of "presumption of law" no discretion has been left to the Court and it is bound to presume the fact as proved until evidence is given by the party interested to rebut or disprove it.[76]

Presumption of Fact.—Presumptions of fact need not necessarily be taken at the beginning of the consideration of a case. It was held that presumptions are always assumptions or inferences of fact, based upon our ideas and experience of the course of nature, the course of human business and the course of human conduct, that they are the assumptions and conscious inferences of a reasonable man; that there is no special magic about such presumptions or assumptions of fact as used in Courts of Law that no Full Bench, however numerous and however distinguished, can lay down that the Court shall make certain inferences or assumptions of fact in future cases.[77]

A presumption of fact cannot be drawn on mere conjecture.[78]

It is not permissible to offer any evidence to overcome an irrebuttable presumption of fact or law because such a presumption is a rule of substantive law rather than a matter of proof.

Where the husband and wife, being in love for about eight years before marriage, lived an amorous life during that period with their sound health and mind, and after marriage they lived together in a room

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73. NORTON OF EVIDENCE, Sections 97- 98.
74. *Syad Akbar* v. *State of Karnataka*, AIR 1979 SC 1848 : (1980) 1 SCC 30.
75. PHIPSON ON EVIDENCE, 15th Edn. (2000), p. 5 (para 1-10).
76. *Gitika Bagchi* v. *Subhabrota Bagchi*, AIR 1996 Cal 246 (paras 38 and 39), **relying on** *Syad Akbar* v. *State of Karnataka*, AIR 1979 SC 1848 : (1980) 1 SCC 30.
77. *Raja Bommoadevara Chayadevamma* v. *Sana Venkatuswami*, AIR 1932 Mad 343.
78. *People* v. *Carrill*, ILR 54 Cal 63.

for months and had privacy, the presumption was conclusive that consummation of marriage was an accomplished fact unless there is any material to dislodge it.[79]

3. PRESUMPTION NOT EVIDENCE

Presumption is not in itself evidence. It is a rule concerning evidence. The rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and co-incidence of the fact and circumstances.[80]

While dealing with sections 70 to 90 and 114 of the Evidence Act, the Allahabad High Court, held that if a presumption is not available under one section of the Act, it can still be drawn under another section of the Act.[81]

Dealing with a case of maintenance of an unmarried daughter, it was held that no presumption from the age, or of health of a daughter about the capacity to earn and maintain herself, can be drawn.[82]

4. MAY PRESUME

A Court, where it 'may presume' a fact, has a discretion to presume it as proved, or to call for confirmatory evidence of it, as the circumstances require. In such a case, the presumption is not a hard and fast presumption, incapable of rebuttal, a presumption *juris et de jure*.[83]

Under this section, it is open to the Court, upon proof of the marriage of a person on a certain date, either to regard as proved the subsistence of the marriage on a subsequent date unless and until it is disproved, or to call for proof of it, using the discretion entrusted to the court by the first clause in a judicial manner according to the circumstances of the case.[84]

When a certified copy of Khatauni was produced and there was no compliance with the rules as to its issue, it was held that a presumption of genuineness cannot be raised.[85]

In regard to commercial documents, when the certified copies of railway records were tendered in evidence, it was held that they would be presumed by Court to be correct, unless there is evidence to the contrary.[86]

It is unsafe to convict based upon the uncorroborated testimony of an accomplice alone, although it is not illegal to do so. The Court should, therefore, regard an accomplice as *prima facie* unworthy of credit. This is a presumption which it is open to the Court to draw. It is not a hard and fast presumption but one which may be displaced in the circumstances of a particular case.[87]

The Court has discretion to call for proof of a document even if the document satisfies the conditions of Section 90 of the Act.[88]

If a presumption in respect of a document is not available under Section 90 of the Act, it would be open to the Court to raise a presumption under sections 4 and 14 of the Act. The raising of the presumption in regard to the due execution and proof of a document under Section 90, is discretionary.[89] Presumption under Section 113-A of the Evidence Act is not mandatory.[90]

Regarding the presumption under Section 118 of the Negotiable Instruments Act, the words 'until the contrary is proved' do not mean that the suit has to be decreed on the basis of presumption under seciton 118. Where the plaintiff and the defendant were disbelieved, it is permissible to look into the

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79. *Gitika Bagchi* v. *Subhabrota Bagchi*, AIR 1996 Cal 246 (paras 40 and 41).
80. *Sodhi Transport Co.* v. *State of UP*, AIR 1986 SC 1099.
81. *Ram Jas* v. *Surendra Nath*, AIR 1980 All 385 (FB).
82. *Waliram Waryam Singh* v. *Mukhtiar Kaur*, AIR 1969 Punj 285.
83. *Emperor* v. *Shrinivas*, (1905) 7 Bom LR 969. **See also** *Haradhan Mahatha* v. *Dukhu Mahatha*, AIR 1993 Pat 129 (para 8).
84. *Ismail Ahmed* v. *Momin Bibi*, AIR 1941 PC 11.
85. *Bhinka* v. *Charan Singh*, AIR 1959 SC 960.
86. *ISP Trading Co.* v. *Union of India*, AIR 1973 Cal 74.
87. *King* v. *Nga Myo*, AIR 1933 Rang 177 (FB).
88. *Rangu Vithoba* v. *Rambha Dina*, AIR 1967 Bom 382.
89. *Ali Hasan* v. *Matiullah*, AIR 1988 All 57.
90. *Nilakantha Pati* v. *State of Orissa*, 1995 Cr LJ 2472 (para 29) (Ori).

preponderance of probabilities and the circumstances of a particular case. The Court, while dealing with the question as to whether the contrary, *viz*, the absence of consideration, has been proved by the defendant, shall have to consider not only whether it believes that consideration does not exist, but also whether it considers the non-existence of consideration so probable that a reasonable man ought under the circumstances of the case to act upon the supposition that the consideration does not exist.[91]

The report of a doctor without his being examined as a witness is not admissible as evidence, as no presumption can be drawn under Section 4.[92]

Mere entry in the revenue records classifying the land as agricultural land, without further evidence, is not by itself sufficient to decide that the land was being mainly used for agricultural purpose, as no presumption can be drawn in that regard.[93] Merely on the basis of the evidence of the shopkeeper whom the accused paid a fake hundred rupee currency note and was found to in possession of thirteen more such notes, and that of other witnesses, the requisite *mens rea* of knowingly possessing fake currency notes could not be presumed as no specific question regarding the same was put to the accused.[94]

5. SHALL PRESUME

The expression "shall presume" leaves no discretion with the Court and there is legislative command to it to raise a presumption and regard such fact as proved unless and until it is disproved. The question of calling upon the parties to formally prove a fact does not arise.[95]

With regard to this type of presumption no discretion or option is left to the court. In cases in which a court shall presume a fact the presumption is not conclusive but rebuttable. The Supreme Court, held that the presumption under sectionn 4 of the Prevention of Corruption Act is one of law, and has to be raised in every case brought under that section. Presumption of law is introduced as an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused. The legislature has chosen to use the words 'shall presume' and not 'may presume'. The former is a presumption of law, and the latter of fact. These phrases are defined in the Evidence Act for purposes of the Evidence Act. Section 4 of the Prevention of Corruption Act is in *pari materia* with the Evidence Act because it deals with a branch of the law of Evidence *viz.*, presumptions, and therefore, should have the same meaning.[96] The A.P. High Court has held that the presumption under Section 4(1) of the Prevention of Corruption Act cannot be used in regard to an offence under Section 5(2) of the Act. It was further held that the accused need not adduce evidence in rebuttal, and his explanation with other prosecution evidence can be considered.[97] Under the Prevention of Corruption Act, it shall be presumed that the accused who has received a sum of money, (unless the contrary is proved) has accepted it as motive or reward.

The Supreme Court held that in considering the plea of insanity of the accused in a case of homicide, the normal presumption of the innocence of the accused and the burden on the part of the prosecution to prove the guilt beyond reasonable doubt never shifts. But the burden to prove the existence of circumstances bringing the case within an exception is on the accused, because the Court will presume absence of such circumstances. Under Section 105 of this Act read with the definition of 'Shall Presume' in Section 4, the Court shall regard absence of such circumstances as proved unless, after considering the matter before it, it believes that the said circumstances existed or their existence was so probable that a prudent man ought, under the circumstances of the particular case, act upon the supposition that they did exist—in other words, the accused will have to rebut the presumption that such circumstances did not exist. The accused has to satisfy the standard of a prudent man. Evidence adduced may not be sufficient to discharge the burden under Section 105, but it may raise a reasonable doubt in the mind of the judge as regards one or other of the necessary ingredients of the offence.[98]

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91. *G. Vasu* v. *Syed Yaseen Sifuddin*, AIR 1987 AP 139 (FB). **Overruling** *Janakalakshmi* v. *Madhavarao*, AIR 1973 AP 103; and **dissenting from** 21 MLJ 1013 : 1949 Bom 257; AIR 1973 Ker 210 : AIR 1935 All 509 : AIR 1936 Nag 130; AIR 1936 Pat 498.
92. *Bhanda Garh* v. *State of Assam*, 1984 Cr LJ 217 (Gou).
93. *Birajananda Dasgupta* v. *Competent Authority under Urban Land Act*, AIR 1988 Cal 8.
94. *Umashanker* v. *State of Chhattisgarh*, 2001 Cr LJ 3074 (para 8) (MP) : 2001 Cr LJ 4696.
95. *Haradhan Mahatha* v. *Dukhu Mahatha*, AIR 1993 Pat 129 (para 8).
96. *State of Madras* v. *Vaidyanatha Iyer*, AIR 1958 SC 61; **see also** *D.M. Alxander (Mrs.)* v. *Commr. of I.T.*, AIR 1953 Mad 166.
97. In re : *Ayyaswamy*, AIR 1965 AP 105.
98. *Dahya Bhai Chhagan Bhai Thakkar* v. *State of Gujarat*, AIR 1964 SC 1563 **overruling** *Ramhitran* v. *State of M.P.*, AIR 1956 Nag 187.

In a defamation case based on a defamatory matter published in a newspaper, the Calcutta High Court, held that a copy of the newspaper is admissible under Section 81 of this Act and the genuineness of the document has to be presumed, and the plea that proof of the contents as per Section 61 should be let in, cannot be sustained and that the burden of proof shifts to the accused to disprove it.[1]

In the case of restitution of conjugal rights, where the legality and the validity of the marriage has not been impugned either in the pleadings or in the evidence, on the ground of non-performance of necessary ceremonies of the marriage, once the factum of marriage is proved, everything necessary to validate such marriage, including the observance of essential ceremonies, shall be presumed.[2]

6. REBUTTABLE PRESUMPTIONS

Under the Bengal Tenancy Act 8 of 1885, Section 10BB, the Calcutta High Court, held that the presumption of correctness of the entries in record of rights, has to be made, though they do not create or extinguish title, but the presumption can be rebutted by evidence.[3] Presumption under Section 113-A of the Evidence Act is rebuttable.[4]

In regard to the report of a public analyst, when it is proved that the seal was intact, presumption has to be drawn as to the observance of required formalities thereto.[5]

7. IRREBUTTABLE PRESUMPTIONS

The Supreme Court, while dealing with Schedule 3, Rule 3 of Citizenship Rules of 1956, held that the rule which makes it obligatory on the enquiring authority to infer the acquisition of citizenship of a foreign country from the fact that the passport of a foreign country has been obtained by an Indian Citizen, is a "rule of evidence" and falls within the scope of Section 9(2) of the Citizenship Act, 1955, which authorises "rules of evidence" to be made, and the challenge to its validity on the ground that it is a rule of substantive law must, therefore, fail.

The decision contains an elaborate discussion about presumptions, rebuttable as well as irrebuttable. After referring to the views of several jurists and writers like Holdsworth, Wigmore, Phipson, Stephen and Dicey, the Supreme Court observed that their views do not disclose an identity of approach and their conclusions show different shades of opinion.

The Supreme Court observed: "In deciding the question as to whether a rule about irrebuttable presumption is a rule of evidence or not, the proper approach to adopt would be to consider whether fact 'A' from the proof of which a presumption is required to be drawn about the existence of fact 'B', is inherently relevant in the matter of proving fact 'B' and has inherently and probative or persuasive value in that behalf or not. If fact 'A' is inherently relevant in proving the existence of fact 'B', and to any rational mind it would bear a probative or persuasive value in the matter of proving the existence of fact 'B', then a rule prescribing either a rebuttable presumption or an irrebuttable presumption in that behalf would be a rule of evidence. On the other hand, if fact 'A' is inherently not relevant in proving the existence of fact 'B' or has no probative value in that behalf, and yet a rule is made prescribing for a rebuttable or an irrebutable presumption in that connection, that rule would be of substantive law and not a rule of evidence. Therefore, in dealing with the question as to whether a given rule prescribing a conclusive presumption is a rule of evidence or not, the view that all rules prescribing irrebuttable presumptions are rules of substantive law cannot be adopted. The question can only be answered after examining the rule and its impact on the proof of facts 'A' and 'B'."

A passport obtained by a person from a foreign country is relevant in an enquiry as to the citizenship of the person holding the passport. Applying the test laid down above to Sch. 3, R. 3, it must therefore be

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1. *Dilip Chakraborty* v. *Public Prosecutor*, 1976 Cr LJ 1300; see also, *Kirtan Sahu* v. *Thakur Sahu*, AIR 1972 Ori 158 : (1972) 38 Cut LT 82 (FB).
2. *Sridhar Dey* v. *Kalpana Dey*, AIR 1987 Cal 213.
3. *Kazy Md Hossain* v. *Sibram Bondopadyaya*, AIR 1967 Cal 10; (a case under the West Bengal Estates Acquisition Act-I on 1954) *Amar Deep Singh* v. *Collector*, ILR 1960 10 Raj 930 (a case under Ajmer Abolition of Intermediaries and Land Reforms Act 3 of 1955).
4. *Nilakantha Pati* v. *State of Orissa*, 1995 Cr LJ 2472 (para 29) (Ori).
5. *State* v. *Umacharan Ram* AIR 1966 Ori 81; *Food Inspector* v. *Pandavalappil Kanna*, AIR 1966 Ker 70; *Subbayan Muthukomaran* v. *State of Kerala*, AIR 1968 Ker 330.

held that the impugned rule is a rule of evidence and not a rule of substantive law. As such, it would be within the scope of the authority conferred on the Central Government by Section 9(2).

The Supreme Court held that there can be no doubt that, the expression "rules of evidence" construed in the light of the Indian legal and legislative history would include some rules of conclusive proof and if that is so, it would be idle to contend that the impugned rule is a part of the substantive law merely because it prescribes a conclusive presumption. Therefore, on this construction of Section 9(2), the impugned rule must be held to be *intra vires*.[6]

8. CONCLUSIVE PROOF

Section 3 of this Act defines 'Evidence'. The word 'Conclusive Evidence' is not defined, but in this section it is stated "When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it". Thus an artificial probative effect is given by the law to certain facts and no evidence is allowed to be produced with a view to combating that effect. Generally, this type of cases occurs when it is against the policy of the Government or it is in the interest of society.[7]

The Supreme Court in *Somawanti* v. *State,*[8] held that there is no difference between 'Conclusive Proof' and 'Conclusive Evidence', the aim of the two expressions being to give a finality to the establishment of the existence of a 'Fact'.[9]

The voters list prepared under the Gujarat Municipalities Act (34 of 1964), is conclusive proof of the right of a voter to vote.[10]

The statement in an order of the Court is conclusive of what happened before the Presiding Officer of that Court.[11]

The declaration made under the Land Acquisition Act under Section 6, is conclusive.[12]

Marriage certificate under special Marriage Act is conclusive proof of solemmization of marriage under the Act.[13] The certificate issued by the Director of the Central Food Laboratory is the conclusive proof of the facts stated therein and his examination as a witness is not permissible.[14] Certificate of purchase issued by the Taluka Board is the conclusive proof of assignment to the tenant of the right, title and interest of the landowner over the holding or the portion thereon to which the assignment relates, which can be discarded only if it is inaccurate on its face or is procured collusively.[15]

The fact that a child was born during the continuance of a valid marriage, is conclusive proof of the fact that the child is legitimate child of the husband, unless it is shown that the parties to the marriage had no access to each other at any time. When the child was born on 2-8-1980 and the wife stated that she visited the husband on 28-12-1979 and had sexual intercourse that night and when the husband failed to prove non-access, it was held that the Court shall on proof of one fact regard the other as proved, and shall not allow evidence to be given for purpose of dis-proving it.[16]

For other cases see Commentary under Section 112.

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6. *Izhar Ahmad* v. *Union* AIR 1962 SC 1052;
7. *Dindayal* v. *State*, AIR 1956 All 520 : 1956 Cr LJ 1031. **See also** *Ningamma* v. *Chikkaiah*, AIR 2000 Kant 50 (para 21).
8. 1963 SC 151.
9. *Jagath Chandra* v. *Province of Bombay*, AIR 1950 Bom 144.
10. *Mahmad Lusein* v. *Onali Fidalli*, AIR 1969 Guj 334. But **see contra** : *Viswanathan* v. *Rangaswamy*, AIR 1967 Mad 244; *Kunhiraman* v. *Krishna Iyar*, AIR 1962 Ker 190 (FB); *Venkata Kondayya* v. *Election Commissioner*, AIR 1955 AP 109.
11. *Ratanlal Saligram* v. *Nathulal Pankraji Namdeo*, AIR 1961 MP 108; *Moran Mar Besselios Catholic* v. *Mar Poulose Athanasius*, AIR 1954 SC 526.
12. *V Gopalakrishna* v. *Secretary Board of Revenue*, AIR 1954 Mad 362.
13. *Nirmal Das Bose* v. *Mamta Gulati*, AIR 1997 All 401.
14. *K V Baby* v. *Food Inspector, Wadakkanchery*, 1994 Cr LJ 3421 (para 19) (Ker), **relying on** *Mathukutty* v. *State of Kerala*, 1987 (2) KLT 867 : 1988 Cr LJ 898 and *Anil* v. *Chief Food Inspector*, 1991 (2) KLT 23.
15. *Cheeranthoodika Ahmmedkutty* v. *Parambur Mariakutty Umma*, AIR 2000 SC 1853.
16. *Prem Singh* v. *Dilladevi*, AIR 1984 All 129. **See also** *G.M. Sudarshan Reddy* v. *Master Abhinay*, 2000 AIHC 4981 (paras 8 and 11) (Kant).

9. NOT CONCLUSIVE PROOF

There is no compulsive presumption in regard to an entry made by a public servant in the discharge of his official duties about a fact in issue or relevant fact.[17]

Registration of a partnership under the Partnership Act of 1932, is not conclusive proof of the existence of a partnership.[18]

The Court is not bound to treat the registration endorsement as conclusive proof of execution of a document, if circumstances of the execution are suspicious.[19]

Under the W. Bengal Land Reforms Act and Urban Land Ceiling and Regulation Act, for the purpose of exclusion of agricultural lands, it was held that the mere entry in the revenue and land records classifying the land as agricultural is not by itself sufficient to decide that land is being used mainly for purpose of agriculture, and to justify its exclusion from the operation of the Act, it must be decided whether, in fact, it was used mainly for the purpose of agriculture.[20]

Under the U.P. Pure Food Rules of 1952, it was held that the presumption under rule 10 flowing out of a certificate of public analyst is not conclusive, but a rebuttable presumption.[21]

The date of birth noted in the form for admission in a school, is not conclusive.[22]

Entries in the electoral roll or of age mentioned therein cannot be treated as conclusive piece of evidence for the dominating persons get the names of even minors entered in it.[23]

10. BURDEN OF PROOF

"The term 'burden of proof,' standing alone, is . . . . . somewhat ambiguous. It may refer to the obligation of a party to prove a fact in issue, or to the obligation of a party to adduce enough evidence to prove necessary evidential facts."[24]

"The burden of proof has been described as "Whose task is it to establish a fact?" . . . . . "[25]

The American scholar Thayer mentioned the use of the phrase 'burden of proof' in two main senses :

> "The peculiar duty of him who has the risk of any given proposition on which parties are at issue—who will lose the case if he does not make this proposition out, when all has been said and done.
>
> The duty of going forward in an argument or in producing evidence, whether at the beginning of a case, or at any later moment throughout the trial or discussion."[26]

"The term encompasses two separate burdens of proof. One burden is that of producing evidence, satisfactory to the judge, of a particular fact in issue. The second is the burden of persuading the trier of fact that the alleged fact is true."[27]

"The phrase "burden of proof" is used to describe the duty which lies on one or other of the parties either to establish a case or to establish the facts upon a particular issue."[28]

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17. *Abdullah* v. *State of Rajasthan*, AIR 1972 Raj 272.
18. *Krishna Paul* v. *CIT*, ILR (1967) 1 Cal 227.
19. *Mallo* v. *Bakhtawari*, AIR 1985 All 160.
20. *Birajananda Das Gupta* v. *Competent Authority*, 1988 Cal 8.
21. *Dindayal* v. *State*, AIR 1956 All 520.
22. *Narayan Dastane (Dr.)* v. *Sucheta Dastane*, AIR 1970 Bom 312.
23. *Mayank Rajput* v. *State of U.P.*, 1998 Cr LJ 2797 (para 24) (All).
24. PETER MURPHY : A PRACTICAL APPROACH TO EVIDENCE, 1985, 2nd Edn., p. 74.
25. STEVE UGLOW'S EVIDENCE : TEXT AND MATERIALS, 1997, p. 63.
26. PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW, 355.
27. MC CORMICK ON EVIDENCE, 1984, 3rd Edn., p. 947.
28. PHIPSON ON EVIDENCE, 15th Edn. (2000), p. 55 (para 4-01).

The normal rule is that the burden of proof lies on the party who alleges a fact. The party can, however, take advantage of presumption which may be available to him.[29]

In a case where a doctor failed to conduct an emergency operation and as a result the patient died, it was held that in such cases, consent of the patient who submits to such an operation is implicit and the doctor who fails to perform the emergency operation must prove satisfactorily that the patient refused to undergo the operation not only at the initial stage but also even after the patient was informed about the dangerous consequence of not undergoing the operation.[30]

Where a suit was filed by an illiterate lady for cancellation of a gift deed on the ground that it was obtained by fraud, the fact that she was illiterate and a widow, was undisputed. It was held that the burden of proof is on the person to show that the deed was valid.[31]

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29. *Syed Akbar* v. *State of Karnataka*, AIR 1979 SC 1848.
30. *T T Thomas* v. *Elisa*, AIR 1987 Ker 52.
31. *Mallo* v. *Bakhtawari (Smt.)*, AIR 1985 All 160.

CHAPTER II

OF THE RELEVANCY OF FACTS

Evidence may be given of facts in issue and relevant facts

S. 5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

***Explanation.*—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.**[1]

ILLUSTRATIONS

(a) *A* is tried for the murder of *B* by beating him with a club with the intention of causing his death.

At *A*'s trial the following facts are in issue:—

A's beating *B* with the club;

A's causing *B*'s death by such beating;

A's intention to cause *B*'s death.

(b) A suitor does not bring with him and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

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COMMENTS

1. PRINCIPLE, OBJECT AND SCOPE

This section deals with the right to produce evidence, in any suit or proceedings, relating to the existence or non-existence of every fact in issue, and also to prove such other facts which may be declared relevant to the fact in issue, by virtue of the provisions contained in Sections 6 to 55. The object of this section is to restrict the investigation made by Courts within the bounds prescribed by general convenience. Of no fact can evidence be given unless it be either a fact in issue or one declared relevant under the following sections. Thus, evidence of all collateral facts, which are incapable of affording any reasonable presumption as to the principal matters in dispute, is excluded to save public time.

This section excludes everything not convered by some other succeeding section. The last four words of the section 'and of no others' preclude a party from providing any facts, not in issue or not declared relevant by any of the remaining sections of this Chapter. To establish the relevancy of any fact, it must be shown that it is a fact in issue or fact such as is declared to be relevant.—'Facts.. declared to

1. See now the Code of Civil Procedure, 1908 (Act No. 5 of 1908).

be relevant'. The relevant facts are all those facts which are in the eye of the law so connected with or related to the facts in issue that they render the latter probable or improbable.

Section 3 says that one fact is relevant to another when the one is connected with the other in any of the ways referred to in this Chapter. Relevancy is thus fully explained in Ss. 6-11. "These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings. They are designedly worded very widely, and in such a way as to overlap each other. Thus a motive for a fact in issue (S. 8) is part of its cause (S. 7); subsequent conduct influenced by it (S. 8) is part of its effect (S. 7). Facts relevant under S. 11 would, in most cases, be relevant under the other section."[2]

The object of this Chapter is to point out in what cases collateral facts are relevant.

2. FACTS IN ISSUE AND RELEVANT FACTS

This expression is defined in Section 3 as including any fact from which either by itself or in connection with other facts, the existence, non-existence, nature and extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows. In Civil Cases the facts in issue arise out of the pleadings by the parties, by assertion of the facts by one party and controverted by the other party. Such disputed facts would be drawn up by the Court under the Civil Procedure Code from the issues framed for determination in the suit.[3]

In Criminal Cases, the Court draws the facts given out by the prosecution, which constitute an offence against the accused person. Only such of those facts relevant to the offence would form a charge against the accused. While framing the charges concerning the offences alleged, the Court briefly points out the facts which constitute the particular offence.

The expression 'relevant' is also defined in Section 3 of this Act. One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act, relating to the relevancy of the facts. Under Chapter-2 of this Act, Section 5 relates to all facts in issue, whereas Section 6-55, deal with collateral facts. A perusal of the title of each section, (that is, Ss. 6-55) would show which fact is made relevant under this Act.

3. "AND OF NO OTHERS"

The last four words 'and of no others' in the section clearly point out that the party to the proceeding is prohibited from proving any fact which is not in issue or not declared relevant by any of the provisions of the Act. The section excludes everything which is not covered by the purview of some other section which follows in te Statute."[4]

There must be a specific provision before facts can be treated as relevant and facts must also be proved as laid down in the Act.[5]

Any one who wants to give evidence of a particular fact must show that it is admissible under some one or other of the following sections. The words "and of no others" impliedly impose a dupy on the Court to exclude evidence of irrelevant facts, irrespective of objections by the parties. In Criminal proceedings this duty was expressly imposed by old Criminal Procedure Code, Section 298. (Omitted by the Code of 1973). (Re: Civil proceedings, see the Code of Civil Procedure, 1908, O. XIII, R. 3).[6]

4. ADMISSIBILITY OF EVIDENCE

According to the practice in England, all facts are admissible: subject to two conditions, *viz*., (1) the best evidence connecting the fact in issue is admissible. (2) No hearsay evidence is admissible. Under the present Act only facts directly connected with the fact in issue and such other facts which are declared relevant can be pleaded by the party. It may be noted here, that there are certain other facts which are not covered by Sections 6-55, which may have to be elicited for the purpose of discrediting a witness, by

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2. STEPHEN'S INTRODUCTION p. 72.
3. *Bishwanath Rai* v. *Sachidanand Singh*, AIP 1971 SC 1949.
4. *The Collector of Gonakhpur* v. *Palakdharik Singh*, (1889) 12 All 1 at 43 (FB); *Mt Khedia* v *Mt Turea*, AIR 1962 Pat 420.
5. *Hasan Abdulla* v. *State of Gujarat*, AIR 1962 Guj 214.
6. *Stokes Anglo Indian Codes*, Vol. II, P. 854, fn-1.

showing his previous statements which are inconsistent with the statements made in that particular case, or to prove the untrustworthiness of a witness.[7]

In a case of murder, it was held by the Supreme Court that the opinion of the prosecuting officers that some of the witnesses were responsible for the murder and not the accused, had no relevancy and should not have been placed on record in the case.[8] The age of a witness noted at the top of the deposition is not part of the evidence since it is not recorded on oath and hence it is not relevant to prove his age.[9]

In an enquiry for fixing the price of a groveland under the Land Acquisition Act, it was held that the evidence of a witness who offered a price for purchasing it prior to acquisition is relevant and acceptable.[10] Opinion as to handwriting can be proved by producing the photograph taken by the expert if the original is not forthcoming and photograph is a relevant fact.[11] In a case where corrupt practice was alleged in an election petition under the Representation of People Act, circumstantial evidence in respect of facts constituting corrupt practice, was held to be relevant.[12]

The fact that a document was procured by improper or even illegal means will not be a bar to its admissibility if it is relevant and its genuineness proved. But while examining its genuineness the circumstances under which it can be produced into Court have to be taken into consideration.[13] The Court is not concerned how the evidence was gathered or from where it was secured. It cannot reject evidence that is the outcome of an unauthorised investigation or by improper illegal means. It is concerned only whether the evidence is relevant to the matters in issue and if so whether admissible. An eminent judge once observed: 'It matters not how you get it; if you steal it even, it would be admissible.'.[14]

Where the written F.I.R. was admitted in evidence without examining its author and the defence made no objection to it, the accused could not contend that the prosecution case be disbelieved for such non-proving.[15]

5. INADMISSIBILITY OF EVIDENCE

Where the prosecution failed to prove that the seized article, containing finger prints, was not tampered before sending to the Bureau and the specimen finger prints were not taken before a Magistrate and the seized article was not produced and exhibited, conviction could not be based on the finger print report.[16] Where the Police Officer, conducting the search and effecting the seizure, could not be better than a complainant, violated the principles of criminal jurisprudence by himself conducting the investigation, the documents of search and seizure were inadmissible in evidence.[17]

6. RELEVANCY AND ADMISSIBILITY

"The prime requirement of anything sought to be admitted in evidence is that it is of sufficient relevance. What is relevant (namely what goes to the proof or disproof of a matter in issue) will be decided by logic and human experience, and facts may be proved directly or circumstantially. But while no matter should be proved which is not relevant, some things which are relevant by the normal tests of logic may not be proved because of exclusionary rules of evidence. Such matters are inadmissible. Admissible evidence is thus that which is (1) relevant and (2) not excluded by any rule of law or practice.

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7. *Rupendradebi* v. *Abhrumati Debi*, AIR 1951 Cal 286; *R.L. Singh* v. *A.A. Singh*, 1958 Mani 7; *Malamma* v. *Nanjamma*, AIR 1988 Kar 225; *Kalidas Ghosal* v. *S.K. Mondal*, AIR 1957 Cal 660; *P. Sirajuddin* v. *Government of Madras*, AIR 1968 Mad 117; *Kishan Narian* v. *State of Maharashtra*, AIR 1973 SC 2751; *Bachibai alias Kunverbai Widow of Shah Thakershi Nenshi* v. *Sha Vivji Derji*, AIR 1963 Guj 241; *Zenas Sorabji* v. *Mirabelle Hotel Company*, AIR 1981 Bom 446 at 457.
8. *Surajpal* v. *State of U.P.*, AIR 1955 SC 419 : 1955 SCJ 351.
9. *Mallipudi Acharyulu* v. *Venkaymma*, (1971) 1 APLJ 350.
10. *Raghubans Narain Singh* v. *The U.P. Govt. through Collector of Bijnor*, AIR 1967 SC 465.
11. *Laxmipat* v. *State*, AIR 1968 SC 938.
12. *Chandanavada Subba Rao* v. *Kasu Bharmananda Reddy*, AIR 1967 AP 155.
13. *Magraj Patodia* v. *R.K. Birla*, AIR 1971 SC 1295.
14. *Balwanth Singh* v. *R.D. Shah, Director of Inspection, Income Tax*, AIR 1969 Del 91.
15. *Pankaj Naik* v. *State of Orissa*, 1994 Cr LJ 829 (para 6) (Ori).
16. *Mohd. Aman* v. *State of Rajasthan*, AIR 1997 SC 2960 : 1997 Cr LJ 3567.
17. *Gyan Chand* v. *State of Rajasthan*, 1993 Cr LJ 3716 (para 11) (Raj).

It may be that an item of evidence is admissible on one ground and inadmissible on others; if so, it will be admitted. Evidence may also be admissible for one purpose and not for another."[18]

See also PHIPSON ON EVIDENCE 15th Edition (2000), Page 106, para 6-05 "Relevancy and Admissibility".

Relevancy and admissibility are not the same. All admissible evidence is relevant but all relevent evidence is not admissible. Relevancy is thus the genus of which admissibility is the species. Though a fact may be relevant as it has connection with the fact in issue, still it may not be admissible, *e.g.*, the communication between an advocate and his client. Sometimes relevancy may give rise to a presumption of admissibility, in which case the party objecting to it has to show that the fact though relevant is not admissible. In this connection it may be noted that Section 122 of this Act forbids disclosure of communication between wife and husband during marriage. Similarly S. 126, prohibits disclosure between a lawyer and a client.

In India, as in England, the test of admissibility of evidence lies in relevancy unless there is an express or necessarily implied prohibition in the Constitution or any other law.[19]

There is no provision of law which renders the statement of a witness produced by one accused inadmissible against the co-accused; but there are obvious reasons for receiving such evidence with great caution.[20]

Where a person was charged in one case for not filing a return on a certain date, he was found not guilty. In the second case he was charged for attempting to bribe the officer for accepting the return with an ante date. The question was whether the evidence of acquittal is relevant in the second case. It was held that it was relevant as the fact of failure to file the return was one of the important facts to be established in the second case.[21]

Merely because a village *Ramoshi* (officer) would be under the influence of the police, his evidence cannot be discarded as not relevant, on any justifiable ground.[22]

7. DISTINCTION BETWEEN RELEVANCY AND PROOF

Relevancy of facts has to be determined according to the pleadings of the parties, relating to the facts in issue. But proof is the procedure by which the relevant or admissible facts have to be proved. Under Section 136 of the Act, the Court is given the power to question the parties as to how the facts placed by them would be relevant and if the court is satisfied it can admit the evidence as admissible. So also the Court decides the relevancy of a fact. And it can also prescribe the mode of proof by which a fact can be proved.

8. OBJECTION TO PROOF

If objection as to the mode of proof of a document, is not raised when it was tendered, it would be deemed that objection was waived. Their Lordships of the Privy Council in *Gopaldas* v. *Sri Thakurji*, (1943 PC 83) observed: "Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie over till the appeal stage and raise objection for the first time as to the mode of

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18. HALSBURY'S LAWS OF ENGLAND, Fourth Edition, Vol. 17, (para 5), Page 7.
19. *Ramji Das Sharma* v. *R.N. Limaya*, (1974) 1 SCC 346.
20. *Sohanlal* v. *State*, (1962) 2 Cr LJ 520.
21. *Manick Chand Agarwalla* v. *State*, AIR 1952 Cal 730. **See also** 1955 Ker LT 830.
22. *Shivji Genu Mohite* v. *State of Maharashtra*, AIR 1973 SC 55.

proof".[23] The party who had given consent or waived the objection which he would have taken, cannot object to it at a later stage.[24]

The Court should take care to find out, when a document is produced, whether it is genuine and free from tampering or mutilation.[25]

9. OBJECTIONS TO THE ADMISSIBILITY HAVE TO BE DECIDED THEN AND THERE

It is proper for the Court to determine the questions as to admissibility of evidence as and when objection arise.[26]

The Court is to decide the question of admissibility of evidence (s. 136 *infra*). It would be decided as it arises and should not be reserved until judgment in the case is given. The moment a witness commences giving evidence which is inadmissible, he should be stopped by the Court. A party objecting to a question must do so as soon as it is stated and before the answer is given. When an irrelevant document is tendered, an objection should be made at that time. If it is not taken in time, it is considered to be waived. A party filing a document cannot urge its inadmissibility when the opposite party seeks to use it against him.[27] The moment a witness commences giving evidence which is inadmissible the witness should be stopped by the Court, even if there is no objection raised by the opposite parties.[28] On the same lines, it was held that the duty of a judge is to disallow inadmissible evidence when no objection is taken, and the judge should stop such questions himself without waiting for an objection to be taken as to its admissibility.[29]

10. WHEN ADMISSIBLE AND INADMISSIBLE PORTIONS ARE MIXED

When the evidence is tendered, it is the duty of the Court to decide the legally admissible evidence. If a document contains both admissible and inadmissible portions (*e.g.* because of some recitals relating to property which requires registration) and if they are severable, then legally admissible portion can only be taken. If they are not separable and so intermixed, the entire evidence has to be rejected.[30]

11. DUTY OF COURT TO GIVE REASONS FOR ADMISSIBILITY

It is always advisable to give at least brief reasons either for admissibility or inadmissibility of the evidence tendered, though detailed reasoning may be given in the judgment, so that the appellate court can appreciate the question of admissibility.[31]

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23. *State of Bihar* v. *Sri Radha Krishna Singh*, AIR 1983 SC 684; *Purushothama* v. *Perumal*, AIR 1972 SC 608; *Sadasib Prakash* v. *State of Orissa*, AIR 1956 SC 432; *Bhagat* v. *Khetu*, AIR 1929 PC 110; *Chandanbai* v. *Jagjiwan Lal*, AIR 1958 Raj 110; *Bibi Kaniz* v. *Mobarak*, AIR 1924 Pat 284; *Jainab* v. *Haiderally*, 43 Mad 609 (FB); *Doagarmal* v. *Sunam Ram*, AIR 1944 Lah 58; *Gonnabathula* v. *Government*, AIR 1926 Mad 282; *Behari Lal* v. *Aminchand*, 1924 All 918; *Behari Lal* v. *Aminchand*, 79 IC 1029; *Rohikund* v. *Zihurus Syed Ali*, AIR 1924 Nag 358; *Kalikananda* v. *Shivanand*, 63 IC 625; *Kedarnath* v. *Pradhan*, 167 IC 190 : IL 1937 Nag 68; *Iyyavar* v. *Secretary of State*, AIR 1942 Mad 528.

24. *Haji Mohammad* v. *State of W. Bengal*, AIR 1959 SC 488; *Purushothama* v. *Perumal*, AIR 1972 SC 608 (PC); *Gonnabathula* v. *Government*, AIR 1926 Mad 282; *Jainab* v. *Hyderaliy*, ILR 43 Mad 709; *Iyyavar* v. *Secretary of State*, AIR 1942 Mad 528.

25. *R.M. Malkani* v. *State*, AIR 1973 SC 157.

26. *Devasikhamani* v. *Andamuthu*, (1955) 1 MLJ 457; *Shri Rama* v. *Lakshmi Devamma*, AIR 1957 AP 60; *Jadurai* v. *Bhabataran*, ILR 17 Cal 173; *Basir* v. *Girijanath*; AIR 1970 Nag 340; *Ramjiban* v. *Oghore*, 25 Cal 401; *Abdul Samod* v. *Gunendra*, 1925 Cal 452; *Laijam* v. *R.*, AIR 1925 All 405; *Ramanuj* v. *Dakshineswar* AIR 1926 Cal 752; *Ahmad Ali* v. *Jyoti Prasad*, AIR 1944 All 188; *Buideswari Singh* v. *Ramraj Singh*, AIR 1939 All 61.

27. *Ram* v. *Secretary of State for India in Council*, ILR (1901) 24 Mad 427.

28. *R.* v. *Pitamber*, 7 WR 25 (Cri).

29. *Stirland* v. *D.P.P.*, (1944) 2 All ER 13 (HL); **see also** *Boya Chinna* In re : AIR 1942 Mad 52; *Harak* v. *Bishnu*, 8 CWN 101; *Nanek* v. *Mian Mahammed*, AIR 1936 Lah 114; *Lim Yam* v. *Lam Choon*, 1928 PC 127; *Kamakshyanarain Singh* v. *Karampura Development Co.*, AIR 1950 Pat 134; *Krishnaswami* v. *Ramachandra*, 1931 Mad 601; *Millar* v. *Madho*, ILR 19 All 76 (PC); *Inayat* v. *R.*, AIR 1936 PC 199.

30. *Gorachand Sirar* v. *Ram Narain Chowdery*, 9 WR 587; *Gurumukh Singh* v. *Commr. of Income-tax*, AIR 1944 Lah 353 (FB).

31. *Ponnammal* v. *M. Stores*, AIR 1950 Mad 62.

12. OBJECTIONS TO RELEVANCY

It is the primary duty of the Court to exclude an irrelevant fact whether there is objection by the party or not as to its admissibility. Section 298 of the old Criminal Procedure Code (now omitted in Act 2 of 1974) laid down that it was a duty of a judge to exclude inadmissible evidence, whether it is or is not objected to by the parties. So far as Civil Cases are concerned a combined reading of Sections 60, 64 and the first proviso to Section 165 would show that only admissible evidence has to be taken by the Court. As the question of admissibility is a pure question of law, it is the duty of the court to exclude inadmissible evidence because it has to deliver the judgment in the case basing upon facts declared by this Act to be relevant and duly proved. It was held by the Madras High Court that a judgment based on irrelevant evidence is not sustainable.[32] In that particular case, evidence was given before a registering officer by consent of parties, though the conditions in Section 33 of this Act were not fulfilled. But in a subsequent decision it was held that the provisions of Section 33 of this Act may be waived.[33] The principle that a judgment based on irrelevant facts or inadmissible facts cannot be sustained, still holds good. If the court failed in its duty in avoiding irrelevant and inadmissible facts it would lead to miscarriage of justice and the ends of justice would get defeated.[34]

Objection to relevancy can be raised in appeal even though evidence was admitted without any objection in the trial court. If the evidence is irrelevant, the consent of the parties cannot make it relevant.[35]

It was held by the Andhra Pradesh High Court that where a question of title was involved and when both parties did not raise objection to oral evidence, they could not take any objection in second appeal.[36]

13. WAIVER OF OBJECTION OR CONSENT OF PARTIES

Basically, proof being a matter of procedure, the parties may by consent or waiver allow evidence being admitted by the Court. So far as the Civil Cases are concerned the parties by consent can validate the procedure recording the evidence by the court.[37] The parties can agree to the reception without proof of recitals in a judgment as to the contents of a document. The parties cannot afterwards object to the admissibility of the recitals in the judgment.[38]

There is difference between waiving the necessity of formal proof of a document and objecting to the admission of a document which is *per se* inadmissible.[39] Document *per se* inadmissible cannot become admissible by consent, as the admissibility is a question of law.[40]

14. CRIMINAL CASES—WAIVER OF CONSENT

So far as the criminal cases are concerned, the general principle is that the accused person cannot give consent on any thing or waive even the procedure in the trial against him, unless any law expressly

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32. *Ponnaswamy* v. *Singaramma*, ILR 41 Mad 731.
33. *Jainab* v. *Hyder Ali*, ILR 43 Mad 609 (FB).
34. *Khatri* v. *State*, AIR 1981 SC 1068 **see also** *Ambar* v. *Lutfe*, 21 Cal WN 996 : ILR 45 Cal 159; *Narhari* v. *Ambabi*, ILR 44 Bom 192; *Luchiram* v. *Radha Charan*, 34 Cr LJ 107; *Dwijen* v. *Naresh*, 49 CWN 791; *Ramgulam Sahu* v. *Durga Prasad*, AIR 1921 Pat 17; *Damodhar* v. *Jadunath*, 91 IC 449.
35. *Marneedi* v. *Masimukkul*, AIR 1949 Mad 689; *Vithubai* v. *Chotuhbai*, AIR 1962 Guj 68; *Vishnugopal* v. *Kantnaram*, AIR 1946 Bom 193; *Rameswar Prasad* v. *Ramnath Khemka*, AIR 1950 Pat 174; *Dolgobind* v. *Maqbul*, AIR 1936 Cal 164; *Mahabirji* v. *Ramnath*, AIR 1936 Pat 634; *B. Islam Ali* v. *M.G Ali Begum*, AIR 1935 Lah 251; *Ghulam Muhammad* v. *Kalimullah*, 1928 Lah 428; *Gonnabathula* v. *G*, AIR 1926 Mad 282; *Lim Yam* v. *Lam Choon*, AIR 1928 PC 127; *Ambar Ali* v. *Luffe Ali*, ILR 45 Cal 159; *Chooni* v. *Neel Madhav*, AIR 1924 Cal 1042; *Marneedi* v. *Madimukula*, AIR 1949 Mad 689; **see contra** *Chimnaji* v. *Dinkar*, 11 Bom 320; *Akbar Ali* v. *Bhvea Lal Jha*, ILR 6 Cal 666 at 670; *Damodar* v. *Jadunath*, 91 IC 449; *Narhari* v. *Ambabi*, ILR 44 Bom 192; *Mt. Sumitra Kuer* v. *Ramschair Chowbey*, 1921 Pat 61; *Chavakula* v. *C*, AIR 1947 Mad 168.
36. *Vaddaboyina* v. *Vaddaboyena*, AIR 1969 AP 300.
37. *Ayyavar* v. *Secretary of State*, AIR 1942 Mad 528; *K P Co. Bank* v. *Dulhanbibi*, AIR 1966 SC 1072; *Konchada* v. *Valupula*, AIR 1925 Mad 257; *Srinivasa* v. *Balwant*, 37 Bom 518.
38. *Gopu Nataraja* v. *Rajammal*, AIR 1922 Mad 394.
39. *Ram Singh* v. *Bijay*, AIR 1972 Cal 190; *Mahabirji* v. *Ramnath*, AIR 1936 Pat 634; *Dalbogind* v. *Maqbul* AIR 1936 Cal 164.
40. *Ponnuswamy* v. *Singaramma*, ILR 41 Mad 731; *Bibhabati* v. *Ramendra*, AIR 1947 PC 19.

permits waiver. It is the duty of the Criminal Court to follow the procedure prescribed by law, and his right cannot be held to be lost by his consent to a procedure.[41]

In this connection it is useful to note Section 58, of this Act, wherein it is stated that no fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which before the hearing they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings. The proviso states that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions. One view is that this section applies only to civil matters. Another view is that it applies to both civil and criminal matters.

Especially in Criminal cases in which a good number of illiterate people are involved, a heavy duty is cast on the lawyers appearing for them in making admissions on behalf of the accused, because the accused is under no obligation to make an admission to anything, and that no implied authority can be presumed in favour of a lawyer to make admissions against the interest of his client, who is the accused in the case. When a lawyer puts up a plea in the case, the accused is entitled to the benefit of such plea, but it cannot be said that the plea or the defence taken up by the lawyer must bind the accused.[42] Except the plea of the accused that he is guilty of the offence, no other admission dispensing with proof is permitted in a criminal trial.[43] It was held that no consent or admission by the prisoner's advocate to dispense with a medical witness (advocate admitted the postmortem certificate) can relieve the prosecution of proving, by adducing evidence as to the nature of injuries received by the deceased, and that the injuries were the cause of the death of the person, for which the prisoner is charged with the offence of murder.[44]

15. NO EVIDENCE OF A FACT BY A PERSON DISENTITLED TO PROVE [EXPLANATION]

This explanation prohibits a party from claiming any relief upon facts or documents not stated or referred to by him in his pleadings. Illustration (b) elucidates the meaning of the Explanation.

Relevancy of facts forming part of same transaction.

S. 6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

ILLUSTRATIONS

(a) *A* is accused of the murder of *B* by beating him. Whatever was said or done by *A* or *B* or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(b) *A* is accused of waging war against the Government of India by taking part in an armed insurrection in which property is destroyed, troops are attacked, and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though *A* may not have been present at all of them.

(c) *A* sues *B* for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d) The question is, whether certain goods ordered from *B* were delivered to *A*. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

SYNOPSIS

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41. *Kottam* v. *Umar*, ILR 46 Mad 117; **following** the **decision in** *Deputy Legal Remembrancer* v. *Upendra*, 12 Cal WN 140.
42. *Trikam* v. *State*, AIR 1969 Goa 69.
43. In re : *Rangappa*, 59 Mad 349.
44. *Mutter* v. *State*, **see also** AIR 1950 Cal 435.

COMMENTS

1. PRINCIPLE, OBJECT AND SCOPE

This section deals with the relevancy of facts forming part of the same transaction. Facts, though not in issue, if they are so connected with a fact in issue as to form part of the same transaction, are relevant, whether those facts occurred at the same time and place or at different times and places. This and the following sections deal with circumstantial evidence. Sections 7, 8 and 9 explain and illustrate this section. Section 7 deals with a fact which is the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue. Section 8, deals with motive, preparation, and previous and subsequent conduct of the person, which has reference to any fact in issue or relevant thereto, whereas Section 9, states such of those facts as are necessary to explain or introduce a fact in issue or relevant facts, or which support or rebut an inference suggested by the fact in issue or relevant facts etc. are relevant. Section 14 deals with the facts showing the existence of any state of mind, such as, intention, knowledge, good faith, negligence, rashness, ill will, or good will etc. when the existence of such state of mind etc. is in issue or relevant. All these facts are only collateral facts forming a chain encircling the facts in issue.

This section admits those facts the admissibility of which comes under the technical expression *res gestae* (*i.e.* the things done, including words spoken in the course of a transaction), but such facts must 'form part of the same transaction.'[45]

In *Babulal* v. *W.I.T. Ltd.*,[46] it was observed that the statement of law in Section 6 is usually known as the rule of *res gestae*, the essence of which doctrine is that the facts, which, though not in issue are so connected with the facts in issue as to form part of the same transaction, that they become relevant like the fact in issue.[47]

In HALSBURY'S LAWS OF ENGLAND, 4th Ed., Vol. 17, para. 6, page 8, it is stated: "Items of evidence are sometimes said to be part of the *res gestae*[48], owing to the nature and strength of their connection with the matters in issue, and as such are admissible. "*Res gestae*" is an expression mainly of utility in the criminal law concerning the contemporaneity of statements to incidents[49], but, in so far as contemporaneous statements are relevant and accompany and explain matters in issue, they will be admissible.[50]

In HALSBURY'S LAWS OF ENGLAND, 4th Ed., Vol.17, para 31, page 25, it is stated: "There is a distinction to be made between the bare facts in issue, and the issue of circumstance and facts which surround them. These surrounding circumstances have sometimes been spoken of as the *res gestae*[51], but it is more accurate and satisfactory to limit that expression to those items of evidence relating to contemporaneous or almost contemporaneous statements which are admitted under the doctrine of the *res gestae*, although they are otherwise inadmissible as infringing what is left of the rule against hearsay.[52] As to the rule against hearsay, see paras 53 *et seq.*, *post*. Facts, as opposed to statements, of which the truth is in issue, which make up the surrounding circumstances are admissible insofar as they are relevant, and witnesses are naturally expected to give their evidence with reasonable fulness of detail and circumstance.[53]

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45. *Sardul Singh* v. *State*, AIR 1957 SC 747.
46. AIR 1957 Cal 709.
47. *Ramchand Tolaram Khatri* v. *State*, AIR 1956 Bom 287; *Ghurey Lal* v. *State through Ram Narain Pathak*, AIR 1965 All 206.
48. The expression "*res gestae*" was used by LORD DENMAN in *Rouch* v. *Great Western Rly Co.*, (1841) IQB 51 at 60; **see** para 31, *post*. **See further** *Ratten* v. *R.*, (1972) AC 378 at 388-390 (1971) 3 All ER 801 at 806, 807 PC.
49. **See** CRIMINAL LAW, Vol. XI (para 366).
50. See para 31, *post*. Facts which are not sufficiently connected to matters in issue are sometimes described as *res inter alios acta*: **see** *Hyde* v. *Palmer*, (1863) 32 L.J.O.B. 126; *Wright* v. *Tatham*, (1838) 5 Cl & Fin 670, HL; *Agassiz* v. *London Tramway Co Ltd.*, (1872) 21 WR 199. Any fact forming part of a transaction being inquired into is sufficiently connected with it to be provable, even though it is not itself in issue: *R* v. *Ellis*, (1826) 6 B&C 145. *Carmarthen and Cardigan Rly Co* v *Manchester and Milford Rly Co*, (1873) LR 8 CP 685.
51. *Rouch* v. *Great Western Rly*, (1841) IQB 51 at 60, per LORD DENMAN CJ. *Res gestae* as a ground for admissibility of hearsay has not been preserved by the Civil Evidence Act, 1968. **See also** para 6 *ante*.
52. ***Ratten* v. *R.*, (1971) AC 378: (1971) 3 All ER 801 (PC).**
53. *R* v. *Stephenson*, (1904) 68 JP 524; *A-G (Jersey)* v. *Narton*, (1967) 1 AC 464.

This principle of '*res gestae*' was explained by 'LORD NORMAND' in *Teper* v. *R.*[54] in which case a husband set fire to a shop of his wife. A police constable heard a woman shouting 'Your place burning and you going away from the fire'. The constable in his evidence stated that he saw a car in which there was a man resembling the accused. His hearing those words was from a burning shop and nearly half an hour after the fire started. Dealing with those facts it was observed 'Nevertheless the rule admits of certain carefully safeguarded and limited, exceptions, one of which is, that the words may be proved when they form part of the *res gestae*..... It appears to rest ultimately on two propositions—that human utterance is both a fact and a means of communication, and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of truth.' It was held that words to be admissible as words explaining an act to form part of *res gestae*, their utterance must, if not absolutely contemporaneous with action, be atleast so closely associated with it in time, place and circumstances, that they are part of the thing being done. It was further held that the hearsay evidence of identification in criminal proceedings is inadmissible.

2. TRANSACTION—MEANING OF

SIR JAMES STEPHEN defined the term 'transaction' as a group of facts so connected together as to be referred to by a single name, as a crime, contract, a wrong or any other subject of enquiry which may be in issue.

According to TAYLOR, it includes everything that may be fairly considered an incident of the event under discussion.[55]

If facts form part of the transaction which is the subject of enquiry, manifestly evidence of them ought not to be excluded. The question is whether they do form part, or are too remote to be considered really part of the transaction before the Court. A transaction is a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong or any other subject of inquiry which may be in issue. Every fact which is part of the same transaction as the fact in issue is deemed to be relevant to the fact in issue, although it may not be actually in issue, and although, if it were not part of the same transaction it might be excluded as hearsay.[56]

A transaction consists both of the physical acts and the words accompanying such physical acts, whether spoken by the person doing such acts, the person to whom they were done or any other person or persons. Such words are admissible in evidence as parts of a transaction.

Illus. (a) under this section shows that what is said and done by the accused A and the victim B, at the time of the incident, if given out by the by-standers, form part of the same transaction and becomes relevant. The statement as that in Illus. (a) is relevant only if it is that of a person who has seen the actual occurrence and who uttered it simultaneously with the incident or so soon thereafter as to make it reasonably certain that the speaker is still under the stress of the excitement caused by his having seen the incident. What is admissible under this section is a fact which is connected with the fact in issue as 'part of the same transaction'. A transaction may consist of a single incident occupying a few minutes or it may be spread over a variety of facts, etc. occupying a much longer time and occurring on different occasions or at different places. Where the transaction consists of different acts, in order that the chain of such acts may constitute the same transaction, they must be connected together by proximity of time, proximity or unity of place, continuity of action and community of purpose or design.[57]

Illustration (b) indicates that acts done at different places and times may form part of the same transaction.

A transaction in its ordinary sense is some business or dealing which is carried on or transacted between two or more persons.[58] Such of those statements made whether at the same time and place or at different times and places, as are connected with a fact in issue also form part of the same transaction.[59]

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54. 1952 AC 480 : (1952) 2 All ER 447.
55. *Kappinaiah* v. *Emperor*, AIR 1931 Mad 233.
56. *Chain Mahto* v. *The Emperor*, (1906) 11 CWN 266, 270.
57. *Hadu* v. *State*, 1950 Cut 509 : AIR 1951 Ori 53.
58. *Gujju Lall* v. *Fatteh Lall*, (1880) 6 Cal 171 (FB).
59. *Krishna Ram Das* v. *State*, AIR 1964 Assam 53.

Facts leading to circumstances as to the nearness of the place, continuity of the act and the purpose or design have been considered as part of the same transaction.[60]

The word 'transaction' is used in a limited sense in illus, (a), but it is used in a wider sense in the remaining illustrations, under the section.[61]

Where children of the deceased were heard crying and saying that their mother was being killed, it was held that such statements of children can be admitted under this section.[62] When a witness stated that he was told by other witnesses that the accused was beating the deceased at about the time of occurrence, it was held that such evidence was admissible as part of *res gestae*.[63] Where the accused had informed his father that the deceased had had a hand in the disappearence of his son and he also threatened the victim on an earlier occasion and subsequently it was found that the victim died in a furnace, the statements of the accused to his father soon after the murder was held admissible by the Supreme Court.[64] Where there is a tape-recorded conversation between the accused and the complainant which was recorded when the police was not there, and the voices were identified, it was held that such contemporaneous conversation was admissible.[65] A spontaneous utterance by the accused at the time of the crime is admissible as *res gestae*.[66] Statements given by the accused at the moment when the offence is committed were held to be admissible under this section.[67] So also threats given by the accused to the deceased.[68]

The only evidence against an accused charged with having voluntarily caused grievous hurt was a statement made in the presence of the accused by the person injured to a third person, immediately after the commission of the offence. The accused did not, when the statement was made, deny that she had done the act complained of. It was held that the evidence was admissible under this section and Section 8, Illus. (g).[69]

Statements of the injured immediately after the incident giving out the name of the accused come within this section.[70] Where the injured narrated the incident when the knife was still stuck on his back and the testimony of the prosecution witness was based on the said narration, it was held that it was not hearsay evidence but a part of *res gestae* under Section 6.[71] Where on hearing the sound of gunshots from the house of the victim, his neighbours rush to the spot within minutes and he told them the names of the assailants who had shot at him and his wife, his statement to them was relevant under this section.[72]

Where there was some appreciable interval between the acts of incendiarism indulged in by the miscreants and the Judicial Magistrate recording the statements of the victims, that interval blocks the statements from acquiring legitimacy under this section as forming part of *res gestae* evidence.[73] The statement of a witness that he was informed by other witnesses and also learnt from the accused that the accused murdered the deceased cannot be admitted as part of *res gestae*.[74] A statement of a girl to her mother after coming back home, that she was raped, is not admissible under Section 6.[75]

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60. *Babulal* v. *W.I.T. Ltd.*, AIR 1957 Cal 709; *Kashmira Singh* v. *State*, 1965 JK 37; *Kriday Singh* v. *R.*, AIR 1946 Pat 40.
61. *Queen Empress* v. *Fakirappa*, ILR 15 Bom 488, 496.
62. *Sawal* v. *State*, AIR 1974 SC 778.
63. *Badruddin* v. *State of Maharashtra*, 1981 Cr LJ 729 (SC).
64. *Pershadi* v. *State*, AIR 1957 SC 211.
65. *Yusuf Ali* v. *State*, AIR 1968 SC 147.
66. *Sarwath Yar Khan* v. *State of U.P.*, AIR 1959 All 493.
67. *Peters* v. *State*, AIR 1959 All 483.
68. *Nagpur Glass* v. *R.P.F. Commissioner*, AIR 1961 Bom 164.
69. In re : *Surat Dhobni*, ILR (1884) 10 Cal 302.
70. *Krishan Ram* v. *State*, AIR 1964 Assam, 53 : 1964 Cr LJ 393. **Also see** *Bhag Singh* v. *State of H.P.*, 1994 Cr LJ 1398 (HP).
71. *Rabindra Nath Moorthy Naidu* v. *State of W.B.*, 1996 Cr LJ 2928 (para 6) (Cal).
72. *Nathuni Yadawa* v. *State of Bihar*, AIR 1997 SC 1808. **See also** *Sukhar* v. *State of U.P.*, AIR 1999 SC 3883 (para 10) : 2000 Cr LJ 29; *Chandrashekharappa* v. *State of Karnataka*, 2001 Cr LJ 765 (para 13) (Kant).
73. *Gentela Vijayavardhan Rao* v. *State of A.P.*, AIR 1996 SC 2791 (para 16).
74. *State* v. *Biharilal*, AIR 1953 Punj 218.
75. *Sreehari* v. *R.*, AIR 1930 Cal 132.

In *Chander Kala* v. *Ram Kishan,*[76] a teacher reported an incident between her and the headmaster to her colleagues the next day. The Supreme Court without deciding whether the conduct of Chandra Kala in narrating the incident to her colleagues was *res gestae,* observed that even assuming it is not *res gestae* and hence inadmissible under Section 6, it was admissible under Section 157 as it was corroborated by her colleagues who gave evidence.[77]

In *Kappinnaiah's* case 1931 Mad 233 the raped woman reported to her mother-in-law shortly after ravishment and 4 days later she died in a canal. The lower court convicted the accused stating that the statement of the ravished woman was relevant u/s. 6, 8 and 32 of this Act. The High Court in the appeal set aside the conviction and relying on *Regina* v. *Lillyman,*[78] held that the statement of the victim is no part of *res gestae* under Section 6 and that as the rape was not the cause of death as she took 3 days to commit suicide Section 32 cannot be attracted. The particulars of the complaint are not evidence of the facts complained of but as evidence of the consistency of the conduct of the prosecutrix with her evidence on the witness box and as negativing consent on her part since she having died did not give evidence, the complaint was not admissible under Section 8.

In a bride burning case, the conduct of the husband after the incident is relevant.[79]

The Privy Council has held that the particulars in any complaint made by the outraged female immediately and directly after the commission of the offence, are admissible, not as evidence or corroboration of the fact complained, but as evidence of the credibility of the complainant and also to negative the defence plea of consent.[80]

If another offence has a nexus with the main offence then evidence relating to the other offence becomes relevant as forming part of the same transaction, *e.g.*—main offence of murder—the other offence is the disposal of the dead body to suppress the evidence of murder. Evidence of the latter offence becomes admissible.[81]

Letters written during the course of negotiations for the purpose of a licence in regard to a land are admissible.[82] The execution of a deed of adoption is part of the transaction of adoption itself and is relevant under this section.[83] A statement made by the executant of a will at the time of registration is admissible.[84]

3. "SAME TRANSACTION"—IN Cr.P.C.

In Section 235 and Section 239 of the old Criminal Procedure Code which correspond to Sections 220 and 298 respectively of the Code of Criminal Procedure, the expression 'same transaction' is used. While dealing with the expression it was held that it includes immediate cause and effect of an act or event, and is so connected with all the relevant circumstances, like reasonable distance of time and space.[85] The expression denotes two facts occurring at the same time and place, though they may not have any connection between them, but may be parts of the same transaction, *e.g.* the fact of committing an offence and the fact of destroying the evidence relating to the offence.[86]

The proximity of time, nearness of the place, continuity of action, and community of purpose and design for the offence are the factors one should have in mind to determine whether the facts form part of

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76. AIR 1985 SC 1268.

77. *Chander Kala* v. *Ramkishan,* AIR 1985 SC 1268; **see also** *Kappinaiah* v. *Emperor,* AIR 1931 Mad 233; *Sree Hari* v. *Emperor,* AIR 1930 Cal 132; *State* v. *Chakradhar,* AIR 1964 Ori 262.

78. (1896) 2 QB 167.

79. *Vinodkumar Baberbhai* v. *State of Gujarat,* 1999 Cr LJ 1650, 1662 (Guj).

80. *Gillie* v. *Posho,* AIR 1939 PC 146.

81. *Vasu Pillai* v. *State,* AIR 1961 Bom 114; *Ghurey Lal* v. *State through Ram Narain Pathak,* AIR 1965 All 206; *Ramchand Tolaram Khatri* v. *State,* 1956 Bom 287.

82. *Kamakshya* v. *Karanpura Development,* AIR 1950 Pat 134.

83. *C P Syndicate* v. *I T Commissioner,* AIR 1962 Bom 115.

84. *Muthukrishna Naicken* v. *Ramachandra Naicken,* AIR 1919 Mad 659.

85. *R* v. *King,* AIR 1929 Bom 296.

86. *Ata Muhammad* v. *R.,* AIR 1950 Lah 199 (FB); *Mirza Jahid Beg* v. *R.,* AIR 1938 All 91.

the same transaction.[87] To form a particular statement as a part of the same transaction, utterances must be simultaneous with the incident or soon after it so as to make it reasonably certain that the speaker is still under stress of excitement in respect of the transaction in question, otherwise it would be irrelevant.[88] If the statement is made to any authority who is competent to investigate the fact, it is admissible irrespective of long lapse of time but if it is made to a person not having that authority, it should be made contemporaneous with the occurrence, though mere gap of a few days, in the circumstances of a case, may not render it inadmissible. The test in such situations is whether the witness had an opportunity to concoct or to be tutored. In the instant case, the accused/approver along with others committed rape on the victim and murdered her on 9-6-1987 and gave evidence in support of the prosecution. He stated that on the third day of the occurrence he went to the house of his brother-in-law and stayed there for six days and then he went to another place where he got a job in a tea shop. On 24-6-1987 he happened to notice his photo in a Tamil daily and then he rushed back to his brother-in-law's house and confessed his guilt to him. There being nothing to indicate that the accused was either tutored or influenced by anybody during the period, his statement was admissible under this section.[89]

Where the witnesses snatched away the *lathi* from the accused while he was assaulting his father with it and subsequently they snatched away the *katari* after he assaulted his daughter with the same, the act of the accused assaulting his daughter would be relevant and admissible under this section though the witnesses did not see the actual assault on her.[90] In a case an illegitimate child claimed maintenance from his alleged father who denied paternity. The mother, against whom there were no allegations regarding any moral lapses, convened a *panchayat* and the *panchayatdars* ordered the alleged father to pay money and some paddy to the child. The conduct of the mother, the alleged father and the *panchayatdars* are the relevant facts under this section.[91]

Where the accused of rape and strangulation begged forgiveness and pleaded it to be his first mistake on being caught while running away, these facts were relevant as forming part of the same transaction.[92] Where the accused made statement regarding his assault on the deceased to the brother of the deceased within half an hour of the incident, the time being too short for any fabrication, such evidence was admissible under this section.[93] Where the assailant intruded into the victim's courtyard during the dead of night and she identified him, her pronouncement before death that the appellant was standing with a gun and his firing the gun at her, are the circumstances so intertwined with each other by proximity of time and space that the statement of the deceased became the part of the same transaction and was admissible under Section 6.[94] Where the witness deposed that immediately after the occurrence his niece told him that his wife was shot by the accused and he was threatening the persons on the spot that he would kill them also like the deceased victims, his evidence was admissible under this section.[95] Where the wife, set ablaze by her husband, told her brother, a witness to the occurrence, 'run away, he (husband) has put fire to me', her words form part of the same transaction.[96]

Under the old Cr.P.C., Section 235, it was held that mere common purpose cannot constitute "same transaction", but there must be facts linked together to form a continuity of the transaction.[97]

4. STATEMENTS OF BY-STANDERS

Statements of by-standers witnessing a transaction are relevant if they are made while the transaction is in progress or so shortly before or after it as to form part of the same transaction.[98] Where A was tried for the murder of B by shooting him, the facts that the person, then in the room, with B, saw a man with

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87. *Becharam* v. *R.*, AIR 1944 Cal 224: *Hirday* v. *R.*, 1946 Pat 40: *R* v. *Lockley*, ILR 43 Mad 411 (The main test is community of purpose or design and continuity of action); *Amritalal* v. *R.* 42 Cal 947, *R* v. *Datto*, 30 Bom 49, *Shapurji Sorabji* v. *R.*, AIR 1936 Bom 154. **Also see** *Nathuni Yadawa* v. *State of Bihar*, AIR 1997 SC 1808.
88. *Jadumani Khanda* v. *State*, 1993 Cr LJ 2701 (para 6) (Ori).
89. *State of T.N.* v. *Suresh*, AIR 1998 SC 1044 : 1998 Cr LJ 1416.
90. *Balaram Swain* v. *State of Orissa*, 1994 Cr LJ NOC 64 (Ori).
91. *Chaya* v. *K.G. Channappa Gowda*, 1993 Cr LJ 767 (para 15) (Kant).
92. *Vinod* v. *State*, 1994 Cr LJ 2360 (para 29) (All).
93. *Venkatesan* v. *State*, 1997 Cr LJ 3854 (Mad).
94. *Rattan Singh* v. *State of H.P.*, AIR 1997 SC 768 (para 6) : 1997 Cr LJ 833.
95. *Mohd. Islam* v. *State of U.P.*, 1993 Cr LJ 1736 (para 18) (All).
96. *Radhey Shyam* v. *State of U.P.*, 1993 Cr LJ 3709 (para 15) (All).
97. *Keshavlal* v. *R*, AIR 1944 Bom 306, **see also** *Mollaya* v. *R*, ILR 49 Mad 74.
98. *Chain Matto* v. *Emperor*, 4 CWN 266 and 276.

a gun in his hand pass a window opening into the room where B was shot, and thereupon exclaimed "there s Bucher" (a name by which A was known), were held to be relevant.[1] A husband, his father and mother were prosecuted for the murder of his wife. She cried out for help as soon as she was pushed into the room. Her children who were playing outside in the verandah exclaimed at the same time that their mother was being killed. The exclamations of children were received through the evidence of persons who heard them.[2] If a by-stander was present at the time of the incident, then his statement if made spontaneously soon after the incident is admissible as relevant.[3] Where a number of persons gathered immediately after the offence and were told by the eye-witnesses as to who were the culprits, it was held that their evidence was relevant.[4]

"By-standers" means all persons who were present at the time of the incident[5] and not the persons who gather at the place of occurrence after the event.

"In order to make the statement of a by-stander admissible it must have been made, as contemplated by Section 6 and illus. (a) to it, at the time the transaction was taking place, or so shortly before or after it as to form part of the transaction. If the transaction has terminated and then the statement is made, the statement is irrelevant. The admissibility is dependent on continuity."[6]

When it is stated by a witness that he went to the spot and heard the by-standers talking that the four persons had committed the murder, it was held his statement was inadmissible.[7]

5. OTHER THAN EYEWITNESSES

Any statement by persons other than the eye-witnesses would be hearsay, because they would have picked up the information from others.[8]

Where the said promissory note was executed by a *pardanashin* lady and evidence was led in that the note was taken by her husband in a room where his wife was sitting and it was brought back after obtaining the signature, it was held that the husband's statement that the signature on the pronote was that of his wife comes under Section 6.[9]

A declaration made subsequent to the occurrence is admissible provided it can be validly assumed that the existing influence continued.[10]

6. FACTS NOT SO CONNECTED AS TO FORM PART OF SAME TRANSACTION

Where a person was charged with forging a particular document, evidence that a number of documents apparently forged or held in readiness for the purpose of forgery, were found in the accused's possession, was held to be inadmissible.[11] The accused was charged with having received illegal gratifications from C&Co., on three occasions in 1876. In 1876, 1877 and 1878, C&Co. were doing business as commissariat contractors and the accused was the manager of the commissariat office. It was held that the evidence of similar but unconnected instances of receiving illegal gratifications from C&Co. in 1877 and 1878 was not admissible against him under Sections 5 to 13.[12] Evidence of witnesses who deposed that the deceased had made certain statements to them either nine months or even ten days prior to his murder was held inadmissible under the Section 7 or Section 8.[13]

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1. FOWKES, (1856) STEPHEN'S DIGEST 12th Ed, (1946).
2. *Sawaldas* v. *State of Bihar*, AIR 1974 SC 778.
3. *Bhaskaran* v. *State of Kerala*, 1985 CrLJ 1711 (Ker). Spontaneous statement of eye-witness, *Om Singh* v. *State of Rajasthan*, 1997 Cr LJ 2419 (Raj).
4. *Mahendrapal* v. *State*, 1956 CrLJ 897: AIR 1955 All 328: *Bijay Singh* v. *State*, AIR 1956 MB 170; *Chhatka* v. *State*, AIR 1958 Cal 482.
5. *Bandela Nagaraju* v. *State of AP*, 1984 CrLJ 674.
6. *Chan Mathoo* v. *Emperor*, 11 Cal WN 266.
7. *Pakhar Singh* v. *Emperor*, 27 CrLJ 140 : AIR 1925 Lah 578.
8. *Nasir Din* v. *Crown*, AIR 1945 Lah 46.
9. *Vazir Begam Ammal* v. *Seth Tula Ram*, (1960) 1 MLJ 142.
10. *Bandela Nagaraju* v. *State of A.P.*, 1984 Cr LJ 674.
11. *Hari Chintaman Dikshit* v. *Moro Lakshman*, ILR (1866) 11 Bom 89.
12. *Empress* v. *M.J. Vyapoory Moodeliar*, ILR (1881) 6 Cal 655.
13. *Autar Singh* v. *Crown*, ILR (1923) 4 Lah 451; *Jowala Sahai* v. *Crown*, 27 IC 664.

In *Venkatasubbaiha* v. *R*,[14] it was held that when a person was tried for filing a false complaint, what subsequently happened during the investigation of the complaint does not come within the meaning of *res gestae*. Where the father of the accused informed the father of deceased wife of the accused that his son/accused had killed the deceased but there was no finding as to proximity of time of information to the incident, the statement of the father of the accused could not be considered as relevant under this section.[15]

7. FIRST INFORMATION REPORT

The first information report is not a substantive piece of evidence.[16]

But it can be used in the defence by the accused under Section 145 of this Act. It can be used by the prosecution for purpose of corroboration of the witness who gave that information.

Facts which are the occasion, cause or effect of facts in issue.

S. 7. Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

ILLUSTRATIONS

(a) The question is, whether *A* robbed *B*.

The facts that, shortly before the robbery, *B* went to a fair with money in his possession, and that he showed it or mentioned the fact that he had it, to third persons, are relevant.

(b) The question is, whether *A* murdered *B*.

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(c) The question is, whether *A* poisoned *B*.

The state of *B*'s health before the symptoms ascribed to poison, and habits of *B*, known to *A*, which afforded an opportunity for the administration of poison, are relevant facts.

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COMMENTS

1. PRINCIPLE, OBJECT AND SCOPE

This section admits a very large class of facts connected with facts in issue or relevant facts, though not forming part of the transaction. Facts forming part of the same transaction are admissible under the preceding section. Evidence relating to collateral facts is admissible when such facts will, if established, establish reasonable presumption as to the matter in dispute and when such evidence is reasonably conclusive. The section provides for the admission of several classes of facts which are connected with the transaction under inquiry in particular modes, *viz.* (1) as being the occasion or cause of a fact; (2) as being its effect; (3) as giving opportunity for its occurrence; and (4) as constituting the state of things under which it happened.

A fact in issue cannot be proved by showing that facts similar to it, but not part of the same transaction, have occurred at other times. Thus, when the question is, whether a person has committed a crime, the fact that he had committed a similar crime before, is irrelevant.

Illustration (a) is an instance of facts relevant as giving occasion or opportunity, (b) of facts constituting an effect, (c) of facts constituting the state of things under which an alleged fact happened.

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14. ILR 48 Mad 640.
15. *Vasa Chandrasekhar Rao* v. *Ponna Satyanarayana*, 2000 Cr LJ 3175 (para 7) (SC) : AIR 2000 SC 2138.
16. *Mahadeo* v. *Ramkuber*, AIR 1943 Oudh 451.

Where the accused took money from the deceased and on the day of the offence the deceased went to the accused to ask for the return of the money. It was held that those facts are relevant showing the occasion, cause or effect of the fact in issue.[17] Where footprints were found near the scene of offence and they also showed from which place they came or to which place they led it was held that the finding of those footprints at the place of occurrence is relevant under this section.[18]

2. TAPE-RECORDING

A contemporaneous tape-record of a relevant conversation is a relevant fact and is admissible under this section but such evidence must be received with caution.[19] There is no doubt that such evidence (tangible exhibits, such as photographs and tape-recordings) may be admitted, but there must be some foundational showing that the actual exhibit preferred is what it is represented to be.[20]

In all these cases (tape-recordings, film, video-tape and computer output) the evidence is real evidence when it is tendered to show what it was that was recorded. The relevance of what was recorded, and the operation of other exclusionary rules may determine ultimate admissibility. Thus if a recording were obtained illegally[21] or in breach of public policy[22] it might be rejected on these grounds, but not because it was a recording. If the matter recorded is itself in issue, then the recording is capable of constituting real evidence of it.[23]

Tape-records are admissible provided (1) the voice of the person is identified by the maker of the record; (2) accuracy of what was recorded is established and (3) the possibility of tampering with the record is ruled out; (4) the subject matter which was recorded must be shown as relevant.[24]

Besides the above three conditions for admission, the Supreme Court in *Ramsingh* v. *Col Ramsingh*,[25] after reviewing the case law including the decisions in *R* v. *Maqsud*,[26] and *R* v. *Robson*,[27] have placed further conditions for accepting tape-recorded evidence, *viz*, (1) the recorded statement must be sealed and kept in safe or official custody; (2) the voice of the speaker should be audible.

The Punjab High Court, in *Dial Singh* v. *Rajpal*[28] held that where the witness had denied his voice which was tape-recorded, recording of the voice of the witness for comparison and identification of his earlier recorded voice is not prohibited under any statute. Hence permission to record voice of the defendant in another cassette for the purpose of comparison with and identification of his earlier recorded voice, cannot be rejected only on the ground that there was a dispute as to whether the earlier cassette was original or not.[29]

Where a police officer recorded the conversation on telephone between two persons with the help of a recording instrument it was held that the recording is admissible; it would not come within the mischief of Section 162 CrPC.[30]

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17. *Jainand (Dr.)* v. *R.*, AIR 1949 All 291.
18. *Sidik Sumar* v. *R*, AIR 1942 Sind 11.
19. *Yusuf Ali* v. *State*, AIR 1968 SC 147. **See also** *Nirmala* v. *Ashu Ram*, 2000 Cr LJ 2001 (para 2) (Raj).
20. PETER MURPHY : A PRACTICAL APPROACH TO EVIDENCE, 1985, 2nd Edn., p. 88.
21. *R.* v. *Senat*, *R.* v. *Sin*, (1968) 52 Cri App Rep 282.
22. *R* v. *Migliorini*, (1981) 38 ALR 356.
23. CROSS & TAPPER ON EVIDENCE, 1995, 8th Edn., pp. 52-53.
24. *Malkani* v. *State*, AIR 1973 SC 157; *Ziyauddin* v. *Brij Mohan*, AIR 1975 SC 1788; *Shreerama Reddy* v. *V V Giri*, AIR 1971 SC 1162; *Yusuf Ali* v. *State*, AIR 1968 SC 147; *Pratap Singh* v. *State*, AIR 1964 SC 72; *State of Maharashtra* v. *Ramdas Shankar Kurlekar*, 1999 Cr LJ 196, at p. 204 (Bom), music heard before and after recording conversation, no plausible explanation, suspicion.
25. AIR 1986 SC 3.
26. (1965) 2 All ER 464.
27. (1972) 2 All ER 699.
28. AIR 1969 P&H 350.
29. *Nirmala* v. *Ashu Ram*, 2000 Cr LJ 2001 (para 2) (Raj).
30. *Malkani* v. *State*, AIR 1973 SC 157.

3. CAUSE AND EFFECT OF FACT IN ISSUE

Where the wife, set ablaze by her husband, told her brother, a witness to the occurrence, 'run away, he (husband) has put fire to me', her words are in the nature of forming the cause and effect of the fact in issue.[31]

See also commentary under 'Document' in Section 3.

4. OTHER INSTANCES UNDER SECTION 7

Report of a court of enquiry under Air Craft Rules is also admissible.[32]

Short hand transcripts are admissible under this section.

Motive, preparation and previous or subsequent conduct.

S. 8. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

***Explanation 1.*—The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.**

***Explanation 2.*—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.**

ILLUSTRATIONS

(a) *A* is tried for the murder of *B*.

The facts that *A* murdered *C*, that *B* knew that *A* had murdered *C*, and that *B* had tried to extort money from *A* by threatening to make his knowledge public, are relevant.

(b) *A* sues *B* upon a bond for the payment of money. *B* denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, *B* required money for a particular purpose, is relevant.

(c) *A* is tried for the murder of *B* by poison.

The fact that, before the death of *B*, *A* procured poison similar to that which was administered to *B*, is relevant.

(d) The question is, whether a certain document is the will of *A*.

The facts that, not long before the date of the alleged will, *A* made inquiry into matters to which the provisions of the alleged will relate, that he consulted vakils in reference to making the will, and that he caused drafts of other wills to be prepared of which he did not approve, are relevant.

(e) *A* is accused of a crime.

The facts that, either before or at the time of, or after the alleged crime, *A* provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(f) The question is, whether *A* robbed *B*.

The facts that, after *B* was robbed, *C* said in *A*'s presence—"the police are coming to look for the man who robbed *B*," and that immediately afterwards *A* ran away, are relevant.

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31. *Radhey Shyam* v. *State of U.P.*, 1993 Cr LJ 3709 (para 15) (All).
32. *Indian Air Lines* v. *Madhuri*, AIR 1965 Cal 252.

(g) The question is, whether *A* owes *B* rupees 10,000.

The facts that *A* asked *C* to lend him money, and that *D* said to *C* in *A*'s presence and hearing—"I advise you not to trust *A*, for he owes *B* 10,000 rupees," and that *A* went away without making any answer, are relevant facts

(h) The question is, whether *A* committed a crime.

The fact that *A* absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(i) *A* is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j) The question is, whether *A* was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant as a dying declaration under Section 32, clause (1), or as corroborative evidence under Section 157.

(k) The question is, whether *A* was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed without making any complaint, is not relevant, as conduct under this section, though it may be relevant as a dying declaration under Section 32, clause (1), or as corroborative evidence under Section 157.

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COMMENTS

1. PRINCIPLE AND SCOPE

The Evidence Act intends to make only those statements admissible which are the essential complement of acts done or refused to be done, so that the act itself or the omission to act acquires a special significance as a ground for inference with respect to the issues in the case under trial.[1]

This section embodies the rule that the testimony of *res gestae* is allowable when it goes to the root of the matter concerning the commission of a crime. Consequently, a verbal statement to a police-officer

1. *Empress* v. *Rama Birappa*, ILR (1878) 3 Bom 12, 17.

during the time of recovery of articles, upon the information of an accused in custody, is admissible in evidence.[2]

The section deals with mainly three aspects:

(1) A fact which shows or constitutes a motive for any fact in issue or relevant fact.

(2) The acts constituting preparation for any fact in issue or relevant fact.

(3) The conduct of the person either previous or subsequent to the offence.

Thus this section has a wider object than Section 7. Illuss. (*a*) and (*b*) are examples of showing motive. Illuss. (*c*) and (*d*) refer to preparatory stages; Illus (*e*) and (*i*) to the conduct of the accused; Illuss. (*f*), (*g*), and (*h*) are the statements affecting the conduct of the accused. Illuss. (*j*) and (*k*) are statements explaining and accompanying acts, which would form *res gestae*.

Under this section the motive which induces a party to do an act, or the preparation which he makes for its commission, will be taken into account. Evidence of motive or preparation becomes important when a case depends upon circumstantial evidence only.

2. MOTIVE

Motive is that which moves a man to do a particular act; there can be no action without a motive, which must exist for every voluntary act. Generally speaking, the voluntary acts of same persons have an impelling emotion or motive. Motive in the correct sense is the emotion supposed to have led to the act. It is often proved by the conduct of a person. "The ordinary feelings, passions and propensities under which parties act, are facts known by observation and experience; and they are so uniform in their operation that a conclusion may be safely drawn that, if a party acts in a particular manner, he does so under the influence of a particular motive."[3] The exchange of hot words by the accused two days prior to the incident, can be enough motive to kill a person and injure others[4] but usual quarrel due to drunkardness of the accused husband with his deceased wife has been held to be not a strong motive to kill her.[5]

Proof of presence of motive, preparation, opportunity or the previous attempts would be relevant as they go to show not only the *mens rea* in committing a crime but also provide sufficient information in establishing the commission of the offence.

PHIPSON brings out inferences from motive as follows: "Evidence of motive is generally admissible in criminal cases because it is thought to make it more likely that the crime was committed.[6] Such evidence can be relied on to establish both the *actus reus* and *mens rea*. Thus in *R.* v. *Heeson*,[7] evidence was led in the trial of a mother for poisoning her child shortly after its first birthday to show that the accused had insured her child's life and was entitled to claim 30 shillings if it died after its first birthday. Some doubt has been expressed as to whether the prosecution should be able to show motive where to do so will reveal previous criminal or discreditable behaviour by the accused. In *R.* v. *Williams*,[8] however, the Court of Appeal upheld the trial judge's decision to allow the prosecution in a case of a threat to kill to lead evidence that the accused bore the victim a grudge because he had previously been imprisoned for assaulting her.

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2. *Kali Jeeban Bhattacharjya* v. *Emperor*, ILR (1936) 63 Cal 1053.
3. *Com* v. *Webster*, 5 Cush 295, 316.
4. *Mangal Singh* v. *State of Punjab*, 1996 Cr LJ 3258 (para 13) (P&H); quarrel between father of deceased and that of accused a few hours earlier to incident, motive, *Krishnaswami* v. *State*, 1996 Cr LJ 3372 (Mad). **See also** *Mahinder Kumar* v. *State*, 1996 Cr LJ 2945 (para 20) (Del); *Sanjay* v. *State*, 1996 Cr LJ 3347 (Del) (strained relations of accused with mother of deceased); illicit relations of deceased with sister-in-law of accused, motive, *Biren Mandal* v. *State*, 1996 Cr LJ 3455 (Del). **See also** *Parimal Mondal* v. *State*, 1996 AIHC 2614 (para 43) (Cal) and *Mohibur Rahman* v. *State of Assam*, 2000 Cr LJ 4725 (para 27) (Gau); deceased brother-in-law refusing to mediate to settle dispute between accused and his wife, constitutes motive, *Arokiasamy* v. *State*, 1996 Cr LJ 3390 (para 19) (Mad).
5. *Krishnappa* v. *State of Karnataka*, 1996 AIHC 1030 (para 6).
6. *R* v. *Ball*, (1911) AC 47, 68, per Lord ATKINSON (in argument); *R* v. *Williams (Clarence)* (1987) 84 Cr App R 299 CA.
7. (1878) 14 Cox CC 40, Chester Winter Assizes.
8. (1987) 84 Cr App R 298 CA.

Some degree of counter-balance to the admissibility of evidence of motive is provided by the fact that an accused may lead evidence suggesting a lack of motive. Thus in *R.* v. *Acott*,[9] the defence led uncontradicted evidence that the accused was found of his mother."[10]

An emotion which leads to the commission of an act is motive. Motive and intention are two distinct matters and they are not one and the same. Intention was explained by the Madras High Court, as follows. The word 'intention' by its etymology seems to have a metaphorical allusion to archery and implies aim and thus connotes not a casual or a merely possible result—foreseen perhaps as not improbable incident but not desired but rather connotes the one object with which the effort is made and thus has a reference to what has been called a dominant motive without which the action would not have been taken."[11]

WHARTON states: "Motive and intent are not synonymous. Motive is the inducing cause, while intent is the purpose or mental state with which the criminal act is committed. Evidence of motive is always relevant and admissible although it is not necessary for the prosecution to offer evidence of motive.[12]

A motive is something which prompts a person to form an opinion or intention to do certain illegal act or even a legal act but with illegal means with a view to achieve that intention.[13]

Sometimes motive may be good but its intention may be bad. For example, if a man steals some food article his intention is bad, though the motive for stealing to save starvation of his children, may be good.

Proof of motive may be given directly or by inference from certain facts. Where the deceased had told her daughter within three days immediately prior to her death about her property dispute with the accused, motive could be inferred therefrom.[14] Where there is proof of absence of motive it may give rise to a reasonable doubt as to the guilt of the accused.

Motive may create a very strong suspicion but it cannot take place of proof.[15] Mere possibility of existence of motive cannot make the accused guilty.[16]

Though the prosecution is not under an obligation to prove the motive for the offence, it lends support to the prosecution case if it is proved, though not by direct evidence but by circumstantial evidence. If motive is proved by the prosecution the Court has to consider it and see whether it is adequate. When motive is suggested by the prosecution, but is not proved, still it is necessary for the Court to consider the suggestion.[17]

3. WHEN MOTIVE LOSES ITS IMPORTANCE

The motive part of the prosecution case loses all its importance, when the prosecution is able to prove by clear, cogent, convincing and unimpeachable evidence the commission of the crime.[18] When

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9. (1996) 2 Cr App R 290 CA.
10. PHIPSON ON EVIDENCE, 15th Edn. (2000), p. 348, Ch. 15 (para 15-22).
11. *Re, Kuttayan alias Nambi Thevar*, AIR 1960 Mad 9.
12. WHARTON'S CRIMINAL EVIDENCE, **see** sec. 166.
13. *S.C. Bahri* v. *State of Bihar*, 1994 Cr LJ 3271 (para 21) : AIR 1994 SC 2420.
14. *Sooraj* v. *State*, 1994 Cr LJ 1155 (para 12) (Ker).
15. *State of Maharashtra* v. *Bhanudas Sommanna Sangolkar*, 1997 Cr LJ 3205 (Bom), **relying on** *Sarwan Singh Rattan Singh* v. *State of Punjab*, AIR 1957 SC 637 : 1957 Cr LJ 1014. **Also see** *Malkhan Singh* v. *State of U.P.*, 1993 Cr LJ 1145 (All).
16. *State of M.P.* v. *Budhram*, 1996 Cr LJ 2010 (para 29) (MP).
17. *State* v. *Shersingh*, AIR 1981 SC 1021; *State* v. *Hariprasad*, AIR 1974 SC 1740; *Charuparva Dei* v. *Duryodhan Mohanty*, 1983 CrLJ 1036.
18. *Narayan Nathu Naik* v. *State of Maharashtra*, 1971 SCJ 72 : AIR 1971 SC 1656; *Gurcharan* v. *State*, AIR 1956 SC 460, *Ramhitram* v. *State of M.P.*, AIR 1956 Nag 187 : 1956 Cr LJ 756; *State of Assam* v. *Upendra Nath Rajkhowa*, 1975 Cr LJ 354; *Paras Ram* v. *State of HP*, 1973 Cr LJ 428; *Sitaram Pandey* v. *State of Bihar*, ILR (1975) 54 Pat 5; *Ishwar Singh* v. *State, (Delhi Admn)*, 1985 CrLJ 1625 (Del); *Shivaji* v. *State*, AIR 1973 SC 55; *State* v. *Hari*, AIR 1974 SC 1740 (It was also held that when a particular motive was alleged for an offence committed, it is proper to enquire whether the crime fits in with the alleged motive). *Podda Narayana* v. *State of AP*, AIR 1975 SC 1252, *Yeshwant* v. *State*, AIR 1973 SC 337; *Bahal* v. *State*, AIR 1976 SC 2032; *Walli Mohammad* v. *R*, AIR 1949 PC 103; *Appu* v. *State*, 1971 Mad 194; *Tulshiram* v. *State*, 1984 Cr LJ 209; *Benguli* v. *State*, 1985 CrLJ 580 (Ori); *Dasan* v. *State of Kerala*, 1987 CrLJ 180; *Nachhittar Singh* v. *Punjab*, AIR 1975 SC 118; *Molu* v. *State of Haryana*, AIR 1976

the evidence of the eye-witnesses is found to be truthful, motive assumes a secondary role.[19] Where participation of the accused in the commission of offences is established by the evidence of the eye-witness, absence of motive pales into insignificance and cannot be a ground to justify his acquittal.[20] Where the evidence of the direct eye-witnesses is trustworthy and acceptable, motive does not assume much importance.[21] When once the court is satisfied about the guilt of the accused on the evidence placed, it need not consider the question of motive.[22] It is not a *sine qua non* for the success of the prosecution that the motive must be proved. So Long as other evidence remains convincing and is not open to reasonable dout, a conviction may well be based on it.[23]

While the accused was on bail pending a criminal case for kidnapping the victim and committing rape, a separate case was filed alleging that he committed the murder of the victim. It was held that a strong motive for the accused to commit murder was established by the evidence.[24]

Holding that when motive is equally balanced, the court had to look to surrounding circumstances in order to find out the truth followed.[25]

Where the prosecution alleged that the occurrence took place due to enmity between the deceased and the accused and the defence also attributed the foisting of prosecution due to the said enmity, it was held that, enmity being double edged weapon, motive does not assume any importance in the case of such nature.[26]

4. MOTIVE NOT AN INGREDIENT OF ANY OFFENCE

Motive is not an ingredient of any offence. But when it is proved it helps the Court to come to a correct conclusion where there is no direct evidence.[27] In *State of Gujarat* v. *Anirudhsing*,[28] it was held that, if motive is proved, that would supply a chain of links but absence thereof is not a ground to reject the prosecution. It is not necessary in each and every case to prove the motive. The prosecution is only required to show that a particular case falls within the domain of a particular section.[29] The absence of motive is a circumstance which is relevant for assessing the evidence. But, where the circumstantial evidence proves the guilt of the accused those circumstances are not weakened by the fact that the motive has not been established.[30]

SC 2499; *Sardan Hussain* v. *State of U.P.*, AIR 1988 SC 1766; *Nand Kumar* v. *State of Rajasthan* (1963) 2 CrLJ 702 (SC); *Re, Gopisetti Chuinna Venkatasubbaiah*, AIR 1955 Andh 161; *Kunjan Vasu* v. *State of Kerala*, (1963) 2 CrLJ 458; *State of Mysore* v. *Nania*, AIR 1958 Mys 48; *State of Bombay* v. *Nilkanth*, 1954 CrLJ 59; *T. Retnakaran* v. *State*, 1955 CrLJ 848; *Rajendra* v. *State*, 1968 CrLJ 811; *Ali Mohidin* v. *State*, 1972 CrLJ 173; *Pratap Singh* v. *State of MP*, 1971 CrLJ 173; *Philips* v. *State of Karnataka*, 1980 CrLJ 171; *Baldev Singh* v. *State*, (1982) 1 CrLJ 1087 (J&K); *Jarnail Singh* v. *State of Haryana*, 1993 Cr LJ 1656 (para 8) (SC). Murderous assault established by clear occular evidence, corroborated by medical evidence, *Baitullah* v. *State of U.P.*, AIR 1997 SC 3946 (para 20) : 1997 Cr LJ 4644 (SC); *Kabiraj Tudu* v. *State of Assam*, 1994 Cr LJ 432 (Gau); *Ram Sagar* v. *State*, 1994 Cr LJ 589 (para 19) (All); *Atish Behera* v. *State of Orissa*, 1996 Cr LJ 270 (para 7) (Ori).

19. *Murarilal Jivanram Sharma* v. *State of Maharashtra*, AIR 1997 SC 1593 : 1997 Cr LJ 782.
20. *State of U.P.* v. *Nahar Singh*, AIR 1998 SC 1328 (para 16) : 1998 Cr LJ 2006. **Also see** *Balak Ram* v. *State of Rajasthan*, 1994 Cr LJ 2451 (para 28) (Raj). Broad daylight murder, direct evidence trustworthy, motive unimportant, *Murugan* v. *State*, 1993 Cr LJ 1259 (para 16) (Mad). Evidence of eye-witnesses trustworthy, mere absence of motive does not entitle acquittal, *Sarat Chandra Panda* v. *State of Orissa*, 1994 Cr LJ NOC 17 (Ori); *State* v. *Selvaraj*, 1994 Cr LJ 705 (para 10) (Mad); *Nageshwar Shah* v. *State*, 1995 Cr LJ 2184 (paras 12-14) (Del); *Kompally Ashok* v. *State of A.P.*, 1995 Cr LJ 2861 (para 18) (AP); *Bhagirath* v. *State of Haryana*, 1996 Cr LJ 3499 (para 7) (SC) : AIR 1996 SC 3431.
21. *Veerappan* v. *State*, 1994 Cr LJ 2584 (para 17) (Mad).
22. *Narayan Nathu Naik* v. *State of Maharashtra*, AIR 1971 SC 1656; *State of AP* v. *Chandraiah*, AIR 1986 SC 1899; *Sitam Ram Pandey* v. *State of Bihar*, 1976 CrLJ 800.
23. *Krishna Pillai Sree Kumar* v. *State of Kerala*, AIR 1981 SC 1237; *Raita Munda* v. *State of Orissa*, 1985 CrLJ 52 (Ori).
24. *State of Punjab* v. *Pritam Singh*, AIR 1977 SC 2005.
25. *Chandra Mohan Tiwari* v. *State of MP*, AIR 1992 SC 891.
26. *R. Kulandavelu* v. *State*, 1993 Cr LJ 2574 (para 18) (Mad).
27. *Ishwar Singh* v. *State (Delhi Admn)*, 1985 CrLJ 1625; *Paras Ram* v. *State of HP*, 1973 CrLJ 428; *Shyamaghana Bindhani* v. *State*, 1987 CrLJ 952 (Ori).
28. AIR 1997 SC 2780 : 1997 Cr LJ 3397.
29. *Raja* v. *State*, 1997 Cr LJ 1863 (Del). **See also** *Bhikari Behera* v. *State of Orissa*, 1995 Cr LJ 2998 (para 8) (Ori).
30. *Rajinder Kumar* v. *State of Punjab*, AIR 1966 SC 1322; *Bahal Singh* v. *State of Haryana*, AIR 1976 SC 2032; *Buli Devi* v. *State*, (1963) 2 CrLJ 470; *Fulkumar* v. *State*, 1969 CrLJ 1549; *Parimal Benerjee* v. *State*, 1986 CrLJ 220

Motive always is a satisfactory circumstance of corroboration, where there is convincing evidence. But it can never supply the want of reliable evidence.[31]

5. ABSENCE OF MOTIVE

The absence of motive cannot undo the direct testimony. Motive only supports the case.[32]

6. NON-PLEADING OF MOTIVE

Where in circumstantial evidence motive is not relied upon as a circumstance, its non-pleading is not fatal for the prosecution.[33]

7. FAILURE TO PROVE MOTIVE—WHETHER FATAL

Failure to give evidence as to the motive may be a great weakness in the whole body of proof. But it is not fatal to the prosecution case. When motive cannot be established the other evidence has to be scrutinised and examined closely.[34] The failure of the prosecution to establish the motive for the crime committed by the accused does not mean that the entire prosecution case has to be thrown over-board. It only casts a duty on the court to scrutinise the other evidence, particularly of the eye-witnesses, with greater care.[35] When the prosecution fails to prove motive, it cannot be a ground to throw the prosecution case over board, if other evidence proves the guilt of the accused beyond all reasonable doubt.[36] Failure to prove motive is not fatal to prove prosecution case as it is not a decisive test to determine criminal character of human acts.[37] The helplessness of the Investigating Officer in collecting evidence of neighbours regarding motive is not an insurance that the accused was innocent.[38]

In a case under Section 161, I.P.C., no motive could be proved for the receipt of illegal gratification by the accused. His acquittal was upheld.[39]

Proof of alleged motive for the crime is admissible though it suggests another crime by the accused.[40]

8. PROOF OF MOTIVE

Motive if put forward has to be fully established like any other incriminating circumstance.[41] Motive cannot be established by hearsay evidence, however reliable it appears to be.[42]

The motives of parties can only be ascertained by inference drawn from facts. Where A was tried for the murder of B, the facts that, at the instigation of A, B murdered C long before B's murder, and that at

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(Cal); *Atley* v. *State of UP*, 1955 CrLJ 1653 (SC); *Hardeo Singh* v. *State of Rajasthan*, ILR (1977) 27 Raj 326; *Uday Kumar* v. *State of Karnataka*, 1998 Cr LJ 4622 (para 16) (SC).

31. *Ishwar Singh* v. *State (Delhi Admn)*, 1985 CrLJ 1625; *Rannun* v. *King Emperor*, AIR 1926 Lah 88.
32. *Radhey Shyam* v. *State of U.P.*, 1993 Cr LJ 3709 (para 19) (All). **See also** *S.C. Bahri* v. *State of Bihar*, 1994 Cr LJ 3271 (para 21) : AIR 1994 SC 2420; *Hari Nath* v. *State of U.P.*, 2000 Cr LJ 3338 (para 22) (All).
33. *M. Jayanth Kumar Reddy* v. *State of A.P.*, 1993 Cr LJ 3875 (para 12) (AP).
34. *Atley* v. *State*, AIR 1955 SC 807; *Nachhittar* v. *State*, AIR 1975 SC 118; *Debi Prasad* v. *State*, 1982 Cr LJ 2214; *Arun Kumar* v. *State*, AIR 1962 Cal 504; *Prem Narain* v. *State*, AIR 1957 All 177; *State* v. *Bhola Singh*, AIR 1969 Raj 219.
35. *Nachhittar Singh* v. *State of Punjab*, AIR 1975 SC 118; *State of UP* v. *Hari Prasad*, AIR 1974 SC 1740; *Atley* v. *State of UP*, AIR 1955 SC 807; *Mahabir Singh* v. *State*, 1979 Cr LJ 1159; *Ramchandra* v. *State*, 1978 Cr LJ (NOC) 55.
36. *Nachhittar Singh* v. *State of Punjab*, AIR 1975 SC 118; *Rajinder* v. *State*, AIR 1966 SC 1322; *Atley* v. *State of UP*, AIR 1955 SC 807; *State* v. *Bhola*, AIR 1969 Raj 219; *Bahal* v. *State*, AIR 1976 SC 2032; *K.S.N. Rao* v. *State of AP*, 1976 Cr LJ 1488.
37. *Sankaran* v. *State*, 1994 Cr LJ 1173 (para 12) (Ker).
38. *Brij Bhushan Sharma* v. *State of U.P.*, 2001 Cr LJ 1384 (para 47) (All).
39. *State of Maharashtra* v. *Ramdas Shankar Kurlekar*, 1999 Cr LJ 196, at pp. 206-207 (Bom). **Also see** *Omwati* v. *Mahendra Singh*, AIR 1998 SC 249 : 1998 Cr LJ 401 (para 10) (SC).
40. *Natha* v. *R*, AIR 1946 PC 187.
41. *Ramgopal* v. *State of Maharashtra*, AIR 1972 SC 656.
42. *Venkatasubba*, AIR 1931 Mad 689.

about that time, A used expressions of malice against C were held to be relevant as furnishing motive on the part of A who murdered B.[43] Motive may be inferred from past enmity.[44]

Where the deceased was doing *pairavi* in the revenue and criminal cases regarding the lands in question inherited by him but having been got recorded by the accused in their names, they were held to have strong motive in assaulting him.[45] Where the material produced showed that there were monetary transactions between the accused and the deceased and some account was to be settled, it was held to be sufficient to point out that there was some mental element to cause murder.[46]

Where the deceased, after taking advance, had cancelled the agreement to sell land in favour of the accused and returned the advanced money to the accused who had accepted the same which fact was admitted by the prosecution witness, the cancellation of the transaction no longer remained a grievance against the deceased and could not be taken as a motive with the accused to commit the murder of the deceased.[47] Where the brother of the deceased had supplied information regarding the illicit liquor business of the accused 3-4 years before the incident, motive was held to be highly improbable.[48]

9. WHEN MOTIVE BECOMES IMPORTANT

Facts which supply a motive for a particular act, such as the impending discovery by the deceased that the man accused of his murder had procured loans from him by means of forged documents,[49] or the impecuniosity of an alleged forger[50] are among the items of circumstantial evidence which are most often admitted.[51] Conversely, facts which tend to show a total absence of motive may be adduced, as where the lack of pecuniary embarrassment on his part is proved by someone accused of arson with intent to defraud an insurance company.[52]

It is, however, easy to attach too much weight to evidence of motive : 'Almost every child has something to gain by the death of his parents, but rarely on the death of a parent is patricide ever suspected.'[53]

Where the prosecution case depends on circumstantial evidence, motive assumes importance and goes a long way to prove the case of the prosecution.[54] Question of motive is of great importance in the case of circumstantial evidence, and where there is absence of such motive, the Court should carefully examine the absence of motive as a circumstance in favour of the accused. However, if the court is satisfied that the circumstances are such that they can lead only to one conclusion that the accused is guilty, then the absence of motive does not vitiate the conviction.[55] In case where only circumstantial evidence is available, at the outset, one considers the motive and the opportunity to commit the crime. If the evidence shows that the accused, having a strong motive, had the opportunity to commit the crime, and the established circumstances on record, considered along with the explanation, if any of the accused, exclude the reasonable possibility of anyone else being the real culprit, then the chain of evidence can be considered to be so complete as to hold the accused guilty in such a case.[56]

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43. *Res* v. *Clewes*, (1830) 4 C & P.
44. *Sonelal* v. *State of UP*, AIR 1978 SC 1142.
45. *Awdesh* v. *State of U.P.*, AIR 1995 SC 375 (para 5).
46. *Ravinder Kumar* v. *State of Punjab*, 2001 Cr LJ 4242 (para 18) (SC).
47. *Ram Narain Singh* v. *State of Rajasthan*, 1995 Cr LJ 2847 (para 6) (Raj).
48. *Vithal Mahadev Patil* v. *State*, 1996 Cr LJ 1796 (para 6) (Kant).
49. *R.* v. *Palmer*, (1856) 5 E & B 1024; STEPHEN : HISTORY OF CRIMINAL LAW, Ch. III, 389.
50. *Russell* v. *Hawes*, (1853) 3 F&F 322.
51. CROSS & TAPPER ON EVIDENCE, 1995, 8th Edn., p. 26.
52. *R.* v. *Grant*, (1865) 4 F&F 322.
53. BEST : PRINCIPLES OF THE LAW OF EVIDENCE, (12th Edn.) 384
54. *Shivaji* v. *State*, AIR 1973 SC 55; *Atley* v. *State*, AIR 1955 SC 807; *Bhagoji* v. *Hyderabad Govt.*, 1954 Hyd 196 : 1954 Cr LJ 1378; *Sivrajan* v. *State*, ILR 1959 Ker 319 : 1959 KLT 167; *Mahadeb Ghosh* v. *State*, 1983 Cr LJ 1854; *Kuldip Sham* v. *State of Punjab*, 1980 Cr LJ 71 (Punj); *State* v. *Dinkar Bandu*, (1969) 72 Bom LR 405; *Rajammal* v. *State*, 1993 Cr LJ 3029 (para 46) (Mad); *Tarseem Kumar* v. *Delhi Administration*, 1995 Cr LJ 470 (para 8) : AIR 1994 SC 2585.
55. *Arun Kumar Benerjee* v. *State*, AIR 1962 Cal 504; *Krishnan Nair* v. *State of Kerala*, ILR 1959 Ker 1094 (SC); *Appu alias Avvanar* v. *State*, 1971 CrLJ 615; *Shahabuddin* v. *State of Rajasthan*, 1973 Cr LJ 723.
56. *Udaipal Singh* v. *State of UP*, AIR 1972 SC 54.

Motive is relevant in all criminal cases whether based on the testimony of the eye-witness or circumstantial evidence. In the instant case, the deceased father had rejected the demand of partition of the landed property made by the accused son who himself had said about the motive of rejection of his demand which was confirmed by his sister. So it could not be said that the motive factor had weakened the prosecution case.[57]

10. MOTIVE BY ITSELF NOT AN INCRIMINATING CIRCUMSTANCE

Mere existence of motive by itself is not an incriminating circumstance[58] and it cannot give rise to an inference of guilt.[59]

Motive for the crime, however adequate, cannot by itself sustain a criminal charge; and, conversely, if the evidence against the accused is clear and clinching, failure on the part of the prosecution to establish any motive is of no consequence.[60] The existence of a strong motive is often an enlightening factor in the process of presumptive reasoning. In estimating the probabilities of a case, motive cannot be left out of account. Though proof of motive is not essential, it is a material consideration.[61] Where an eyewitness stated that the accused told him that the victim was the person who took away the machine without paying repair charges, and then, the accused assaulted the victim and that he received an injury when he intervened, it was held that motive can be inferred.[62]

In the case of murder of the wife, there are many considerations which have to be looked into and it is difficult to know the exact motive in a given case.[63] The fact that, on two previous occasions, the accused was convicted for the offence of murder cannot constitute a motive or preparation for the offence of murder for which he is being tried, so as to attract Section 8.[64]

Previous threats, previous altercations, or previous litigations between parties are relevant to show motive.[65] It has been held that old enemity coupled with an incident regarding the passage of sullage water could be the motive for the crime.[66] Where the father gave the land standing in his name, to the accused, and subsequently got it mutated in the name of the brother of the accused, it was held that there was motive to kill the father.[67]

However where complaints were lodged against each other by the accused and the deceased, two years prior to the offence in question, it was held that they cannot prove the motive of the accused to commit the offence in question.[68]

Existence of previous and subsequent similar conduct is relevant to an issue of intention or other state of mind, although it cannot be used to prove the commission of the crime.[69]

If there is motive in doing an act, then the adequacy of that motive is not in all cases relevant. Heinous offences have been committed with a very slight motive.[70]

Motive or malice in prosecution cannot absolve the criminal though, if it is established, it may have its effect in the appreciation of evidence.[71]

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57. *State of U.P.* v. *Babu Ram*, 2000 Cr LJ 2457 (paras 11 and 13) (SC) : AIR 2000 SC 1735, **reversing** Cri A Nos. 498, 506 of 1993 and Ref. No. 3 of 1993, Dt. 23-4-1994 (All).
58. *Hadu* v. *State*, AIR 1951 Ori 53. **See also** *Girja Shankar Misra* v. *State of U.P.*, AIR 1993 SC 2618 (para 6).
59. *Pratap Singh* v. *State of MP*, 1971 Cr LJ 172; *State* v. *Rudia*, (1985) 1 Crimes 125 (Raj).
60. *Mayachar Sha* v. *State*, 1987 Cr LJ 1948 (Ori).
61. *Rangaswami* v. *Chenchurama*, 1959 Mad LJ (Cri) 348; *Kuldipsham* v. *State of Punjab*, 1980 Cr LJ 71; *Joseph* v. *State of Kerala*, (1964) 1 Cr LJ 493; *Radha Krishna Nandaji* v. *State of MP*, (1962) 2 Cr LJ 694.
62. *Subash* v. *State of UP*, AIR 1987 SC 1222.
63. *Nanak* v. *State of UP*, AIR 1983 SC 1091.
64. *Gangaram* v. *Imperator*, AIR 1920 Bom 371.
65. *Chhotka* v. *State*, 1958 Cal 482.
66. *Gurmej Singh* v. *State of Punjab*, AIR 1992 SC 214.
67. *Inder Dass* v. *State of Rajasthan*, 1985 Cr LJ 1416.
68. *Subhas Debnath* v. *State*, 1985 Cr LJ 1373 : (1985) 2 Bom CR 518.
69. *Emperor* v. *Shiv Kali Goswami*, AIR 1944 All 257 : ILR (1944) All 758 (FB).
70. *State* v. *Kinkar Bandu*, (1969) 72 Bom LR 405.
71. *P. Sirajuddin* v. *Govt. of Madras*, 1968 Cr LJ 493.

Mere suspicion of motive is not sufficient to frame charges against an accused.[72]

11. PREPARATION AND ATTEMPT

Facts, such as the purchase of poison by someone who is accused of murder,[73] which suggest the existence of a plan or design, or preparation for a given course of action may always be proved, and this evidence is of considerable weight because it calls for an explanation of his conduct from the person against whom it is given.

Every offence consists of four stages namely: (1) Intention, (2) Preparation, (3) Attempt, (4) A completed act.

Under the Indian Penal Code only the third and fourth stages are punishable. The first and second stages are not punishable because the law allows *locus penitentiae* only upto the second stage. An attempt is a direct movement towards the commission, after preparation. There is greater degree of determination in an attempt as compared with preparation.[74]

Though preparation may not be an offence, still any fact which shows preparation is relevant under this section.

According to Stephen, an attempt is an act done with intent to commit a crime, and forming part of a series of acts which could constitute its actual commission, if it were not interrupted.[75]

Preparation consists[76] in devising or arranging means necessary for the commission of the offence. Preparations on the part of the accused to accomplish the crime charged, or to prevent its discovery, or to aid his escape, or to avert suspicion from himself are relevant on the question of his guilt. Where the question is whether A has committed an offence, the fact of his having procured the instruments, which are used in its commission, is relevant. Illustrations (*c*) and (*d*) refer to preparation.

If any act is done towards the commission of an offence but it does not lead to the commission of the offence, unless it is followed or preceded by other acts, then it is only an act of preparation.[77] In some cases, the person who wants to commit the crime, after making preparations, may have a second thought, to resile from his attempt. It becomes therefore, important to consider whether there was *locus penitentiae*.[78] No inference of guilt will arise where the preparations may have been innocent, or for the execution of something different, though illegal; or where the crime for the execution of which the preparations were made may have been subsequently frustrated or voluntarily abandoned. A is indicated for murdering B by poisoning him. It appears that, shortly before, A purchased a quantity of poison. This raises an inference of guilt. But it appears that A had purchased the poison to kill vermin. This overthrows the inference of guilt. A prepares poison with which he intends to kill B. Before he uses it he repents of his crime and abandons the idea of killing B. This overthrows the inference arising from the purchase of poison.

It is observed by Best: "Of all species of preparations, those which are resorted to for the purpose of averting suspicion from the criminal require the most particular notice..... Previous attempts to commit an offence are closely allied to preparations for the commission of it, and only differ in being carried one step further and nearer to the criminal act, of which, however, like the former, they fall short." (8th Ed. Section 454, 455, p. 403).

Mere writing of bogus telegrams with a view to despatch them for purposes of cheating would amount only to preparation.[79] An attempt is the direct movement towards the commission after preparations are made.[80] When a person wanted to administer something capable of causing miscarriage to a pregnant woman and, in fact, he administered a harmless substance, it was held that he cannot be

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72. *Gangaram Kondiba Ingle* v. *State of Maharashtra*, 2000 Cr LJ 336 (para 8) (Bom).
73. *R.* v. *Palmer*, (1856) 5 E&B 1024.
74. *State of Bihar* v. *Jgadish Narain*, AIR 1959 Pat 376.
75. STEPHEN'S DIGEST—Introduction.
76. *Jain* v. *R.* AIR 1943 Pat 82, 87; *Lakshmi Prasad* v. *Emperor*, AIR 1923 Pat 307.
77. *Province of Bihar* v. *Bhagwat Prasad*, AIR 1949 Pat 326.
78. In re : *Bavaji*, AIR 1950 Mad 44; *Naravanaswami Pillai* v. *Emperor*, AIR 1932 Mad 507.
79. *Raman Chettiar* v. *King Emperor*, AIR 1927 Mad 77.
80. *Jain* v. *R.* AIR 1943 Pat 82, 87.

convicted for an attempt to cause miscarriage in as much as the act he did was not an 'act done towards the commission of the offence' within the meaning of this section.[81] Attempt to commit an offence can be said to have come into being when the preparation is complete, and the culprit begins to do something within an intention of committing the offence, which is a step forward towards the commission of an offence, the moment he begins to do an act with the necessary intention, he commences his attempt to commit the offence.[82] An attempt is an act of such a nature that it is in itself evidence of a criminal intent with which it is done. A criminal attempt bears criminal intent upon its face.[83]

Where a debtor took the promisory note executed by him for purpose of endorsing the payment towards the debt and endorsed on it as if he paid the entire amount though he paid a small amount towards the debt, it was held that it was not mere prepration but an attempt to cheat.[84]

A person 'commits the offence' or 'attempts to commit a particular offence' when (i) he intends to commit that particular offence and (ii) he, having made preparations and with the intention to commit the offence does an act towards the commission. Such an act need not be the penultimate act towards the commission of that offence, but must be an act during the course of committing that offence.[85]

The distinction between preparation and attempt may be clear in some cases, but in most of the cases the dividing line is very thin; nonetheless, it is a real distinction. The crucial test is whether the last act, if not prevented by any extraneous cause would fructify into the commission of an offence; in such a case, it would amount to an attempt to commit an offence. The question is really one of fact depending upon the circumstances of each case.[86]

For more cases on preparation, attempt etc., standard commentaries on the Indian Penal Code and on Criminal Law may be referred to.

12. CONDUCT—MEANING OF

The expression 'conduct' is not defined in the Act. However this section also, by way of explanation, states what the expression 'conduct' would mean. The first explanation shows that mere statements as distinguished from the act would not constitute 'conduct' unless those statements accompany and explain the acts other than statements. It may be noted that statements which accompany the acts are part of *res gestae* and so they are relevant.[87]

The conduct of any party or his agent with reference to a suit or proceeding will be scanned under this section. A fact can be proved by conduct of a party and by surrounding circumstances. The production of articles by an accused person is relevant as evidence of conduct. Statements accompanying or explaining conduct are also relevant as part of the conduct itself. 'Conduct' to be relevant must directly influence or be influenced by a fact in issue or relevant fact. It would not include actions resulting from some other intermediary cause or circumstances.[88]

Thus, signs made by the deceased, shortly before her death, when questioned as to the circumstances under which injuries had been inflicted on her, could not be proved as conduct, as, taken alone, and without referring to questions leading to them, there was nothing to connect them with the cause of death and so to make them relevant.[89] Such questions and signs taken together are admissible in evidence under Section 32(1) as 'verbal statements' as to the cause of the death of the deceased. (*Ibid*).

13. PARTY

The word 'any party' in the main body of the section includes not only the plaintiff and defendant in a civil suit but also a person charged with an offence in a criminal prosecution. In criminal proceedings,

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81. *Asgarali Pradhania* v. *Emperor*, AIR 1933 Cal 893.
82. *Abhayanand* v. *State of Bihar*, AIR 1961 SC 1698 : (1961) 2 Cr LJ 822.
83. *Ganapathi* v. *T.A. Chinnayya Mudaliar*, AIR 1953 Mad 609.
84. *Ganapathi* v. *T.A. Chinnayya Mudaliar*, AIR 1953 Mad 609.
85. *Kesavananda* v. *State of Kerala*, AIR 1973 SC 1461.
86. *King* v. *Tustipada Mandal*, AIR 1951 Ori 284, 287; In re : *Vallu Narayana Reddy*, AIR 1955 AP 48 : 1955 Cr LJ 917; *State of MP* v. *Murat Singh*, 1971 MP LJ 960.
87. *Vide Illuss.* (j) and (k).
88. *R.* v. *Abdulla*, ILR (1885) 7 All 385 (FB).
89. *Queen Empress* v. *Abdullah*, ILR (1885) 7 All 385 (FB).

the prosecution represented by the State occupies the position analogous to that of a plaintiff in a civil suit.[1]

The conduct of a party alone is admissible and of none others; the conduct of a conspirator who was dead and hence not an accused at the trial, is not admissible.[2] Where the joint act of several persons is sought to be proved, for an inference to be drawn from their conduct by the Court, it was held that evidence should be led with some degree of probability, so that it may be possible for the Court to draw necessary inference from the conduct of each one of the persons concerned in the Act.[3]

The conduct of an accused is relevant only against him and not against the co-accused.[4] Conduct of the prosecutrix, the victim of rape, that she informed her parents about the occurrence immediately, was relevant.[5] Where the accused led the police to the room of the co-accused from where the prosecutrix was found, such evidence is admissible.[6]

14. CONDUCT OF AN ACCUSED

There is distinction between the conduct of an accused, simpliciter, admissible under this section, and the conduct which is in reference to any fact in issue or relevant fact.

When the accused produces some articles which are the subject matter of the offence, it is relevant as evidence of conduct. Statements accompanying or explaining such conduct are also admissible under Section 8 as a part of his conduct.[7] Pointing of the accused to the police to the place where the dead body of his wife was hidden, would be admissible as conduct.[8] Where the accused after committing murder of his two daughters tried to commit suicide, his conduct was incriminating and admissible.[9] The fact that the person, accused of murder, appeared at the police station with the weapon of offence shortly after occurrence and blood-stained clothes were recovered from him, is admissible against the accused as the evidence of his conduct.[10]

15. SECTION 8 AND SECTION 27, SECTION 8 AND SECTION 162, Cr.P.C.

Where the accused led the police and pointed out the place where stolen articles or weapons, which might have been used in the commission of the offence, and they were found hidden, it was held that the conduct of the accused is admissible under this section, irrespective of the fact whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Act.[11] Where an accused led the police and the *Panchas* to a dealer from whom he purchased the weapon, it was held that the information given is inadmissible under Section 27, but the evidence given by the police officer and the *Panchas*, that the accused had taken them to the dealer, when corroborated by the dealer, is admissible under this section.[12]

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1. *R.* v. *Abdullah*, ILR 1885 7 All 385; *Arun Kumar Benerjee* v. *State*, AIR 1962 Cal 504 : (1962) 2 Cr LJ 354.
2. *Sardul Singh* v. *State*, AIR 1957 SC 747 : 1957 Cr LJ 1325.
3. *Rafiquiddin Ahamad* v. *Emperor*, AIR 1935 Cal 184 (FB).
4. *Desraj* v. *State*, 1951 Simbla-14 : 1951 All WR (Sup).
5. *Ranjit Hazarika* v. *State of Assam*, (1998) 8 SCC 635 : 1998 SCC (Cri) 1725.
6. *Bhubender Parkash* v. *State*, 1986 Cr LJ 9 (Del).
7. In re : *Bandi*, AIR 1963 AP 87; *R.* v. *Ganu*, AIR 1932 Bom 286; *Rafique-ud-din Ahmad* v. *R.* AIR 1935 Cal 184, *R.* v. *Nanua*, 1941 All 145; *Mayachar Sha* v. *State*, 1987 Cr LJ 1948 (Ori); *Amar Layek* v. *State of West Bengal*, 1988 Cr LJ 1293.
8. *Ravindra* v. *State of Kerala*, 1999 Cr LJ 2364 (para 14) (Ker). **Also see** *Vasudevan* v. *State*, 1993 Cr LJ 3151 (para 9) (Ker); *Mohibur Rahman* v. *State of Assam*, 2000 Cr LJ 4725 (para 27) (Gau).
9. *Phundi* v. *State of M.P.*, 1993 Cr LJ 1881 (MP).
10. *Veerappan* v. *State*, 1994 Cr LJ 2584 (Mad), **following** *Siddappa* v. *State of Karnataka*, 1991 Cr LJ 458 (Kant), **explaining** and **distinguishing** *Zirngee Ariel* v. *State of Madhya Pradesh*, AIR 1954 SC 15 : 1954 Cr LJ 230 and *Elukuri Seshapani Chetti* v. *Emperor*, 1936 MWN 1241 : 1934 (38) Cr LJ 323.
11. *Prakash Chand* v. *State (Delhi Admn)*, AIR 1979 SC 400; *State* v. *Vaidyanatha*, AIR 1958 SC 61; *Shivbahadur* v. *State*, AIR 1954 SC 322; *Zwinglee Ariel* v. *State*, AIR 1954 SC 15; H.P. *Administration* v. *Omprakash*, AIR 1972 SC 975; *State of U.P.* v. *Jageshwar*, AIR 1983 SC 349; *Ramkishan Mithanlal Sharma* v. *State*, AIR 1955 SC 104; *Aher Raja Khima* v. *State of Saurashtra*, AIR 1956 SC 217; *Pershadi* v. *State of U.P.*, AIR 1957 SC 211; *State of U.P.* v. *Deoman Upadhyaya*, AIR 1960 SC 1125.
12. *H.P. Administration* v. *Omprakash*, AIR 1972 SC 975.

In a case where the accused took out the weapon from a place under the cot and handed it over to the police without making any statement, that place being also accessible to all, it was held that the fact of recovery is barred under Section 27. It cannot also be relied upon as evidence under Section 8.[13] Where the accused pointed out the place where the stolen property was kept concealed, in the absence of anything to show that the property was stolen property, it was held that his conduct was not influenced by any fact in issue or relevant fact.[14]

The statement of an accused made to a police officer in the course of investigation, is hit by Section 162, Cr.P.C. What is excluded by Section 162, Cr.P.C., is the statement, and not the evidence relating to the conduct when questioned by the police officer. The conduct of the accused is not dealt with by Section 27, but is only relevant under this section.[15]

There is a distinction between the conduct of a person accused of an offence and a statement given to a police officer during investigation. The former is relevant under Section 8 and the latter will be hit by Section 162, Cr.P.C. Where an accused simply led the police and pointed out the place where incriminating articles were hidden and found, it is admissible as conduct under Section 8, irrespective of whether any statement given contemporaneously or antecedent to such conduct falls within the purview of Section 27.[16]

16. "CONDUCT OF ANY PERSON AN OFFENCE AGAINST WHOM IS THE SUBJECT OF ANY PROCEEDING"

Certain gestures of the deceased shortly before his death, in reply to the questions put to him are relevant as conduct under this section.[17] Where the deceased complained that he was apprehending danger to his life at the hands of certain people, such complaint is admissible as evidence of his conduct, in the trial wherein his death was the subject matter.[18]

Conduct may be antecedent, contemporaneous or subsequent conduct.

17. CONDUCT OF EYE-WITNESSES

The post-event conduct of a witness varies from person to person. It cannot be a cast-iron reaction to be followed as a model by everyone witnessing such event[19] and unless the reaction demonstrated by an eye-witness is so improbable or so inconceivable from any human being pitted in such a situation, it is unfair to dub his reaction as unnatural.[20]

Where the eye-witnesses, the brothers of the deceased arriving on the murder spot hearing his cries, ran away from there to inform the people leaving his brother in distress, their conduct was held to be unnatural and their presence there was doubtful.[21] The conduct of the eye-witness of the murder of her mother in not disclosing it to anybody and going to sleep quietly was held to be unnatural[22] but the conduct of the eye-witness, the body-guard of the victim of murderous assault in not retaliating the assault, was held to be not unnatural as the assault by fire arms by the assailants was sudden and there was no evidence to show that the body-guard was having any arms.[23]

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13. *Bahdual* v. *State*, AIR 1979 SC 1262.
14. *Vajeram Raghura* v. *State of Kutch*, AIR 1954 Kutch 20 : 1954 Cut 20 : 1954 Cr LJ 793.
15. *Kalijtban* v. *R.*, AIR 1936 Cal 316; *Jamunia* v. *R.*, 1936 Nag 200; *R.* v. *Nisri*, ILR 31 All 592 (FB).
16. *Prakash Chand* v. *State*, AIR 1979 SC 400 : (1979) 2 SCR 330. **See also** *Bejoy Mondal* v. *State of W. Bengal*, 1984 Cr LJ 518; *Malkhan Singh* v. *State of U.P.*, AIR 1975 SC 12.
17. *Emperor* v. *Motiram Rai Singh*, AIR 1936 Bom 372.
18. *J.M Gregory*, In re : AIR 1928 Cal 510.
19. *Rammi* v. *State of M.P.*, 1999 Cr LJ 4561 (para 8) (SC) : AIR 1999 SC 3544. **See also** *Leela Ram* v. *State of Haryana*, AIR 1999 SC 3717 (paras 11 and 12).
20. *State of Karnataka* v. *K. Yarappa Reddy*, 2000 Cr LJ 400 (para 26) (SC) : AIR 2000 SC 185, **reversing** Cri A No. 248 of 1986, Dt. 14-9-1987 (Kant).
21. *Shankar Rao* v. *State of A.P.*, 1993 Cr LJ 3833 (paras 6 and 9) (AP).
22. *Krishnappa* v. *State of Karnataka*, 1996 AIHC 1030 (paras 6 and 7).
23. *Ram Sanjiwan Singh* v. *State of Bihar*, 1996 Cr LJ 2528 (para 11) (SC).

18. ANTECEDENT CONDUCT

Under this category the previous attempts for committing the offence and also preparations would also become relevant. (See discussion under the head 'previous attempts').

Purchasing fire arms or a weapon of offence comes under antecedent conduct. It may be noted that motive for committing the offence, the means and opportunities of committing it, declarations of intention, and threats and previous attempts, and preparations, would all come under this head antecedent conduct.

In a trial for the offence of cheating, the facts that the accused was financially embarrassed and had attempted to cheat on other occasions were held to be relevant to prove motive under this section.[24] Some months before he was murdered, the deceased wrote a letter to the Commissioner of Police, Bombay, asking for protection and stating that he apprehended injury from accused No. 2 and was in fear of his life. At the trial of accused No. 2 for abetting the murder of the deceased by accused No. 1 the letter was offered in evidence for the prosecution. It was held that the letter was admissible in evidence as containing statements which accompanied and explained the conduct of the deceased, such conduct having been influenced by a fact in issue (*viz.*, accused No. 2's alleged intention to caused deceased's death, Section 5, Ill. (*a*)), and a relevant fact (*viz.*, accused No. 2's alleged ill-will towards deceased constituting a motive for accused No. 2's alleged complicity in the stabbing of the deceased).[25] At the trial of the accused for the murder of K, the approver gave evidence that he and the accused had murdered one B a few days before the murder of K, and that they proposed to conceal the murder of B by causing injuries to K and getting themselves arrested for so doing. It was held that the evidence was admissible to establish motive for the murder of K with which the accused were charged.[26]

19. CONTEMPORANEOUS CONDUCT

Evidence of contemporaneous conduct is always admissible as a surrounding circumstance.[27]

A contemporaneous tape-record of the conversation, provided it is proved, the voice is identified, and the accuracy of the conversation, eliminating the possibility of tampering, is established, is admissible as a relevant fact.[28] In the case of offence of bribery, immediate reactions, words or gestures or act at the time of the alleged offence are relevant.[29] Where a question is whether a document is a sale deed or a mortgage, contemporaneous conduct is always admissible.[30]

20. SUBSEQUENT CONDUCT

A criminal trial is not an enquiry into the conduct of an accused, for any purpose other than to determine whether he is guilty of the offence charged. In that connection, that piece of conduct of the accused can be held to be incriminatory which has no reasonable explanation except on the hypothesis that he is guilty. Conduct which destroys the presumption of innocence can alone be considered as material.[31]

Under the head subsequent conduct, the following types of conduct would be material:—

(1) Change of life, *e.g.*, prior to an offence he is poor, subsequent to the offence he leads a posh life.

(2) Evasion of justice, *e.g.*, absconding or hiding or fleeing the country, keeping things concealed or tampering with evidence, etc., all these afford a presumption of guilt according to the circumstances of the case.

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24. *A.V. Joseph* v. *King-Emperor*, ILR (1924) 3 Ran 11.
25. *Emperor* v. *Manchan Khan*, (1932) 34 Bom LR 1087.
26. *Natha Singh* v. *Emperor*, (1946) 49 Bom LR 225 (PC).
27. *Bhaskar Waman Joshi* v. *Shri Narayan Rambilas Agarwal*, AIR 1960 SC 301.
28. *Malkani* v. *State of Maharashtra*, AIR 1973 SC 157; *Yusufalli Esmail Nagree* v. *State of Maharashtra*, AIR 1968 SC 147; *Smt. Joginder Kaur* v. *Surjit Singh*, AIR 1985 P&H 128.
29. *Maha Singh* v. *State (Delhi Admn.)*, AIR 1976 SC 449.
30. *Palla Singh* v. *Attar Singh*, AIR 1954 Punj 81.
31. *Anant Chintaman Lagu* v. *State of Bombay*, AIR 1960 SC 500 : 1960 SCJ 799 at 782, 783.

(3) Fear, trembling, *etc.*, physical symptoms indicating fear, paleness, trembling, fainting, weeping, sweating, sighing, hesitation, fluttering of the voice, etc.

There must be proper material showing the subsequent conduct of the accused to make it relevant and to add as an additional link for the main prosecution case.[32]

Refusal to appear in identification parade and to give specimen foot-prints is indicative of guilt.[33]

In a trial for kidnapping, robbery and murder, the subsequent conduct of the accused, in making evidence for himself to prove *alibi*, his projected flight by sea, and his endeavour to conceal his identity, were admitted in evidence as conduct indicating a consciousness of impending danger and guilt.[34] Where the accused saw the police he tried to escape which was the first sign of his guilty conduct and at his instance stolen property was recovered which was in his special knowledge, his conduct was relevant.[35] The conduct of an accused in absconding, when the police gets suspicious of his complicity in the offence of murder, is relevant under this section and might well be indicative to some extent of a guilty mind. But this is not the only conclusion to which it must lead the court. Such is the instinct of self-preservation in an average human being that even innocent persons may, when suspected of grave crimes, be tempted to evade arrest.[36] Evidence of possession by the accused of a large number of coins not in common circulation and his attempt to dispose of them were held to be admissible on his trial for having fraudulently delivered to another counterfeit coins knowing them to be counterfeit.[37]

Explaining the meaning of the term "absconder", the Supreme Court said: "To be absconder, in the eye of law, it is not necessary that a person should have run away from his home, it is sufficient if he hides himself, to evade the process of law even if the hiding place be in his own home."[38]

The conduct of the accused making himself scarce is relevant and may be indicative to some extent of a guilty mind, but would not be conclusive evidence of his guilt.[39] It was held in *Matru* v. *State*,[40] that mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind; that the act is a relevant piece of evidence to be considered along with other evidence; that its value would depend on the circumstances of each case; and that it can scarcely be held as a determining link in completing the chain of circumstantial evidence, which must admit of no other hypothesis than that of the guilt of the accused.[41] In a case where B fired shots, R also was present but they both fled when villagers chased them. It was held that, from the mere presence of R at that place, it cannot be taken that he had common intention and his running away along with B cannot prove R's guilty conscience.[42]

The prosecution cannot satisfy itself by producing suspicious circumstances to show that the accused did not surrender or was not traceable for about a year.[43]

In *Rahman* v. *State*,[44] the Supreme Court observed: Different persons are differently constituted and some persons when wanted in a criminal case, deliberately abscond simply to avoid a criminal trial. Still, the flight of the accused from justice after the occurrence is a relevant circumstance indicative of the conduct of the accused. At the same time, it must be borne in mind that conclusion of guilty mind cannot be drawn from such circumstance alone because even an innocent person may be tempted to such conduct, to avoid arrest."

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32. *Dinkar Bandhu Deshmukh* v. *State*, AIR 1970 Bom 438.
33. *Mulkh Raj* v. *Delhi Admn*, AIR 1974 SC 1723.
34. *Queen-Empress* v. *Sami*, ILR (1890) 13 Mad 426.
35. *Pentapati Veerababu* v. *State of A.P.*, 1998 Cr LJ 2505 (para 8) (AP). Accused producing watch of deceased before police from his house, admissible, *Valiyaveetil Ashraf* v. *State*, 1994 Cr LJ 555 (Ker).
36. *Thimma* v. *State of Mysore*, AIR 1971 SC 1871; *Rahman* v. *State of U.P.*, AIR 1972 SC 110; *Ramanathan* v. *Tamil Nadu*, AIR 1978 SC 1204; *Ramanathan* v. *State of Tamil Nadu*, 1978 Cr LJ 1137.
37. *Queen-Empress* v. *Nur Mahommed*, ILR (1883) 8 Bom 223.
38. *Kartarey* v. *State of U.P.*, AIR 1976 SC 76.
39. *Adikanda Das* v. *State of Orissa*, 1988 Cr LJ 1885.
40. AIR 1971 SC 1050.
41. *Raghubir Singh* v. *State*, AIR 1971 SC 2156; *Mazehar Ali* v. *State*, 1976 Cr LJ 1629; *Kultan Pillai* v. *State of Kerala*, 1960 Ker LJ 1273.
42. *Banwari* v. *State of U.P.*, AIR 1962 SC 1198.
43. *Prakash* v. *State*, (1969) 3 SCC 741; **relied on** in *Datar* v. *State*, AIR 1974 SC 1193.
44. AIR 1972 SC 110.

Where shortly after the rape, the victim makes a complaint to her mother, her complaint is her subsequent conduct having a direct bearing on the fact in issue and is admissible.[45] A statement of the prosecutrix, soon after the occurrence of rape, is admissible and relevant as the evidence of the prosecutrix in the court under Section 157.[46] Where a witness failed to identify the accused in a prior identification parade but identified in a subsequent parade, his subsequent conduct was held to be relevant to show that he was unreliable.[47]

Where the accused after committing murder of his wife gave information to the police that she had committed suicide and he thereby had given a version favourable to himself, such information (F.I.R.) is thus relevant under Section 8.[48] Where the accused of rape and strangulation tried to run away from the spot and on being caught begged forgiveness and pleaded that it was his first mistake, these facts form the subsequent conduct of the accused.[49] An accused stating that his wife had eloped with another man, without giving report to the police, went through an engagement ceremony post haste and also remained inactive inspite of the foul smell from his bathroom. On those facts it was held that subsequent conduct coupled with the motive was relevant as it proved his guilty mind.[50] In a case of murder taking place in the house of a witness, her conduct of sleeping in the neighbour's house, being a young wife of 28 years observing '*ghunghat*' in the presence of her husband's elder brother, the accused, when her husband was away, was held to be not unnatural.[51] Though nothing was recovered from the vendor pointed out by the accused and from whom he had purchased the knife, the weapon of offence, his conduct could be relevant under Section 8.[52] Presence of the accused before and after the incident in the vicinity of the village in which dacoity took place is relevant and admissible under Section 8.[53] Where the accused was present at the spot where the dead body of the deceased was lying and he recognised it in the presence of other witnesses, his conduct of leading the police and other persons present at the spot to his house and pointed to the place from where the weapon of assault and other incriminating articles were recovered, was held to be admissible under this section.[54]

Minor deviations from regular conduct do not make the accused person insane or prove his unsoundness of mind.[55]

21. ABSCONDING OR FLEEING

The fact that the accused was seen with a pistol by the injured immediately after firing and the accused ran away from the spot is relevant.[56] Where the accused disappeared from his home after the incident of the killing, leaving his family including his wife and child in lurch and starting a new life in a far off village by converting himself as a sikh and concealing the real identity and raising a new family, all this destroyed the presumption of innocence and spoke volumes in favour of his guilt and his conduct was relevant under Section 8 and his conviction was proper.[57] In a robbery-cum-murder case the subsequent conduct of the accused in not absconding after the occurrence may be because they thought that they had obliterated evidence against them by killing all the three persons present in the house and they did not consider it wise to abscond, lest it might give rise to suspicion against them.[58]

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45. *Indru* v. *State of H.P.*, 1989 Cr LJ 2238.
46. *Chanderkala (Smt).* v. *Ramkishan*, AIR 1985 SC 1268 : 1985 Cr LJ 1490; *Radhya Sham* v. *State of J&K*, 1988 Cr LJ 447.
47. *Gofur Shaik* v. *State*, 1984 Cr LJ 559 (Cal).
48. *Purkha Ram* v. *State of Rajasthan*, 1997 Cr LJ 1566 (Raj).
49. *Vinod* v. *State*, 1994 Cr LJ 2360 (para 29) (All).
50. *Kantu Chhagan* v. *State of Gujarat*, 1982 Cr LJ 1110.
51. *Lekraj* v. *State of Gujarat*, AIR 1998 SC 242, at p. 244 : 1998 Cr LJ 396.
52. *Mohan* v. *State*, 1997 Cr LJ 22 (Mad).
53. *Sunil* v. *State of Rajasthan*, 2001 Cr LJ 3063 (para 21) (Raj).
54. *Sonatan Mahato* v. *State of W.B.*, 2001 Cr LJ 3470 (para 21) (Cal).
55. *Sankaran* v. *State*, 1994 Cr LJ 1173 (para 11) (Ker).
56. *Malkhan* v. *State*, AIR 1975 SC 12; *Chandrika Prasad* v. *Emperor*, AIR 1930 Oudh 324.
57. *Santokh Singh* v. *State*, 1998 Cr LJ 218 (J&K). Attempt to escape after occurrence, relevant. *Tola Ram* v. *State of Rajasthan*, 1996 Cr LJ 8 (para 16) (Raj); *Kuldip Sharma* v. *State*, 1996 Cr LJ 244 (para 32) (Del); *Jale Singh* v. *State of Rajasthan*, 1996 Cr LJ 1177 (para 36) (Raj).
58. *State of M.P.* v. *Mukund*, 1997 Cr LJ 534 (MP).

22. FIRST INFORMATION REPORT

When the accused himself gives information which forms the first information report, it is admissible as his conduct under Section 8.[59]

The importance of first information report lies in the fact that it shows on what materials the investigation commenced and what was the story then told.[60]

If that information is a non-confessional statement it would be admissible under Section 21, as it is relevant as an admission.[61]

If it is a confessional statement made to a police officer it cannot be used under Section 25, but can be used under Section 27, to the extent allowed by that section.

However, that can be used only by way of corroboration or contradiction in view of Sections 145 and 157 of this Act.[62]

The first information report of an injured person can be admitted under illuss. (j) and (*k*) under this section.[63]

23. STATEMENT AND COMPLAINT

One must bear in mind the distinction between a statement and a complaint. Illuss., (j) and (k) of this section would show that the statements of a person against whom an offence is committed would be relevant. The distinction is that in the case of a statement, it is only a bare statement of fact, whereas a complaint is a statement made to a person in authority with a view to obtaining redress or punishment, *e.g.*, to a police officer or a parent or some other person who is required for assistance and protection.[64]

According to PHIPSON: "the complaint must be voluntary and spontaneous and not elicited by leading, inducing or intimidating questions."[65]

A complaint was made to a Sub-divisional Officer by a person apprehending danger to his life, liberty and reputation. In the trial for conspiracy to murder the complainant, it was held that the complaint is admissible under this section, as evidence of conduct of the deceased which was being influenced by fear.[66] Where a raped girl of 4 years was crying and she disclosed the name of the accused and blood and semen were found on the clothes of the accused, it was held that the statement of the girl was admissible.[67] When a ravished woman lodges a complaint, the statements in the complaint are relevant as conduct, though they are not relevant as direct proof of the act. The facts in the complaint which relate to the charge against the accused may be given in evidence, not as being evidence of facts complained of, but as evidence of the consistency of conduct of the woman, and of the story given by her in the witness box, as negativing consent on her part.[68]

When a raped girl answers the questions put to her, her statement cannot be treated as a complaint.[69]

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59. *Aghnoo Nagesia* v. *State of Bihar*, AIR 1966 SC 119 : 1966 Cr LJ 100; *Damodar Prasad* v. *State of Maharashtra*, AIR 1972 SC 622; *State* v. *Shiv*, AIR 1962 Raj 3.
60. *Manimohan Ghosh* v. *Emperor*, ILR (1931) 58 Cal 1312.
61. *Aghnoo Nagesia* v. *State of Bihar*, 1966 SC 119 : 1966 CrLJ 100.
62. *Vallon* v. *State*, AIR 1957 TC 207.
63. *Umrao* v. *State*, AIR 1961 MP 45.
64. *Parvathi* v. *Thirumalai*, ILR 10 Mad 334; *Gangadhar* v. *Emperor*, ILR (1915) 43 Cal 173 : AIR 1916 Cal 867; *Emperor* v. *Phulel*, ILR 35 All 102.
65. PHIPSON ON EVIDENCE 13th Edn., p. 151.
66. *Goloke* v. *R.*, AIR 1938 Cal 51.
67. *State* v. *Hiraman*, AIR 1965 Bom 154.
68. *Rameshwar* v. *State*, AIR 1952 SC 54 : 1952 CrLJ 547; *Kappinaiah* v. *R*, AIR 1931 Mad 233; **relying on** *Regina* v. *Uyman*, (1896) 2 QB 167; *State* v. *Pichika*, AIR 1963 Ori 58; *State* v. *Chakradhar*, AIR 1964 Ori 262; *Richard Gillie* v. *Posho Ltd.*, AIR 1939 PC 146.
69. *R.* v. *Phagunia*, AIR 1926 Pat 58; *R.* v. *Soopi*, AIR 1930 Lah 84; *Sreehari* v. *R.*, AIR 1930 Cal 132.

24. IMMEDIATE COMPLAINTS [ILLUSTRATIONS (J) AND (K)]

Under these illustrations the terms of the immediate complaint (not the formal complaint to Magistrate or Police Officer) are admissible as original evidence.[70]

Statements are admissible:—

(a) If they form part of the same transaction u/s. 6;

(b) Showing conduct influenced by a fact in issue u/s. 8;

(c) Negativing the consent when consent is material under Section 9;

(d) Other statements can be used under Sections 32, 145 and 157.

If the statement is made to a Police Officer during investigation, it is hit by Section 162, Cr. P.C.

Statement or disclosure made by a ravished girl either to the members of her family or to others, is an evidence of conduct, admissible as corroboration by Section 8, illustration (j).[71]

25. STATEMENTS NOT INCLUDED IN CONDUCT [EXPLANATION (1)]

This explanation, while explaining the word 'conduct' states "that the word 'conduct' does not include statements unless those statements accompany and explain acts other than statements." Thus, it is clear that the distinction is, on the one hand, between statement simpliciter and on the other statements which accompany and explain a certain act. A statement may consist of words spoken or written, or some gestures made by some mute persons. But acts exclude words and cannot be translated into words.[72]

This explanation points to a case in which a person whose conduct is in dispute mixes up actions and statements; and in such a case those actions and statements may be proved as a whole. For instance, a person is seen running down a street in a wounded condition, and calling out the names of his assailant, and the circumstances under which the injuries were inflicted. Here what the injured person says and what he does may be taken together and proved as a whole.[73]

Statements made by an accused while in the custody of the police are not admissible in evidence as conduct or otherwise.[74]

This section, so far as it admits a statement as included in the word 'conduct', must be read in connection with Sections 25 and 26, and cannot admit a statement as evidence which would be shut out by those sections.[75]

The evidence of police officers as to the pointing out of the various places by the accused cannot be treated as evidence of conduct because such evidence really amounts to confession of his guilt by the accused while he is in the custody of the police.[76] The evidence of circumstance that the accused led to the police officer and pointed out the place where the weapon which might have been used in the commission of offence was found hidden would be admissible as conduct, irrespective of the fact whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27.[77]

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70. *The Queen* v. *J. Macdonald*, (1872) 10 Beng LR (Appx) 2.
71. *Bandu* v. *State of Maharashtra*, 1996 Cr LJ 285 (para 10) (Bom).
72. *R.* v. *Nanua*, AIR 1941 All 145 : 1941 All 280.
73. *Queen Empress* v. *Abdullah*, ILR (1885) 7 all 385, 395 (FB); *Emperor* v. *Sadhu Charan Das*, ILR (1921) 49 Cal 600; *Chandrikaram Kahar* v. *King Emperor*, (1922) 1 Pat 401; *Ranga* v. *Crown*, ILR (1924) 5 Lah 305; All these are approved of in *Chandrasekhar* v. *King*, 1937 AC 220.
74. *Queen-Empress* v. *Nana*, ILR (1889) 14 Bom 260 (FB).
75. *Queen-Empress* v. *Nana*, ILR (1889) 14 Bom 260 (FB). See the observations of BROOMFIELD J., in *Emperor* v. *Ganu Chandra*, (1931) 34 Bom LR 303, 311 : ILR 56 Bom 172 : AIR 1932 Bom 186. See the opinion of the Division Bench in the Full Bench case of *Syamo Maha Patro*, In re : (1932) 55 Mad 903 (FB).
76. *Turab* v. *King-Emperor*, ILR (1934) 10 Luck 281; *Emperor* v. *Hira Gobar*, (1919) 21 Bom LR 724 : AIR 1919 Bom 162.
77. *Prakash Chand* v. *State (Delhi Administration)*, AIR 1979 SC 400 : 1979 Cr LJ 329. Also see *Ravi* v. *State of Kerala*, 1994 Cr LJ 162 (para 32) (Ker), *Viswanbharan* v. *State of Kerala*, 1994 Cr LJ 1522 (para 17) (Ker).

The Allahabad High Court had dissented from this view and held that the pointing out of property does not amount to a confession. The digging out and handing over to the police by the accused person, without saying anything, of certain articles from particular spots to which he took the police and witnesses does not amount to a "statement".[78]

In *Bhagwandas* v. *State*,[79] it was held that evidence relating to truth of a statement which does not explain any accompanying conduct of the accused is not admissible under this section. Hearsay evidence relating to a statement of admission by one of the conspirators is not admissible under this section, if it did not explain any accompanying conduct of that conspirator. When a person who took the bribe was caught, and gave a statement, the statement is not admissible.[80] Where a woman who was with her husband during the night, told her brother in the morning when questioned by them that she did not know the whereabouts of her husband, it was held that the statements of the brothers were inadmissible as they did not accompany or explain any act.[81]

Conversation over telephone for settling details for passing bribe-money was recorded by secret instruments. This was held to be evidence of conduct.[82]

The Court cited from *R.* v. *Leatham*, (1861-8 Cox CC 198): "It matters not how you get it, if you steal it even, it would be admissibl in evidence." If such statements do not appear on record, the evidence remains incomplete or imperfect.[83]

In *State* v. *Hiraman*,[84] witness stated that when she questioned a girl of 4 years of age, who was crying, she disclosed the name of the accused who raped her. "I saw her answering the calls of nature outside in the open and on seeing me she began crying and on questioning she told me that the accused had placed her on his lap and blood came out.". It was held that such part of the statement which explains the crying of the girl was admissible. Where the only eye-witness, the father of the victim girl who was fired at, did not mention the names of the accused to the neighbours who gathered there, after the occurrence, it was held that he might have not known the names of the accused and that does not render the prosecution case untrue specially where there was evidence against the accused.[85]

26. SILENCE OF THE ACCUSED [EXPLANATION (2)]

There is a difference of opinion as to whether silence of the accused is relevant and admissible, giving rise to an inference that he accepts the truth of the accusation where the charge is made by a police officer or other person with authority to investigate the crime.

This subject comes under Explanation 2, read with illus. (*g*), in the Act, which would show that a statement made to the accused or in his presence and hearing, which affects his conduct is admissible when such conduct is relevant. It is a general rule that statements in the presence of the accused, and which he might have contradicted, if untrue, are evidence against him. See illuss. (*f*) and (*g*).

The maxim *qui taci consentire videtur* (Silence gives consent) must be taken with considerable qualification. For silence to carry incriminating force, there must be circumstances which afford an opportunity to speak. Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not.[86]

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78. *Emperor* v. *Nanua*, AIR 1941 All 145; *Mislri*, (1909) ILR 31 All 592, (FB) but is an "act" or "conduct".
79. AIR 1974 SC 898.
80. *Zwinglee Ariel* v. *State*, 1954 SC 15; *Venkatasubba* v. *Emperor*, AIR 1931 Mad 689.
81. *Bai Katija* v. *State*, AIR 1962 Guj 1.
82. *R.M Malkani* v. *Maharashtra*, AIR 1973 SC 157.
83. *Emperor* v. *Rafique-ud-din Ahmad*, ILR (1934) 62 Cal 572; *Neharoo* v. *Emperor*, AIR 1937 Nag 268.
84. AIR 1965 Bom 154.
85. *Harbhajan Singh* v. *State of J&K*, AIR 1975 SC 1814.
86. Per BOWEN, L.J., in *Wiedemann* v. *Walpole*, (1891) 2 RB 534, 539; *Reg* v. *Mallory*, (1884) 15 Cox 456; *Sivrajan*, AIR 1959 Ker 325.

Before the words of a third person are let in, it must be shown that the conduct which they allege to affect is relevant.[87] In *R.* v. *Christie*[88], it was held that a statement made in the presence of the accused even when he should be expected reasonably to deny it, but does not do so, is not evidence against him of the facts stated. If he denies, the mere denial does not make it inadmissible because he may deny the statement in such a manner and in such circumstance as may lead a jury to disbelieve him and constitute evidence from which an acknowledgment may be inferred by them. This decision was considered in *R.* v. *Hall*[89], *R.* v. *Chandler*[90] and *Parkes* v. *R*[91]. There is an exhaustive discussion of the different views expressed in these decisions in 'PHIPSON ON EVIDENCE' 15th Edition (2000), paras 30-04 to 30-09, pages 736-743. After considering all these decisions it is observed at p. 409 as follows:

"LORD DIPLOCK made this comment: although in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer... silence alone, on being informed that an accusation has been made against him cannot give rise to an inference that (the defendant) accepts the truth of the accusation." In PHIPSON'S opinion this represents the correct modern view. Again PHIPSON states at page 740: "it is submitted that:

1. LORD DIPLOCK'S dictum in *Hall* is still the correct view of the law.
2. The circumstances of *Parkes* provide an exception to the rule which accords with common sense, and provides an example of an "exceptional circumstance" mentioned in the dictum of LORD DIPLOCK.
3. Accordingly, where an accusation is made when persons are speaking on even terms, silence in the face of an accusation may give rise to an inference that the defendant accepts the truth of the accusation.
4. As assistance in deciding what amounts to "even terms" *Parkes* is to be preferred to *Chandler*.

On the same footing, evidence may be strictly admissible, in circumstances where the matter is not within the party's knowledge[92] or the statements are not directly addressed to him[93] but the same principle as above will apply."

See also discussion on this aspect in CROSS ON EVIDENCE, 6th Edn., pp. 528-531 and CROSS & TAPPER ON EVIDENCE, 1995, 8th Edn., pp. 696-698; STEVE UGLOW'S EVIDENCE : TEXT & MATERIALS, 1997, pp. 122-123 and *R.* v. *Cowan*.[94]

Silence of the accused can be taken into account in proper cases, but no presumption arises *ipso facto* from the silence of the accused, as the accused has always a right to remain silent.[95] As the accused is not bound to give any explanation, mere silence cannot be used against him.[96]

The silence of the accused should come under Illus. (b) *i.e.*, it should be proved that the accusation made by the woman against the man was made in his presence, when it becomes relevant.[97] Where an injured person told a third party in the presence of the accused that he was assaulted by the accused and the accused did not deny the accusation, the statement was held to be admissible under this section, because it afforded the accused an opportunity either to deny or give some explanation, though he might not avail himself of that opportunity.[98] It was held that to treat silence as an incriminating force there must be circumstances which afford the accused an opportunity to speak.[99]

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87. *Queen* v. *Abdullah*, ILR (1885) 7 All 385 (FB); *Emperor* v. *Hira Gobar*, ILR (1919) 21 Bom LR 724 : AIR 1919 Bom 162.
88. 1914 AC 545.
89. (1971) 1 All ER 322.
90. 1976 IWLR 585.
91. (1976) 3 All ER 380 (PC).
92. *Price* v. *Burva*, 6 WR 40; *R.* v. *Mallory*, (1884) 13 QBD 33; R. v. Cox, (1859) 1 F&F. 90.
93. *R.* v. *Cox*, and *R.* v. *Mallory*, *ante*.
94. [1995] 4 All ER 939, at 942f-945d.
95. *Ghura* v. *R.*, AIR 1942 All 47.
96. *R.* v. *Basongouda*, AIR 1941 Bom 315.
97. *Nga Ave* v. *R.* AIR 1938 Rang 127; *Emperor* v. *Damapala*, AIR 1937 Rang 83 (FB).
98. *Emperor* v. *Damapala*, AIR 1937 Rang 83 (FB); *Ghura* v. *R.* AIR 1942 All 47.
99. *R.* v. *Thilak*, 28 Bom 479.

PHIPSON[1] states: "But when the circumstances are such that a reply cannot properly be expected, the party's silence will afford no inference of assent.[2] And statements addressed to a party when he is ignorant of the language,[3] asleep, intoxicated, deaf,[4] dying,[5] has for a proper purpose promised to keep silent,[6] or is attending divine service,[7] are inadmissible. So, statements made in a party's presence in the course of judicial proceedings are not generally receivable against him merely on the ground that he did not deny them, for the regularity of such proceedings prevents the free interposition allowed in ordinary intercourse.[8] Even here, however, cases may occur in which the refusal of a party to repel a charge made in a Court of justice,[9] or to cross-examine or contradict a witness,[10] or to reply to an affidavit,[11] may afford a strong presumption that the imputations made against him are correct. This proposition was recently considered by James MUNBY Q.C. sitting as a Deputy High Court Judge of the Chancery Division in *Killick* v. *Pountney*.[12] Here a series of letters from the plaintiff's solicitors, a statement of claim and affidavit evidence sent to the defendant over a period of years failed to elicit any response[13] to the accusation made in them that the defendant had used undue influence in order to persuade an elderly man to make a new will to his significant advantage.[14] The defendant did not participate in the trial in any way. The learned judge was not persuaded by the authorities cited in *Phipson*[15] that he should draw an adverse inference from the defendant's silence and the Court of Appeal decision in *Hollis* v. *Burton*[16] was influential in persuading him that the facts of the case fell outside the ambit of any implied admission doctrine. He concluded that drawing the adverse inference proposed by counsel sat uncomfortably with the gravity of the question of undue influence,[17] the inquisitorial nature of the proceedings,[18] and compliance with the procedural requirement that a trial be conducted in contentious probate actions notwithstanding defaults and failures on the part of the defence.[19] The defendant's

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1. PHIPSON ON EVIDENCE, 15th Edn. (2000), pages 740-742, para 30-09.
2. *Child* v. *Grace*, 2 C & P 193.
3. *R* v. *Spencer*, (1959) Crim. LR 284. *S* was convicted with his father at Quarter Sessions of receiving. According to the police evidence the father made an incriminating statement in *S*'s presence; denied by the father, and *S* said he did not hear it. *S* appealed to the Court of Criminal Appeal on the ground that the jury were not warned that the father's statement (if any) was not evidence against *S*, unless made in *S*'s presence: *Held*, that the jury ought to have been warned to put the father's statement out of their minds in considering the evidence against *S*, unless they were satisfied that *S* was present when it was made. It is submitted that if *S* had been present, but did not hear it, or admit it, it should still not have been received in evidence.
4. *Wright* v. *Tatham*, 5 C & F 701, 722; *R.* v. *Attard*, 43 Cr App R 90; *R.* v. *Spencer*, (1959) Crim LR 284.
5. *R.* v. *Mitchell*, 17 Cox 503, 508.
6. *Slattery* v. *People*, 76 Ill 217.
7. *Johnson* v. *Trinity Church*, 11 Allen 113.
8. *R* v. *Mitchell*, *supra*; *R.* v. *Kelly*, 64 JP 84; *R. v Appleby*, 3 Stark 33; *R.* v. *Turner*, 1 Moo CC 347; *R.* v. *Swinnerton*, C & M 593; *R.* v. *Britton*, 17 Cox 627; *Child* v. *Grace*, 2 C & P 193; *Finden* v. *Westlake*, M & M 461; *Melen* v. *Andrews*, M & M 336.
9. *Simpson* v. *Robinson*, 12 QB 511.
10. *R.* v. *Coyle*, 7 Cox 74.
11. *Freeman* v. *Cox*, 8 Ch D 148, **discussed in** *Hollis* v. *Burton*, (1892) 3 Ch 226; *Hampden* v. *Wallis*, 27 Ch D 251.
12. Unreported March 31, 1999, transcript courtesy of Mr. Martin Russell, counsel for plaintiff.
13. Apart from an initial instruction to solicitors to commence a probate action.
14. On drawing adverse inferences from the failure of a party to respond to oral or written accusations of a serious nature made outside the context of litigation **see** *Bessela* v. *Stern*, (1877) 2 CPD 265 and *Wiedemann* v. *Walpole*, (1891) 2 QB 534. Failure to answer letters may be less significant since, as SCRUTTON L.J. observed in *Thomas* v. *Jones*, (1921) 1 KB 22, 43. "Lunatics write all sorts of letters to all manner of people, and if the receiver of a letter from a lunatic making a charge were bound to write at once and deny it, the time of judges, at any rate, would be fully taken up by answering the letters."
15. Greatest weight was attached to the affidavit case of *Freeman* v. *Cox*, (1878) 8 Ch D 148, which was adopted by CHITTY J. in *Hampden* v. *Wallis*, (1884) 27 Ch D 251, 257 and the Court of Appeal in *Porrett* v. *White*, (1885) 31 Ch D 52.
16. (1892) 3 Ch 226.
17. Adverse inferences have been drawn from the defendant's silence to help establish murder in *Halford* v. *Brookes*, (1991) 3 All ER 559 and *Francisco* v. *Diedrick*, *The Times*, April 3, 1998.
18. It could be argued that if the nature of the proceedings were a relevant concern, the fact that the inquisitorial model tends to allow the admission of more evidence than the adversarial, should encourage the Court to regard the defendant's silence as evidence of some relevance and weight in its quest to determine the validity of the disputed will.
19. Formerly Order 76, now CPR, Part 49 and practice direction. The plaintiff called a number of witnesses and had established the *prima facie* case which is a necessary prerequisite for the drawing of any adverse inference.

silence and decision not to participate in the proceedings may not have been for discreditable reasons, let alone to conceal guilt of undue influence, but it is respectfully submitted that despite the learned judge's reluctance to speculate, this was necessary in order to determine the strength of the inference. This question of strength of inference was considered by the House of Lords in *R.* v. *I.R.C., ex p. Commbs & Co.*[20] :

> "In our legal system generally, the silence of one party in the face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a *prima facie* case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may either be reduced or nullified."

No such presumption arises when the accused makes no statement or no detailed reply in answer to the statutory question of the Magistrate before committal,[21] or when asked by the police to make a statement after being cautioned.[22] The caution tells him that he need not reply and the mere omission to deny a formal charge made by the police is not evidence from which an inference can be drawn unfavourable to the accused.[23] This is so whether or not a caution is given. The caution merely reminds the suspect of his right to say nothing. The fact that he was not so reminded is no ground for inferring that his silence was not in exercise of that right.[24] Where a person charged makes no answer at all or makes some observation which in itself is not in the nature of an explanation it is better that the judge at the trial should make no observation on it.[25] Similarly, failure to deny an allegation of adultery after caution has been held not to be evidence of the adultery alleged."[26]

27. SOME INSTANCES WHERE CONDUCT WAS ADMITTED AS RELEVANT

Fabricating false evidence.

Antedating a document to support a plea of *alibi*.[27]

Having possession of stolen properties.[28]

Expressions of fear or disturbed state of mind.[29]

When the accused was confronted in a bribe case and when he was called upon to produce the money, hesitation, perspiring, trembling, and things like that are relevant.[30]

Making attempts to conceal one's identity.[31]

Giving inconsistent and contradictory account of the circumstances relating to a crime.[32]

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20. (1991) 2 AC 283, 300.

21. *R.* v. *Naylor*, 23 Cr App R 177.

22. *R.* v. *Leckey*, 29 Cr App R 128.

23. *R.* v. *Whitehead*, 21 Cr App R 23. Note, too, that at common law a judge is not entitled in any circumstances to suggest to a jury when a man refuses to answer any questions having been cautioned that if he were innocent, it is likely that he would have answered the questions: *R.* v. *Sullivan*, (1967) 51 Cr App R 102; *R.* v. *Davis*, (1959) 43 Cr App R 215. **See also** *R* v. *Leckey*, (1943) 29 Cr App R 128; *R.* v. *Naylor*, (1932) 23 Cr App R 177; *R* v. *Hoare*, (1966) 1 WLR 762. cf. *R.* v. *Ryan*, (1964) 50 Cr App R 144, CA (conviction affirmed). The Court of Appeal has urged that comment on silence should become permissible when the defendant at trial produces an explanation or defence which the police have had no chance to verify: *R.* v. *Alladice*, (1988) 87 Cr App R 380, 383.

24. *R.* v. *Hall*, (1971) 55 Cr App R 108.

25. *R* v. *Tune*, 29 Cr App R 162. When a defendant refuses to answer many of the questions asked by a police officer, a comment by the judge may be justified provided that the jury are made aware that the issue is whether the defendant's silence amounts to an acceptance of what the police officer said: *R.* v. *Chandler*, (1976) 63 Cr App R 1.

26. *Hathaway* v. *Hathaway*, (1970) 1 WLR 456.

27. *Ranjit Singh* v. *State*, AIR 1952 HP 81; *Mohammad* v. *Emperor*, AIR 1934 Lah 695.

28. *Lingam Ramanna & C.* ILR 13 Mad 426; *State* v. *Ramchandra Bhoi*, AIR 1965 Ori 175.

29. *Arun Kumar Banerjee* v. *State*, AIR 1962 Cal 504.

30. *State of Madras* v. *Vaidyanatha Iyer*, AIR 1958 SC 61; *Rao Shiv Bahadur Singh* v. *State of Vindhya Pradesh*, AIR 1954 SC 322. *M.M. Gandhi* v. *State of Mysore*, AIR 1960 Mysore 111.

31. *Lingam Ramanna & C.*, ILR 13 Mad 426.

32. *Ranjit Singh* v. *State*, AIR 1952 HP 81.

Where a clerk was charged for embezzlement, many other incorrect entries of the same nature as the entries in question, were held as admissible to negative the defence of mistake.[33]

28. CIVIL CASES

Even in civil cases sometimes subsequent conduct is relevant. Where there was conversion of a Hindu to Buddhism it was held that evidence of subsequent conduct can be given to corroborate the fact of conversion.[34] When a person complained to some people immediately after the receipt of a document that he was defrauded by a certain person, it was held that statement is admissible to establish his conduct.[35] Conduct of the members of the family suggesting the existence of a family arrangement is admissible.[36] A statement by a retiring partner, made immediately after his retirement, refusing to continue to guarantee the firm's account with a bank, may be admissible to explain his conduct.[37]

In the case of documents the Court very often interpret them by evidence of the mode in which the property dealt with by them has been held and enjoyed. SUGDEN L.C., stated in a case: "Tell me what you have done under such a deed, and I will tell you what that deed means".[38]

But where there is no ambiguity in a document, the acting or the conduct of parties is not relevant.[39] Acts of parties cannot be allowed to affect the construction of written instruments if that construction be in itself unambiguous,[40] for otherwise, the conduct of the party is very important in the construction of documents.

Facts necessary to explain or introduce relevant facts.

S. 9. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant insofar as they are necessary for that purpose.

ILLUSTRATIONS

(a) The question is, whether a given document is the will of *A*.

The state of *A*'s property and of his family at the date of the alleged will may be relevant facts.

(b) *A* sues *B* for a libel imputing disgraceful conduct to *A; B* affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between *A* and *B* about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between *A* and *B*.

(c) *A* is accused of a crime.

The fact that, soon after the commission of the crime, *A* absconded from his house, is relevant under Section 8, as conduct subsequent to and affected by facts in issue.

The fact that, at the time when he left home he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

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33. *R* v. *Richardson*, (1861) 2 F&F 343, 3 Cox CC; **referred to** with **approval in** *R* v. *Stephen*, (1888) 16 Cox CC 387 : 58 LT 776.
34. *Punjabrao* v. *D.P. Meshram*, AIR 1965 SC 1179.
35. *Chennupati Venkata Subamma* v. *Neeluri Narayana Swami*, 1954 Mad 215.
36. *Sahu Madho Das* v. *Mukan Ram*, AIR 1955 SC 481.
37. *Pramathachandra Kar* v. *Bhagwandas*, (1931) 59 Cal 40.
38. *Attorney General* v. *Drummond*, (1842) 1 Dru & War 353, 368 on appeal, (1849) 2 HLC 837.
39. *Kamalnarayan* v. *Ramkishorelal*, AIR 1958 MP 246.
40. **In re** : *Purmanandas Jeewandas*, (1882) 7 Bom 109.

(d) *A* sues *B* for inducing *C* to break a contract of service made by him with *A*. *C*, on leaving *A*'s service, says to *A*—"I am leaving you because *B* has made me a better offer." This statement is a relevant fact as explanatory of *C*'s conduct, which is relevant as a fact in issue.

(e) *A*, accused of theft, is seen to give the stolen property to *B*, who is seen to give it to *A*'s wife. *B* says as he delivers it—"*A* says you are to hide this." *B*'s statement is relevant as explanatory of a fact which is part of the transaction.

(f) *A* is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

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COMMENTS

1. PRINCIPLE AND SCOPE

Section 7 deals with the admissibility of facts which are the occasion, cause, or effect of facts in issue. Section 8, similarly makes admissible facts showing motive or preparation for any fact in issue or relevant fact. This section makes admissible facts which are necessary to explain or introduce relevant facts, such as place, name, date, identity of parties, circumstances and relations of the parties.

Illustrations (a) and (b) are examples of introductory fact.

Illustrations (d) and (e) indicate that explanatory statements are admitted under this section irrespective of the fact whether the person against whom it is made heard it or was present when it was made. Under this section it is not necessary that the person against whom the statement is made should be present when it is made.

When we deal with a fact to establish the identity of any person, at times it may be necessary to expose parts of the body, in which case the question would arise whether a person suspected of an offence can be compelled to expose his body, and whether the right of the suspect under the Constitution

would be violated. It was held by the Supreme Court, that exposing parts of the body for purpose of identification does not offend Article 20(3) of the Constitution.[1]

The accused has no right to disguise or to cover the marks on his face or body in such a way as to deny the prosecution witness an opportunity of seeing as much as is necessary for identification.[2] Where at the time of T I parade, the burn injuries received by the accused during the occurrence were covered by trousers and were not visible to witnesses, identification by the witnesses was held to be proper.[3]

"There are many incidents, which though not strictly constituting a fact in issue, may yet be relevant to it. Not only may the probability of an occurrence be tested by considering its attendant circumstances, but these incidents are often essential to elucidate its true character, to reveal the motive of the parties or to establish their connection with the fact."[4]

Illustrations (a), (b), (d) and (f) are examples of how the fact becomes relevant in explaining or introducing a fact in issue. Illus. (e), deals with the facts which support or rebut an inference, suggested by a fact in issue or a relevant fact. Illus. (c), and the last part of illus. (b) give instances to explain the phrase "insofar as they are necessary for that purposes"; the second clause of illus. (c), shows how an inference under Section 8 from the act of absconding can be rebutted by showing that the absconder left home suddenly on account of urgent business at another place.

The principle in this section is a second exception to the general rule that evidence of collateral facts is not usually receivable.

2. FACTS NECESSARY TO EXPLAIN ETC.

In a case of conspiracy to commit a dacoity, facts showing close and intimate association of the accused with the approver are admissible under this section.[5]

Where the police at Bombay was informed by Nyasaland police by a telegram that two bank drafts were stolen and it was feared that signatures would be forged and the drafts might be encashed in Bombay. The accused encashed one of the drafts in a French Bank in Bombay and later presented another draft at another Bank in Bombay. The Bank officials gave information to the police who arrested the accused. It was held that the telegram received by Bombay police, which was alleged to have been sent from Nyasaland police was relevant to explain the conduct of the clerk in the Bank and therefore admissible.[6]

Section 88 cannot be a bar to a telegram being considered along with the other evidence and can be admissible for purposes covered by this section.[7]

It has been held that evidence of visits of the accused to two places in Karachi was admissible as the visits were closely connected with cheating the customs authority at Karachi.[8] Though a person was not shown as an accused along with the main accused, it was held that the tearing of a stolen draft by a person on hearing the arrest of another conspirator is admissible to show the conduct of such person.[9] Where a statement was made by a brother of a woman who was kidnapped, stating that his sister announced the accused as one of the abductors, it was held that it was admissible as explaining the circumstances of the arrest of the accused and also for establishing the identity of the accused.[10] If a person absconds immediately after the crime, though his name does not find a place in the first information report, such conduct is admissible as it tends to explain his conduct furnishing a motive and is relevant under this section.[11] The absence of an entry in an account book is relevant to explain the conduct of the person who prepares it.[12] Where a child was crying, it attracted the attention of the

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1. *State of Bombay* v. *Kathikalu*, AIR 1961 SC 1808; *Pearelal Shaw* v. *State*, AIR 1961 Cal 531.
2. *S.* v. *Madanlal*, AIR 1959 All 504.
3. *III Addl. Sessions Judge, Guntur* v. *G.* v. *Rao*, 1996 Cr LJ 703 (para 14) (AP).
4. PHIPSON ON EVIDENCE, 15th Edn. (2000), para 34-08, page 820; *Dysart Peerage*, 1881 6 App. Cas. 489.
5. *R.* v. *Wahiduddin*, ILR 54 Bom 524.
6. *Emperor* v. *Abdul Gani*, AIR 1926 Bom 71.
7. *Raghunath Pande* v. *Emperor*, AIR 1933 Pat 96.
8. *Mohanlal* v. *Emperor*, AIR 1937 Sind 293.
9. *Emperor* v. *Abdul Gani*, AIR 1926 Bom 71.
10. *Nur Muhammad S/o. Ali Khan* v. *Emperor*, AIR 1944 Sind 38 : ILR 1944 Kar 86.
11. *Gangaram* v. *Emperor*, 22 Bom LR 1274 : 62 IC 545.
12. *Gangaram* v. *Lachiram*, AIR 1928 Nag 153; *Imam Bindi* v. *Mostoddi*, ILR 45 Cal 878.

neighbours and at that time the child's mother was murdered, it was held that the evidence of neighbours was admissible, though they had not seen the actual murder, as their evidence spoke not only of the nature of the child's cries but also as to what the child said, though the child's evidence was not admissible.[13]

Where the question was whether A wrote an anonymous letter to B, threatening him and requiring him to meet A at a particular place, at an appointed time, the fact that A went to the place at the time appointed would be conduct relevant under this section, and the fact that A had some other business to transact at that place and time would be relevant as tending to rebut the inference raised by his going to the place that he was the author of the letter.[14] Where certain entries were made on a slip of paper showing particulars of the cheques some of which were the subject matter of the case, the complainant gave the circumstances under which the slip was written. It was held that both the slip and the complainant's statement were admissible showing the conduct relating to the issue of misappropriation.[15] The contract and the correspondence between the parties would be relevant, when dealing with a criminal case for cheating, in regard to the very same transaction.[16] Where a copy of a letter written by an accused was found in his possession, which showed that he sent the original with objectionable writing, it was held that in a case for sedition, the copy of the letter found with the accused was relevant to show the intention of the accused, and that it was not necessary for the prosecution to prove that such a letter was actually sent by the accused, before the copy was admitted in evidence.[17] Statements made by an accused person on previous occasion which would support or rebut the theory of his guilt are admissible under this section.[18]

Sections 9 and 11 read with Section 21 of this Act would justify the Court in admitting all previous statements made by the accused relating to the question of his guilt, and it is immaterial whether the previous statement is made to a police officer or to a judicial officer or to a third party provided that the statement is relevant to the fact in issue.[19] Where prior to the dacoity, the accused was associated with the approver, and their object was to commit thefts and other offences, when the persons were charged with an offence relating to a particular dacoity, it was held that the fact of close association with the approver corroborates with the approver's statement, that a conspiracy existed, and is, therefore, admissible under this section and/or Section 11[20] Report of the Court of Enquiry under Rule 75 of the Indian Aircraft Rules is admissible to explain or introduce a fact in issue or relevant fact which supports or rebuts an inference suggested by a fact in issue or relevant fact.[21]

3. INSOFAR AS THEY ARE NECESSARY FOR THAT PURPOSE

It is only such of those facts as are necessary for the purpose of explaining *etc.*, of the fact in issue or relevant facts are admissible. Beyond that necessity, facts cannot be made relevant.[22]

4. CIVIL CASES

In many cases on the civil side where the market value of a piece of land or building was in question, it was held that the evidence of value of similar property in the neighbourhood was admissible as relevant under this section.[23] Rental value of neighbouring premises can be admitted as relevant for determining the value of land or building under the Calcutta Municipal Act.[24]

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13. *Rabanlallu Shaikh* v. *Emperor*, AIR 1938 Sind 97.
14. *William Barnard*, (1758) 19 How. St. Trials 815.
15. *State* v. *Vinaya-Chandra*, AIR 1967 SC 778.
16. *S.R. Luthra* v. *Father RP Sah*, 1973 BLJR 51.
17. *Emperor* v. *Phillip Spratt*, AIR 1928 Bom 77.
18. *Mohanlal Bhona* v. *Emperor*, AIR 1937 Sind 293.
19. *Guru* v. *R*, 73 IC 963.
20. *Emperor* v. *Wahiduddin*, AIR 1930 Bom 157.
21. *Indian Air Lines Corp.* v. *Madhuri Chowdhari (Smt.)*, 1965 Cal 252.
22. *Lakshmi Das* v. *State*, AIR 1963 Bom 400.
23. *General Electric Co.* v. *Corporation of Calcutta*, AIR 1959 Cal 413; *Corporation of Calcutta* v. *Province of Bengal* AIR 1940 Cal 47; *Nageshwar Rao* v. *Deputy Collector*, AIR 1959 AP 52; *Assistant Divisional Officer* v. *Tavabalu* AIR 1933 Bom 361; *Ram Dhan* v. *Union of India*, ILR (1979) 1 Del 545; *Gangadhara* v. *Deputy Collector*, 22 MLJ 379
24. *Lalchand* v. *Corporation of Calcutta*, AIR 1953 Cal 428.

As to the price paid for a piece of land or building, the buyer and seller are the best persons having personal knowledge and their evidence is substantive evidence. The recitals in a document can be taken as evidence if they are relevant as admissions, or under Section 32 of the Act.[25]

The absence of an entry in a book of account is a relevant fact under this section and also under Section 11 of the Act to prove that an alleged payment was not made.[26] Absence of an entry in the school admission register which has to be maintained by a public servant under educational rules and under the Municipalities Act, becomes relevant under this section or Section 11.[27]

5. IDENTIFICATION

(a) General Principles

"It is often important to establish the identity of a person who a witness testifies that he saw on a relevant occasion. Sometimes, the witness will testify that he had seen the person before, or even knew the person well, and therefore *recognised* the person observed on the relevant occasion. But if the witness did not recognise the person he might still testify that on some subsequent occasion he was able to identify a person as the person he had initially seen on the relevant occasion. This subsequent occasion may have been formal, such as an identification parade, or informal, for instance seeing the person in the street. In each situation the reliability of the evidence of identification will depend on the quality of the opportunity which the witness had to see the person on the original relevant occasion. Where the witness purports to have identified the person on a subsequent occasion the reliability of that evidence will also depend on the quality of the subsequent identification process. Thus, the reliability of visual identification evidence will be greater if, for instance, the witness saw the person on the relevant occasion in good light, from close-up, for a considerable length of time, and the reliability will be less if, for instance, he was drunk when he witnessed the incident, he had not seen the person he knew for a long time or felt under pressure when asked to point someone out on a subsequent occasion.

Experience has shown that even honest and convincing witnesses can make mistakes in identification."[28]

In assessing the evidence of identification it is neither possible nor desirable to lay down any hard and fast rules. Certain guiding principles can be stated. One such is the basic principle of criminal law that a fact or circumstance should be proved against the accused before it can be relied upon and used against him. The evidence of identification is as much subject to the definition of the word 'proved' in Section 3 and must satisfy the tests laid down by that section. The test excludes from its orbit blind faith of a true believer, because prudence and credibility do not go together.

Where the investigation inspires confidence and the witness was tested fairly before he picked out the suspect, the demands of prudence are satisfied and the court feeling reassured rejects the possibility of a coincidence, which becomes remote; but, where the investigation is tainted, the performance of the witness cannot be accepted at its face value, for the reasonable possibility of external aid being given to the witness cannot be eliminated.[29]

(b) Object of Identification

In all criminal cases, the two important points that are to be decided are whether the alleged offence was committed, and, if so, who committed the offence. Even in civil cases the question of identity may arise; *e.g.*, in a case of adoption, the question may arise whether a particular person is the adopted son of a particular individual. The object of conducting the test identification parade of a person is the same as in the case of identification of things or articles. Here also the evidence of test identification is only a supporting evidence and not substantive evidence. It helps only to corroborate the evidence of the identification witnesses.[30]

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25. *State* v. *Mariyamma*, AIR 1969 Ker 265.
26. *Imambiandi* v. *Motasnddi*, ILR 45 Cal 878; *Gangaram* v. *Lachiram*, AIR 1928 Nag 153.
27. In re : *Siram Reddi Simhachalam*, AIR 1960 AP 253.
28. PHIPSON ON EVIDENCE, 15th Edn. (2000), page 308 (para 14-03).
29. *Anwar* v. *State*, 1961 All 50 : (1961) 1 Cr LJ 22.
30. *Rajkishore* v. *State*, AIR 1971 SC 1058; *Matru* v. *State*, AIR 1971 SC 1050.

Identification would serve, firstly, to satisfy the investigating authority, before sending the case for trial to the Court, that the person arrested, who was not previously known to the witness, was one of those who committed the crime; secondly, to satisfy the Court that the accused was the offender.[31]

The identification of property is to be done, to satisfy the Court that the particular property was the subject-matter of the crime and to furnish evidence to corroborate the testimony of the witness.[32]

(c) Identification of Person

One of the methods of establishing the identity of the accused is "test identification parade". Its evidence is received under this section. The idea of the parade is to test the veracity of the witness on the question of his capability of identifying, from several persons made to stand in a queue, an unknown person whom the witness had seen at the time of occurrence.[33]

Test identification is designed to furnish evidence to corroborate the evidence which the witness concerned tenders before the Court.[34] It is considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings.[35]

When the eye-witness cannot give the name of the offender but claims that he can identify the offender if he is shown to him, it is all the more necessary to hold a test identification. In such cases, holding identification parade will be in the interest of the accused and of the prosecution. It is also a workable way of testing the memory and veracity of the witnesses.[36] The plea of the accused that it was not possible for a rickshaw-puller to remember after many days that a particular load was transferred at their instance, was held to be not tenable in the peculiar circumstances of the case and also because of the psychological phenomenon that human memory is very often a conditioned characteristic and any special or peculiar lineament can create an impact on the human mind lasting for long, unlike routine events.[37] Similarly absence of identification parade was held to be fatal where in a rape case the name of one of the accused was not mentioned in the F.I.R. along with others.[38] Where the persons who committed mass rape on the victim were not known to her, the investigating agency should conduct the identification parade.[39]

Identification parades are held by the police, during their investigation, for the purpose of enabling the witnesses to identify the properties which are the subject matter of the offence, or to identify the persons who are concerned in the offences.[40] Test identification is meant for the purpose of helping the investigation with an assurance that their progress with the investigation into the offence is proceeding on right lines, though it does not constitute substantive evidence.[41]

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31. *Satya Narain* v. *State*, AIR 1953 All 385; *State* v. *Gulam Mohuddin*, AIR 1951 All 475; In re : *Sangaiah*, AIR 1948 Mad 113.
32. *Harnath* v. *State*, AIR 1970 SC 1619.
33. *Kanan* v. *State of Kerala*, 1979 Cr LJ 919; *Chonampara* v. *State of Kerala*, AIR 1979 SC 1761.
34. *Ashrafi* v. *State*, AIR 1961 All 153; **overruled** on another point in *Sheo Raj* v. *State*, AIR 1964 All 290; *Satya Narain* v. *State*, AIR 1953 All 385; *Prokash Kumar Bose* v. *King*, AIR 1957 Cal 514; *State of Orissa* v. *Maheshwar* AIR 1964 Ori 37; *Rama Gope* v. *State*, 1950 Pat 574; *Sudhindranath Dutt* v. *King*, AIR 1952 Cal 422; *Nebi Dusada* v. *State*, AIR 1956 Pat 39; *Bijoy Kumar Mohapatra* v. *State*, 1982 Cr LJ 2162 (Ori), *Rajendra Sharma* v. *State*, 1982 Cr LJ (NOC) 177 (All); *Akbar Ali* v. *State of U.P.*, 1982 Cr LJ (NOC) 194 (All); *Ganesh Bhaj Watt Pandram* v. *State of Maharashtra*, 1985 Cr LJ 191 (Bom).
35. *Budhsen* v. *State*, AIR 1970 SC 1321 : 1970 Cr LJ 1149, *Hasib* v. *State*, AIR 1972 SC 283; *Santokh* v. *Izhar*, AIR 1973 SC 2190, *Sampath* v. *State*, 1984 SC 491; *State of Orissa* v. *Susanta Kumar Dey* ILR (1978) 2 Cut 577 (DB), *Dayandeo Appa Gaikwad* v. *State of Maharashtra*, 1980 Bom Cr R 874 (DB) Identification in Court corroborated by identification in T.I (parade and other evidence, *Sukumar Jena* v. *State of Orissa*, 1993 Cr LJ 1354 (Ori).
36. *Ramanathan* v. *State*, AIR 1978 SC 1204.
37. *Ravinder Kumar* v. *State of Punjab*, 2001 Cr LJ 4242 (para 17) (SC).
38. *State of H.P.* v. *Lekh Raj*, AIR 1999 SC 3918 (para 4) : 2000 Cr LJ 44.
39. *Ramchandran* v. *Station House Officer, Annamalai Nagar P.S.*, 1999 Cr LJ 1180, 1182 (Mad)
40. *Ramkishan* v. *State of Bombay* 1955 SCR 903 : AIR 1955 SC 104, *Satyavir* v. *State*, AIR 1958 All 746 : 1958 Cr LJ 1266, *Pramabandhu Mishra* v. *State* ILR 1952 Cut 219, *Sudha Dehury* v. *State*, 1982 Cr LJ 500 (Ori)
41. *Matru* v. *State*, AIR 1971 SC 1050; *Kanan* v. *State*, 1979 SC 1127.

The identification made by the witnesses at the parade itself has no independent value. The identity of the accused can be proved by circumstantial evidence also.[42] The record of test identification itself is not substantive evidence according to law, without proof of those facts recorded. It can be used either for corroboration or for contradiction.[43] The evidence at the trial of a witness who identified the accused or articles before the police is admissible by way of corroboration.[44]

If the witnesses fail to identify in the identification parade prior to the trial, it may even destroy the case made out by their evidence.[45] However, where in a motor accident case, the driver ran away immediately after the accident, failure of some of the passengers to identify him was held to be not fatal.[46]

When the witness fails to identify the accused in Court, though the accused was identified in the test identification, no conviction can be based on the test identification.[47] Where some of the prosecution witnesses failed to identify the accused in the identification parade, the accused were given benefit of doubt.[48] However where a witness who identified the accused in test identification failed to identify at trial after 20 years, but the trial court was highly impressed by the testimony of the witness, the court relied on the identification by such witness in the test identification parade.[49]

Conversely identification by a witness in court for the first time without being tested by a prior test identification is valueless.[50]

Failure to get test identification, is not necessarily fatal to the prosecution.[51]

(d) Identification of the victim's body

Where the dead bodies of the victims, the mother and her newly-born baby were recovered from a pit in a highly decomposed condition and beyond recognition and evidence of the victim's parents and other witnesses was corroborated from the articles found on the dead bodies and the serologist's report, it was held that in the circumstances of the case, the identification of the victims was established.[52] Where the dead body of the victim was identified by the sister and the nephew of the deceased, it was immaterial that the doctors had varying opinions about the age of the victim and circumcision.[53] Absence of identification of the dead bodies of the victims in not by itself fatal to the prosecution case.[54]

(e) Identification prior to T.I. Parade

Where the prosecutrix, the victim of rape, had allegedly identified the accused twice before the Army Officers prior to T.I. parade, but the officers were not examined in the Court, it was held that no credence could be given to such identification.[55]

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42. *Sampat Tatvadae Shinde* v. *State of Maharashtra*, AIR 1974 SC 2791; *Santosh Singh* v. *Izhar Hussain* AIR 1973 SC 2190; *Matru* v. *State of U.P.*, AIR 1971 SC 1050; *Bhima Shaw* v. *State*, AIR 1956 Ori 177; *Nemai Adak* v. *State*, AIR 1965 Cal 89; *Moktar Sahani* v. *State*, 1985 Cr LJ 90 (Cal).
43. *State* v. *Ghulam Mohuddin*, AIR 1951 All 475.
44. *Ramkishan Thakur* v. *State*, AIR 1955 SC 104.
45. *Mohomed Hussain* v. *Emperor*, AIR 1936 Pesh 166; *Bindeshri* v. *Emperor*, AIR 1927 All 163; *Shashi Kumar Banerjee* v. *Subodh Kumar Banerjee*, AIR 1964 SC 529, (since deceased by LRS).
46. *Mandya Rural Police* v. *Ravi*, 1997 AIHC 3627 (para 7) Vol. 6 (Kant).
47. *Ramadhar* v. *State of Bihar*, 1988 CrLJ 264 (Pat).
48. *State of U.P.* v. *Hori Lal*, 1999 Cr LJ 1039, 1047 (All).
49. *Subhas Bhattacharyya* v. *State*, 1985 Cr LJ 1807 (Cal); *Jagish* v. *State*, 1985 CrLJ 1621 (Del) (after a long time).
50. *State* v. *V.C. Shukla*, AIR 1980 SC 1382 : 1980 Cr LJ 965. **Also see** *Audumbar Digambar Jagdane* v. *State of Maharashtra*, 1999 Cr LJ 1936, 1943 (Bom); judgments reported in 1982 Cr LJ 2056 (para 9) (Bom)(DB) and 1994 SCC (Cri) 1751; *Jaysing* v. *State of Maharashtra*, 1999 Cr LJ 1687, 1691 (Bom).
51. *Harbhajan Singh* v. *State of J&K*, AIR 1975 SC 1814; *Jadunath Singh* v. *State of U.P.*, AIR 1971 SC 363; *Majee Taha* v. *State*, 1973 CrLJ 526 (Gau).
52. *State of Karnataka* v. *Bhoja Poojari*, (1997) 11 SCC 537.
53. *State of W.B.* v. *Mir Mohammad Omar*, AIR 2000 SC 2988 (paras 19 and 20).
54. *Raj Bahadur* v. *State*, 1996 Cr LJ 2364 (paras 10-12) (Del), **applying** *Ram Chandra* v. *State of Uttar Pradesh*, AIR 1957 SC 381 : 1957 Cr LJ 559 and *Rama Nand* v. *State of Himachal Pradesh*, (1981) 1 SCC 511 : 1981 Cr LJ 298.
55. *Prahlad Singh* v. *State of M.P.*, AIR 1997 SC 3442 : 1997 Cr LJ 4078.

(f) When test identification is not necessary

When the accused is arrested at the scene of occurrence, or is caught by the people and produced before the police, it is not necessary to hold identification, in the absence of a request from the accused.[56] In such cases, omission to hold identification or to produce one of witnesses would not have a bearing on the prosecution case.[57] Where all the witnesses knew the accused before the occurrence and could identify him but they did not know his name, holding of T.I. parade was not essential.[58] Where the incident of murder took place during the day and the F.I.R. was lodged within an hour of the incident mentioning the names of the accused, there was no possibility of erroneous identity or concoction of a false story, non-holding identification parade did not matter.[59] Where the witnesses who were close friends of the deceased had the opportunity of talking together with the accused for about 7-8 minutes when the accused entered the place of incident, evidence of identification of the accused at their trial by the said witnesses without the corroboration of the T.I. parade could be relied upon.[60] Where in a case of rash and negligent driving there was enough evidence to identify the accused as a driver of the vehicle at the time of accident and his identity was never in dispute, identification parade was not necessary.[61] Where the rickshaw puller witnessed the murder being committed in his rickshaw and he stated that he knew the accused and even otherwise he was in their company for about three hours, conviction could be based on his testimony without holding any test identification parade.[62] Conducting T.I. parade was of no consequence where the murder was committed in the hospital where the nurse, the ward boy and the patients admitted there had a lot of opportunity to observe the accused and they were supporting the prosecution case.[63] If an accused is identified by cogent and proper evidence by other witnesses who were examined before the Court, normally identification parades are not resorted to.[64]

(g) Difference between identification of person and property

Identification of a person means recognising the face of a stranger who was seen momentarily only at the time of the commission of the crime. Identification of property is usually the recognition of the property by its owner. The owner knows his/ her own articles and when he/she sees them, he/she picks them out. He/she is well acquainted with all the peculiarities of the articles. Even though, ostensibly, there may be no distinctive marks, an owner can very frequently be trusted to pick out his/ her own articles. There is some peculiarity in the article which is present in the sub-conscious mind of its owner and which he/she may not be able to describe. It is, therefore, idle to place the identification of the property on the same footing as the identification of an accused person.[65]

Money cannot be the subject of test identification.[66]

The evidence at the trial of a witness who identified the accused or incriminatory articles before the police is admissible in evidence by way of corroboration.[67]

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56. *State* v. *Raju*, AIR 1971 SC 708; *Lakhvinder Singh* v. *State*, 1988 CrLJ 319 (Del); *State of Rajasthan* v. *Sukhpal Singh*, AIR 1984 SC 207 : (1983) 1 SCC 393; *Virendra Singh* v. *State of U.P.*, 1999 Cr LJ 4645 (para 14) (All); *Tara Singh* v. *State of Rajasthan*, 2000 Cr LJ 1982 (para 17) (Raj).
57. *Lakhvinder Singh* v. *State*, 1988 CrLJ 819 (Del).
58. *Ambika Prasad* v. *State*, 1997 Cr LJ 2853 (Del); *Mohd. Iqbal M. Shaikh* v. *State of Maharashtra*, 1998 Cr LJ 2537 (SC) : AIR 1998 SC 2864. Accused a public figure in locality, no identification parade required. *Arun Parshuram Sutar* v. *State of Maharashtra*, 1999 Cr LJ 438, at pp. 439-440 (Bom); *Juglal Mehto* v. *State (Delhi Administration)*, 1995 Cr LJ 1618 (Del).
59. *Asha* v. *State of Rajasthan*, AIR 1997 SC 2828 : 1997 Cr LJ 3508. **Also see** *Pammi* v. *Government of Madhya Pradesh*, AIR 1998 SC 1185 : 1998 Cr LJ 1617 (para 13) (SC).
60. *Ronny* v. *State of Maharashtra*, AIR 1998 SC 1251 : 1998 Cr LJ 1638 (para 24). **distinguishing** *Kanan* v. *State of Kerala*, (1979) 3 SCC 319 : 1979 SCC (Cri) 621 and *Mohd. Abdul Hafeez* v. *State of A.P.*, (1983) 1 SCC 143 : 1983 SCC (Cri) 139.
61. *Francis Xavier Rodrigues* v. *State*, 1997 Cr LJ 1374 (Bom). **See also** *Munna* v. *State of Rajasthan*, 2001 Cr LJ 4127 (para 9) (Raj).
62. *Romesh Kumar* v. *State of Punjab*, 1993 Cr LJ 1800 (para 6) (SC).
63. *Referring Officer* v. *Arja Narasimha Rao*, 2001 Cr LJ NOC 105 (AP) : (2001) 2 Andh LT (Cri) 51.
64. *Subhaya Perumal Pilley* v. *State*, 1997 Cr LJ 922 (para 5) (Bom).
65. *Pukh Raj* v. *State of Rajasthan*, ILR (1971) 21 Raj 52; **see also** In re : *Gundla Narayana*, AIR 1959 AP 387; *Kartar Singh* v. *State of U.P.*, AIR 1952 UP 42.
66. *Nawal Kishore* v. *State*, 1983 Cr LJ 79 (NOC) (Del).
67. *Ramkrshan* v. *State of Bombay*, AIR 1955 SC 104.

Mere recovery of money from the accused, is not sufficient for conducting identification.[68]

(h) Precautions : Identification of Articles

It is important to ensure that the witness did not have any opportunity of seeing the articles after its recovery by the police and before the test identification is conducted by a magistrate.[69] Where the witness was also present at the time of recovery of the articles it was held that the identification was legally defective in law. Where the photo of the article is already published in the newspapers, its identification has no value and is unreliable.[70] It is necessary for the police to seal the article recovered immediately after its recovery; the seal should be intact till the article is produced before a magistrate for the purpose of identification. It is the magistrate who should open the seal, mix it up with similar articles and then place them for identification by the witness.[71] Where the property was not sealed at the time of recovery, no value can be attached to the test identification proceedings.[72]

Similar articles are to be mixed up with the articles to be identified. Substantial number of items which are similar to the property in question should be mixed up so as to avoid the possibility of identification by accident.[73] As a matter of prudence, the Court must insist on atleast two articles of distinctive appearance being mixed up for proof of identification, when the identification of an article of distinctive appearance is in question.[74] If there are prominent marks they are to be concealed.[75]

When there was no evidence that the articles to be mixed up have not been seen by the witnesses, it was held that the identification was not reliable.[76] When it is found that the close relations of the deceased had identified the articles as belonging to the deceased by virtue of having frequently seen and handled them, it would be unjust to reject their testimony on the ground that similar articles were not mixed up and that reasons for their identifying the articles were not given.[77] Things of daily use identified by witnesses can be relied upon even in the absence of special identification marks on them.[78] Where stolen ornaments, *sarees* were readily recognised in the Court itself by the lady to whom they belonged, the evidence was admitted because ladies have an uncanny sense of knowing their things though *sarees* of that kind may be openly available in the market.[79] The female kin of the deceased mother would be in a better position than the male kin to identify the jewellery or ornaments worn by the deceased.[80]

Where, at the instance of an accused charged with murder, arrows and bows were recovered from his house, when there was nothing to connect them with the offence, mere recovery was held to be not an incriminating circumstance against the accused.[81] Where an article of common use like a *dhoti* with blood stains (in a rape case) was said to have been recovered from the house of the accused, but there was no evidence that it belonged to the accused and was worn by him when he committed the offence, mere identification of the *dhoti* was held to be of no use, though it had distinctive blood marks.[82]

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68. *Suraj Mal* v. *State (Delhi Admn.)*, AIR 1979 SC 1408; *Sadasive Das* v. *State*, 1958 Ori 51 : 1958 CrLJ 534.
69. *Kantha* v. *Delhi Administration* AIR 1958 SC 350 (sea ship); *Mohammed Ilyas* v. *State*, AIR 1950 All 615.
70. *State of U.P.* v. *Bhura*, (1985) 1 Cr LJ 536 (All). **Contra :** *Sanjeevan* v. *Kerala State*, 1994 Cr LJ 1316 (para 11) (Ker).
71. *State of Vin. Pra.* v. *Saura Munni Dhimar*, AIR 1954 Vin Pra 42.
72. *Kanta Prasad Razak Ram* v. *Delhi Admn.*, AIR 1958 SC 350.
73. *Madan* v. *State*, ILR (1957) 7 Raj 296; *State* v. *Ram Bilas*, AIR 1961 All 614 : (1961) 2 CrLJ 746; *State* v. *Wahid Bux*, AIR 1953 All 314.
74. *Mahomad Jamsher Tadvi* v. *State*, AIR 1956 Bom 186.
75. *Ishwari* v. *State*, 1980 CrLJ 571; *Ghanashyam* v. *State*, 1984 CrLJ 588 (Ori).
76. *Subhan* v. *Rex*, AIR 1950 All 180; But this view was **dissented from** in *State* v. *Jhabbu*, AIR 1952 All 445.
77. *State of M.P.* v. *Sarveshwar Prasad*, 1977 MPLJ 620; *Nagappa* v. *State of Karnataka*, 1981 SCC 278 : AIR 1980 SC 1753; *Earabhadrappa* v. *State of Karnataka*, AIR 1983 SC 446 (Cri).
78. *Reechchoo* v. *State of M.P.*, 1981 CrLJ (NOC) 110; **see also** *Mahalsingh* v. *State of Punjab*, 1983 CrLJ (NOC) 34 (Punj); *Hari Shankar* v. *State*, 1985 CrLJ 1700 (Del).
79. *Earabhadrappa* v. *Sate of Karnataka*, AIR 1983 SC 446. **Also see** *State of M.P.* v. *Mukund*, 1997 Cr LJ 534 (MP).
80. *Gade Lakshmi Mangraju* v. *State of A.P.*, AIR 2001 SC 2677 (para 24) : 2001 Cr LJ 3317.
81. *Kachhwa* v. *State of Rajasthan*, 1986 Cr LJ 306 (Raj).
82. *Karan Singh* v. *State*, 1966 CrLJ 318.

Identification of washerman's mark on the clothes found on the dead body, by the washerman before the Magistrate, is sufficient proof. In such a case no test identification is necessary.[83]

(i) Articles need not be identical

For purpose of identification, the requirement is that similar articles are to be mixed up; they need not be identical articles.[84]

(j) When Witness is not able to give reasons for his Identification

Where the articles has a distinguishing mark, it causes a sub-conscious impression by frequent use and observation, on the mind of the identifier. And that leads the witness to identify the same, though such articles are generally available. Under such circumstances, the identifier may not be able to formulate his reasons for the identification. Therefore, his evidence cannot be discredited on the ground that reasons for identification are not given by him.[85]

(k) Identification only in Court—Effect

Failure to hold an identification parade does not make evidence of identification before the Court inadmissible.[86] But where one of the eye witness stated in a general manner that all the four persons in the dock were culprits and the other one stated that all the culprits had partially covered their faces and failed to identify two of the accused persons, they could not be convicted on the basis of such identification in the Court in the absence of corroboration by way of T.I. parade which was not held.[87]

When the witness identifies the stolen property in court and the evidence is clear, cogent and beyond any reasonable doubt, the fact that no list of property was furnished to the court in the proper time, and no identification was held or the identification was defective, would not detract from the value of his evidence.[88] Where a lady witness identified the stolen property, namely, silk *sarees* and ornaments, at the trial, and where there was no test identification, it was held that the testimony of the witness was admissible. It was held by the Supreme Court, that it is a matter of common knowledge that ladies have an uncanny sense of identifying their own belongings, particularly the articles of personal use such as, *sarees*, ornaments etc. Identification of such articles at the trial without any prior identification is acceptable, and can be acted upon.[89]

But if the ornament is broken to pieces, they cannot identify it.[90]

Identification for the first time during trial is inherently of a very weak character which loses much of its value without prior test identification parade.[91] Identification for the first time in the Court cannot be relied upon in the absence of corroboration[92] but where the victim had plenty of time to recognise the accused while he removed the gold ornaments from her neck in broad daylight and she had given his

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83. *State of Assam* v. *Upendra Nath Rajkhona*, 1975 CrLJ 354.

84. *Ishwari* v. *State*, 1980 CrLJ 571.

85. *Nakul* v. *State*, (1986) 1 (Cri) 199 (animals and things); *State* v. *Pareswar Ghasi*, AIR 1968 Ori 20; *The Public Prosecutor* v. *Indla China Lingaih*, AIR 1954 Mad 433 : 55 CrLJ 583; *Re, Govinda Reddy*, AIR 1958 Mys 150 : 1958 CrLJ 1489.

86. *Kanta Prashad* v. *Delhi Admn.*, AIR 1958 SC 350; *Chandran* v. *State of Kerala*, 1986 CrLJ 1865; *George* v. *State of Kerala*, AIR 1998 SC 1376 (para 25) : 1998 Cr LJ 2034; *Prem* v. *State of Maharashtra*, 1993 Cr LJ 1608 (para 5), **relying on** *Harbhajan Singh* v. *State of J&K*, AIR 1975 SC 1814 : 1975 Cr LJ 1553 and *Jadunath Singh* v. *The State of Uttar Pradesh*, AIR 1971 SC 363 : 1971 Cr LJ 305.

87. *Trilochan Harijan* v. *State of Orissa*, 1998 Cr LJ 1887 (para 5) (Ori). **Also see** *Rampal Pithwa Rahidass* v. *State of Maharashtra*, 1994 Cr LJ 2320 (para 27) (SC).

88. *Madam* v. *State*, ILR 1957-7 Raj 296; *Chunna* v. *State*, AIR 1961 Raj 35, *State of Orissa* v. *Dhan Mali*, (1964) 1 CrLJ 602.

89. *Earabhadrappa* v. *State*, AIR 1983 SC 446 : 1983 Cr LJ 846; *Robert Peter Kadam* v. *State of Maharashtra*, 1998 Cr LJ 3879 (para 11) (Bom).

90. *Sadasiv Das* v. *State*, AIR 1958 Ori 51 : 1958 CrLJ 534.

91. *Ramanath Naik* v. *State*, 1995 Cr LJ 2255 (para 5) (Ori); *Durga Mahesh* v. *State of A.P.*, 1996 AIHC 4856 (para 8) (AP).

92. *Shyamlal Pradhan* v. *State of Orissa*, 1996 Cr LJ 1019 (paras 6 and 7) (Ori), **relying on** *Budhsen* v. *State of U.P.*, AIR 1970 SC 1321 : 1970 Cr LJ 1149 and *Kanan* v. *State of Kerala*, AIR 1979 SC 1127 : 1979 Cr LJ 919. **See also** *Danu* v. *State of Orissa*, 1996 Cr LJ 2107 (paras 7-9) (Ori).

description in the F.I.R., identification by her for the first time in the Court was not vitiated by non-conduct of T.I. parade.[1] Where there was strong possibility of the accused having been shown to the witnesses before the identification parade and the same was rejected, conviction on the basis of identification in the Court was not justified.[2] Where the accused was identified for the first time in the Court and there was no other evidence against him, no conviction could be based on such identification.[3] Where the accused were already arrested but no T.I. parade was held, their identification by the father and uncle of the deceased for the first time in the Court, was held to be not reliable.[4] Where in a case of rape no identification parade was held and the victim did not know the accused, identification of the accused by her in the Court after more than three years, was of no value and could not form the basis of conviction.[5]

It was held by the Apex Court that it cannot be held that in the absence of test identification parade, the evidence of eye-witnesses identifying the accused for the first time during trial would become inadmissible or totally useless. The credence of such evidence would always depend on the facts and circumstances of each case.[6]

(l) Identification of Person—Right of the accused to demand identification

There is no provision in the Criminal Procedure Code to enable the accused to demand test identification on the ground that none of the witnesses are known to him and that they had never seen him. It was, however, held by the Supreme Court, that once the accused makes an application, and it is turned down, the prosecution would run the risk of losing the case unless there is some other evidence for the prosecution.[7] When the accused asks for test identification, and the Court is satisfied that there is some force in the contention of the accused, it has ample power under Section 540, Cr.P.C. (S. 311 of New Code) to direct test identification.[8] At least as a rule of prudence, it should be allowed, when the accused asserts that he is unknown to the witness.[9] The accused may rely on the omission of test identification, but he has no right to demand it.[10] In some cases, the accused can demand test identification.[11] When the accused makes a challenge that the witnesses do not know him, an identification should be held, unless the prosecution shows, that the accused was known to the witnesses.[12] Where the accused demands holding an identification parade, it should be allowed as it would be possible to check the varacity of the eye-witness.[13] Though the accused cannot compel the prosecution to hold an identification during the investigation, normally, it is desirable that the parade

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1. *Madhukar Damu Patil* v. *State of Maharashtra*, 1996 Cr LJ 1062 (para 15) (Bom), **distinguishing** *Mohd. Abdul Hafeez* v. *State of A.P.*, AIR 1982 SC 367: 1983 Cr LJ 689 and *State of Maharashtra* v. *Sukhdev Singh*, AIR 1992 SC 2100 : 1992 Cr LJ 3454. The Court referred to *Kantaprasad* v. *Delhi Administration*, AIR 1958 SC 350 : 1958 Cr LJ 698.
2. *Umar Ahmad Shaikh* v. *State of Maharashtra*, AIR 1998 SC 1922 : 1998 Cr LJ 2534 (para 8).
3. *Robert Peter Kadam* v. *State of Maharashtra*, 1998 Cr LJ 3879 (para 8), **relying on** *Kanan* v. *State of Kerala*, AIR 1979 SC 1127 : 1979 Cr LJ 919 (para 3) and *Asharfi* v. *State*, AIR 1961 All 153 : 1961 (1) Cr LJ 340. **Also see** *Jalli* v. *State of Rajasthan*, 1994 Cr LJ NOC 34 (Raj); *Kallan* v. *State of U.P.*, 2001 Cr LJ 4403 (para 8) (All); witness giving insufficient description and incomplete names of culprits in statement given to police, identifying for first time in Court, conviction cannot be based. *Siri Ram Sharma* v. *State*, 1995 Cr LJ 1116 (paras 34 and 35) (Del).
4. ***Jaspal Singh*** v. ***State of Punjab***, AIR 1997 SC 332 : 1997 Cr LJ 370.
5. *Vijayan* v. *State*, 1993 Cr LJ 2364 (para 19) (Mad), **relying on** *Mohd. Abdul Hafeez* v. *State of A.P.*, AIR 1983 SC 367 : 1983 Cr LJ 689; *Chonampara Chellappan* v. *State of Kerala*, 1979 SCC (Cri) 1029 : 1979 Cr LJ 1335, at pp. 1338-39 and *Kanan* v. *State of Kerala*, AIR 1979 SC 1127 : 1979 Cr LJ 919. **See also** *Mangal Singh* v. *State*, 1996 AIHC 2390 (para 5) (Del); *Raju* v. *State of Rajasthan*, AIR 1998 SC 275 : 1998 Cr LJ 493, gap of one year; sole witness identifying accused after 2-1/2 months for first time in Court, cannot be relied upon. *Basant Samal* v. *The State*, 1994 Cr LJ NOC 399 (Ori).
6. *R. N. Patel* v. *State of Gujarat*, 1999 Cr LJ 5013 : 1999 AIR SCW 4770 : (1999) 9 JT (SC) 319, **followed in** *Chandresh Paswan* v. *State of U.P.*, 2001 Cr LJ 4430 (paras 4 and 5) (All).
7. *Jadunath Singh* v. *State of U.P.*, AIR 1971 SC 363; *Sriram* v. *State of U.P.*, AIR 1975 SC 175; *Lajja Ram* v. *State*, AIR 1955 All 671; *Suresh Chandran* v. *State*, 1979 All LJ 1160; *Gaddam Vijaya Bhaskara Reddy* v. *State of A.P.*, 1999 Cr LJ 2715 (para 8) (AP).
8. *Ashrafi* v. *State*, AIR 1961 All 153 **overruled on** another point in *Shcoraj* v. *State*, AIR 1964 All 290.
9. *Awadh* v. *State*, AIR 1954 Pat 483; *Prakash Kumar* v. *King*, AIR 1951 Cal 475.
10. *Ali Jan Imam Ali* v. *State*, AIR 1968 All 28; *Ali Jan Iman Ali* v. *State*, 1968 CrLJ 9; *Tek Chand* v. *State*, 1965 Punj 146; *Ismail Amir Shaikh* v. *Maharashtra*, 1985 Cr LJ 273 (Bom).
11. *State* v. *Jugnoo*, AIR 1968 All 333.
12. *State* v. *Gulam Mohauddin*, AIR 1951 All 475; *Lajjaram* v. *State*, AIR 1955 All 671.
13. *Suresh Chandra* v. *State*, 1979 All LJ 1160.

should be held if so desired by the accused.[14] When the prosecution failed to conduct test identification on the request of the accused, the Court ordered that the same should be held.[15] When the request for identification of the accused who asserted that he was not known to the witnesses, was denied, it was held that the denial of the right of the accused would tantamount to stopping the accused from setting up a defence and was against the elementary principles of criminal law.[16]

In re.: *Sangaiah*, (1948 Mad 113), it was held: "Identification parades are held not for the purpose of giving defence advocates material to work on but in order to satisfy investigating officers of the *bona fides* of the prosecution witnesses."[17]

If there is failure to hold the identification, when the eye-witnesses name the accused as the murderer, without knowing the accused before the occurrence of the crime, evidence of the witness cannot safely be relied on.[18]

Where a witness gives the name of one accused whom he has identified, ordinarily no identification parade is necessary. But if any accused holds out a challenge, the accused should be put on a parade and such a parade must always be held in order to meet the challenge. One exception to this is that if the accused had been arrested on the spot and was in police custody up to the time of trial, there could be no question at all about his identity.[19]

It cannot be said that once the prayer of accused for putting him to identification by witnesses, who claim to be knowing the accused from before, is opposed by the prosecution and is not accepted, he becomes entitled to be released on bail irrespective of other facts of the case.[20]

(m) Identification under supervision of a Magistrate

Identification has to be done under the supervision of a Magistrate. There is a great responsibility on the part of the Magistrate to see that it is done with care and caution and according to the rules prescribed, because the life and liberty of the accused would depend on his vigilance and caution. He must also see that the identification is not conducted in such a way as to make it impossible for the identifiers, to identify the suspect.[21]

Test identification conducted by Magistrates is preferred to identification conducted by any other person. The Magistrate's identification memo is a record of his statement which the identifier expressly or impliedly made before him. The statement is a formal statement of the identifier and it is usable normally for contradicting him under Section 145 or Section 155 of this Act, and also for corroborating him under Section 157. If it was made before the police, it would be hit by Section 162 Cr.P.C., and would, therefore, not be admissible for purposes of corroboration.

If a I class or a II class Magistrate specially empowered holds identification, Section 164, Cr.P.C., applies and his identification memo is admissible in evidence under Section 80 without proof. If others hold identification, they must be called to prove their memo.[22]

The Magistrate must make sure that the witness is a stranger to the suspect; otherwise the whole identification becomes a farce.[23]

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14. *Tek Chand* v. *State*, AIR 1965 Punj 146.
15. *State* v. *Rajju*, AIR 1971 SC 708.
16. *Joginder Singh* v. *Punjab State*, 1974 Cr LJ 240.
17. *State* v. *Ghidarn Mohiruddin*, AIR 1951 All 475; **see also** *Satya Narain* v. *State*, AIR 1953 All 385.
18. *Ram Bahadur* v. *State*, 1977 Cr LJ 1788.
19. *State* v. *Dhanpat Chamara*, AIR 1960 Pat 582.
20. *Satyavir* v. *State of U.P.*, 1998 Cr LJ 124 (All), **distinguishing** *Suresh Chandra* v. *State*, 1979 All Cri C 250 : 1979 All LJ 1160; *Mohd Yaqoob* v. *State*, 1974 All Cri C 43 and *State of U.P* v. *Rajju*, AIR 1971 SC 708. **Also see** *Surendra Narain* v. *State of U.P.*, 1998 Cr LJ 359 : AIR 1998 SC 192.
21. In re : *Narayan*, AIR 1965 MP 225; *Budhsen* v. *State*, AIR 1970 SC 1321; *Samunder Singh* v. *State*, AIR 1953 Raj 182.
22. *Asharfi* v. *State*, AIR 1961 All 153; **relying on** *Ramkishan* v. *State*, AIR 1955 SC 104; **Dissented from** *Abdul Aziz S/o Rahim Bakhsh* v. *The Crown*, AIR 1950 Lah 167; *Kanai Lal Dwary* v. *State*, AIR 1950 Cal 413; *Nagina* v. *Emperor*, AIR 1921 All 215; *Sheik Pinju* v. *State*, AIR 1952 Cal 491; *Ajgar Shaik* v. *Emperor*, AIR 1928 Cal 700.
23. *Hazrat Ali* v. *State of Assam*, 1983 Cr LJ (NOC) 61 (Gau); *Md Abdul Haffeez* v. *State*, 1984 Cr LJ (NOC) 75 (AP).

Under Para 443 of U.P., Jail Manual, an advocate has a right to be present. So, refusal by the Magistrate to admit the advocate during identification is a negation of the right granted to the accused by law.[24]

6. PRESENCE OF POLICE

Test identification should be done genuinely and properly. The main consideration for the Court should be whether the test identification was conducted in a fair and reasonable manner, as there is always a possibility of mistaken identification. Therefore, it becomes necessary to observe certain important precautions before conducting the test identification.

Where an identification parade is conducted by the police, the evidence of such identification either of the property or of the person is hit by the provisions of Section 162, Cr.P.C.[25] No police should be present in the vicinity where the parade is conducted and police should not be with the identifying witnesses even for sometime prior to the test identification.[26] When the police arranged for identification parade to be held by *panchas*, the statements made by the witnesses to the *panchas* would be outside Section 162, Cr.P.C. provided police have been kept away from the place of the parade; and the entire identification is conducted by the *panchas* themselves.[27] An identification parade held by investigating officer for his 'personal satisfaction' (in the absence of Magistrate) in a murder case involving several accused, is a grievous error of judgement on the part of the investigating officer.[28]

7. REFUSAL BY THE ACCUSED TO APPEAR FOR TEST IDENTIFICATION

When the accused refuses to appear for a test identification, an adverse inference of the guilt of the accused can be drawn.[29]

However, a contrary view was expressed in *Adesh Kumar* v. *State*.[30]

When an accused refused on the ground that he was already shown to the witness, his subsequent identification in Court has no probative value, and no adverse inference can be drawn against the accused[31] so also where the photos of the accused were shown to the witnesses[32] but where the accused had no evidence to substantiate his assertion of having been shown to witnesses in the police station, adverse inference could be drawn against him.[33]

Where the accused refused to participate in the identification, the evidence of the witness identifying the accused in the Court, can be relied upon.[34] Where ample opportunity existed for the eye-witnesses to identify the assailants, evidentiary value of their evidence would not be detracted by the accused not participating in the identification parade.[35]

8. LEGITIMACY OF T.I. PARADE (PLACE OF HOLDING)

Where the photographs of the accused were shown to the witnesses before the T.I. parade, the parade was held in the lock-up of the investigating agency thereby identifying witnesses got sufficient opportunity of seeing the accused, the identifying witnesses were police constables attached to the concerned police station; it was all the more necessary for the investigating agency to ensure that the T.I.

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24. *Raghubir Singh* v. *State*, AIR 1952 All 589.
25. *Ramkishan* v. *State*, AIR 1955 SC 104; *Santa Singh* v. *State*, AIR 1956 SC 526; In re : *Moorthy*, AIR 1956 Mad 536.
26. *Proush Kumar* v. *King*, AIR 1951 Cal 475; *Panchu Gopal Das* v. *State*, AIR 1968 Cal 38.
27. *Jamnadas Parashram* v. *State of M.P.*, AIR 1963 MP 106.
28. *Re. Mettu Pentayya*, AIR 1960 AP 545; *Kartarsingh* v. *State of Vin. Pra.*, AIR 1952 Vin Pra 42; *Bhaiulal Singh* v. *State of Vin Pra.*, AIR 1952 Vin Pra 7; *Bhagguram* v. *State of M.P.*, 1952 Cr LJ 106 (MP).
29. *Kiwan Prakash Pandurang Mokash* v. *State of Maharashtra*, ILR 1974 Bom 337; *Rajinder Kumar* v. *State*, 1983 Cr LJ (NOC) 3 (Del); *Hari Shankar* v. *State*, 1985 Cr LJ 1700.
30. 1986 Cr LJ 233 (Del).
31. *Hari Shankar* v. *State*, 1985 Cr LJ 1700 (Del). **See also** *Anoop Singh* v. *State*, 1994 Cr LJ 3442 (para 22) (Del); *Mangal Singh* v. *State*, 1996 AIHC 2390 (para 4) (Del).
32. *Ravi* v. *State*, 1995 Cr LJ 3593 (para 27) (Del).
33. *Anil Kumar* v. *State*, 1996 Cr LJ 2491 (para 23) (Del).
34. *Mohinder Singh* v. *State*, ILR (1970) 2 Del 854; *Iqbal Singh* v. *State*, 1981 CrLJ 512; *Johrilal* v. *State of M.P.*, AIR 1971 MP 116.
35. *Sunil* v. *State of Haryana*, AIR 1994 SC 1536 (para 3).

parade was held in a manner and at a place (preferably in jail) so as to avoid any criticism about its legitimacy.[36]

9. VALUE OF TEST IDENTIFICATION

The evidence of test identification is not substantive evidence, but can be used for corroboration or contradiction.[37] The value of identification is very poor and it would be very unsafe to rely on it solely for upholding the conviction.[38]

There cannot be any hard and fast rule for placing reliance on the evidence of identifying witness. Each case depends upon its facts.[39]

Where the witnesses identified the accused both in the test identification and in the Court, their evidence can safely be accepted.[40] Where the prosecution witness identified the accused as a dacoit in the T.I. parade conducted by the Magistrate but did not recognise him in the trial Court and trembled while accused stared at him which demeanour was noted by the Court, conviction was based on such substantive identification evidence.[41] The importance of identification of the accused by the witness in the Court cannot be minimised simply because he failed to identify the accused in the T.I. parade in the first round.[42]

The mere *ipse dixit* of the witness that the accused was one of the dacoits could not be believed in the absence of an identification parade.[43]

Where certain marks on the accused were not mentioned in the FIR, or identification, by any identifying witness, benefit of doubt should be given to the accused.[44] The witnesses identifying the accused at the first sight after the gap of seven weeks after arrest though his beard and long hairs which he had at the time of commission of offence were removed, delay not satisfactorily explained and possibility of having been shown, rendered the evidence of identification unacceptable and the accused was held to be entitled to benefit of doubt.[45]

No presumption can be drawn when the identifying witnesses are coached by police, or when suspects are shown to them.[46] Some facts to be borne in mind by the Court, with respect to identifying witnesses, to determine whether they are worthy of being relied on, are:—

(1) The number of wrong persons picked out by the identifying witnesses.

(2) The consistency of the identification made at different times.

(3) Sufficiency of number of men on parade.

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36. *Ravindra* v. *State of Maharashtra*, 1998 Cr LJ 4059 (para 9) (SC) : AIR 1998 SC 3031 **applying** *Hasib* v. *State of Bihar*, (1972) 4 SCC 773. The Court referred to *Laxmipat Choraria* v. *State of Maharashtra*, AIR 1968 SC 938.
37. *S.T. Shinde* v. *State*, AIR 1974 SC 791; *Hasib* v. *State*, AIR 1972 SC 283; *Santokh* v. *Izhar*, AIR 1983 SC 2190; *Bhuboni* v. *State of U.P.*, AIR 1970 SC 1321; *Bhobunoi* v. *R*, AIR 1949 PC 257; *Brijbhushan* v. *R*, AIR 1946 PC 38; *State* v. *Raghuraj Singh*, 1970 CrLJ 78; *S.T. Shinde* v. *State of Maharashtra*, AIR 1974 SC 791; (The value of such evidence depends upon many things, particularly the fact whether, at the time of occurrence, the circumstances were such as to enable a witness to have a clear perception of the assailant.) **See** *Wakil Singh* v. *State of Bihar*, AIR 1981 SC 1392; *State of U.P.* v. *Boota Singh*; AIR 1978 SC 1770; *State of U.P.* v. *Boota Singh*, (1979) 1 SCR 298; *State of U.P.* v. *Boota Singh*, 1978 All LJ 1156; *Ponnuswami* v. *Suyambanandan*, 1979 MLJ (Cri) 290; *Sk. Umar Ahmed Shaikh* v. *State of Maharashtra*, AIR 1998 SC 1922 : 1998 Cr LJ 2534.
38. *Poshaki* v. *State*, AIR 1953 All 526; *Rajkishore Sahu* v. *State*, 1983 Cr LJ 1715 (Ori).
39. *Budhsen* v. *State of U.P.*, AIR 1970 SC 1321; *State of Orissa* v. *Kanhu Charan Barik*, 1983 Cr LJ 133 (Ori); *Prithi* v. *State*, AIR 1966 All 607; *Ali Jan Imam* v. *State*, AIR 1968 All 28.
40. *State of Orissa* v. *Chhaganlal Sundarka*, 1977 Cr LJ 319.
41. *Ram Nath Mahto* v. *State of Bihar*, 1996 Cr LJ 3585 (paras 4 and 5) (SC) : AIR 1996 SC 2511.
42. *Lakhasingh* v. *State*, 1994 Cr LJ 2952 (para 27) (Raj).
43. *Budhsen* v. *State of U.P.*, AIR 1970 SC 1321; *Vaikuntam Chandrappa* v. *State of A.P.*, AIR 1960 SC 1340. *Birey Singh* v. *State*, 1953 All 785; *Karim Khan* v. *State of Orissa*, 1985 Cr LJ (NOC) 67 (Ori); *Basti Ram* v. *State of U.P.*, 1982 Cr LJ 164 (NOC) (All).
44. *Yeshwant* v. *State of Maharashtra*, AIR 1973 SC 337; *Prabhati* v. *State*, AIR 1966 Raj 241; *Nandkishore* v. *State*, AIR 1952 Ajmer 60; *State of Orissa* v. *Maheshwar*, AIR 1964 Ori 37; *Brijlal Goala* v. *State*, 1982 Assam 153; In re : *Kamaraj Goundar*, AIR 1960 Mad 125; *Devi Dayal* v. *State of Patiala East Punjab and State Union of Patiala*, AIR 1953 Pepsu 8; *Nawal Kishore* v. *State*, 1983 Cr LJ (NOC) 79 Del.
45. *Rajesh Govind Jagesha* v. *State of Maharashtra*, 2000 Cr LJ 380 (para 5) (SC) : AIR 2000 SC 160.
46. *Prithi* v. *State*, AIR 1966 All 607; *Nathwa* v. *State*, AIR 1951 All 452.

The other facts which should weigh with the judge in scrutinising the identifying evidence are:—

(1) Whether the witness has known the accused.

Where the accused persons were know to the witnesses as they were residing in a village within a radius of two miles, no weightage could be given to their testimony of identification.[47]

(2) Whether the witnesses were close enough to the accused about the time of the alleged occurrence.

(3) Whether the accused had taken some prominent part which impressed the witnesses in making the identification.[48]

The Court should approach the evidence of identification with the reasonable doubt of an intelligent person and accept it only if his doubts are removed. The requirement is the satisfaction of the court on the acceptability of the identification. If the identification parade was not properly and regularly conducted, it cannot operate as reliable corroboration regarding identification in the Court.[49]

If precautions had not been taken by the Magistrate before and after the identification parade, the evidence in that respect must be excluded from consideration while judging the guilt of the appellants.[50] The fact that eye-witness identifying an accused in parade did not say anything with regard to the specific part played by the accused in the commission of the crime, does not render evidence of such identification inadmissible[51] and the testimony of an identification witness cannot be discarded on the alleged ground that he had not disclosed the features of the accused at the time of the T.I. parade.[52]

A witness should be judged by the Court on the strength of what he himself has seen and not on what he was told.[53]

Identification of a parade by witness for the first time in Court, without it being tested by a prior test identification parade is valueless.[54]

Evidence of identifying witness not examined in committing Court, can be accepted under Section 207A, Cr.P.C., 1898.[55]

Where a particular description of one of the accused was given, earlier, then such distinctive description might go a long way in supporting the identification of witnesses.[56]

When the possibility of the witness seeing the accused before the parade is not ruled out, the accused is to be given the benefit of doubt, more so where there was delay in holding the parade on account of transferring the accused from jail to jail for some reasons.[57]

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47. *Ali Bahadur* v. *State*, 1998 Cr LJ 2871 (paras 11 and 12) (All), **following** *Ashraf & Ram Dhani* v. *State*, 1960 ALJ 595.
48. *Harinarath* v. *State*, AIR 1953 Bhopal 8.
49. *Mohanan Nair* v. *State of Kerala*, 1989 Cr LJ 2106.
50. *Bhanulal Das* v. *Tripura*, AIR 1958 Trip 40; *Wakil Singh* v. *State of Bihar*, AIR 1981 SC 1392 : 1981 CrLJ 1014 : 1981 SCC (Cri) 634; *State of Gujarat* v. *Mahmad*, 1996 Cr LJ 3400 (Guj).
51. *State of A.P.* v. *Venkata Reddy*, AIR 1976 SC 2207; *Purna Chandra Sahu* v. *State of Orissa*, 1984 CrLJ 1407 (Ori).
52. *State of Rajasthan* v. *Darbara Singh*, 2000 Cr LJ 2906 (para 14) (Raj).
53. *Sunder* v. *State*, AIR 1957 All 809; *State of Rajasthan* v. *Shiv Singh*, AIR 1962 Raj 3; *Satya Narain* v. *State*, 1953 All 385; *Shiam Lal* v. *Rex*, 1953 All 131.
54. *State (Delhi Admn.)* v. *V.C. Shukla*, AIR 1980 SC 1382.
55. *Jwala Mohan* v. *State*, AIR 1963 All 161 (FB); **overruling** *Maikoo* v. *State*, AIR 1961 All 612; and **relied on** *Shri Ram* v. *State of Maharashtra*, AIR 1961 SC 674; **see also** *State of Orissa* v. *Maheswar Alias*, AIR 1964 Ori 37.
56. *Raja Ram* v. *State*, 1966 All 192; **overruling** *State* v. *Ram Autar Chaudhary*, AIR 1955 All 138.
57. *Rajjan* v. *State*, 1980 All LJ 635. Accused shown to prosecutrix several times at police station before holding T.I. parade, entitled to benefit of doubt. *Sadhoo* v. *State of M.P.*, 1997 Cr LJ 2809 (MP). Prosecutrix a minor girl, victim of rape, admitted tutoring, accused shown prior to identification, entitled to acquittal, *Prahlad Singh* v. *State of M.P.*, AIR 1997 SC 3442 : 1997 Cr LJ 4078. **Also see** *Badloo* v. *State of U.P.*, 1998 Cr LJ 1072, at pp. 1073 and 1074; *Ramesh Jogi* v. *State of U.P.*, 1998 Cr LJ 3861 (paras 52 and 56) (All); *Asifkhan Haiderkhan Pathan* v. *State of Gujarat*, 1998 Cr LJ 4458 (para 21) (Guj); *Ahmad Bin Salam* v. *State of Andhra Pradesh*, 1999 Cr LJ 2281 (para 5) : AIR 1999 SC 1617. Appellant shown to sole eye-witness in police station, no reliance on identification in T.I. parade held thereafter, *Ganpat Singh* v. *State of Rajasthan*, (1997) 11 SCC 565; possibility of having been shown, *Danu* v. *State of Orissa*, 1996 Cr LJ 2107 (paras 7-9) (Ori); *Ganga Din* v. *State of U.P.*, 2001 Cr LJ 1762 (para 11) (All).

It is the duty of the prosecution to establish beyond any doubt that the witnesses, who identify the accused at the identification parade had seen him at the time of occurrence, that they did not know him before, and did not see him at any time after the occurrence and prior to the identification parade.[58]

When accused is shown to victim by police before trial, his identification in court by victim is valueless.[59] When the identifying witnesses had no opportunity to see the accused persons prior to holding of the test identification parade, and such witnessed had identified the accused as culprits who committed dacoity, the conviction on the basis of such witnesses was held to be proper[60] and the mere fact that the witnesses and one of the accused used to board the same train everyday would not mean that they were known to each other.[61]

When the accused is known by his common name and not his original name, and the common name was mentioned in the FIR, it cannot be said that the accused was not known to the witnesses, and it is not necessary to hold identification.[62] If the accused was taken for recovery of alleged weapon of offence just before conducting the identification parade, the identification of the accused without any supporting evidence would not be a valid identification and cannot be made the basis for conviction.[63]

If the names and description of the accused are not given in FIR, and if the accused were identified only before the Court four months after the occurrence and that too, without holding test identification, such identification is not reliable[64] and where no description of the culprits was given by the witnesses during their examination by the police under Section 161, Cr.P.C. but they gave some description when examined just before the T.I. parade, that cannot be considered as a circumstance to strengthen the evidence of identification in the Court,[65] but if the witnesses identified the accused in the identification parade which was corroborated by the evidence of other witnesses, their evidence could not be disbelieved merely because the description of the accused was not given in the F.I.R.[66]

A witness taking 10 minutes to identify the accused cannot be relied on.[67]

If the identification appears to have been induced by any suggestion or other means, the Court should not hesitate to quash any conviction, particularly when the decision depended upon the identification of the accused.[68]

The jail identification by the witness had a positive value though the value is reduced by the fact of his non-identification at trial.[69]

Where there was enmity of witness towards the accused, the identification may not afford a plausible ground to believe the statements of the witness.[70]

Identification cannot be discarded because witness omits to give description during investigation but identifies subsequently.[71]

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58. *State* v. *Yumnam Babu Singh*, AIR 1957 Mani 21.
59. *Mohanlal* v. *State of Maharashtra*, 1982 SC 839. *Mohanlal Gangaram Gehani* v. *State of Maharashtra*, 1982 Cr LJ 632; *Ashrafi* v. *State*, 1961 All 153; *Kanialal* v. *State*, 1950 Cal 413; *Laxmipat Choraria* v. *State*, 1968 Cr LJ 1124 : AIR 1968 SC 938 : (1967) 70 Bom LR 595 : (1968) 2 SCR 624 (SC); accused shown to witness in police lock-up during investigation. *Mohd. Iqbal M. Shaikh* v. *State of Maharashtra*, 1998 Cr LJ 2537 (SC) : AIR 1998 SC 2864. *State of M P* v. *Samaylal*, 1994 Cr LJ 3407 (para 8) (MP); Photographs of 8 out of 10 published in daily newspaper prior to T.I. parade, *Fagu Das* v. *State of Orissa*, 1996 Cr LJ 2245 (paras 7 to 10) (Ori).
60. *Kalipado Gope* v. *State of Bihar*, 1987 Cr LJ 1320 (Patna); *Sk. Jamir* v. *State of Orissa*, 1998 Cr LJ 1728 (para 4) (Ori).
61. *Ram Mohan Singh* v. *State*, 1996 Cr LJ 692 (All).
62. *Surjit Singh* v. *State*, 1986 CrLJ 1910 (Del).
63. *Parmod Kumar* v. *State*, 1990 CrLJ 68.
64. *Md. Abdul Hafeez* v. *State of A P.*, AIR 1983 SC 367; *Basudev Yadav* v. *State of Bihar*, 1988 CrLJ 1408 (Pat).
65. *Manepalli Anjaneyulu* v. *State of A P.*, 1999 Cr LJ 4375 (para 28) (AP).
66. *Babu Lal* v. *State of Rajasthan*, 1994 Cr LJ 3531 (para 8) (Raj).
67. *Ganesh Bhagwati Pandian* v. *State of Maharashtra*, 1985 CrLJ 191 (Bom).
68. *Satyanarain* v. *State*, AIR 1953 All 385; *Saghir Ahmad* v. *State*, AIR 1950 All 723.
69. *Ishwari* v. *State*, AIR 1961 All 153, overruled on another point in *Sheo Raj* v. *State*, AIR 1964 All 290.
70. *Nebi Dusadh* v. *State*, AIR 1956 Pat 39.
71. *Prabhati* v. *State*, AIR 1966 Raj 241; *Prithi* v. *State*, AIR 1966 All 607.

The witnesses must be questioned before identification on what basis they are going to identify the suspect and the statements of particulars given by them have to be recorded; if the witness did not give any distinctive features or marks of the accused, though he identified during the test identification, the identification would not have any value.[72]

However it was held that even where the witness had not given the details of the suspect, the lacuna does not vitiate the identification of the suspect by the witness.[73]

Where there was no possibility of villagers arriving at the scene of offence before the accused fled the scene, it was held that evidence of identification by villagers lost its significance.[74] Where there were material discrepancies in the dying declaration and the eye-witness account, regarding the identity of the assailant, the defence could show that the dying declaration belied the evidence the eye-witness.[75]

In a dacoity case, the inmates of the house where the dacoity was committed are competent witnesses to depose on the point of identification of the accused persons by them. Their testimony cannot be discarded as that of interested witnesses.[76]

Evidence of witnesses as to the identification of a large number of dacoits cannot be accepted without corroboration.[77]

Evidence of witnesses who could identify two out of three accused in the dacoity, cannot be rejected merely because, by some mistake, one accused could not be identified.[78]

Where the police official failed to mention certain steps taken by him in the memo, that by itself did not invalidate the identification in the absence its direct bearing on the identification.[79]

10. PROOF OF IDENTIFICATION

"PHIPSON[80] states : Most commonly a witness will testify to his own identification of the person, either as a matter of recognition at the time of the incident or as a matter of identification on a subsequent occasion. Sometimes a witness will be unable to testify that he recognised the person as someone known by a particular name because his only knowledge that the person was known by that name was derived from what he had been told by someone else and the evidence would consequently be hearsay.[81]

Sometimes, it may be desirable for another witness to give evidence of the identification, for instance, because the identifier has forgotten or is unavailable. There is some doubt, however, as to whether such evidence is hearsay.

It is sometimes suggested that identification is an *act* and as such is not covered by the hearsay rule. Any statement accompanying the act, such as "that is the man" or "it is number eight", can then be admitted as part of the act,[82] or so mixed up with it as to become part of the *res gestae*.[83] But, with respect, there seems little justification for treating an act which was intended by the actor to be

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72. *Wakil Singh* v. *State of Bihar*, AIR 1981 SC 1392; *Subash* v. *State*, AIR 1987 SC 1222, (4 months delay, witness did not give descriptive features, held identification useless and benefit of doubt is to be given). **Contra :** *Sanjeevan* v. *Kerala State*, 1994 Cr LJ 1316 (para 15) (Ker).
73. *Chahat* v. *State of Rajasthan*, ILR 1974 Raj 1183; **relying on** *Chander Singh* v. *State of U.P.*, AIR 1973 SC 1200.
74. *State of U.P.* v. *Jageshwar*, AIR 1983 SC 349.
75. *Bholaprasad* v. *State of Maharashtra*, (1998) 9 SCC 353 : 1998 SCC (Cri) 1035.
76. *Ramdeo* v. *State of Bihar*, 1988 CrLJ 1431 (Pat).
77. *Bodhia Chamar* v. *State*, 1972 CrLJ 1407.
78. 1975 All CrC 185.
79. *Manji* v. *State of Rajasthan*, 1996 Cr LJ 788 (para 7) (Raj).
80. PHIPSON ON EVIDENCE, 15th Edn. (2000), pages 310-311 (para 14-04).
81. *R.* v. *Hussain*, (1998) Crim LR 820 CA. Arguably, it would not be hearsay for the witness to testify that *he* knew the person by a particular name rather than that *others* knew the person by that name.
82. This was conceded by counsel for the respondent before the House of Lords in *R.* v. *Christie*, (1914) AC 545, and their Lordships then divided on whether the recital of the indecent assault by the child at the time of identification was also part of the *act* of identification; Lord ATKINSON, with whom Lord PARKER concurred holding that it was, at pp. 553-554, VISCOUNT HALDANE (at p. 551), Lord MOULTON (at p. 558) and Lord READING (at p. 563) holding that it was not. Only VISCOUNT HALDANE and Lord MOULTON, however, seem to have doubted the concession.
83. *R.* v. *McCay*, (1990) 1 WLR 645 CA.

equivalent of an oral assertion, such as pointing out one person on an identification parade, as outside the scope of the hearsay rule.

It is sometimes suggested as an alternative that there is a general exception to the hearsay rule for identification evidence.[84] This suggestion seems to be contradicted, however, both by the authority of Lord MORRIS, who stated in *Sparks* v. *R.*[85] that "there is no rule which permits the giving of hearsay evidence merely because it relates to identity", and by the fact that it is clear that excited utterances of identification have to fall within the scope of that aspect of the *res gestae* exception to the hearsay rule in order to be admissible. It has been said, however, that there is statutory authority for admitting hearsay evidence of formal identifications complying with Code of Practice D.[86] But, with respect to the Court of Appeal, the argument that Parliament by passing Section 67(10) of the Police and Criminal Evidence Act, 1984 intended to delegate to the Secretary of State, subject to approval by resolution, the power to create exceptions to the hearsay rule, is far-fetched. If this argument is accepted, however, it has the merit of only allowing the admission of hearsay evidence where the identification had been subject to the safeguards as to reliability contained in the Codes of Practice.

It is submitted that the correct view is that it would contravene the hearsay rule for someone other than the identifying witness to testify to the identification. Where the identifying witness is unavailable, however, such evidence may be admitted under one of the statutory exceptions to the hearsay rule found in Sections 23 and 24 of the Criminal Justice Act, 1988. The Court of Appeal has indicated that in deciding the fairness of admitting such hearsay evidence of identification[87] the trial judge should consider the strength of the evidence of identification and the possibility of it being controverted otherwise than by cross-examination.[88]"

Where the identification memorandum was not proved by any of the identification witnesses or by the Magistrate, the identification evidence cannot be relied upon.[89]

11. CONVICTION ON THE BASIS OF T.I. PARADE

Conviction can be based on the evidence of T.I. parade alone only when the Court concludes that the testimony of identification witnesses was beyond suspicion.[90] Where Clause XI of the Criminal Manual was substantially complied with and no serious defect could be pointed out in the identification parade and the accused were properly identified, conviction could be based on such identification.[91] Where delay in conducting T.I. parade was explained and there was no possibility of the accused having been shown to the witness whose evidence of identification was found to be reliable, conviction could be based on such evidence.[92] It is not a hard and fast rule that conviction cannot be based on solitary identification. It is a rule of prudence where the incident took place at right and there was not sufficient light for identification, it would not be safe to sustain conviction on such identification.[93] In a case of dacoity, the accused were alleged to have looted firearms but no evidence was adduced to show that the accused was not shown to any witness from the time of his arrest till the time of his lodging at the jail. Besides, there was no recovery of any of the weapons looted in the present dacoity. Conviction only on the basis of identification by witness was not proper.[94] In a case the docoits looted a bus passengers at 11 p.m. The witnesses, the inmates of the bus, gave no description of the dacoits in their earlier statements and oral evidence in the Court. The accused were detained at the police station for two days after the

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84. Support for this is often said to be found in *R.* v. *Osbourne and Virtue*, (1973) QB 678 CA. But in that case the main issue was whether the identifying witness's account of the identification procedure could be contradicted by evidence from another prosecution witness, and the hearsay rule does not appear to have been expressly mentioned.
85. (1964) AC 964, 981 PC.
86. *R.* v. *McCay*, (1990) 1 WLR 645 CA.
87. Under Criminal Justice Act 1988, S. 26.
88. *R* v. *Dragic*, (1996) 2 Cr App R 232 CA. **See also** *R* v. *Radak*, (1999) 1 Cr App R 187 CA.
89. *Ali Bahadur* v. *State*, 1998 Cr LJ 2871 (paras 13 and 14) (All), **following** *Sheo Raj* v. *State (FB)*, AIR 1964 All 290 : 1963 All LJ 1128.
90. *Ramesh Kumar Soni* v. *State of M.P.*, 1997 Cr LJ 3418 (MP), **relying on** *State of M P* v. *Manka*, 1960 MPC 216
91. *Pravinkumar K Shukla* v. *State of Maharashtra*, 1997 Cr LJ 577 (Bom), **distinguishing** *Ramcharan Bhudiram Gupta* v. *The State of Maharashtra*, 1995 (1) All MR 122 : 1995 Cr LJ 4048 and *Vilas Vasantra Patil* v. *The State of Maharashtra*, 1995 (1) All MR 513 (Sic).
92. *Ramesh Chandra Lenka* v. *State of Orissa*, 1995 Cr LJ 3178 (paras 6-8) (Ori)
93. *Ravindra Laxman Mahadik* v. *State of Maharashtra*, 1997 Cr LJ 3833 (Bom).
94. *Khan Singh* v. *State*, 1997 Cr LJ 2305 (All).

occurrence without any explanation. Identification of the accused by the witnesses within any margin of error, created suspicion in the mind of the Court and conviction was set aside.[1] Where conviction was not based on identification parade but on the reliable evidence of the eye-witnesses, conviction could not be set aside on the ground that identification was not reliable as the witness had seen the accused prior to T.I. parade.[2]

12. MIXING

To achieve the guarantee of truth, when several witnesses are to identify the suspect or suspects, each suspect should be separately put up for identification; the witnesses should be kept outside the purview of the suspect and each time only one identifier should be called; for every identifier there should be change of clothes of the suspect. The suspect should be given, the chance of any place in the row of non-suspects who are mixed up with him; he may be allowed to change the position in the row for the identification of each identifier.[3]

As to the proportion of other persons to be mixed up with the suspect, there cannot be any hard and fast rule; but, in some cases, it was held that the proportion should be atleast 3:1.[4]

The Allahabad High Court held that it should be 5:1. The Supreme Court, in *Budhsen* v. *State*, (AIR 1970 SC 1321) held that the number of undertrial prisoners or outsiders who are to be mixed-up with the suspect should be reasonably large and their bearing and general appearance should not be glaringly dissimilar.[5] Proportion of outsiders to be mixed up with *suspects* should be fair.[6] Where the accused was mixed up will the persons of the same age and the witness identified him after rounds, it was held that in the circumstances of the case, the identification evidence could not be discarded merely because the height of the accused was less than the persons with whom he was mixed up or he had a sear.[7]

An identification parade must be held in the Jail premises, because the undertrial prisoners will be available for mixing up, with the suspect during course of identification. And, secondly, the witnesses can be kept outside the compound of the jail so that they cannot see the suspect prior to the identification.[8]

13. OFFENCE AT NIGHT

Where the witness knew the accused prior to the occurrence and, when the offence took place during night, a lantern was burning, and the witness was sleeping, a few feet away from the accused, it was held that there was no difficulty for the witness to identify the accused.[9]

Where there was a tiny kerosene lantern at the time of occurrence, it was held that it was inherently difficult for a person to identify a large number of 14 or 15 persons who committed the offence.[10] Where the minor girls were admittedly asleep during the alleged murder on the spot in pitch darkness of night and their version that their clothes smeared with blood of the deceased were confiscated by the

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1. *Tahir Mohammad* v. *State of M.P.*, 1993 Cr LJ 193 (paras 9 and 10) (SC) : AIR 1993 SC 931.
2. *Mullagiri Vajram* v. *State of A.P.*, 1993 Cr LJ 169 (para 5) (SC) : AIR 1993 SC 1243.
3. 1979 All CrR 371.
4. *Aliya* v. *State*, AIR 1958 MB 87; *Naubatsingh* v. *Emperor*, AIR 1935 All 653; *Chhate Lal* v. *Emperor*, AIR 1933 Oudh 269; *Kuldipsingh* v. *Emperor*, AIR 1934 Pat 537.
5. *Asharfi* v. *State*, AIR 1961 All 153 (DB) (it is held that it should be 10:1 and changed every time a fresh accused is put up for identification); *Anwar and another* v. *State*, AIR 1961 All 50 (LB); *Gokul* v. *State*, AIR 1958 All 616; *Satyanarain* v. *State*, AIR 1953 All 385; *State* v. *Wahid Bux*, AIR 1953 All 314.
6. *Dal Chand* v. *State*, AIR 1953 All 123; *Ranjna* v. *State*, AIR 1957 Him Pra 75; *Aliya S/o. Garibkhan* v. *State*, AIR 1953 MB 87; *Koli Bhagu Ranchhod* v. *State*, AIR 1955 Sau 4; *Ram Sanehi* v. *State*, AIR 1963 All 308; *Brindaban* v. *State of M.P.*, 1981 CrLJ (NOC) 187 (MP); *Ganesh Bhagwati Pandian* v. *State of Maharashtra*, 1985 CrLJ 191 (Bom).
7. *Balbir Singh* v. *State of Rajasthan*, AIR 1997 SC 1704 : 1997 Cr LJ 1179.
8. *State of Vin. Pra* v. *Sarua Munni Dhimar*, AIR 1954 Vin Pra 42.
9. *Deena* v. *State*, AIR 1978 SC 1605; *Shianarayan Laxminarayan Joshi* v. *State of Maharashtra*, 1980 CrLR 388 : AIR 1980 SC 439 (SC), (There was the headlight of a tractor).
10. *State of U.P.* v. *Jageshwar*, AIR 1983 SC 349; *Mithoo Singh* v. *State of U.P.*, 1996 Cr LJ 1385 (paras 15-19) (All); no evidence showing street light burning, *Bala Pandurang Kesarkar* v. *State of Maharashtra*, 2000 Cr LJ 693 (para 8A) (Bom); insufficient light, *Ganga Din* v. *State of U.P.*, 2001 Cr LJ 1762 (para 10) (All). **Contra :** *Rajdeo Paswan* v. *State of Bihar*, 1994 Cr LJ NOC 65 (Pat).

Investigating officer, was negatived by him, identification by then was held to be untrustworthy.[11] Where in a dacoity case one of the witnesses failed to identify the accused, there was darkness at the place of incident and the miscreants covering their faces were not known to the witnesses, it was held that in such circumstances identification was not possible[12] but in a dacoity case, the clothes on the face of the accused came down in the scuffle and the lights were on at the relevant time at night, identification of the accused by the witnesses in the T.I. parade was held to be reliable.[13]

But in a subsequent case, the Supreme Court observed that villagers living in villages where electricity has not reached as yet, get accustomed to seeing things in the light shed by a lantern, and that their eye-sight gets conditioned and becomes accustomed to the situation.[14]

It would not make identification of all accused in a double murder case impossible, when occurrence took place in an open field at 5.30 p.m., if the accused belonged to the same village.[15]

The evidence at the trial of a witness who identified the accused or incriminatory articles before the police is admissible in evidence by way of corroboration.[16]

When a witness testified regarding the identification of the accused in the test identification parade, and he had seen the accused during night time when the offence took place, it is necessary for the court to satisfy itself as to the condition of the eye-sight of the identifier. If it is found that his vision is dim and he is not in a position to recognise the person from a distance, it would become doubtful whether he was able to recognise the suspect in the darkness. The prevailing light at that time would be of crucial importance.[17]

A stabbing incident took place in moonlight; the assailant was near the victim and the victim's brother was also there. The assailant was known to the victim and his brother previously. On those facts it was held that it was possible for the victim and his brother to identify the accused in that moonlight.[18] Where the eye-witness deposed that he had seen the occurrence and identified the accused in moonlight from a particular distance, his evidence could not be defaulted on the presumptuous ground of improbability of identification from the particular distance.[19] Where the assailants could target their victims without mistake in the light then available, though meager, the same light was held to be sufficient for the injured victims to identify them.[20]

Where the witness and the accused who was his step-son, were living in the same house, it was held that it would be possible for the witness to recognise the accused, though the offence took place in the room and even though it was dark, as the witness physically intervened while the accused was striking the deceased, and the witness had the opportunity of feeling the presence of the accused by touch.[21]

Where the dacoits used battery lights and there was an electric light burning nearby, the evidence of eye-witnesses that they were able to identify them was accepted, though identification was held after a long time.[22] Where the prosecution witnesses got ample opportunity to identify the accused/dacoits as they spent considerable time in looting and ransacking the house and the witnesses were not put to mortal fear also, the delay in conducting the T.I. parade was explained, conviction on their identification evidence was held to be proper.[23]

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11. *Damber* v. *State of U.P.*, 1993 Cr LJ 3745 (paras 18 and 19) (All). Faces of assailant covered with cloth, insufficient light, identification doubtful, *Kajal Sarkar* v. *State of Assam*, 1993 Cr LJ 3869 (paras 13 and 16) (Gau)
12. *Sk. Jamir* v. *State*, 1998 Cr LJ 2244 (para 9) (Ori).
13. *Babu Lal* v. *State of Rajasthan*, 1994 Cr LJ 3531 (paras 6 and 7) (Raj).
14. *Machhi Singh* v. *State of Punjab*, AIR 1983 SC 957. **See also** *Ram Gulam Chaudhary* v. *State of Bihar*, AIR 2001 SC 2842 (para 34) : 2001 Cr LJ 4632.
15. *State of U.P.* v. *Manoharlal*, AIR 1981 SC 2073; *State of U.P.* v. *Manoharlal*, 1981 CrLJ 1701.
16. *Ramkishan* v. *State*, AIR 1955 SC 104.
17. *Ghanashyam Das* v. *State*, 1984 CrLJ 588 (Ori).
18. 1979 All Cr R 498.
19. *Malik Ram Bhoi* v. *State of Orissa*, 1993 Cr LJ 984 (para 7) (Ori).
20. *Nathuni Yadav* v. *State of Bihar*, AIR 1997 SC 1808.
21. *State of Orissa* v. *Jagadhar*, ILR 1975 Cut 1557.
22. 1977 Raj Cr C 334.
23. *Pallepu Venkati* v. *State of A.P.*, 1996 Cr LJ 1458 (paras 7-9) (AP).

Where the only evidence is of identification of dacoits, *the question of light is of paramount importance*. This should be appreciated in a careful and judicious manner.[24] It is the duty of the court to see (a) state of light at the time of dacoity or any offence; (b) condition of the eye-sight of the identifier; (c) state of his mind, (d) opportunity of seeing the offender; (e) errors committed by him in identification, (f) any special conduct or outstanding features of the offender noticed by him.[25]

14. DELAY IN IDENTIFICATION

The identification should be held as early as possible after the arrest of the accused; because the impression in the mind of the witness may fade in course of time. In the following cases, it was held that the identification was valueless on account of unreasonable delay. Whenever, there is delay in holding a test identification, the prosecution should explain it, and the absence of a reasonable explanation will detract from the value of the test.[26] Where the T.I. parade was held after about 3 or 4 months of arrest of the accused persons and no explanation was given for the inordinate delay, identification evidence of such T.I. parade was held to be unreliable.[27] Where the name of the accused was included after the identification parade which was conducted after the delay of seven months of which no plausible explanation was given and the independent witnesses disowned the participation of the accused, it could be said that he was falsely booked in the crime and his acquittal by giving him benefit of doubt was held to be proper.[28] Where the T.I. parade was held after 56 days and being the resident of a nearby village, there was possibility of his being seen by the witness, accused was entitled to acquittal. Delay casts doubt *vis-a-vis* it's genuineness.[29]

Where is a case of dacoity test identification parade was held after three and a half months of the occurrence but there was no material to show that the witnesses had the chance to see the suspect before the identification parade, it was held to be reliable.[30] Where in a case of dacoity involving murder of four members of the family in a gruesome and callous manner in electric light leaving deep impression of the

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24. *Mai Koo* v. *State*, AIR 1961 All 612; **overruled on** another point in; *Jwala Mohan* v. *State*, AIR 1963 All 161; *Basti Ram* v. *State of U.P.*, 1982 Cr LJ (NOC) 164.
25. *Ashrafi* v. *State*, AIR 1961 All 153.
26. *Hasib* v. *State of Bihar*, AIR 1972 SC 283; *Md Abdul Hafeez* v. *State of AP*, AIR 1983 SC 367 (4 months); *Dhaja* v. *Emperor*, AIR 1948 All 241; *Biswanath* v. *State*, 1983 CrLJ (NOC) 202 (Cal); *Gokul* v. *State*, AIR 1958 All 616 (8 months); *Mongalia* v. *State*, 1975 Raj LW 469 (12 months); *Chunnoo* v. *State*, AIR 1954 All 795 (19 months); *Dobi* v. *State* AIR 1953 Raj 49 (15 months); *Anwar* v. *State*, AIR 1961 All 50; *Sheo-Nandan* v. *State*, AIR 1964 All 139; *State* v. *Wahid Bux*, AIR 1953 All 314; *Bechu* v. *State*, 1957 Cr LJ 113; *Hazara* v. *R*, AIR 1947 Pat 157; *Dwarka Singh* v. *R*, AIR 1947 Pat 107; *Pirthi* v. *State*, AIR 1966 All 607; *Harinath* v. *State*, AIR 1988 SC 345; *Daryao Singh* v. *State*, AIR 1952 All 59; *Rameshwar Singh* v. *State of J&K*, AIR 1972 SC 102; *Delhi Admn.* v. *Balakrishan*, AIR 1972 SC 3; *Ram Das* v. *State*, AIR 1966 AP 344; *Syed Mohammad Kasim Razvi* v. *State of Hyderabad*, AIR 1951 Hyd 97; *Ashrafi* v. *State*, AIR 1961 All 153; **overruled on** another point in *Sheo Raj* v. *State*, AIR 1964 All 290 (24 days delay not explained); *Himangshu Pahari* v. *State*, 1986 Cr LJ 622 (2 years delay due to absconding of the accused; held it can be ignored); *Ahtar Singh* v. *State*, AIR 1979 SC 1188, (12 months delay rejected as not explained); *Pritam* v. *State*, AIR 1971 Raj 184 (identification parade after inordinate delay is not proper in the absence of any convincing explanation for delay); *Sheo Nandan* v. *State*, AIR 1964 All 139; *State* v. *Wahid Bux*, AIR 1953 All 314; *State of Orissa* v. *Iswar Rout*, 1994 Cr LJ NOC 105 (Ori); *Girja Shankar Misra* v. *State of U.P.*, AIR 1993 SC 2618 (para 12). Delay of 8 mms. from occurrence, no explanation, fatal, *Islam Molla* v. *State of W.B.*, 1996 Cr LJ 724 (para 10) (Cal); delay of about two months, ample opportunity to see accused, unreliable, *Govind* v. *State of U.P.*, 1996 Cr LJ 445 (paras 24 and 29) (All), **relying on** *Habal Shaikh* v. *The State*, 1991 Cr LJ 1258 (Cal); unexplained delay of 2-1/2 months and no proof of non-opportunity of seeing accused by witness, no corroborative value, *Kunwarlal* v. *State of M.P.*, 1999 Cr LJ 3632 (paras 15 and 16) (MP); delay of two months after incident and about seven weeks after arrest *Manepalli Anjaneyulu* v. *State of A.P.*, 1999 Cr LJ 4375 (para 22) (AP); delay of 8 days after recovery of ornaments and 3 months after seizure of other articles, *Durga Mahesh* v. *State of A.P.*, 1996 AIHC 4856 (para 8) (AP); delay of nearly 2-1/2 years after incident, doctrine of depreciation in memory applicable, not reliable, *State* v. *Suresh*, 2000 Cr LJ 2855 (para 13) (All).
27. *Shabad Pulla Reddy* v. *State of A.P.*, AIR 1997 SC 3087 : 1997 Cr LJ 3753.
28. *State of U.P.* v. *Ram Swarup*, 1998 Cr LJ 2788 (para 15) (All).
29. *Sri Ram* v. *State of U.P.*, 1993 Cr LJ 1570 (paras 2 and 3) **relying on** *Soni* v. *State of U.P.*, (1982) 3 SCC 368 (1) : 1983 SCC (Cri) 49 (1) and *Asharfi* v. *State of U.P.*, AIR 1961 All 153 : 1960 All LJ 595 : 1961 (1) Cr LJ 340.
30. *Pravakar Behera* v. *State of Orissa*, 1997 Cr LJ 3291 (para 7) (Ori), **relying on** *Wakil Singh* v. *State of Bihar*, AIR 1981 SC 1392 : 1981 Cr LJ 1014. About two months delay due to preoccupation of Magistrate, otherwise unimpeachable, can't be discarded, *Murarilal Jivanram Sharma* v. *State of Maharashtra*, AIR 1997 SC 1593 : 1997 Cr LJ 782. Delay of one month, accused not shown to witnesses, cannot be rejected, *Vikram Singh* v. *Raj Singh*, 1998 SCC (Cri) 578, 582; *Ganpat Singh* v. *State of Rajasthan*, 1994 Cr LJ 1565 (Raj); *Vinit* v. *State of Maharashtra*, 1994 Cr LJ 1791 (para 17) (Bom).

culprits on the mind of the witnesses, the accused were put on test identification within 24 hours of their arrest, identification could not be rejected merely on the ground that it was not possible for them to identify the culprits after a period of three months from the incident.[31] Where the injured eye-witnesses in their examination and cross-examination showed that they had gained enduring impress of identity of the accused terrorists during the incident in which they had lost their near and dear ones, delayed identification by them of the accused in the Court after seven or eight years would not affect their evidence.[32] Where the witnesses had occasion to see the accused dacoits clearly and distinctly, the allegation of showing their photographs to witnesses is of no consequence and the fact of conducting T.I. parade 11 days after producing the accused before the Magistrate did not amount to delay.[33]

Identification becomes suspect if all witnesses identify the accused after a lapse of one year and not one of them makes a mistake.[34]

In the case of identification, where the accused was on bail for a considerable period, the omission to point out this circumstance to Jury is a serious misdirection.[35]

The delay becomes immaterial when the prosecution does not rely on the evidence of test identification.[36]

The validity of test identification cannot be challenged on the ground of irregularity in the manner of holding it or on the ground of undue delay, when the Magistrate who conducted the identification and the Police Officer who conducted the investigation have not been cross-examined in that behalf.[37]

15. FAILURE OF CONDUCT T.I. PARADE

The purpose of holding T.I. parade is to test the veracity of the witness on the question of identity. Non-holding of it would render unsafe the reliance on the evidence of such witness.[38] Opportunity to a witness to interact with the accused or to notice his distinctive features lends assurance to his testimony in the Court and absence of corroborative evidence by way of test identification parade would not be material.[39] Where the claim of the eye-witnesses that they already knew the accused was found to be true, failure to hold T.I. parade was inconsequential even if the accused demanded for the source.[40] Where the departmental witness whom the accused was unknown was uncorroborated by independent witnesses still no test identification was held, the accused was entitled to benefit of doubt.[41]

16. METHODS OF IDENTIFICATION

A witness may testify to a person's identity from his voice alone or from observing his stature, complexion, clothing, or other marks, or from the person's photograph. A witness may testify to a person's age or state of intoxication merely from his appearance; so, too, chattels, may be identified by their appearance and other qualities.[42]

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31. *Brij Mohan* v. *State of Rajasthan*, 1994 Cr LJ 922 (paras 9 and 10) : AIR 1994 SC 739. Dacoity in broad day light, delayed identification corroborated, reliable. *Munna* v. *State*, 1993 Cr LJ 3719 (paras 11, 12 and 14) (All).
32. *Daya Singh* v. *State of Haryana*, 2001 Cr LJ 1268 (paras 12-15) (SC) : AIR 2001 SC 1188.
33. *State of Karnataka* v. *Rajan*, 1994 Cr LJ 1042 9paras 23 and 24) (Kant).
34. *Chunnoo* v. *State*, AIR 1954 All 795.
35. *Hazara Singh* v. *State*, AIR 1951 Cal 377.
36. *Raj Kishore Singh* v. *State of Bihar*, AIR 1971 SC 1058; *Anwar* v. *State*, AIR 1961 All 50.
37. *Bharat Singh* v. *State of U.P.*, AIR 1972 SC 2478; **distinguishing** *Hasib* v. *State*, AIR 1972 SC 283; *Budhsen* v. *State of U.P.*, AIR 1970 SC 1321.
38. *Har Pal Singh* v. *State of U.P.*, 2000 Cr LJ 4552 (para 25) (All).
39. *Ronny alias Ronal James Alwaris* v. *State of Maharashtra*, 1998 (2) Crimes 65 : 1998 Cr LJ 1638, 1649 (SC)
40. *Surendra Narain* v. *State of U.P.*, AIR 1998 SC 192 : 1998 Cr LJ 359, **explaining** and **distinguishing** *Shri Ram* v. *State of U.P.*, (1975) 3 SCC 495 : 1975 SCC (Cri) 87, **approving** *Sangiah*, In re : (1948) 49 Cr LJ 89 : AIR 1948 Mad 113; *Kanta Prasad* v. *Delhi Admin*, AIR 1958 SC 350 : 1958 Cr LJ 698; *Asharfi* v. *State*, (1961) 1 Cr LJ 340 : AIR 1961 All 153 and *Tek Chand* v. *State*, AIR 1965 Punj 146 : (1965) 1 Cr LJ 466 and **implied overruling** *Amar Singh* v. *Emperor*, AIR 1943 Lah 303 and *State* v. *Dhanpat Chamara*, AIR 1960 Pat 582 : 1960 Cri LJ 1650. **Also see** *Anandan* v. *State*, 1999 Cr LJ 1368, 1370 (Mad), **distinguishing** *State of U.P.* v. *Charles Gurmukh Sobhraj*, 1996 SCC (Cri) 1065 : 1996 Cr LJ 3844.
41. *Gangaram* v. *State of M.P.*, 1994 Cr LJ NOC 381 (MP).
42. WIGMORE, Vol. 2, Section 660, p. 771.

"In *R.* v. *Deenik*,[43] the Court of Appeal upheld a conviction following a trial where voice recognition evidence was admitted. The evidence was given by a Customs Officer who identified the voice of the defendant, who she overheard being interviewed, with the voice of a man she had spoken to on the telephone whilst masquerading as another suspect's wife. Although there is no Code of Practice governing voice recognition, no doubt if the police were seeking a formal identification by voice it would be preferable for them to provide the witness with a series of voices to choose from.[44] In an Australian case,[45] a witness claimed to be able to remember the noise made by a particular vehicle's engine, and after listening to eight vehicles picked the one belonging to the accused.

Expert evidence based on the comparison of the suspect's voice with a recording of the perpetrator's voice may also be admitted. In *R.* v. *Robb*,[46] such evidence was admitted even though the expert had used an approach which the majority of experts thought was unreliable."[47]

In *United States Shipping Board* v. *The Ship St. Albans*, 1931 PC 189; Lord MERRIVLE observed that clearly a photographic picture cannot be relied upon as proof in itself, of the dimensions of the depicted object or objects, and cannot be made properly available to establish the relative proportions of such objects except by evidence of personal knowledge or scientific experience to demonstrate accurately the facts sought to be established..... It is well-settled that for certain purposes, photographs may be received in evidence, and, as is well known, photographs are used and can properly be used in proceedings where there is a dispute about identification of a particular person and where the question of identification is a critical one.[48] A photograph can be used in evidence as a faithful reproduction when original is not available, if it is not a false or faked one, and no trick photography is involved.[49]

(a) Factors to be considered.—Factors relevant to be taken into consideration in the identification are whether there was an opportunity for the witnesses to see the accused at the time of the incident, whether they could remember by face the accused persons and whether they could identify them by such memory in the Court.[50]

(b) Personal Characteristics, etc.—"When a party's identity is in issue it may be proved or disproved presumptively by similarity or dissimilarity of personal characteristics, *e.g.* age, height, size, hair, complexion, voice, handwriting, manner, dress, distinctive marks, faculties, as well as of residence, occupation, family relationship, education, travel, religion, knowledge of particular people, places, or facts, and other details of personal history.[51] In the well-known case of *R.* v. *Voisin*,[52] the accused's peculiar misspelling of the words "bloody Belgian"[53] helped to establish his identity as the murderer. In a series of recent cases, the Courts have struggled with the problem of how to prove that a person charged with driving when disqualified was indeed the same person who was previously disqualified. In the case which prompted the series[54] it was suggested that if the accused did not admit the prior disqualification it could only be proved by evidence of matching fingerprints[55] or testimony from someone who was present in Court at the time of the previous conviction and disqualification. This proved highly inconvenient,[56] and it has not been confirmed that proof of coincidence of name and date of birth will usually suffice to establish a case to answer, and that thereafter refusal to give evidence could be taken into account.[57]

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43. (1992) Crim LR 578 CA.
44. But in *R.* v. *Gummerson and Steadman*, (1999) Crim LR 680 CA, the Court of Appeal thought that there was no necessity to hold a "voice parade" and a warning modelled on *Turnbull* was sufficient.
45. *R.* v. *Pfenning*, (1995) 182 CLR 461, 539 (High Ct of Australia).
46. (1991) 93 Cr App R 161 CA.
47. PHIPSON ON EVIDENCE, 15th Edn. (2000), page 331 (para 14-33).
48. *Khedia* v. *Turia (St.)*, AIR 1962 Pat 420.
49. *Laxmipat Choraria* v. *State of Maharashtra*, AIR 1968 SC 938 : 1968 CrLJ 1124.
50. *State of Karnataka* v. *Rajan*, 1994 Cr LJ 1042 (para 23) (Kant).
51. *R.* v. *Orton*, (1874), **unreported**; *R.* v. *Davis and Murphy*, (1971) 56 Cr App R 249 CA.
52. (1918) 1 KB 531 CA.
53. A piece of paper with the words "blady belgiam" on it had been found with part of the victim's body. The accused wrote the words "Bladie Belgiam" when asked to write "bloody Belgian."
54. *R.* v. *Derwentside JJ., ex p. Heaviside*, (1996) RTR 384 QBD.
55. Under S. 39 of the Criminal Justice Act, 1948.
56. See *e.g. R.* v. *Derwentside JJ., ex p. Swift*, (1997) RTR 89 QBD; *DPP* v. *Mansfield*, (1997) RTR 96 QBD; *DPP* v. *Mooney*, (1997) RTR 434 CA.
57. *Olakunori* v. *DPP*, (1998) COD 443 QBD.

In civil cases, a party's identity most frequently comes in question as having executed a particular document; and here identity of name, handwriting, residence and occupation, or even of name and handwriting alone, will generally suffice."[58]

(c) Identification by Gait, Speech and Voice.—To recognise a person in a pitch dark night merely by modulations of his voice is a very risky experiment; it is not safe to rely on the identification of a person by his voice alone.[59] Especially if, prior to the occurrence, the witness did not talk with the accused and did not hear his voice.[60]

The identification of a person by the timbre of his voice, depending upon subtle variations in the overtones, when the person recognising is not familiar with the person recognised, may be some what risky in criminal trials, but when the person recognising was intimately known to the person recognised (in this case the witness met the accused on several occasions prior to the date of occurrence) and the witnesses had heard the accused and his brothers calling the deceased to come out of the hut, it was held that the identification of the accused by the witness by voice was not improbable.[61] A well acquainted person can be recognised without mistake by voice, and more especially in the flashes of torch light.[62] In a dark night one can recognise one's close relation, who is also an inmate of the house, by his voice.[63] Where the witness identified the accused in a dark night by his voice, when it was raining, and the accused was not intimately known to the witness nor was there any conversation prior to that night, it was held that the identification cannot be relied on.[64]

(d) Identification by Perception.—The evidence of persons that they recognised the plaintiff who disappeared several years ago, was held admissible. When they saw the plaintiff after his reappearance, they could recognise him by their past recollection of that person.[65]

The power of perception and memorising differs from man to man and also depends upon the situation, the strength or trustworthiness of the witnesses.[66]

(e) Identification by Hair.—The Supreme Court held that by microscopic examination of hair one can decide wherefrom the hair came.[67] Taking hair sample of the accused during investigation does not amount to furnishing evidence against oneself and the prosecution can be granted permission to obtain his hair sample for the purpose of comparison during investigation.[68]

(f) Identification by Finger-Prints, Foot-Prints, Handwriting and Palm-Prints.—An accused cannot raise the plea that the finger-prints of the other accused found at the place and time of occurrence could not be proved by the prosecution to be his when the other accused did not challenge the said evidence.[69]

See commentary under Section 45.

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58. PHIPSON ON EVIDENCE, 15th Edn. (2000), pages 307-308 (para 14-02).
59. *Bhagtu* v. *Emperor*, AIR 1928 Lah 925; *Kirpal Singh* v. *State of U.P.*, (1964) 1 SCJ 411 : AIR 1965 SC 712; In re : *Saibanna Tippanna*, AIR 1966 Mys 248; *Abdul Haque Ali* v. *State of M.P.*, 1983 CrLJ (NOC) 122 (MP); *Joseph* v. *State of Kerala*, 1963 Ker LT 292 : (1964) 1 CrLJ 493; *State of Orissa* v. *Chandra Pentia*, 1981 CrLJ 1060 (Ori)
60. *Shayam Deo Singh* v. *State of Bihar*, 1988 CrLJ 508 (Pat).
61. *Kripal Singh* v. *State of U.P.*, AIR 1965 SC 712 : (1965) 1 Cr LJ 636 **Also see** *State of Maharashtra* v. *Harishchandra Tukaran Twatade*, 1997 Cr LJ 612 (Bom); *Shivaji Ganu Naik* v. *State of Maharashtra*, 1999 Cr LJ 471, at pp. 473-474 (Bom) and *Kedar Singh* v. *State of Bihar*, 1999 Cr LJ 601 (SC) : AIR 1999 SC 1481, shape of body, gait, manner of walking or even by voice; *Shyamrao Vishnu Patil* v. *State of Maharashtra*, 1998 Cr LJ 3446 (para 9) (Bom); *Shankar Shridhar Kavale* v. *State of Maharashtra*, 1998 Cr LJ 4491 (para 17) (Bom); *Samal Hombram* v. *State*, 1994 Cr LJ NOC 204 (Ori); *Bhimsha Subanna Pawar* v. *State of Maharashtra*, 1996 AIHC 1 (para 19).
62. *Jamser Ali* v. *State of Tripura*, AIR 1954 Tri 11.
63. *State of Orissa* v. *Jagadhar*, ILR 1975 Cut 1557.
64. *Narain Baraik* v. *State*, 1972 CrLJ 177.
65. *Bibhabati Debi* v. *Ramendra Narayan*, AIR 1942 Cal 498 (SB).
66. *Daya Singh* v. *State of Haryana*, 2001 Cr LJ 1268 (para 14) (SC) : AIR 2001 SC 1188
67. *Kanbi Karsan Jadav* v. *State*, AIR 1966 SC 821 : 1966 CrLJ 605.
68. *Sandeep Kalson* v. *The State*, 1994 Cr LJ NOC 430 (Del).
69. *Gade Lakshmi Mangraju* v. *State of A.P.*, 2001 Cr LJ 3317 (para 19) (SC) : AIR 2001 SC 2677.

(g) Photographs and video-films.—PHIPSON[70] states : A photograph or film of a crime actually being committed is admissible.[71] A jury may be invited to make an identification by comparing the image with the appearance of the accused and this will not be treated as equivalent to a dock identification. Nonetheless, the jury should be given a careful warning about the risks of error in this procedure, and the accused is free to absent himself from the dock.[72] The jury may be assisted by being shown other pictures of the accused.[73] If in the circumstances the jury cannot be expected to identify the accused from the photograph or film, for instance because the photograph or film is unclear,[74] or because the accused has changed his appearance,[75] a witness who has studied the photograph or film may identify the people on it.[76] The witness's evidence may be based on the use of facial-mapping,[77] video-superimposition[78] or repeated viewing.[79]

A witness may give evidence of having identified a person from a photograph or film even if the photograph or film has been lost or destroyed before the trial.[80] Care must be taken, however, to avoid the prejudice to the accused which might result from a revelation that the accused was recognised because of his previous encounters with the police.[81]

(h) Sketches and photofits.—Where a witness takes part in the composition of a sketch or a photo-fit picture of a suspect the resulting image is admissible for the prosecution.[82] The image is not hearsay, but, according to the Court of Appeal, is equivalent to a photograph of what the witness saw. Furthermore, the image is not a 'statement', and is therefore admissible even if the witness gives testimony consistently describing the suspect's appearance.[83] Since such an image is treated as equivalent to a photograph, if it does not resemble the accused it will be admissible for the defence."[84]

(i) DNA evidence.—"This evidence involves comparison between genetic material thought to come from the person whose identity is in issue and a sample of genetic material from a known person. If the samples do not "match" then this will prove a lack of identity between the known person and the person from whom the unknown sample originated. If the samples do "match" this does not conclusively prove identity. Rather, an expert will be able to derive from a database of DNA samples an appropriate number reflecting how often a similar DNA "profile" or "fingerprint" is found."[85]

(j) Identification by sniffer dogs.—The evidence based on sniffer dogs has inherent frailities. The possibility of error on the part of the dog or its master is the first among them. The possibility of misunderstanding between the dog and its master is close to its heels. The possibility of misrepresentation or a wrong inference from the behaviour of the dog could not be ruled out. The last, but not the least, is the fact that from a scientific point of view, there is little knowledge and much uncertainty as to the precise faculties which enable police dogs to track and identify criminal. Police dogs are engaged in these acts by virtue of instincts and also by the training imparted to them. The Criminal Courts need not therefore bother much about the evidence based on sniffer dogs. Investigating exercises

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70. PHIPSON ON EVIDENCE, 15th Edn. (2000), pages 311-312 (para 14-05).
71. *R* v *Tolson*, (1864) 4 F & F 103, 104; *R.* v. *Cook*, (1987) QB 417, 424 CA. For detailed consideration of the basis of admissibility **see**, *R* v. *Nikolovski*, (1996) 141 DLR (4d.) 647 (Supreme Court of Canada).
72. *R.* v. *McNamara*, (1996) Crim LR 750 CA.
73. *R* v. *Dodson*, (1984) 70 Cr App R 220; *R.* v. *Clare and Peach*, (1995) 2 Cr App R 333 CA. Though clearly it would be important that the photographs used were not of such a type as to suggest that the accused had previous convictions.
74. *R* v. *Clare and Peach*, (1995) 2 Cr App R 333 CA.
75. *R* v *Stockwell*, (1993) 97 Cr App R 260 CA.
76. *R* v. *Stockwell*, (1993) 97 Cr App R 260 CA; *R.* v. *Clare and Peach*, (1995) 2 Cr App R 333 CA; *R.* v. *Clarke*, (1995) 2 Cr App R 425 CA.
77. *R* v *Stockwell*, (1993) 97 Cr App R 260 CA. In *R.* v. *Hookway*, (1999) Crim LR 750 CA, identification by facial-mapping evidence alone was held to be sufficient to establish a case to answer.
78. *R* v *Clarke*, (1995) 2 Cr App R 425 CA.
79. *R* v. *Clare and Peach*, (1995) 2 Cr App R 333 CA.
80. *Taylor* v. *Chief Constable of Cheshire*, (1987) 84 Cr App R 191 DC; cf. *Kajala* v. *Noble*, (1982) 75 Cr App R 15.
81. *R.* v. *Fowden and White*, (1982) Crim LR 588.
82. *R* v. *Cook*, (1987) QB 417 CA.
83. *R* v. *Cook*, (1987) QB 417 CA.
84. PHIPSON ON EVIDENCE, 15th Edn. (2000), page 316 (para 14-10).
85. PHIPSON ON EVIDENCE, 15th Edn. (2000), page 330 (para 14-32).

can afford to make attempts or forays with the help of canine faculties but judicial exercise can ill afford them.[86]

Calling of dog squad would not necessarily lead to the only inference that the perpetrator of the offence were not identified.[87]

17. IDENTIFICATION OF SUSPECT BY WITNESS

Ability of witness to identify should be tested without showing him the suspect, or his photograph, or furnishing him date for identification. Showing photograph prior to identification makes identification worthless.[88]

Where a constable made a reference during the cross-examination to a photograph of the accused which he had seen in a book of photographs that was used for purpose of identifying the person who had committed the crime, it was held that his evidence is admissible.[89] If the identification of persons on the basis of a photograph is to be held to have the same value as the evidence of a test identification parade, gross injustice to the detriment of the persons suspected may result.[90] However, it cannot be said that the identification by photo is inadmissible in evidence. The prosecution has to examine the identifying witness in the Court where he has to identify the accused. Then alone it would become substantive evidence. But that does not mean that at the stage of framing of charge, the Court is disabled from considering the prospect of such a witness correctly identifying the accused during trial. In so considering the Court can take into account the fact that during the investigation the photograph of the accused was shown to the witness and he identified the person as the one whom he saw at the relevant time.[91]

The police may show a number of photographs of different persons so as to evaluate the impression of the witness as to whether he can identify the suspect or not. But showing him the photograph of the suspect before the identification makes the identification parade a farce. Where the police official posed for photograph with the accused with names written on planks in the hands of the accused and the photographs were sent for publication, the identification parade was held to be farcical.[92]

A superimposed photograph of the deceased over the skeleton of a human body was held admissible by the Supreme Court to prove the fact that the skeleton was that of the deceased.[93] The skeleton can be identified by its physical or visual examination with reference to any particular feature which would mark it as belonging to the person whose bones or skeleton it is stated to be; similarly, the size of the bones, their angularity or curvature, the prominences or the recessions, would be features which on examination and comparison may serve to establish 'the identity of a thing' within the meaning of this section.[94]

Where the medical officer who conducted the autopsy on a decomposed body, opined that he found marks of injuries on the body, and decomposition was not so advanced as to defy identification, it was held that the medical officer's opinion is relevant as supporting the prosecution.[95]

Pieces of bones were recovered and the chemical examiner opined that they were most probably of a female aged between 16 and 20 years, but he was not clear whether they belonged to a single individual. He stated in his report, that in regard to the cuts on the bones which he noticed, he was not sure that they must have been caused ante-*mortem*. On those facts the Madras High Court, held that the *corpus delicti* was not proved.[96]

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86. *Gade Lakshmi Mangraju* v. *State of A.P.*, 2001 Cr LJ 3317 (paras 13, 17 and 18) (SC) : AIR 2001 SC 2677.
87. *Vishnu* v. *State (N.C.T. of Delhi)*, 2001 Cr LJ 4006 (para 38) (Del).
88. *L. Choraria* v. *State of Maharashtra*, AIR 1968 SC 938.
89. *R* v. *Wattam*, (1942) 1 All ER 178.
90. *Kartar Singh* v. *State of Punjab*, 1994 Cr LJ 3139 (para 368) (SC).
91. *Umar Abdul Shakoor Sorathia* v. *Intelligence Officer, N.C. Bureau*, 1999 Cr LJ 3972 (paras 11 and 12) (SC) : AIR 1999 SC 2562. **distinguishing** *Kartar Singh* v. *State of Punjab*, 1994 Cr LJ 3139 : (1994) 3 SCC 569.
92. *Manepalli Anjaneyulu* v. *State of A.P.*, 1999 Cr LJ 4375 (paras 29 and 30) (AP).
93. *Ram Lochan* v. *State of West Bengal*, AIR 1963 SC 1074.
94. *Ram Lochan Ahir* v. *State of West Bengal*, (1964) 1 SCJ 82 : AIR 1963 SC 1074 : 1963 CrLJ 170.
95. *Har Dayal* v. *State of U.P.*, AIR 1976 SC 2055.
96. In re : *Madurai*, AIR 1960 Mad 370.

Where the doctor gave an opinion that a skull which was found was probably that of a female 12 years old, and there was evidence that the girl was last seen in that direction, and no one else except the girl was reported missing, it was held that it may be concluded that the remains were that of the girl, taking several other circumstances into account.[1] A skeleton found in a jungle was identified as that of a milk-man, who was alleged to have been murdered. The medical evidence was that the bones belonged to an adult male of 30-50 years of age. It was held that the probabilities, when taken with other circumstances, pointed out that the skeleton was that of the deceased.[2] The delay in conducting the identification of a dead body from the skeletons recovered, has to be taken into consideration, in appreciating the evidence.[3]

Where a dead body was found in a decomposed state, unfit for purpose of any examination, it was held that the body may be identified taking into account the height, and the age of the deceased and his clothes.[4]

Where the instructions contained in the Criminal Manual issued by the High Court were not complied with in conducting the T.I. parade, the identification evidence could not be accepted.[5] Where this distinctive mark that two accused persons had one leg each amputed and one accused had small pox marks on his face still no person having small pox marks was mixed up while conducting the T.I. parade, the evidence of identification could not be relied upon[6] but where the scar mark on the face of one of the accused was not so distinct as to demarcate itself from others, non-mixing of persons with such distinctive mark, did not vitiate the test identification parade.[7]

18. IDENTIFICATION OF ACCUSED IN DIFFERENT OFFENCES

Where two separate cases of dacoity were filed against the same accused, in two different courts, and where a test identification was done in one case, the Supreme Court, held that if in one case the evidence of test identification was not acted upon, it cannot be a ground for rejecting that evidence of identification in another case, as the question, whether such identification is trustworthy or not, depends upon the facts and circumstances of each case.[8]

Where there are two suspects dissimilar in appearance, two separate parades should be held.[9]

Identification of one out of four persons held not sufficient for conviction. However, correct identification by three out of four persons was held to be sufficient to bring home the guilt of the accused.[10] Evidence of witnesses who could identify two out of three accused in the dacoity, cannot be rejected merely because, by some mistake, one accused could not be identified.[11]

Evidence of witnesses as to the identification of a large number of dacoits cannot be accepted without corroboration.[12]

The value of identification parade is not reduced by the mere defect in conducting it by a competent Magistrate.[13]

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1. *Jamunia Partap Lohar (Mt.)* v. *Emperor*, AIR 1936 Nag 200.
2. *Mangal Singh Sonelal* v. *Emperor*, AIR 1948 Nag 78.
3. *State of Assam* v. *Upendra Nath Rajkhowa*, 1975 Cr LJ 354.
4. *Ihsanan (Mst.)* v. *Crown*, 1923 Lah 40.
5. *Vilas Vasantrao Patil* v. *State of Maharashtra*, 1996 Cr LJ 1854 (paras 6-8) (Bom), **relying on** *Ramcharan B. Gupta* v. *The State of Maharashtra*, 1995 (1) All MR 122 (Bom). **See also** *Sukesh Kumar* v. *State of H.P.*, 2000 Cr LJ 698 (paras 19 and 24) (HP), where T.I. parade was not conducted in terms of Punjab Police Rules, unreliable and non-compliance of norms and rules, *Jai Ram Ahir* v. *State of Bihar*, 2000 Cr LJ 3981 (para 5) (Pat).
6. *Tulsi* v. *State of U.P.*, 2000 Cr LJ 3080 (paras 5 and 7) (All).
7. *Sanjay Rakshit* v. *State of Bihar*, 2001 Cr LJ 445 (para 8A) (Pat).
8. *Chander Singh* v. *State*, AIR 1973 SC 1200.
9. *Ganesh Bhagwati Pandian* v. *State of Maharashtra*, 1985 CrLJ 191 (Bom).
10. *Chunnoo* v. *State*, AIR 1954 All 795; *Bijuli* v. *State*, 1985 CrLJ 1977 (Ori).
11. 1975 All Cr C 185.
12. *Bodhia Chamar* v. *State*, 1972 CrLJ 1407.
13. *S. Vamanappa Madar Shankarappa Ravanappa Kaddi* v. *State of Mysore*, AIR 1979 SC 1831; *Raja Ram* v. *State*, AIR 1966 All 192 (FB).

Where a chart was prepared by the Magistrate at the identification parade, and he was not examined to prove the particulars of the chart, such report is no evidence of the identification.[14]

Statements made by the identifying witness to the Magistrates who is conducting the identification parade, are admissible.[15]

19. BENEFIT OF DOUBT

Where the eye-witness failed to identify one of the nine accused persons, benefit of doubt should go to that one accused and not to others.[16] In a case involving a large of accused, benefit of doubt was given to the accused who were not identified by more than one witness but conviction of those identified by at least two reliable witnesses was maintained.[17]

Things said or done by conspirator in reference to common design.

S. 10. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

ILLUSTRATION

Reasonable ground exists for believing that *A* has joined in a conspiracy to wage war against the Government of India.

The facts that *B* procured arms in Europe for the purpose of the conspiracy, *C* collected money in Calcutta for a like object, *D* persuaded persons to join the conspiracy in Bombay, *E* published writings advocating the object in view at Agra, and *F* transmitted from Delhi to *G* at Cabul the money which *C* had collected at Calcutta, and the contents of a letter written by *H* giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove *A*'s complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

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14. *Ramadhar* v. *State of Bihar*, 1986 CrLJ 684 (Pat); **see also** *Sheo Raj* v. *State*, AIR 1964 All 290 (FB); **overruling** *Ashrafi* v. *State*, AIR 1961 All 153.
15. **In re** : *Narayan Singh*, AIR 1965 MP 225.
16. *Satbir* v. *Surat Singh*, AIR 1997 SC 1160.
17. *Chandra Shekhar Rind* v. *State of Bihar*, 2001 Cr LJ 4693 (paras 11, 12 and 13) (SC), the Court referred **two-witness** adopted by the Apex Court in *Binay Kumar Singh* v. *State of Bihar*, AIR 1997 SC 322 : 1997 Cr LJ 362 : (1997) 1 SCC 283.

COMMENTS

1. PRINCIPLE AND SCOPE

The principle on which the acts and declarations of other conspirators, and acts done at different times, are admitted in evidence against the persons prosecuted, is that, by the act of conspiring together, the conspirators have jointly assumed to themselves, as a body, the attitude of individuality, so far as regards the prosecution of the common design; thus *rendering* whatever is done or said by any one, in furtherance of that design, a part of the *res gestae* and, therefore, the fact of all.

According to PHIPSON (15th Edn. (2000), para 29-10, p. 728): "Where two persons are engaged in a common enterprise, the acts and declarations of the one in pursuance of that common purpose are admissible against the other. This rule applies in both civil and criminal cases and, in the latter, whether there is a charge of conspiracy or not, provided that the crime charged was committed in pursuance of a conspiracy; *i.e.*, an agreement of two or more persons to commit it."

The *mens rea* in a conspiracy consists in the intention to execute the illegal elements in the conduct contemplated by the agreement, in the knowledge of those facts which render the conduct illegal.[18]

"The admissions of one conspirator are receivable against the other if they relate to an act done in furtherance of the conspiracy, but not otherwise."[19]

See discussion under side-heading 'Co-conspirators', MC CORMICK ON EVIDENCE, 1984, 3rd Edn., pp. 792-794.

In *Bhagwan Swarup* v. *State of Maharashtra*[20] the Supreme Court has laid down the conditions under which Section 10 becomes applicable in the following terms:—

"This section, as the opening words indicate will come into play only when the court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, that is to say, there should be a *prima facie* evidence that a person was a party to the conspiracy, before his acts can be used against his co-conspirators. Once such a reasonable ground exists, anything said, done or written by one of the conspirators, in reference to the common intention, after the said intention was entertained, is relevant against the others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it. The evidentiary value of the said acts is limited by two circumstances, namely, that the acts shall be in reference to their common intention and in respect of a period after such intention was entertained by any one of them. The expression "in reference to their common intention" is very comprehensive and it appears to have been designedly used to give it a wider scope than the words "in furtherance of" in the English Law; with the result, anything said, done or written by a co-conspirator, after the conspiracy was formed, will be evidence against the other before he entered the field of conspiracy or after he left it. Another important limitation implicit in the language is indicated by the expressed scope of its relevancy. Anything so said, done, or written, is a relevant fact only "as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it." It can only be used for the purpose of proving the existence of the conspiracy or that the other person was a party to it. It cannot be used in favour of the other party or for the purpose of showing that such a person was not a party to the conspiracy. In short, the section can be analysed as follows: (1) there shall be a *prima facie* evidence affording a reasonable ground for a court to believe that two or more persons are members of a conspiracy; (2) if the said condition is fulfilled, anything said, done, or written by any of them in reference to their common intention will be evidence against the other; (3) anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them; (4) it would also be relevant for the said purpose against another who entered the conspiracy, whether it was said, done or written before he entered the conspiracy or after he left it; and (5) it can only be used against a co-conspirator and not in his favour."

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18. *Kamara* v. *D.P.P.*, (1973) 2 All ER 1242; **see also** HALSBURY'S LAWS OF ENGLAND, 4th Ed., Vol. 11 (para 60), page 46 FN 2.
19. CROSS & TAPPER ON EVIDENCE, 1995, 8th Edn, p. 654.
20. (1964) 2 SCJ 771 at 776 : AIR 1965 SC 682.

The Supreme Court[21] observed: "Section 10 of the Evidence Act has been deliberately enacted in order to make such acts and statements of a co-conspirator admissible against the whole body of conspirators, because of the nature of the crime. A conspiracy is hatched in secrecy, and executed in darkness. Naturally, therefore, it is not feasible for the prosecution to connect each isolated act or statement of one accused with the acts or statements of the others, unless there is a common bond linking all of them together. Ordinarily, specially in a criminal case, one person cannot be made responsible for the acts or statements of another. It is only when there is evidence of a concerted action in furtherance of a common responsibility, on the principle that every one concerned in a conspiracy, is acting as the agent of the rest of them. As soon as the Court has reasonable grounds to believe that there is identity of interest or community of purpose between a number of persons, any act done, or any statement or declaration made, by any one of the co-conspirators, is, naturally, held to be the act or statement of the other conspirators, if the act or the declaration has any relation to the subject of the conspiracy. Otherwise, stray acts done in darkness in prosecution of an object hatched in secrecy, may not become intelligible without reference to the common purpose running through the chain of acts or illegal omission attributable to individual members of the conspiracy." The facts of the case are A and B went to an inspector of police and asked him to hush up the case against B and said that the Inspector would be amply rewarded. Then, when A went with money to the Inspector, A was arrested and the money was seized. After investigation A and B were charged under Section 120-B. IPC. The question was whether the statements made by A, that he was sent by B with the money to be offered by way of bribe to the police officer, was admissible against B. It was held that, as both A and B went together with the proposal to hush up the case, it was clear evidence of the two persons having conspired to commit an offence of bribing a public servant and so the charge under Section 120-B was proper; that being so, anything done or said by any one of the two, with reference to the common intention, *i.e.*, conspiracy to offer bribe, was equally admissible against both of them. That statement was admissible not only to prove that B had constituted A his agent in the preperation of the crime but also to prove the existence of the conspiracy itself.

This section is based on the theory of agency. In Civil Law, there is vicarious liability of the master for the acts done by his servants, and of the principal for the acts of his agent, etc. In criminal cases, the theory of agency is applied in a limited extent to an offence like conspiracy. This section is based on the identity of interest existing between the conspirators; when the concerned action is proved, then the principle underlining this section comes into play and each conspirator would become an agent for the other. To put it in other words, the acts done by one conspirator in pursuance of the common desire or intentity of interest are admissible against his fellow conspirators.[22]

If two or more persons conspire together to commit an offence, each is regarded as being the agent of the other, and just as the principal is liable for the acts of the agent, so also each conspirator is liable for what is done by his fellow-conspirator, in furtherance of the common intention entertained by both of them.[23]

In *Sardul Singh* v. *State of Bombay*,[24] after referring to the Privy Council decision in *Mirza Akbar's* case[25], the Supreme Court observed: "On well-established authority, the principle underlying the reception of evidence, under Section 10, of the statements, act and writings of one co-conspirator as against the other is on the theory of agency.....The admission of such evidence, in proof of conspiracy or of the fact that he was a co-conspirator, is, in essence, admission not as against himself but as against the others who are on trial. To the extent that such an issue, *e.g.*, of there being a conspiracy and of his being a co-conspirator is relevant at the trial, it must be proved only by evidence under Section 10. Evidence

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21. *Badrirai* v. *State*, AIR 1958 SC 953 : 1959 SCR 1141.
22. *R* v. *Vaishampayan*, AIR 1932 Bom 56 : 55 Bom 839; *R* v. *Shafi Ahmad*, 49 Bom 642; *Vishindas, Lachmandas* v. *Emperor* AIR 1944 Sind 1; *Indra Chandra* v. *Emperor*, AIR 1929 Pat 145 (FB); *Md. Yunus* v. *State of Bihar*, 1977 CrLJ 1243; *Harish Dwarkadas Gandhi* v. *G.B. Yadav*, 1989 Mah LJ 187; *Sardul Singh* v. *State of Bombay* AIR 1957 SC 747; *Mirza Akbar* v. *Emperor* AIR 1940 PC 176; *Wahi Mohammad* v. *King*, AIR 1949 PC 103; In re : *M. Rangarajulu* AIR 1958 Mad 368; *Somireddy* v. *State*, 1959 And LT 562; *Delhi Cloth Mills* v. *Workmen*, AIR 1970 SC 919 : (1969) 2 SCR 307; *State of Maharashtra* v. *Prabhat Kumar Shantaram*, (1985) 1 Bom CR 609.
23. *Emperor* v. *Shafi Ahmed*, (1925) 31 Bom LR 515.
24. AIR 1957 SC 747.
25. AIR 1940 PC 176.

Act, which is an exceptional section limited in its application to conspiracies to commit an offence or to commit an actionable wrong."[26]

Under Section 34 of the Indian Penal Code, when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. This section makes admissible in evidence things said or done by a conspirator in reference to the common design. It applies to crimes as well as torts, *i.e.*, to joint offenders as well as joint tort-feasors. It has no bearing on the question as to how far a conspiracy to commit an offence or actionable wrong is an offence under the Indian Penal Code. It is based upon the principle that, when several persons conspire to commit a crime or a tort, each makes the rest his agent to carry the plan into execution. If the acts of one conspirator to commit an illegal act are proved, the act of one conspirator becomes an act of the other.

If two or more persons conspire together to commit an offence, each is regarded as being the agent of the other, and just as the principal is liable for the acts of the agent, so also each conspirator is liable for what is done by his fellow-conspirator, in furtherance of the common intention entertained by both of them.[27]

As the principle of this section is to ensure that one person shall not be made responsible for the acts and deeds of another until some bondage in the nature of agency has been established between them, the acts, words or writing of another which is proposed to be attributed vicariously to the person charged must be in reference to their common intention or design and after such design was entertained.[28]

Unlike in England where the wife and husband are regarded as one person for certain purposes, there is no rule in India that the wife and husband constitute one person for purposes of criminal law; and both may be charged with conspiracy with a third person.[29]

The evidence of a conspirator is admissible against his co-conspirator on the principle that the thing done, written or spoken was something done in carrying out the conspiracy, and is receivable as a step in the proof of the conspiracy. The words written or spoken may be a declaration accompanying an act and indicating the quality of the act as being an act in the course of the conspiracy or the words written or spoken may in themselves be acts done in the course of the conspiracy.

Once the common intention ceased to exist any statement made by a former conspirator thereafter cannot be regarded as one made "in reference to their common intention." In other words, a post-arrest statement made to a police officer, whether it is a confession or otherwise, touching his involvement in the conspiracy, would not fall within the ambit of Section 10. Confessional statement of the accused who is no more alive is of no evidentiary value.[30]

The provisions of Section 10 come into operation in a case when two or more persons have conspired together to commit an offence and are prosecuted under any penal provision. Where the petitioners were not being prosecuted but were detained under the provisions of COFEPOSA Act, this section is not applicable to them.[31] Section 10, which is an exception to the general rule, while permitting the statement made by one conspirator to be admissible as against another conspirator, restricts it to the statement made during the period when the agency subsisted. Once it is shown that a person became snapped out of the conspiracy, any statement made subsequent thereto cannot be used as against the other conspirators under this section. Whether a particular accused had ceased to be a conspirator or not, at any point of time, is a matter which can be decided on the facts of that particular case. Normally, a conspirator's connection with the conspiracy would get snapped after he is nabbed by the police and kept in their custody because he would thereby cease to be the agent of the other conspirators. In the instant case, the prosecution could not establish that the accused who were arrested, continued to conspire with those conspirators remaining outside. At any rate it cannot be said that the

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26. **See also** *Bhagwan* v. *State*, AIR 1965 SC 682.
27. *Emperor* v. *Shafi Ahmed*, (1925) 31 Bom LR 515 : AIR 1949 Bom 642.
28. *Hamza* v. *State of Kerala*, 1978 Ker LT 963; *Lal Chand* v. *State*, 1972 Raj LW 675.
29. *R* v. *Butchi*, ILR 17 Mad 401; *Abdul Khadar* v. *Taib*, AIR 1957 Mad 339.
30. *State of Gujarat* v. *Mohammed Atik*, AIR 1998 SC 1686 : 1998 Cr LJ 2251 (paras 14 and 17), **approving** *Indra Chandra Narang* v. *Emperor*, AIR 1929 Pat 145 : 30 Cr LJ 646 and **relying on** *Bhagwan Swarup Lal Bishan Lal* v. *State of Maharashtra*, AIR 1965 SC 682 : (1964) 2 SCR 378; *Mirza Akbar* v. *King Emperor*, AIR 1940 PC 176 : 41 Cr LJ 871 and *Sardul Singh Caveshar* v. *State of Bombay*, AIR 1957 SC 747: 1958 SCR 161.
31. *Abhay Tuli* v. *Lt. Governor*, 1998 Cr LJ 3217, at page 3221 (Del).

confession made by an accused can be used as substantive evidence against the other co-accused on the principle enunciated in Section 10. Thus, the confessional statement made by an accused after his arrest, if admissible and reliable, can be used against a confessor as substantive evidence, but its use against the other co-accused would be limited only for the purpose of corroboration of other evidence.[32]

2. "REASONABLE GROUND TO BELIEVE"

The operation of this section is strictly conditional upon there being reasonable ground to believe that two or more persons have conspired together to commit an offence.[33] There must be reason to believe that there was a conspiracy and the accused persons were members of that conspiracy.[34]

In order to decide whether any act done or statement made or thing written by an alleged conspirator is admissible in evidence against any person, the test is to see first, whether there is reasonable ground to believe that a conspiracy existed between him and such person; and, secondly, whether such act, statement or writing had reference to their common intention.[35]

This expression means that there should exist *prima facie* evidence in support of the existence of conspiracy between two accused, and it is then only that anything said, done, written by one can be used against the other.[36] The application of this section follows the findings that there is a reasonable ground to believe that a conspiracy exists and certain persons are conspirators, and it does not precede that finding.[37]

Where the accused persons who were connected with the investigation of a crime had to associate with their colleagues who were also investigating the crime, this association alone could not be considered by itself to be incriminating; in the absence of any other evidence which would make out a reasonable ground for holding them to be members of the conspiracy; they were entitled to be acquitted.[38] The statements made by the co-conspirators can be used by the Court for purposes mentioned in Section 10 only after the basic satisfaction is arrived at, and that satisfaction must be based upon reasonable ground which, from the nature of things, must be founded on some different material, or some other independent evidence.[39] Where the finding of the High Court was that there was reasonable ground to believe that the appellant and the other accused had conspired together, the confessional statement made by him could be used against the other accused also.[40]

The Calcutta High Court following the Privy Council case in *Gill* v. *R*,[41] held: Once a reasonable ground to believe that several persons have conspired to commit an offence exists, the acts and declarations of a particular person in reference to the common intention are relevant facts, although that person may not so much as even know of the existence of many others engaged in the conspiracy, or they are utter strangers to him. A trial Judge may admit evidence under Section 10 of the Evidence Act; yet, he may reject it, if at a later stage of the trial that ground of belief is displaced by further evidence. In *Gill's* case the Privy Council observed that in the same reasoning an appellate court which has from the outslet refused that belief must refuse also to admit evidence which was admissible only upon the footing of the belief being entertained. It is not necessary that in a conspiracy charge, evidence once admitted remains admissible evidence whatever new aspect the case may assume, whether in the original or in the appellate court.[42]

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32. *State of T.N.* v. *Nalini*, 1999 Cr LJ 3124 (paras 111, 114-116) (SC) : AIR 1999 SC 2640.
33. *Barndra Kumar Ghose* v. *Emperor*, ILR (1909) 37 Cal 467, 504; *Natwarlal* v. *State of Bombay*, (1963) 65 Bom LR 660 (SC).
34. *Chandrattan* v. *Crown*, ILR (1945) Kar 129.
35. *Balmokand* v. *Crown*, (1915) PR No. 17 of 1915 (Cr).
36. *Naimat Singh*, ILR (1953) 2 All 250; *Kehar Singh* v. *State (Delhi Admn)*, AIR 1988 SC 1883.
37. *Chandrattan Moondra* v. *Emperor*, AIR 1945 Sind 188; *Emperor* v. *Shafi Ahamed*, 31 Bom LR 515.
38. *Baburao Bajirao Patil* v. *State of Maharashtra*, (1971)3 SCC 432.
39. *Shanti Prasad Jain* v. *State*, ILR (1972)1 Del 536; *Daulat Ram Sud* v. *Kamleswar Dutt*, ILR (1971)2 Cal 308; *Narainlal Nirla* v. *State of Rajasthan*, 1984 CrLJ 1495; *Natwarlal* v. *State of Bombay*, (1963) 65 Bom LR 660.
40. *Ammini* v. *State of Kerala*, AIR 1998 SC 260 : 1998 Cr LJ 481.
41. AIR 1948 PC 128.
42. *Samunder Singh* v. *State*, AIR 1965 Cal 598.

3. CONSPIRACY

Conspiracy consists in a combination or agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means.

The constituent elements of criminal conspiracy consist of: (1) an agreement between two or more persons; (2) to do an illegal act; (3) to do a legal act by illegal means; (4) an overt act done in pursuance of the conspiracy.[43]

Section 120-A, Indian Penal Code, defines conspiracy as follows: "When two or more persons agree to do, or cause to be done, an illegal act or an act which is not illegal, by illegal means, such an agreement amounts to criminal conspiracy. Provided that no agreement, except an agreement to commit an offence, shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such an agreement in pursuance thereof.

The Indian Penal Code makes a few exceptions as in the case of English Law of conspiracy *viz.* Section 311 IPC (*Thug*), Section 400, IPC (belonging to a gang of dcoits), Section 401, IPC (belonging to a gang of thieves), Section 402, IPC (being a member of an Assembly of dacoits), Section 121-A, IPC (conspiring to wage war). In the above cases the accused is punishable whether an act is done or not and, even if the offence is committed or not in furtherance of the conspiracy. Besides that he is also punishable separately for every offence committed in furtherance of the conspiracy.

This section has nothing to do with the question as to how far a conspiracy to commit an offence or actionable wrong is an offence under the IPC.[44]

Only one overt-act by itself is not sufficient for infering that there was participation in a criminal conspiracy.[45]

The offence of conspiracy would be complete when two or more persons conspire to do or cause to be done an illegal act, or an act which is not illegal, by illegal means. It is immaterial whether or not the illegal act is the ultimate object of the conspirators.[46]

For further cases reference may be made to commentaries on the Indian Penal Code.

4. TWO OR MORE PERSONS HAVE CONSPIRED TOGETHER—NO CONSPIRACY BY ONE INDIVIDUAL

Section itself states that when two or more persons conspired etc: it follows that there must be two or more persons for committing an offence of conspiracy. Following the decision in *King* v. *Plummer*[47], the Allahabad High Court, in *Gulab Singh* v. *Emperor*[48] observed: "It is necessary in a prosecution for conspiracy to prove that there were two or more persons agreeing for purpose of conspiracy and that there could not be a conspiracy of one.[49] In that case the Jury found one of the two accused was not a party to the agreement, and acquitted him. It was held that it follows as a matter of course that the other accused cannot be convicted of that charge, as to constitute conspiracy, the assent of both the accused was necessary.

When three persons were charged two of them were found having no concern with the conspiracy, it was held that the third person also cannot be convicted even on his own confession.[50]

5. AGREE TO CONSPIRE TOGETHER

There is a distinction between conspiracy and other offences in that, conspiracy consists simply in an agreement or confederacy to do some act and it is no matter whether it is done or not; but, in other

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43. *Emperor* v. *Rashbehari*, AIR 1936 Cal 753: *State* v. *Jaigovind*, AIR 1951 Raj 89.
44. *R* v. *Tirumalreddy*, ILR 24 Mad 523.
45. *Rameswar* v. *State*, AIR 1965 Cal 38.
46. *Jitendra* v. *R*, AIR 1937 Cal 99 (SB).
47. (1902) 2 KB 339.
48. AIR 1961 All 14.
49. **See also** *King Emperor* v. *Osman Sardar*, AIR 1924 Cal 809.
50. *Topandas* v. *State of Bombay*, AIR 1956 SC 33; **In re** : *Rangarajulu*, AIR 1958 Mad 368.

offences, mere intention to do a criminal act in itself is not a crime, until something is done which amounts to doing of an act or attempting to do some act so as to carry out the intention.

Though to establish the charge of conspiracy there must be an agreement, there need not be proof of direct meeting or combination, nor need the parties be brought into each other's presence; the agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design. So again, it is not necessary that all should have joined in the scheme from the first; those who come in at a later stage are equally guilty, provided the agreement be proved.

So long as the design of the conspirators rests in intention only, it is not indictable.

Where the deceased, the earlier paramour of a woman was last seen in the company of hers and her later paramour and her intimacy with the deceased had revived which the later paramour was averse to, that itself was held to be not sufficient to hold that they had agreed to kill the deceased.[51]

6. CONSPIRACY—PROOF OF CONSPIRACY

According to the section, the proof must relate to anything said or done "in reference to their common intention". The Supreme Court, in *Bhagwan Swroop* v. *State*,[52] held that the expression has a wider scope than the words "in furtherance of" in the English Law.[53] There should be *prima facie* evidence that a person was a party to the conspiracy before his acts can be used against the co-conspirators. Where the accused was charged of conspiring to approve purchase of T.V. sets at hiked prices and there is only a signature put by the accused petitioner in the file, subsequent to the direction of the then Chief Minister to send the revised notes, this act without anything more could not be said to be the outcome of abetment and conspiracy and charge of conspiracy against him was improper.[54] Where there were entries in the diaries regarding acceptance of illegal gratification by the petitioner but there was no evidence on record except the alleged entries to *prima facie* prove the *factum* of conspiracy, provisions of Section 10 were not attracted.[55] Where entries in the books of account allegedly showed conspiracy amongst all the accused persons, the prosecution witness only indicated that one of the accused was known to other accused persons and had gone to their residence on formal occasions and the witnesses did not speak even a word about the other accused, it was held that conspiracy was not proved.[56]

The law requires specific proof that each of the conspirators participated with a particular design to do a particular criminal act.[57]

As the essence of conspiracy is secrecy, there may be no witness to say that the conspirators agreed to carryout an unlawful object. It is only from the conduct and the acts of the conspirators, that their agreement can be inferred. The Supreme Court, however, held, in *Ramanath* v. *State*[58], that where there was no evidence whatsoever of any pre-meditation or of a pre-arranged plan by the assailant of murdering the deceased, the mere fact that all the accused were seen at the place of offence at the time of firing, did not justify the inference of a common intention.

It is not necessary that more than one person should be convicted for the offence of criminal conspiracy. It is enough if the court can find that two or more persons were actually concerned in the criminal conspiracy.[59]

In view of the secrecy among the conspirators, it is from the members of the family or from the persons who are intimately connected with those persons, or from their associates, the evidence of conspiracy can be gathered.[60] Conspiracy may be inferred from the criminal acts done by the alleged

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51. *State of Kerala* v. *P. Sugathan*, 2000 Cr LJ 4584 (para 17) (SC) : AIR 2000 SC 3323.
52. AIR 1965 SC 682.
53. **See also** *Sammunder Singh* v. *State*, AIR 1965 Cal 598; *Harichand* v. *State*, ILR (1974) 2 Del 706.
54. *V.R. Nedunchezhian* v. *State*, 2000 Cr LJ 976 (paras 89, 98 and 99) (Mad).
55. *L.K. Advani* v. *Central Bureau of Investigation*, 1997 Cr LJ 2559 (Delhi).
56. *Central Bureau of Investigation* v. *V.C. Shukla*, AIR 1998 SC 1406 : 1998 Cr LJ 1905 (para 43).
57. *Sailendra Nath Mitra* v. *State*, AIR 1954 Cal 373.
58. AIR 1953 SC 420.
59. *Dalip Singh* v. *State of Punjab*, AIR 1953 SC 367; *Bimbadhar Pradhan* v. *State of Orissa*, AIR 1956 SC 469; *Kapildeo Singh* v. *The King*, AIR 1950 FC 80.
60. In re : *Govinda Reddy*, 1958 Cr LJ 1488 : AIR 1958 Mys 150.

conspirators.[61] The agreement to conspire may be inferred from circumstances which raise a presumption of a concerted plan to carry out an unlawful design.[62] Conspiracy can be proved by circumstantial evidence.

Sixteen accused were tried for an offence under Section 121-A, IPC, the evidence that was sought to be relied, consisted of some documents and letters which were in the handwriting of some of the accused, and which were seized from them by the police. It was held that the handwriting of the different accused can be proved by the witnesses acquainted with the handwriting, and it is relevant under Section 47, of this Act, and that, as it is always difficult to secure outside independent evidence, it can be proved by the conduct of the accused, and the documents and letters. When a letter is found with a conspirator, and its writer and addressee are known, it is admissible against other conspirators. The possession of documents creates an inference that the possessor is aware of its contents, that the agreement may be inferred from the circumstances giving to a presumption of common concerted plan to carry out the unlawful design.[63]

Where an accused got examined himself as a defence witness, his evidence relating to a communication between one conspirator and the other during the period when the conspiracy was going on, and which related to implementing the conspiracy, was held relevant though whether such evidence can be relied upon or not is a separate issue.[64]

In *Baburao Bajirao Patil* v. *State of Maharashtra*[65], it was held that in a case of conspiracy in which only circumstantial evidence is forthcoming, when the broad features are proved by trustworthy evidence connecting all the links of a complete chain, then isolated events and the confessional statements of co-accused lending assurance to the conclusions of the Court can be considered as relevant material.

Conspiracy can be proved by the surrounding circumstances or by the antecedent or subsequent conduct of the accused.[66]

Documents written by the deceased describing conversation with a third person who referred to the accused as a conspirator were held admissible.[67]

In re.: *Rangarajulu*,[68] it was held that the existence of a secret code by itself is evidence to support the inference that the persons named therein have conspired to commit an offence.

7. ANYTHING SAID, DONE OR WRITTEN

Anything 'said' would include the statements speeches, or declarations made by the person.[69] Evidence of communication between conspirators while the conspiracy is on is admissible.[70] The statements of a co-accused during the trial under Section 342 Cr.P.C. (old) are not admissible against others.[71] Any statements by one conspirator to another about the complicity of a third conspirator is a relevant fact. In *R* v. *Surya*,[72] a document had been written by a dead person, referring to her conversation with a third person who told her that the accused was one among his revolutionary friends from whom he used to take guidance. It was held that it was admissible as a statement, and that it was a relevant fact under this section.[73]

The expression 'written' would include the manuscript, whether signed or unsigned; written or typewritten. A letter written by a person who is a stranger to the transaction is not admissible.[74] On a trial for forgery, a letter written by a person, who had no hand in the forgery, to his brother, a stranger to the

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61. *Abdul Hamid* v. *State of Tripura*, AIR 1958 Tri 1 : 1958 CrLJ 97.
62. *Barindra Kumar Ghose* v. *Emperor*, ILR (1909) 37 Cal 467.
63. *Ngargam Mahandra Singh* v. *State of Manipur*, AIR 1952 Mani 4 : 1952 CrLJ 1518.
64. *Tribhuvan* v. *State*, AIR 1973 SC 450.
65. (1971) 3 SCC 432.
66. In re : *Rangarajulu*, AIR 1958 Mad 368 : 1958 CrLJ 906.
67. *Emperor* v. *Surya Kumar Sen Gupta*, AIR 1934 Cal 221.
68. AIR 1958 Mad 368.
69. *Jhabwala* v. *Emperor*, AIR 1933 All 690; *Chandra Narang* v. *Emperor*, AIR 1929 Pat 145.
70. *R* v. *Abani*, 38 Cal 169.
71. *Emperor* v. *Abanibushan*, 38 Cal 169; *Kunwar Sen* v. *Emperor*, AIR 1933 Oudh 86.
72. AIR 1934 Sind 221 (FB).
73. See also *Shyamkumar* v. *R*, AIR 1941 Oudh 130.
74. *Emperor* v. *Keshav Narayan*, 25 Bom LR 248.

transaction, was produced. The writer of the letter was not examined; but the letter was allowed to go in under this section. It was held that the letter was not admissible in the absence of evidence that its writer was a conspirator in the fabrication of the will.[75]

This section will apply to 'anything said, done or written' by a conspirator who gives evidence as an approver.[76]

As a matter of prudence corroboration is required of such evidence of an approver unless the Court is satisfied that he is speaking the truth.[77]

8. COMMON INTENTION

The section states that anything said, done or written by one of such persons in reference to their common intention, after the time when such intention was first entertained, is relevant.

In *Bhagwan Swaroop* v. *State,*[78] it was held that the expression "In reference to their common intention" is very comprehensive and is designedly used to give a wide scope, with the result that anything said, done or written by a co-conspirator, after the conspiracy is formed will be evidence against the other before he entered the field of conspiracy or after he left it.

The expression refers to the acts intended as a result of common intention of the conspirators, in future, and not to the common intention in the past.[79]

9. ANYTHING SAID OR DONE OR WRITTEN IN REFERENCE TO THE COMMON INTENTION—HEARSAY EVIDENCE

The Judicial Committee, in *Mirza Akbar* v. *Emperor*[80] **approving** *Emperor* v. *Ganesh Raghunath*[81] and *Emperor* v. *Abani Bhusan*[82] observed: "Their Lordships think the words of Section 10 must be construed in accordance with it and are not capable of being widely construed so as to include a statement made by one conspirator, in the absence of the other, with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed.....In their Lordships' judgement the words 'common intention' signify a common intention existing at the time when the things was said, done or written by one of them." Their Lordships, while approving the construction placed on this section in *Emperor* v. *Ganesh Raghunath* and *Emperor* v. *Abani Bhusan,* said that the distinction was rightly drawn between communications between conspirators while the conspiracy was going on with reference to the carrying out of the conspiracy, and the statements made after the arrest or after conspiracy was over, by way of description of past events. Referring to *R* v. *Blake*[83] they observed: "what in that case was held to be admissible against the conspirator was the evidence of entries made by his fellow conspirator, contained in various documents actually used for carrying out the fraud. But, a document not created in the course of carrying out the transaction, but made by one of the conspirators after the fraud was completed, was held to be inadmissible against the other." The Privy Council also referred to the principle stated by LORD DENMAN that "a mere statement made by one conspirator to a third party, or any act of such conspirator not done in pursuance of the conspiracy, is not evidence for or against another conspirator." The decision of the Privy Council was relied by the Supreme Court on in *Sardul Singh* v. *State of Bombay*[84] which contains an elaborate discussion of the law under Section 10.

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75. *Emperor* v. *Keshav Narayan,* (1923) 25 Bom LR 248.
76. *Vishindas Lachmandas* v. *Emperor,* AIR 1944 Sind 1.
77. *Badrirai* v. *State of Bihar,* AIR 1958 SC 953; *Bolanath* v. *Emperor,* AIR 1939 All 567; *Beshoran* v. *State,* 1981 All LJ 991; *Lal Chand* v. *State,* 1972 Raj LW 675; *Bagawandas Keshwani* v. *State of Rajasthan,* AIR 1974 SC 898 : 1974 Cr LJ 751; *Tribhuvan Nath* v. *State of Maharashtra,* AIR 1973 SC 450 : 1972 CrLJ 1277; (Communications between the conspirators). In re : *Rangarajulu,* AIR 1958 Mad 368 : 1958 CrLJ 906; *Nathuram Godse* v. *Rex,* ILR 1956 Punj 499 (FB).
78. AIR 1965 SC 682. **See also** *State of Maharashtra* v. *Damu Gopinath Shinde,* 2000 Cr LJ 2301 (paras 44 and 46) (SC) : AIR 2000 SC 1691.
79. *Sital* v. *R,* AIR 1920 Cal 300; *Pritan* v. *R,* AIR 1939 Sind 185.
80. AIR 1940 PC 176.
81. AIR 1932 Bom 56.
82. AIR 38 Cal 169.
83. (1844) 6 QB 126.
84. AIR 1957 SC 747.

These words signify a common intention existing at the time when the thing was said, done or written by one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. In *Bhagwan Das* v. *State*,[85] two persons were charged with defrauding the Government by fabricating three cash memos to appear as if they had purchased medicines and obtained payment against those cash memos. The medical store proprietor who was one of the accused admitted that the cash memos were fictitious and that they were prepared at the instance of the other accused. The Supreme Court, held that the cash memos are in pursuance of an agreement between the two accused and could be used in evidence against both under this section.[86]

It follows that what is said, done or written by one of them after the common intention or conspiracy had ceased to exist would not be admissible against a co-conspirator.[87] In re.: *Rama Ratan*,[88] one accused asked another accused to supply an explosive to blow up a bridge; after the attempt was made, it failed; he wrote a letter to the other accused asking him to supply explosive again. When both the accused were tried for conspiracy, the letter written for supplying again another explosive was held to be inadmissible. A statement by an absconding accused was made the basis for framing a charge against the accused under Section 120-B, IPC, but that statement was long after the period of alleged conspiracy was over and the purpose of the conspiracy had terminated. It was held that the statement, although made by way of description of past events which happened during the period of conspiracy, was a narrative made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist and, therefore, such statements were inadmissible in evidence against any party other than the maker of the statement.[89]

10. DIFFERENCE BETWEEN ENGLISH AND INDIAN LAW

The main difference is that according to the present section, what the conspirator said, did or wrote must be in reference to his common intention; where as under the English Law, such acts must be in furtherance of the common design. This section is much wider than the English Law. The illustration given under this section would show the comprehensive nature on the subject.[90]

Therefore, the contents of a letter written by one conspirator giving an account of the conspiracy, is relevant against the others, even though it was not written in support of it or in furtherance of it. (*Ibid*).

Under this section, even after one conspirator ceases to have connection with the conspiracy, his acts are admissible whereas under the English Law, they are not admissible.

The Delhi High Court held that the expression "in reference to their common intention", used in Section 10, is very comprehensive and appears to have been designedly used to give it a wider scope than the words 'in furtherance of' in the English Law. Accordingly, anything said, done or written by a conspirator after the conspiracy was formed will be evidence though the thing was said, done or written before the other conspirator entered the field of conspiracy or the thing was said, done or written by a conspirator after the other left it.

In that case after two people conspired to smuggle gold into India from Pakistan and to send the sale proceeds from India to places outside India, it was that the statements of the accused in relation to the above facts can be used against other conspirator to prove the existence of conspiracy and that other conspirators, known or unknown, were a party to it that their being an identity of interest or community

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85. AIR 1974 SC 898.
86. **See also** *Tribhuvan* v. *State*, AIR 1973 SC 450.
87. *Mirza Akbar* v. *R*, AIR 1940 PC 176; In re : *Rama RataRam*, AIR 1944 Mad 302; *Shamsher* v. *State*, AIR 1956 Pat 404.
88. 1944 Mad 302.
89. *Sk. Md. Omar* v. *State of W.B.*, (1965) 2 Cr LJ 443; 448; *Shamsher Bahadur* v. *State of Bihar*, AIR 1956 Pat 404 : 1956 CrLJ 1220; *Sardul Singh* v. *State of Bombay*, AIR 1957 SC 747 : 1958 SCR 161; *State of Bombay* v. *Sardul Singh*, (1957) 59 Bom LR 449; *Bhadra Misra* v. *Nirmala Sundari Devi (Smt.)*, AIR 1954 Ori 23; All the above cases **followed** *Mirja Akbar* **case** (AIR 1940 PC 176).
90. *Bholanath* v. *Emperor*, AIR 1939 All 567 : ILR 1939 All 7; *Bhagwan Swroop* v. *State of Maharashtra*, AIR 1965 SC 682; **see also** *R* v. *Ambani*, ILR 38 Cal 169.

of purpose between the conspirators the statements in question are admissible under this section, as the declarations made in the statements have a relation to the object of the conspiracy.[91]

Anything said, done or written "in reference to the common intention" is admissible, and therefore the contents of letters written by one in reference to the conspiracy is relevant against the others even though not written in support of it or in furtherance of it.[92]

The evidence of a conspirator's subsequent conduct, that is, conduct subsequent to the commission of the offence of conspiracy, is admissible to show that he himself was a conspirator. For the purpose of proving the identity of others, who might have been concerned along with himself in the conspiracy, his subsequent conduct would not be relevant. That identity must be proved by independent evidence. But, for showing the existence of a conspiracy and showing that he himself was a conspirator in that conspiracy, his subsequent conduct is relevant and the evidence about it is admissible under this section.[93]

11. ANTECEDENT CONDUCT

Evidence throwing light on the object of conspiracy like speeches, statements made in speeches, some correspondence between the conspirators who have identity of thought are admissible under this section.[94]

The illustration under this section would show that who one who procured the arms outside the country, another collected money in Calcutta, another persuaded persons to join the conspiracy, another published writing advocating the object, all acts individually are relevant and prove the existence of a conspiracy, though one of them may be ignorant of the several acts done by others at different places.

The conduct and the surrounding circumstances must relate to the offence and must not be too remote. For example, where the facts are that the accused was an associate of the conspirators and was anxious to escape observation, and was doing his best to conceal his whereabouts, after the date of the occurrence connected with the criminal conspiracy, or was assisting the conspirators in their defence, though all relevant, if they fall short of proof of an agreement which is the gist of the crime, then such conduct is not admissible.[95]

12. AGAINST EACH OTHER

This expression is in reference to their common intention and the facts and declarations of which evidence is given in the case can reasonably be said to have reference to the object of the conspiracy. And they will be good evidence not only against the maker but also against others who are believed to be so conspiring.[96]

This expression is intended to prove the existence of a conspiracy, *i.e.*, to show that a person was a party to it, and cannot be used in favour of the other party or for the purpose of showing that such a person was a party to it.[97]

The section applies to acts and declarations of one of body of conspirators in respect of the common design of all. Everything said or done by any of the conspirators in furtherance of the common object is evidence against each and all of the parties concerned, whether they were present or absent. Thus, the cries of the mob, with whose proceedings LORD GORDON was connected, though made in his absence, were held to be admissible against him, as explanatory of the objects which he in common with the multitude had in view.[98]

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91. *Harichand* v. *State*, ILR (1974) 2 Del 706.
92. *Emperor* v. *Bhola Nath*, (1939) All 736.
93. *State of Bombay* v. *Sardar Sardul Singh*, (1957) 59 Bom LR 449; *State* v. *Shankar Sakharam*, (1957) 59 Bom LR 244.
94. In re : *Chidambaram*, 32 Mad 3.
95. *Rakhal Chandra* v. *R.*, AIR 1930 Cal 647 (FB).
96. *Samunder Singh* v. *State*, AIR 1965 Cal 598 : (1965) 2 CrLJ 713.
97. *Bhagwan Swroop* v. *State of Maharashtra*, AIR 1965 SC 682.
98. *Lord George Gordon*, (1781) 21 St Tr 486, 535; *Sava Kve* v. *Queen Empress*, (1892)(96)1 UBR 148.

The section is intended to make evidence communications between different conspirators, while the conspiracy is going on, with reference to the carrying out of the conspiracy.[1]

A confession by a conspirator made to a Magistrate after arrest disclosing the existence of a conspiracy, its objects and the names of its members, is not admissible under this section against the co-conspirators jointly tried with him, but only under S. 30.[2] When a person accused along with others voluntarily comes into the witness-box and deposes as a witness for defence, he is in the same position as an ordinary witness, and is, therefore, subject to cross-examination.[3] The evidence so brought out can be used against his co-accused.[4] If such a witness incriminates his co-accused, he too gets the right to cross-examine him.[5] Once his evidence as a witness for the defence is on record and it speaks of a communication between one conspirator and the other during the existence of the conspiracy and relates to its implementation, it becomes relevant.[6]

13. CONFESSION BY CO-ACCUSED

This section makes admissible evidence only communications between different conspirators. This section is not intended to make the confession of a co-accused as evidence and put on the same footing as a communication passing between different conspirators with reference to the conspiracy, though it may be considered under Section 30, of this Act. The value of such confession cannot be placed higher than the statement of an accomplice which, as a rule of prudence, requires corroboration.[7]

Though in some cases,[8] it was held to the contrary, they cannot be good law in view of the later Privy Council decision in *Mirza Akbar's* case.[9]

In *Haricharan* v. *State*[10], it was held that the confession of a co-accused cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence and feels the necessity for an assurance in support of its conclusion deductible from the said evidence. Where the other evidence is wholly unsatisfactory, the prosecution cannot rely on the confession of the co-accused, as against the presumption of innocence which applies to an accused person. This case was distinguished in *Baburao Bajirao* v. *State*[11]. It was held that where only circumstantial evidence is forthcoming and broad features are proved by trustworthy evidence connecting all the links forming a complete chain, then on isolated events, the confessional statements of the co-accused can be considered for lending assurance to the conclusions of the Court.

In the absence of any reliable and trustworthy evidence such confession cannot be used in a conspiracy case.[12] In another case it was held that in the absence of reliable evidence beyond reasonable doubt confession of a co-accused cannot be used against others.[13]

The satisfaction of the court as regards the existence of the conspiracy must be based upon some other independent evidence and not by virtue of confessional statements of the co-conspirator, though it is relevant under this section.[14]

Statement of an accused to a doctor, though incriminating, is not a confession and not hit by Section 26 of the Act.[15]

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1. *Emperor* v. *Abani Bhushan Chuckerburty*, (1910) 38 Cal 169, 178 (SB). **See also** *Shivnarayan* v. *State of Maharashtra*, AIR 1980 SC 439 (where the conduct of Conspirators was held to be relevant against a person who joined the conspiracy by providing help in concealing deficiencies in the balance of Laxmi Bank).
2. *Emperor* v. *Abani Bhushan Chukerbutty*, (1910) 38 Cal 169 (SB).
3. *People's Ins. Co* v. *Sardul*, AIR 1962 Punj 101 and *Jibachh Shah* v. *State*, AIR 1965 Pat 331.
4. *King* v. *James Paul*, (1920) 2 KB 183, 185.
5. *Rex* v. *Hadwen*, (1902) 1 KB 882, (887)8.
6. *Tribhuvan Nath* v. *State of Maharashtra*, AIR 1973 SC 450.
7. *Ram Prasad* v. *R*, AIR 1927 Oudh 369; *R.* v. *Abanibhusan*, 38 Cal 169; *Dengo* v. *R.*, AIR 1938 Sind 94; *Baliram* v. *R.*, AIR 1938 Nag 295.
8. *Satdeo* v. *R.*, AIR 1936 Oudh 164; and *Kunjalal* v. *R.*, 38 Cal WN 1015.
9. AIR 1940 PC 176.
10. AIR 1964 SC 1184.
11. (1971) 3 SCC 432.
12. *Kedarsingh* v. *State*, (1988) 3 SCC 609.
13. *Kehar Singh* v. *State*, (1988) 3 Crimes 210 (SC).
14. 1984 Cr LR 317 (Bom).
15. *State of Kerala* v. *Ammini*, AIR 1988 Ker 1 : 1988 Cr LJ 107 (FB).

14. WHEN SUCH INTENTION WAS FIRST ENTERTAINED BY ANY ONE OF THEM

This wording used in the section is intended to fix the period from which time the evidence can be adduced as to the facts said and done or written by any one of the conspirators and which took place before the common intention ceased to exist.[16]

A agreed to supply B one packet of explosive for purpose of blowing up a railway bridge and B along with C used the explosive, but his attempt proved unsuccessful; later B wrote a letter to A mentioning his unsuccessful attempt and asked him to supply some more explosive substance. On those facts it was held by the Madras High Court, that the letter of B was not admissible against A, as the common intention had ceased to exist after the attempt to blow up the bridge failed.[17]

15. RETRACTED CONFESSION

A retracted confession of co-accused does not constitute substantive evidence within the meaning of Section 3 of this Act. It can only be taken into account by the Court in arriving at its conclusions. Its value however, depends on the facts and circumstances of each case. It has also to be borne in mind that a retracted confession being a weak link even against the maker, it must necessarily be more so against the co-accused.[18]

Retracted confession can form the basis of a conviction if corroborated on material particulars by other evidence. Such confession of an accused can be used against others when conspiracy on their part is proved.[19]

16. STATEMENT OF APPROVER

Section 10 would apply to the evidence of an approver with reference to anything said, done or written by him. But there must be reasonable grounds for believing the evidence of the approver. It requires corroboration on material particulars for relying on that evidence. If the evidence of the approver is found to be unreliable, the question of corroboration would not arise.[20] When a conspirator is given pardon by the court he becomes an approver on certain conditions according to law; and he is expected to give out the truth to the court. At times to avail of the pardon one may become an approver. Therefore, it is necessary as a rule of prudence, to require corroboration, of his evidence specially in the case of conspiracies.[21]

The possession of a document would be evidence to show that the conspirator in whose possession it was found had received and preserved it, though the execution or authorship of the document is a question of fact. Regarding documents found in possession on search or otherwise. they are admissible only where it is proved that it is in the handwriting of the concerned person. The mere fact that it is found in one's possession does not prove the truth of its contents against the other accused.[22]

Where there was correspondence between one accused living in India and a revolutionary in Berlin, it was held that it was not incumbent to show that the letters were in fact written by the other in Berlin and that it was enough to show that some person in Berlin was in conspiracy with the accused and correspondence was passing between them.[23] Where a postcard was written by one accused who was in prison to another accused, it is admissible as the document is not in the nature of a mere confession provided the conditions of Section 10 are complied with.[24]

But the Nagpur High Court held that any statement made by a conspirator after his arrest is not admissible against others under Section 10, though it may be admissible under Section 30 as a confession of a co-accused.[25]

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16. *Sardul Singh* v. *State*, AIR 1957 SC 747.
17. In re : *Rama Ratanan*, AIR 1944 Mad 302.
18. *Baburao Bajirao* v. *State of Maharashtra*, (1971) 3 SCC 432.
19. *State of Kerala* v. *Ammini*, AIR 1988 Ker 1 : 1988 CrLJ 107 (FB); *Kehar Singh* v. *State (Delhi Admn.)* AIR 1988 SC 1883.
20. *Krishnalal Naskar* v. *State*, 1982 CrLJ 1305 (Cal).
21. *Vishindas Lachmandas* v. *Emperor*, AIR 1944 Sind 1 (FB).
22. *Jitendra* v. *R.*, AIR 1937 Cal 99 (SB).
23. *Jhabwala* v. *R.*, AIR 1933 All 690.
24. *Abdul Azis* v. *R.*, AIR 1932 Cal 557.
25. *Baliram* v. *R.*, AIR 1938 Nag 295.

17. SECTION 10—120-B, INDIAN PENAL CODE

As a general rule, evidence of commission or commissions constituting the offence is to be confined to the period mentioned in the charge; for the purpose of charge of conspiracy, however, there cannot be a blanket ban, as there are certain provisions of the Evidence Act, other than Section 10, with the aid of which evidence outside the period mentioned in the charge can be admitted and relied upon. In a charge of conspiracy, conduct in general of each conspirator including his acts, writings and statements is evidence against himself. Such conduct, irrespective of the time to which it relates, can be relied upon by the prosecution to show the criminality of the intention of the individual accused with reference to his proved participation in the alleged conspiracy. Such evidence will be admissible under Sections 8 and 14 of the Evidence Act.[26]

In *Badri Rai* v. *State of Bihar*[27], the facts were when an Inspector of Police was on his way to the police station, A and B approached him with a request to hush up a criminal case pending investigation against B for a reward; the Inspector drew up F.I.R., of the offer of the bribe on his own statement and prepared a seizure list of the money offered to him; at once the inspector arrested A; after usual investigation A and B were put on trial under Section 120-B read with Section 165-A, Indian Penal Code and they were convicted. Dealing with that case, their Lordships posed the question whether the statement made by A that he was sent by B with the money to be offered by way of bribe to the Inspector was admissible against A. It was observed: "The incident when both A and B approached the Inspector with the proposal that he should hush up the case against B for which he would be amply rewarded, was clear evidence of the two persons having conspired to commit the offence of bribing a public servant in connection with the discharge of his public duties. Therefore, the charge under Section 120-B had been properly framed against both of them. That being so, anything said or done by one of the two, with reference to the common intention, namely, the conspiracy to offer bribe, was equally admissible against both of them. That statement was admissible not only to prove that B had constituted A his agent in the perpetration of the crime, but also prove the existence of the conspiracy itself."

18. SECTION 10—120-A, INDIAN PENAL CODE

Where the accused were charged with criminal conspiracy under Section 120-A, Indian Penal Code for an offence of using a forged document as genuine and thereby dishonestly obtaining money, it was held that proof of conspiracy to commit forgery for purpose of cheating is admissible under this section.[28]

Where two accused were put on trial for smuggling gold into India from Pakistan and remitting the sale proceeds from India to outside India, it was held that, there being an identify of interest or community of purpose between the conspirators, the statements of the conspirator are admissible under this section, as the declarations made in the statements have a relation to the object of the conspiracy; the essence of conspiracy is that there should be an agreement between two or more persons to do an act of enumerated in Section 120-A of the Penal Code. Statements refering to the activities of the co-accused or with reference to their common intention are relevant as against each of the persons believed to have so conspired, as well as for the purpose of proving the existence of the conspiracy as also for the purpose of showing that any such person was a party to it.[29]

When the acts of accused persons fall within the definition of making 'False Documents; by preparing parts of the documents separately, but acting in concert with each other it was held that the conviction under Section 468 read with Section 120-A Indian Penal Code is to be upheld, as the several acts of the accused are admissible under this Section.[30]

19. SECTION 10—121-A INDIAN PENAL CODE

Where there were 16 accused in a conspiracy case, it was found that some of the documents and letters seized from them were in the handwriting of some of the accused, and some witnesses identified

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26. (1978) 2 Cal LJ 214.
27. AIR 1958 SC 953.
28. *Abdulla Mohammad Pagarkar* v. *State of Goa*, 1977 Cr LJ 1835.
29. *Hirachand* v. *State*, ILR (1974) 2 Del 706.
30. *Narayan Lal Nirala* v. *State of Rajasthan*, 1984 CrLJ 1495.

the handwriting of some of the accused. It was held that the handwriting of the different accused identified by some prosecution witnesses acquainted with it is relevant under Section 47 of the Evidence Act. When a letter is found with a conspirator, and its writer and addresses are known, they are admissible as relevant under this section to prove the existence of the conspiracy against other conspirator. The possession of a document creates an inference that the possessor is aware of its content; in order to establish conspiracy, an agreement may be infered from circumstances raising a presumption of common concerted plan to carry out the unlawful design.[31]

20. HEARSAY EVIDENCE

Normally, hearsay evidence is not admissible unless it explains any accompanying conduct of a co-conspirator but, subject to certain conditions, it is admissible under Section 10.[32]

21. CRIMINAL BREACH OF TRUST

It was held by the Supreme Court in *Sardul Singh* v. *State*[33] that where a charge against the accused specified the period of conspiracy, the evidence of the act of co-conspirators outside the period is not receivable; but in the cases of criminal breach of trust, all evidence which would go to show that certain transactions are bogus is certainly admissible under other sections of this Act. But that would be notwithstanding that such evidence may refer to and narrate the acts of the conspirators beyond the period of conspiracy, but within reasonable limits.

When facts not otherwise relevant become relevant.

S. 11. Facts not otherwise relevant are relevant—

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

ILLUSTRATIONS

(a) The question is, whether *A* committed a crime at Calcutta on a certain day.

The fact that, on that day *A* was at Lahore is relevant.

The fact that, near the time when the crime was committed, *A* was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(b) The question is, whether *A* committed a crime.

The circumstances are such that the crime must have been committed either by *A*, *B*, *C* or *D*. Every fact which shows that the crime could have been committed by no one else and that it was not committed by either *B*, *C* or *D*, is relevant.

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31. *Ngargam Mahendra Singh* v. *State of Manipur*, AIR 1952 Mani 4 : 1952 Cr LJ 1518.
32. *Trilochan Joshi* v. *Union of India*, 1983 Chand Cr C (Del) 249 : (1983)1 Crimes 1025
33. AIR 1957 SC 747.

COMMENTS

1. PRINCIPLE AND SCOPE—FACTS NOT OTHERWISE RELEVANT

Chapter 2 of this Act deals with relevancy of facts, under Sections 5-55. Leaving out this particular Section 11, other sections in this chapter deal with different types of facts and make them relevant. Certain facts which are not otherwise relevant are made relevant under this section. That is why this section is regarded as a residuary section. They would be relevant provided the conditions specified in clauses (1) & (2) as explained by illustrations are fulfilled. Under the first clause, a fact which is inconsistent with any fact in issue or relevant fact, would be relevant. The following statement by Stephen, the framer of this Act, in his introduction to the Act, which was quoted with approval by the Supreme Court in *Ramchander* v. *State of Haryana*[34] contains the best commentary on the second clause. "It may possibly be argued that the effect of the second paragrah of Section 11 would be to admit proof of such facts as these, *viz.*, (i) statements as to facts made by persons not called as witnesses; (ii) transactions similar to but unconnected with the facts in issue; and (iii) opinions formed by persons as to fact in issue; as relevant facts. It may, for instance, be said: "A (not called as a witness) was heard to declare that he had seen B commit a crime". This makes highly probable that B did commit that crime. Therefore, A's declaration is a relevant fact under Section 11(2). This was not the intention of the section, as is shown by the elaborate provision contained in the following part of Chap. II (Sections 32 to 39) as to particular classes of statements, which are regarded as relevant facts either because the circumstances under which they are made invest them with importance, or because evidence can be got. The sort of facts which the section was intended to include are facts which either exclude, or imply more or less distinctly, the existence of the facts sought to be proved. Stephen was of the view that some degree of latitude was designedly left in the wording of the section on account of the variety of matters to which it might apply. The meaning of the section would have been more fully expressed if words to the following effect had been added to it. 'No statement shall be regarded as rendering the matter stated highly probable within the meaning of the section, unless it is declared to be relevant fact under some other section of this Act'."

Under this section, any fact which either disproves, or tends to prove or disprove, any claim or charge in a case is made relevant. The effect of this and the previous section is to make every relevant fact admissible as evidence. Thus, where the question is whether *X* lent money to *Y*, evidence of the property of *X* about the time of the alleged loan is admissible as tending to disprove it. Similarly, where the question is whether *X* is the child of *Y*, evidence of the resemblance, or want of resemblance, of *X* to *Y* is admissible. In *Rex* v. *Parbhudas*[35] WEST J., said:— "Section 11 of the Evidence Act is, no doubt is expressed in terms so extensive that any fact which can, by a chain of ratiocination, be brought into connection with another, so as to have a bearing upon a point in issue, may possibly be held to be relevant within its meaning. But the connections of human affairs are so infinitely various and so far-reaching, that thus to take the section in its widest admissible sense, would be to complicate every trial with a mass of collateral inquiries limited only by the patience and the means of the parties. One of the objects of a law of evidence is to restrict the investigations made by Court within the bounds prescribed by general convenience, and this object would be completely frustrated by the admission, on all occasions, of every circumstance on either side having some remote and conjectural probative force, the precise amount of which might itself be ascertainable only by a long trial and a determination of fresh collateral issue, growing up in endless succession, as the inquiry proceeded. That such an extensive meaning was not in the mind of the legislature, seems to be shown by several indications in the Act itself. The illustrations to Section 11 do not go beyond familiar cases in the English Law of Evidence."

Collateral facts which, by way of contradiction, are inconsistent with a fact in issue or another relevant fact, *i.e.*, which make the existence of a fact in issue or a relevant fact probable or improbable, or which, by way of corroboration, are consistent with the existence of a fact in issue or a relevant fact, *i.e.*, tend to render the existence of a fact in issue or a relevant fact highly probable, are themselves made relevant by the present section.[36]

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34. AIR 1981 SC 1036.

35. 1874 Bom HCR 90. 91.

36. *Rangayyan* v. *Innasimuthu*, AIR 1956 Mad 226.

The words of this section are wide in their scope and the evidence which would be held to be admissible in English Law would be properly admitted under this section.[37]

Questions have arisen as to whether recitals in deeds between third parties, recitals of boundaries in the documents not *inter partes*, and judgment not *inter partes* would be admissible under this section.

The Patna High Court expressed the view that Section 11, has been expressed in very wide language, and, the questions of valuation, non-passing of consideration, absence of necessity for sale, and matters of such nature will certainly be relevant. The section however, does not admit of collateral facts which have practically no connection with the main fact. In considering only the sole question whether a deed has been executed within the meaning of Section 35, the Registration Act, questions like valuation, absence of necessity for sale, etc. cannot be relevant under Section 11 of the Evidence Act. It would appear that such questions do not come within the first part of the section, as they cannot be said to be truly inconsistent with the fact in issue, which is the proof of execution of the document within the meaning of Sections. 35 and 77 of the Registration Act. In a suit properly framed, but not under Section 77 of the Registration Act, such facts will be admissible under the second part of Section 11 as the question of validity of the document and the effect of the execution will be the fact in issue. For an enquiry in a suit under Section 77 of the Registration Act, these collateral facts are not so mediate as to render the issue of mere execution highly probable or improbable.[38]

JUSTICE CHANDRAVARKAR in *Khaver Sultan* v. *Rukha Sultan*[39] held that, to make a collateral fact relevant and admissible under this section, two requirements of law have to be fulfilled:—firstly, the collateral fact must itself be established by reasonable conclusive evidence and, secondly, when established, it must afford a reasonable presumption or an inference as to the matter in dispute. This view was later affirmed in.[40]

Thus, where the question in issue was whether possession was duly given of certain immovable properties under a deed of gift, so as to make it complete and valid under the Muhammadan Law, it was held that, if the deed of gift must be held to have operated effectually as to immovable property, the fact of this partial delivery, being a collateral fact fulfilling all the requirements of the law, was relevant under this section as making the existence of the facts in issue highly probable.[41]

The admissibility under this section in each case depends on how near is the connection of the facts sought to be proved with the facts in issue, to what degree do they render facts in issue probable or improbable when taken with other facts in the case, and to what extent would the admission of the evidence be inconsistent with principles enunciated elsewhere in this Act.[42] Where the accused was charged with having entered into a conspiracy to bring false evidence against a certain person, his previous acts of having instituted unfounded prosecution against that person are admissible in evidence. (*Ibid.*).

The expression 'fact' and a statement as to its existence, are different. This section deals with the admissibility of the existence of facts and not the statements as to its existence. If statements are to be admissible, the fact of making that statement must in itself be a matter in issue.[43]

Evidence recorded by one forum cannot be read in relation to the proceedings emanating from the other forum.[44]

Section 11 and Section 32.—There is difference of opinion between different High Courts in regard to whether Section 11 is subject to Section 32. One view is that this section is subject to the other provisions of the Act, and that any statement not satisfying the requirements of Sections 32 and 33 cannot be admitted simply on the ground that such statement may render highly probable or improbable

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37. *Queen Empress* v. *Vajiram*, 16 Bom 414.
38. *Rajendra Singh* v. *Ramganit Singh*, AIR 1954 Pat 556.
39. (1904) 6 Bom LR 983.
40. *Bibi Khaner Sultan* v. *Bibi Rukha Sultan*, 29 Bom 468 : 7 Bom LR 443.
41. *Khaver Sultan* v. *Rukha Sultan*, (1904) 6 Bom LR 983 at p. 285.
42. *Htin Gyaw* v. *Emperor*, ILR (1927) 6 Rang 6, 14.
43. *Nauna Khatun* v. *Basant Singh*, AIR 1934 All 406; *R.D. Sethna* v. *Mirza Mohammad Surzahi*, 9 Bom LR 1047; *Ambikacharan* v. *Kumud Mohan*, AIR 1928 Cal 983; *Thakurji* v. *Parmeshwar Dayal*, AIR 1960 All 339.
44. *Sangeeta Balkrishna Kadam* v. *Balkrishna Ramchandra Kadam*, AIR 1994 Bom 1 (para 9).

a fact in issue or relevant fact. VARADHACHARIAR J. in *Sevugan Chetiyar* v. *Raghunatha Doraisingam*[45] observed: 'as regards Section 11, it seems to us that Section 11 must be read subject to the other provisions of the Act, and a statement not satisfying the conditions laid down in Section 32 cannot be admitted merely on the ground that, if admitted, it may probabilise or improbabilise a fact in issue or a relevant fact.

The same view was held in *Belarani* v. *Mahabir*[46]; *Naima Khatun* v. *Basant Singh*[47]; *Bhogal Paswan* v. *Bibi Mabihan*[48] and *Kamla Devi* v. *Rodreshwar Prasad Singh*[49]. In *Bhogal Paswan* v. *Bibi Mabihan*, rent receipt in respect of the suit lands granted by a landlord to the plaintiff, describing the plaintiff as the daughter of the tenant, was held not admissible under Section 32 of the Act as the landlord was still alive and there was no explanation on behalf of the plaintiff for his non-examination and the statement in the receipt as to the relationship of the plaintiff with the deceased tenant not being admissible under Section 32, cannot be relevant under Section 11.

The Assam High Court is also of the same view. Where a single note was made by a deceased in a diary, the question was whether that statement in the diary was admissible under Section 11. It was held that a statement made by a deceased person, to be relevant under Section 32(2), has to be one made 'in the course of ordinary business'; that Section 32(2) indicates a routine of business which is usually followed by the person whose declaration is sought to be proved, and it does not apply to any particular transaction of an exceptional kind and a solitary note in a diary by a deceased, which it is not possible to ascertain why and when it was made, cannot in the circumstances be said to be one made by the deceased in the normal routine and Section 32 is not applicable. Section 11 is controlled by Section 32 of the Act when the evidence consists of a statement of a person who is dead.[50]

On the other hand, it was observed in *State* v. *Jagdeo*[51]. "If a fact is relevant under Section 32, it can be proved notwithstanding that it is not relevant under Section 11, and to say that a fact relevant under Section 11 cannot be proved unless it is covered by the provisions of Section 32, is nothing short of striking out Section 11 from the Evidence Act. When Section 32 itself is sufficient to allow a fact to be proved, it would have been futile for the legislature to enact Section 11 if a fact made relevant by that section could not be proved unless it was also relevant under Section 32."

The same view was expressed by the Mysore High Court in the following terms: "Recitals in a document not *inter partes* are not 'facts' as mentioned in Section 11, unless the existence of those recitals is itself a matter in issue. Sections 11 and 32 cover different fields and there is no question of any overlapping, if properly construed. In brief, Section 11 deals with 'facts' while Section 32 deals with 'statements'. Section 32 is an exception to the rule of hearsay and it is proper to read Section 11 as an exception to Section 32. The several sub-sections of Section 32, in a measure, take in portion of a few other provisions contained in the Evidence Act. This is indicative of the fact that Section 32 exhaustively deals with law relating to relevancy of statements made by persons mentioned therein.[52]

In *Kalappa Siddappa* v. *Bhimagovind*,[53] it was stated that the recitals in a document not *inter partes* are not 'facts' within the meaning of that word in Section 11, that Sections 11 and 32 deal with different fields, as was pointed out in *State* v. *Jagdeo*[54]. They quoted with approval the observations in that case.

There is yet another view. The rule that Section 11 is controlled by Section 32 where the evidence consists of the statements of persons who are dead or cannot be found is subject to certain exceptions. It is admissible under Section 11 when it is altogether immaterial whether what a dead man said was true or false, but highly material that he did say it. In these circumstances, no amount of cross-examination could alter the fact, if it be a fact, that he did say the thing, and if nothing more is needed to bring the things said under Section 11, then the case is outside Section 32. There is a difference between the

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45. AIR 1940 Mad 273.
46. ILR 34 All 341.
47. AIR 1934 All 406.
48. AIR 1963 Pat 456.
49. 1976 Hindu LR 185.
50. Sec. 11 also cannot be relied on AIR 1972 Assam 86.
51. 1958 All LJ 380.
52. *Ravjappa* v. *Nilakanta Rao*, AIR 1962 Mys 53 **following**; *Krishna Mohan Ghosh* v. *Surapate Banerjee*, AIR 1925 Cal 684; *Soney Laljah* v. *Derabdeo*, AIR 1935 Pat 167 (FB); *Naima Khatun* v. *Basant Singh*, AIR 1934 All 406 (FB).
53. AIR 1961 Mys 160.
54. 1955 All LJ 380.

existence of fact and a statement as to its existence. Section 11 makes admissible the existence of facts, and not statements as to such existence, unless the fact of making that statement is in itself a matter in issue."[55]

2. CLAUSE (1) "IF THEY ARE INCONSISTENT WITH ANY FACT IN ISSUE OR RELEVANT FACT"

The importance of this clause that it gives a party an opportunity to disprove some fact, which is asserted by the opposite party. The principle of essential inconsistency is underlined in this clause. The usual theory of essential inconsistency is that a certain fact cannot co-exist with the doing of the act in question, and, therefore, if that fact is true of a person of whom the act is alleged, it is impossible that he should have done the act. Wigmore, in his Evidence (2nd Ed., Section 132, Vol.1) observes: "The usual theory of essential inconsistency is that a certain fact cannot co-exist with the doing of the fact in question, and, therefore, if that fact is true of a person of whom the act is alleged, it is impossible that he should have done the act..... The inconsistency, to be conclusive in proof, must be essential, *i.e.*, absolute and universal, but since in offering evidence, we are not required to furnish demonstration but only fair ground for inference, the fact offered need not have this essential or absolute inconsistency, but merely a probable or presumable inconsistency; and its evidentiary strength will increase with this approach to absolute or essential inconsistency."

Where the question was whether a particular deed was executed within the meaning of Section 13 of the Registration Act, it was held that the questions like valuation and absence of necessity for sale cannot be relevant under this section, as such questions do not come within the first clause of the section and as they cannot be said to be inconsistent with the fact in issue, which under Sections 35 and 77 of the Registration Act is only the execution of the document.[56]

Even where a deed of relinquishment could not be admitted for want of registration under Section 17B, read with Section 49 of the Registration Act, it was held that it was relevant and admissible under this section, if the deed was inconsistent with the fact in issue in the case.[57]

According to WIGMORE, the facts which would normally fall under this section are of five common cases, though there may be some more conceivable cases.

(1) The absence of the person charged at the place of occurrence (*alibi*);

(2) The absence of a husband (non-access)—a variety of the preceding;

(3) The survival of an alleged deceased person after the supposed time of death;

(4) The doing of a crime by a third person; and

(5) The self-infliction of the harm alleged (see Wigmore Section 136-144, 2nd Ed).

If an object is secreted by the accused and recovered from his conscious possession and is found to be an incriminating object, it is relevant under Section 8 or Section 11(2).

Mere physical presence of the accused in proximity or in close proximity to the object cannot by itself be an incriminating circumstances unless it can be held that he was in conscious and intelligent possession of that object. Merely because he is the head of the joint family, or the owner of the house, he cannot be credited with constructive knowledge of a hidden thing. There would be no possession when there is no knowledge. Possession without knowledge lacks the element of *mens rea* or criminal intent which is essential for an offence.[58]

It was held: "A person cannot be said to be in possession of an article which he or she does not realise is or may be in her handbag, in her room or in some other place, over which she had control."[59]

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55. *Thakurji* v. *Parameshwar*, AIR 1960 All 339; **See also** *Ambikacharan* v. *Kumud Mohan*, AIR 1928 Cal 893; *Sethana* v. *Mirza Muhammad*, 9 Bom LR 1047; *Kamla Devi* v. *Rodreshwar Prasad Singh*, 1976 Hindu LR 185 (Pat).
56. *Rajendra* v. *Ramganit*, AIR 1954 Pat 556.
57. *Sheobandhan Singh* v. *Sahdeo Prasad*, AIR 1930 All 130.
58. *Re, Kodur Thimma Reddy*, AIR 1957 AP 758.
59. *Lockyer* v. *Gibb*, (1967) 2 QB 243 : (1966) 2 All ER 653; *Warner* v. *Metropolitan Police Commissioner*, (1968) 2 All ER 356 (HL); *Sweet* v. *Parsley*, 1970 AC 132 : (1969) 1 All ER 347; ("carries" means carries to his knowledge) 1950 AC 458.

3. *ALIBI*

Meaning of.—The plea of *Alibi* postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea can, therefore, succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed[60]; distance thus would be a material factor in the matter of acceptability of the plea of *alibi* and the distance of 400-500 yards between the place of occurrence and the place where the accused claimed to be present cannot be said to be 'present elsewhere'.[61] *Alibi* is based on the theory that the fact of presence elsewhere is essentially inconsistent with the presence of the accused at the place and time of the alleged occurrence, and the participation in it.

Where the accused handed over his diary to the police and claimed that certain entries establish his presence at a different place on the night in question, it is relevant under illus. (*e*) of Section 8 read with this section.[62]

4. *ALIBI*—APPLIES TO CIVIL CASES ALSO

WIGMORE (Vol. 1, Section 136, p. 570) states that the argument of *alibi* is not confined to criminal acts but may be equally applied to the disproof of civil acts, such as the execution of a deed.

5. PLEA OF *ALIBI* IS TO BE TAKEN UP AT A VERY EARLY STAGE

In *Sahdeo Shham* v. *State of Vindhya Pradesh*[63]; it was held that a request to call the witness to prove *alibi* at the very end of the trial would appear to be vexatious and dilatory, unless the possibility of making such a request has been indicated at the earlier stages. A defence of *alibi*, if true, is to be raised at the earliest moment.[64]

6. PROOF OF *ALIBI*

Strict proof is required to prove the plea of *alibi* and the burden was on the accused. In the instant case, strict proof of impossibility of the presence of the accused at the place of occurrence was not available and hence the plea was not sustainable.[65]

Where a plea of *alibi* is set up and it utterly breaks down, it is a strong inference that, if the prisoner was not in fact where he says he was, then in all probability, he was where the prosecution says he was.[66]

The plea of *alibi* must be proved with absolute certainity, so as to completely exclude the possibility of the presence of the person concerned at the place of occurrence.[67] Where there was no contemporaneous document was produced to prove the plea of *alibi*, it was not accepted.[68] In a case Supreme Court observed that absence from the factory did not mean absence from the place of crime, the same being nearby.[69]

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60. *Dudh Nath Pandey* v. *State of U.P.*, AIR 1981 SC 911.
61. *Munshi Prasad* v. *State of Bihar*, AIR 2001 SC 3031 (para 3) : 2001 Cr LJ 4708.
62. *Ranjit Singh* v. *State*, AIR 1952 HP 81.
63. AIR 1954 VP 6.
64. In re : *M K. Thiagaraja Bhagavathar*, AIR 1946 Mad 271; *Chhoga* v. *Rex*, AIR 1950 Ajmer 18; *Dilwar* v. *Emperor*, AIR 1936 Lah 233; *Ramadhin Brahmin* v. *Emperor*, AIR 1929 Nag 36.
65. *Singha Magan Gamit* v. *State of Gujarat*, 1999 Cr LJ 2111 (paras 26 and 27).
66. *Mohinder Singh* v. *State of Punjab*, 1971 CrLJ 1764.
67. *State of Maharashtra* v. *Narsingrao Gangaram*, AIR 1984 SC 63; *State of Haryana* v. *Sher Singh*, AIR 1981 SC 1021. **Also see** *Binay Kumar Singh* v. *State of Bihar*, AIR 1997 SC 322 : 1997 Cr LJ 362; *Rajesh Kumar* v. *Dharamvir*, 1997 Cr LJ 2242, no contemporaneous document produced; *Mithilesh Upadhya* v. *State of Bihar*, AIR 1997 SC 2457 : 1997 Cr LJ 2983; *Pandurang Shivram Kawathkar* v. *State of Maharashtra*, 2001 Cr LJ 2792 (para 12) (Bom).
68. *Rajesh Kumar* v. *Dharamvir*, AIR 1997 SC 3769 (para 23) : 1997 Cr LJ 2242 (SC), **reversing** Cri A No. 80 and 81 –DB of 1985, decided on 20.12.1988 (P&H).
69. *Dudh Nath Pandey* v. *U.P.*, AIR 1981 SC 911; **See also** 1984 Cr LJ (Raj) 179.

The Allahabad High Court held that if the evidence by the accused in respect of his plea of *alibi* creates a reasonable doubt about the genesis of the occurrence, it would be sufficient to give benefit of doubt to the accused.[70]

WIGMORE observes: "The defendant's case is often much weakened by an unsuccessful attempt to prove an *'alibi'*. But this result happens, not because of any implied or technical admission involved in the attempt but because of fraud and subornation of perjury manifested in the attempt..... In no case can the attempt be held to involve an admission of crime, nor the simple failure to establish it afford any presumption of the defendant's presence at the time and place when and where the crime was committed..... It can have no effect upon the question of his presence at the place charged, otherwise than by disclosing falsehood and prevarication and thus affording general evidence of guilt."[71]

The prosecution case cannot be said to have been proved against a particular accused, merely because the accused came out with a plea of *alibi*, the evidence in support of which was found to be untrustworthy.[72]

A fool-proof *alibi* is no doubt the most effective answer to a charge. A false plea of *alibi* is very dangerous, the result of which is like a bubble if successfully picked rebounds on him who has taken it, which while smashing his defence, strengthens the prosecution.[73]

For the purpose of arriving at the conclusion that the plea of *alibi* has been established, not only the defence evidence in support of the plea but also the prosecution evidence should be examined. The accused has to prove the plea of *alibi* under Section 103 of this Act, and it is not for the prosecution to prove that the accused was absent from duty on the date of occurrence.[74]

The plea of *alibi* must cover the whole time of the transaction or atleast so much period as to render the presence of the accused improbable at the time of the crime.[75]

The Privy Council, in *Bhuboni Sahu* v. *The King,*[76] observed: "The tendency to include the innocent with the guilty is peculiarly prevalent in India, as judges have noted on innumerable occasions, and it is very difficult for the court to guard against the danger. An Indian villager is seldom in a position to place cogent evidence of *alibi*. If he is charged with having taken part in a crime on a particular night when he was in fact asleep in his hut, or guarding his crops, he can only rely, as a rule, on the evidence of his wife, members of his family, or friends to support his story, and their evidence is interested and not likely to carry weight. The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting upon independent evidence which in some measure implicates each accused."[77]

7. APPRECIATION OF EVIDENCE IN RESPECT OF *ALIBI*

Where the accused pleads, that he was away from the house when the offence was committed and the evidence to the contrary was proved, it was held that the *alibi* failed[78] and the Court would be slow to believe any counter evidence.[79]

Where the eye-witness evidence was corroborated by other witnesses in respect of the fact that the accused immediately after the incident was absconding from the village, the plea of *alibi* that the accused had gone to another city cannot be accepted.[80] The uncorroborated oral evidence of *alibi* given by one witness cannot be relied upon, specially when the witness gives no reason for being able to remember the

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70. *Ram Sahai* v. *State of U.P.*, 1984 All LJ 1139.
71. WIGMORE Vol. 2, Sec. 279, P. 126.
72. *State of Haryana* v. *Prabhu*, AIR 1979 SC 1019.
73. *Hadibandhu Jali* v. *State*, 1972 Cut LR (Cri) 526 : ILR 1972 Cut 1181 : (1972) 38 Cut LT 1044
74. *Satya Vir* v. *State*, 1958 Cr LJ 1266 : AIR 1958 All 746; *Parbhoo* v. *Emperor*, AIR 1941 All 402 (FB)
75. *Milawa Shingh* v. *State*, 1969 Raj LW 254.
76. AIR 1949 PC 257, 261.
77. **See also** *Ambikacharan Roy* v. *Emperor*, AIR 1931 Cal 697 (FSB).
78. (1983) 2 Chand LR (Cri) 339. **Also see** *Brijlala Pd. Sinha* v. *State of Bihar*, AIR 1998 SC 2443 (para 12) : 1998 Cr LJ 3611; *Nisar Ahmad Fajmahomed Kaji* v. *State of Gujarat*, (1998) 9 SCC 23 : 1998 SCC (Cri) 967.
79. *State of Gujarat* v. *Chavda Manaji Chelaji*, 2000 Cr LJ 1091 (paras 11 and 11.1) (Guj).
80. *Dodo Majhi* v. *State*, (1984) 88 Cal WN 312.

exact dates on which the accused is alleged to have come to the village of the witness, and to have left it.[81]

It was held by the Allahabad High Court, that, if the *alibi* evidence be good and no weakness is detected by the court in it, it should not be given the go by. If the court comes to know of no weakness in the prosecution evidence, the two cannot be true and the weakness must be found somewhere, however difficult it might be. If the court fails to find any weakness in either, the benefit of such failure must go to the accused and not to the prosecution, because a well-established *alibi* must be sufficient to show that the prosecution witnesses were not speaking the truth, or atleast to throw doubt upon their truthfulness. When a defence of *alibi* is set up and that defence utterly breaks down, it is a strong inference that, if the prisoner was not in fact where he says he was, then in all probability he was where the prosecution says he was. Moreover, such inference is to be drawn only when the defence of *alibi* breaks down and not when it is disbelieved.[82]

The evidence of a highly interested witness supporting the plea of *alibi* is liable to be rejected.[83] In a case, two out of the three accused set up the plea of *alibi*; where the victim received as many as 19 injuries, it was held that the number of injuries suggested that they were caused by more than one miscreant and the defence of *alibi* was not tenable.[84] Where the accused claimed to be out of the house seeing a cinema show at the time of murder, in view of the evidence of the witness who stated that he heard shouts of the daughter of the accused that her father was beating her mother, it was held that the plea of *alibi* was not proved.[85] Where the accused pleaded that he was hospitalised on the date of occurrence, and the nurse who made the entries in the hospital's indoor register was not examined, it was held that the plea failed[86] but where the accused was discharged from a hospital situated 180 kms. away from the place of occurrence one a half hours earlier only from the time of incident, the plea of *alibi* was proved.[87]

8. PLEA OF *ALIBI*—PLEA OF SELF-DEFENCE

If there is sufficient material on record to show that the accused acted in his right of private defence of property, he cannot be deprived of the benefit of the plea of self-defence, even though he tries to set up the plea of *alibi* in vain and pleads the right of private defence in the alternative.[88]

9. COMMISSION OF CRIME BY THIRD PERSON

If X is charged with homicide, committed by him alone, and it is shown in disproof that Y did the killing, X is clearly exonerated; for the fact that Y has done it, it is inconsistent with X's guilt.[89]

10. SECTION 11(2)

The facts which make the existence or non-existence of a fact in issue, or relevant facts, highly probable or improbable, are made relevant by this clause.

11. "HIGHLY PROBABLE OR IMPROBABLE"

These words have got a significant role while deciding whether a fact, which makes the existence or non-existence of the fact in issue or relevant fact, is relevant in a particular case. It indicates that the connection between the facts in issue and the collateral facts which are sought to be proved, must be immediate so as to render the existence or non-existence of the two highly probable or improbable.[90] The

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81. *Madhuwa Pyarelal Kurmi* v. *State of V. Pra,* 1954 CrLJ 1303: AIR 1954 V Pra 36.
82. *Sheo Shanker* v. *State,* 1953 Cr LJ 1400 : AIR 1953 All 652.
83. *Mangru* v. *State,* 1983 All LJ 232 (DB).
84. *Poosaram* v. *State of Rajasthan,* 1984 Cr LJ 1848.
85. *Tulshiram* v. *State of Maharashtra,* 1984 Cr LJ 209. **See also** *Hari Chand* v. *State of Delhi,* 1996 Cr LJ 1701 (para 27) (SC) : AIR 1996 SC 1477.
86. *Dalel Singh* v. *Jagmohan Singh,* 1981 Cr LJ 667.
87. *Tulshiram Bhanudas Kambale* v. *State of Maharashtra,* 2000 Cr LJ 1566 (para 9) (Bom).
88. *Hiralal* v. *State of Bihar,* 1977 Raj LW 336 : 1977 Cr LJ 1921.
89. WIGMORE Vol. 1, section 139, p. 573.
90. *Jhabwala* v. *Emperor,* AIR 1933 All 690; *Empress* v. *Vyapoori Mudaliar,* ILR 6 Cal 655.

expression 'highly probable' is important and the facts to be proved must be so closely connected with the facts in issue, that the court will not be in a position to determine it without taking them into consideration.[91] In *Babulal Chonkhani* v. *Western India Theaters Ltd.*,[92] it was observed that the words are not 'reasonably probable'. The word is not just 'probable', th significant word is 'highly'; that means more than normal standard of probability. The illustration, although not controlling this section, indicates clearly what is the standard of high probability or high improbability. The words 'highly probable' in clause (2) of Section 11 are of great importance. Only such facts are made admissible by this clause as would carry great weight with the court in reaching a conclusion either way, with regard to existence or non-existence of a fact in issue or relevant fact. It is not mere reasonable probability that is contemplated; on the other hand, a high degree thereof is envisaged.[93]

Where one of the facts in issue was possession of a revolver, the fact that three weeks previously, the accused displayed a revolver similar in size and appearance to that with the possession of which he was charged, was held relevant under this section.[94] In a suit for recovery of possession of a plot and declaration of title, the defendants denied the existence of the plot in question or possession of the plaintiff; but its existence and possession of the plaintiff over it was acknowledged in a sale deed of the adjacent plot and hence the same was held admissible in view of Sections 13(a) and 11.[95] Where the police alleged that the accused A was arrested on 29-9-1973, and the co-accused B, apprehending his arrest, filed an application during investigation, showing that A was arrested on 27-9-1973, it was held that the application of B could be considered as part of B's statement under Section 342, Cr. P.C. (old), as it would make the arrest of A on 29-9-1973, highly improbable.[96]

Where a complainant, a printer at Bareilly claimed copyright of printing a certain book and the infringement of it by printer at Hathras, the court trying the offence at Bareilly summoned the infringing copies of the book. It was held that "The complainant cannot be restricted to produce evidence only regarding sale of the copies at Bareilly when the relevant material evidencing the alleged infringement itself was available in the shape of recovery of the mass of the infringing copies at Hathras, which would have a direct bearing on the case cognizable at Bareilly. Even though the printing of the infringing copies at Hathras might be an offence in itself under the Copyright Act, yet if that is also material for the determination of the question regarding the sale of infringing copies at Bareilly, the production of infringing copies seized at Hathras would itself become relevant.[97]

In a suit for partition, there was an arbitration. In finding out the extent of the estate, the arbitrators excluded the deposits or investments made by others, because those were not assets but liabilities of the estate. They, however, showed the depositors and their sums in the schedule annexed to the award. But as the depositors were not parties to the partition suit, no direction as to the repayment of those deposits was made in the decree made on award. On refusal by the receivers to repay them, the depositors filed a suit on the basis of the award. On the question of its maintainability, it was held, that the award might not be an admission of the assets held by the executors; but the schedule of the award and the circumstances under which it was prepared made the existence of the claim of the plaintiff highly probable and as such, was relevant under Section 11(2) of the Evidence Act.[98] Even self-serving statements, where they make the relevant fact highly probable or improbable, are admissible.[99]

In a suit where the execution of a document was in question, questions like valuation, absence of necessity of sale, are held not relevant as they do not render the execution highly probable or

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91. *Rajendra* v. *Ramganit*, AIR 1954 Pat 556.
92. AIR 1957 Cal 709, 716.
93. *Bhuriya* v. *Ramkali*, AIR 1971 Punj 9 **following** *Saroj* v. *Urmed*, AIR 1922 Cal 251; *Adwaita Chandra Saha* v. *Chittagong Co Ltd*., AIR 1925 Cal 103; *Lajpat Rai* v. *Faiz Ahmad*, AIR 1927 Lah 448; *Ghulam Muhhamad* v. *Kalimullah*, AIR 1928 Lah 428; *Pramatha* v. *Krishna*, AIR 1924 Cal 1067.
94. *Sarojekumar Chakrabarti* v. *Emperor*, AIR 1932 Cal 474 : (1932) 59 Cal 1361.
95. *Kanti Lal* v. *Shanti Devi*, AIR 1997 Raj 230.
96. *Satbir* v. *State of Haryana*, AIR 1981 SC 2074.
97. *Ghureylal* v. *State*, (1965) 1 CrLJ 530 : AIR 1965 All 206.
98. *Hrishikesu Das* v. *Smt. Khantamani Dasi*, AIR 1959 Cal 257.
99. *Harihar Prasad* v. *Keshoprasad*, AIR 1925 Pat 68.

improbable.[1] Where printed newspapers containing an account of some proceedings were found in the possession of the accused, it was held that those papers are evidence of the fact of the publication of such account in that paper, but they themselves are not evidence of the truth of the facts stated therein, unless in connection with the other facts, they make the existence or non-existence of the fact mentioned therein, 'highly probable or improbable'.[2]

Where the accused was charged under Section 401, IPC, a previous 25 years old judgment, convicting the accused for dacoity was held admissible, to show the criminal tendency and not the habit of the accused to show that the offence concerned was highly probable.[3] Where the question was whether a person was a tenant as on 1-3-1974 and the documents came into existence after 1-3-1974, it was held that they cannot be thrown out as totally irrelevant because it has to be seen on the facts of the case whether the fact in issue is highly probable or not.[4] A reference in a sale deed that the vendor was in affluent condition and that he was not in need of money is not relevant in considering the question whether consideration was paid, as such facts would not make highly probable or improbable the payment of consideration.[5] The rate for lands shown in the other documents, which are similarly situated to the land in question, would render highly probable the rate claimed and hence relevant.[6] Where the value of a land recently acquired was fixed by judicial determination or otherwise, it woud be relevant for fixing the price of the adjoining land which is now under acquisition.[7]

On a charge of forgery, evidence of possession by the accused of other documents suspected to be forged was held to be inadmissible.[8] Where the question was whether a person was a habitual cheat, the fact that he belonged to an organization formed for the purpose of habitually cheating in concert was held to be relevant, and it was open to the prosecution to prove against each person that the members of the gang did cheat.[9] But, in case of conspiracy to commit dacoity, facts showing that the object of the illegal association during a period of several months prior to the dacoity in question had been the commission of thefts and other discreditable acts were held inadmissible to prove the nature and character of the association.[10]

Evidence of plans or desire to commit suicide is admissible. In *Commonwealth* v. *Trefethen*[11], it was expained in the following terms: "The nature of the case proved by the Commonwealth was such that it was not impossible that she had committed suicide. If it could be shown that she actually had an intention to commit suicide, it would be more probable that she did in fact commit it than if she had no such intention..... It may be true that an unmarried woman pregnant with child, if she has an intention to commit suicide, does not always carry that intention into effect, although she has an opportunity; but it is impossible to say that the actual existence of such an intention does not tend to throw some light upon the cause of death of such a woman when found dead under circumstances not inconsistent with the theory of suicide.....If it could be shown that during the week before her death she had actually attempted to drown herself, and had been prevented from doing so, it seems manifest that this fact, according to the general experience of mankind, would have some tendency to show that she might have made a second attempt."

Where the dead body was not recovered but only the human skeleton, skull and some bones, but the accused showed the slippers and cycle used by the deceased, and some portions of wearing apparel, it was held that the act of the accused was relevant as the act, besides his extra-judicial confession, would make the prosecution case highly probable to show the guilt of the accused.[12]

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1. *Rajendra* v. *Ramganit*, AIR 1954 Pat 556.
2. *Jhabwala* v. *R.*, AIR 1933 All 690.
3. *Moti Ram* v. *Emperor*, AIR 1925 Bom 195.
4. *Sarojini Shedthi* v. *Putta Naik*, (1978) 1 Kant LJ 370 : ILR (1978) 1 Kant 678.
5. *Bai Asmalbai* v. *Esmailji*, AIR 1964 Guj 174.
6. *State of Orissa* v. *Rajendra Panda*, AIR 1984 Ori 86.
7. *State of Bihar* v. *Mosafir Thakur*, AIR 1980 Pat 40; *H. Narayanaiah* v. *Land Acquisition Officer*, AIR 1981 Kant 26; *Asstt. Collector & L.A.O., Gadwal* v. *Pandu Rangaiah*, 1997 AIHC 2741 (para 21) (AP).
8. *Reg.* v. *Prabhudas*, (1874) 11 BHC 90.
9. *Kalu Mirza* v. *Emperor*, ILR (1909) 37 Cal 91.
10. *Emperor* v. *Wahidduddin (No. 1)*, (1929) 32 Bom LR 324 : 54 Bom 524.
11. (1892) 157 Mass 180.
12. *Amar Layek* v. *State of W.B.*, 1988 CrLJ 1293.

12. OMISSION IN FIRST INFORMATION REPORT—AFFECTING PROBABILITIES

If there are omissions of important facts which constitute an important link of the prosecution story, and such omissions affect the probabilities of the case, they become relevant in judging the varacity of the prosecution case.[13] Where the FIR disclosed an offence of outraging the modesty of a woman and of use of abusive language, and the accused was charged with robbery, it was held that the omission in the FIR about the offence of robbery affected the veracity of prosecution case.[14] The delay in filing the F.I.R. gives rise to the improbability of the presence of the accused, and where the presence of the accused, a Government servant, at the place of occurrence was not proved, it was held that the accused was entitled to acquittal.[15]

Where the F.I.R. was lodged by a person other than the eye-witness which was not contradictory to the evidence of the eye-witness but there was merely an omission in the F.I.R. to specify overt acts of two accused persons separately, such a variance would not be a ground to reject the evidence of the eye-witness totally.[16]

Where the father of the boy who was murdered, gave the statement that the deceased boy told him the facts and that formed the first information report, and the evidence the version in the F.I.R. is found to be at great variance with the version placed at the trial, it was held that the omission of material facts affecting the probability of the case is relevant for judging the veracity of the prosecution case, and the prosecution story cannot be accepted.[17]

13. PREVIOUS JUDGMENTS

Where the question was whether the detenus were foreigners within the meaning of the Foreigners Act, and judgments delivered by Baroda State Courts holding that they are Baroda State subjects were relied on, it was held that Section 11 had no application, for, if a judgment is held to render highly probable or improbable what was found by it, no judgment would ever be rendered irrelevant, provided the subject matter is relevant to the subject matter in issue.[18] An order of rectification by a Civil Court, though not a judgment *in rem* is relevant in assessment proceedings before the I.T.O.[19]

14. JUDGMENT NOT *INTER PARTES*

Judgments not *inter partes*, even if not admissible under Sections 40, 41, 42 may be admissible under this section read with Section 43, under certain circumstances, for limited purposes.[20]

In a case where the previous suit was to recover a two-thirds share of the property in question, and the subsequent suit was by a different plaintiff to recover the remaining one-third share of the same

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13. *Ramkumar Pande* v. *State*, AIR 1975 SC 1026; *Jagabandhu Mohanta* v. *State*, (1985) 1 CrLJ 575 (Ori); *Prabhakar Behara* v. *State of Orissa*, (1984)58 Cut LT 42; *Arjun Sahu* v. *State of Orissa*, (1987) 1 Crimes 678 (though contents of FIR are not substantive evidence); *Anam Pradhan* v. *State*, 1982 CrLJ 1585 (Ori-DB); (1976) 1 Raj Cr Cases 243; *State* v. *Makund Harijan*, 1983 CrLJ 1870; (1985) 1 Ori LR 332; *Balamunda* v. *State*, (1985) 59 Cut LT 370 : 1985 (2) Crimes 69; *Jugal Kishore* v. *State*, 1984 CrLJ 360 : (1985) 2 Ori LR 179; *Nirmal Karnbar* v. *State of W B*, 88 Cal WN 150; *Shyamaghana Bindhani* v. *State*, 1987 CrLJ 952; *Prafulla Bora* v. *State*, 1988 CrLJ 428 (FIR can be used for corroboration).

14. *Ashokan* v. *State of Kerala*, 1982 CrLJ 173 (Ker).

15. *Purna* v. *State of U.P.*, AIR 1984 SC 454.

16. *Dadi Narsi Reddy* v. *State of A.P.*, 1999 Cr LJ 2055 (para 13) (AP).

17. 1980 Cut LR (Ori) 280.

18. In re : *Antonius*, AIR 1950 Bomb 101.

19. *I.T. Commissioner, Kanpur* v. *Kamla Town Trust*, AIR 1996 SC 620 (para 17).

20. *Tepu Khan* v. *Rajani Mohun Das*, ILR (1898) 25 Cal 522 (FB) (holding that *Gujju Lall* v. *Fatteh Lall*, ILR (1880) 6 Cal 171 (FB) is materially qualified by the decisions of the Privy Council in *Ram Ranjan Chuckerbutty* v. *Ram Narain Singh*, (1894) 22 IA 60 : ILR 22 Cal 533 and *Bhutto Kunwar* v. *Kesho Pershad*, (1897) 24 IA 10 : 19 All 277); *Sitaldas* v. *Santram*, AIR 1954 SC 606; *Ramkripal* v. *Mumbati Kumari*, AIR 1958 Pat 477 (Judgment not *inter partes* admissible for determining market value); *Collector Bilaspur* v. *Lachhman*, AIR 1965 HP 18 **see also** *Nageswara Rao* v. *Dy. Collector*, 1959 AP 52; *State of U P* v. *Nathhoo*, AIR 1986 All 172; *Hemchandra Purna Chandra*, AIR 1934 Cal 788 (**see** *post* **under section 13 Commentary**).

property, it was held in the subsequent suit that the judgment in the previous suit was not admissible in evidence, the subject-matter in the two suits not being identical.[21]

Except where they are judgments *in rem*, or where they relate to public matters, judgments not *inter partes* have been always held to be not *res judicata* but they cannot be wholly excluded for other purposes, insofar as they explain the nature of possession, or throw light on the motives or conduct of parties, or identify property.[22] Judgments not *inter partes* in land acquisition references relating to another land are not admissible. Award in a land acquisition matter made by the land acquisition officer is only an offer and hence not admissible in another case.[23]

The claim order passed by a civil court, rejecting the claim of the accused, can be taken to show the falsity of the statement of the accused in a criminal case.[24]

15. DOCUMENTS RECITALS IN DOCUMENTS NOT *INTER PARTES*

A piece of land was sold in parts to two different buyers who were in dispute about their respective areas. Sale-deed earlier in time was preferred as showing the probable intention of the parties.[25]

Recitals as regards boundaries in document not *inter partes* are not admissible under this section. Two conditions must be satisfied before a statement is admissible under Section 32(3) of this Act:— firstly, it must be statement of a relevant fact and, secondly, it must be a statement against the proprietory interest of the person making it. It is also necessary that the person making the statement must be aware of the fact that it is against his interest.[26]

In a suit in which the plaintiff claims title to a land, the recital of the boundary of another land in a document between him and a third party, which describes him as the owner of the suit land, is not admissible.[27]

Recital in mortgage bond executed long before the suit, describing the mortgagor as the owner of the property under a partition, is admissible.[28] Where the plaintiffs and some of the defendants were co-owners of certain properties, the question at issue being whether there was a partition between them, and whether, under that partition, the defendants came to be in possession of a specific property in lieu of their share in all the properties, a petition and a written statement filed by the defendants in certain previous suits admitting the partition and the exclusive acquisition of the specific property were held admissible against those defandants as they made the existence of the partition, which was the fact in issue, highly probable. They were also admissible under Section 21(3).[29] Where the question whether the property in the suit was kept joint, inspite of partition, was a fact in issue, a document called as *subdharana* bond executed by the party in favour of third person reciting that there was a partition of the suit property was produced, to which the plaintiff was not a party; it was held that the recital, though not binding on the plaintiff, is relevant under this section.[30] Where the question in issue was whether B had predeceased K, a statement made by a party in his own favour in an objection petition filed in previous land registration proceedings, that B had predeceased K, was held admissible under this section.[31] Recital in a sale deed about the necessity for the sale is admissible, but some evidence *aliunde* is required to prove necessity.[32] Where in an election petition filed under the Representation of People Act, 1951,

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21. *Tepu Khan* v. *Rajani Mohun Das*, ILR (1898) 25 Cal 522 (FB).
22. Per RANADE J. In *Lakshman* v. *Amrit*, 2 Bom LR 386, 393 : ILR (1900) 24 Bom 591, 599.
23. *Spl. Land Acquisition Officer* v. *Lakhamsi Govelabhai*, AIR 1960 Bom 78.
24. *Ramprasad Ramdir* v. *Dagdulal Nandlal*, AIR 1956 Ori 212.
25. *Brij Lal* v. *Ram Pratap*, AIR 1982 Del 149.
26. *R.C.R. Institution* v. *State of Mysore*, AIR 1976 Kant 75; **relying** on *Ramrati Kuer* v. *Dwarika Prasad Singh*, AIR 1967 SC 1134; *Maneklal Mansukhbhai* v. *Hormujji Jamshadji*, 1950 SC 1; *Soney Lal Jha* v. *Darbdeo Narain Singh*, AIR 1935 Pat 167 (FB); unless executant is examined, *Sadhurajan* v. *Sriramulu Naidu*, AIR 1999 Mad 377 (para 28) **relying on** *Amiappa Nainar* v. *Annamalai Chettiar*, 1972 (1) MLJ 317 : AIR 1972 Mad 154.
27. *Kalappa Siddappa* v. *Bhima Govinda*, AIR 1961 Mys 160; *The Church of our Lady of Immaculate Conception R.C.R. Institution* v. *State of Mysore*, , AIR 1976 Kant 75.
28. *Jai Gobind Singh* v. *Briji Bihari Singh*, AIR 1966 Pat 168.
29. *Gyannessa* v. *Mabarakannessa*, ILR (1897) 25 Cal 210; *Nana* v. *Shanker*, (1901) 3 Bom LR 465; *Naro Vinayak Patvardhan* v. *Narhari Raghunath*, ILR (1891) 16 Bom 125.
30. *Chatradhari Mahton* v. *Akleshwar Mahton*, AIR 1952 Pat 382.
31. *Inderdeo Rai* v. *Deo Karan Rai*, AIR 1955 Pat 292.
32. *Rani* v. *Smt. Santa Bala Debnath*, (1970) 3 SCC 722.

corrupt practice of hiring trucks is alleged, the *pukar* register and documents relating to the prosecution of truck drivers are admissible.[33] Where certain entries in A's account books were placed showing certain payments made to B, it was held that the absence of corresponding entries in B's account book, regarding receipt of such payments, though not relevant under Section 34, is relevant under Sections 5 and 11 and can be proved by B's account books.[34]

In suits for damages, facts tending to enable Court to determine amount are relevant.

S. 12. In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant.

COMMENTS

1. PRINCIPLE AND SCOPE

Section 5 states that evidence may be given of facts in issue or relevant facts, whereas Sections 6-11 deal with certain facts which are generally relevant to the facts in issue or relevant fact. This section deals with the fixation of damages and such of those facts as would enable the Court to determine the amount of damages. Section 73 of the Contract Act deals with the facts which are relevant for purpose of fixing the amount of compensation. Under this section, in a suit for damages, facts tending to 'determine' the amount of damages, which are to be awarded by the court only are relevant. Section 55 of this Act states that in civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive is relevant. The explanation thereunder shows that in Sections 53, 54 and 55 the word 'character' includes both reputation and disposition. So, to cover cases under Section 73 of the Contract Act and Section 55 of this Act, this section becomes important.

This section enables the court to admit any facts which will help it to determine the amount of damages which ought to be awarded to a party. When damages are claimed in a suit, the amount of damages is a fact in issue. 'Damages' are the pecuniary satisfaction which the plaintiff may obtain by success in an action.

For the meaning of damages standard treatises on 'Damages' may be referred to.

This section prescribes the mode of using the former statements of a witness for the purpose of contradicting the him.[35]

2. HOW TO ASSESS

(1) The damage suffered should be as near as possible, to the sum which will put the injured party in the same position as he would have been if he had not sustained the wrong foi which he is awarded damages or compensation.

(2) Damages are usually assessed on the basis of actual loss suffered and are called general or ordinary damages.

(3) Where the plaintiff has not suffered any real damages by reason of breach of contract, normally, nominal damages are awarded.[36]

(4) Special damages can be awarded for personal inconvenience or physical dis-comfort caused by the other party. Where malice, fraud or defamation is involved, causing damage to the reputation of the individual, then exemplary damages can be awarded for the wrongful act of the defendant.

Thus there are four types of damages which the courts can grant.

Damages may be recovered either for breach of contract under Section 73 of the Contract Act, or for loss of goods under Sale of Goods Act, 1930, or in an action for tort.

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33. *Pratap Singh* v. *Rajender Singh*, AIR 1975 SC 1045.
34. *State of A.P.* v. *Checmalapti Ganeswara Rao*, (1963) 2 CrLJ 671 : AIR 1963 SC 1850.
35. *State of Rajasthan* v. *Teja Ram*, 1999 Cr LJ 2588 (para 32) (SC) : AIR 1999 SC 1776.
36. *Arjunsa* v. *Mohanlal*, AIR 1937 Nag 345.

In *Thawardas Perumal* v. *Union of India*,[37] it was held that the parties by express agreement, may vary their rights and obligations which may arise under the law. And if they do so, the express agreement will govern them.

Where defamatory statements imputing misconduct on the part of a man towards his step-daughter were the subject matter of a suit, and in defence truth was pleaded, evidence that the step-daughter herself had been spreading rumours that her step-father had been making improper advances to her, was held relevant under this section for assessing damages.[38]

The Supreme Court held that, for determining the amount payable as compensation, the evidence of a person who had made an offer for the purchase of that land is relevant to show that the land was of certain value.[39] In suits for compensation for short delivery by the railway authorities or for deterioration of the goods entrusted to the railways, it was held that the short delivery certificate or non-delivery certificate upon which the words 'without prejudice' are found, would not amount to admission of the liability, and proof of actual damages and the quantum of damages is necessary in such cases.[40]

Under this section it may be laid down generally that evidence tending to determine, *i.e.*, to increase or diminish the damages, is admissible though not expressly involved in issue. Thus, in an action for breach of promise of marriage, the plaintiff may give evidence of the defendant's fortune; for it obviously tends to prove the loss sustained by the plaintiff; but not in an action for adultery; not for malicious prosecution. But the evidence of the amount of damages, which is the necessary and obvious result of the defendant's breach of contract, or of his tort, may be proved, though only alleged generally in the plaint.[41]

Facts relevant when right or custom is in question.

S. 13. Where the question is as to the existence of any right or custom, the following facts are relevant:—

(a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence.

(b) particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from.

ILLUSTRATION

The question is, whether *A* has a right to a fishery. A deed conferring the fishery on *A*'s ancestors, a mortgage of the fishery by *A*'s father, a subsequent grant of the fishery by *A*'s father, irreconcilable with the mortgage, particular instances in which *A*'s father exercised the right, or in which the exercise of the right was stopped by *A*'s neighbours, are relevant facts.

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38. *Masem Tin* v. *Kyaw Marg*, AIR 1936 Rang 332.
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COMMENTS

1. PRINCIPLE AND SCOPE

This section provides that where the question is as to the existence of any right or custom, certain transactions or certain instances are relevant. A transaction to be relevant must be, one by which the right or custom in question was created, claimed, modified, recognised, asserted, or denied or which was inconsistent with its existence (*vide* Cl. (a)). Instances to be relevant, under Cl. (b) must be those in which the right or custom was claimed, recognised or exercised or in which its exercise was disputed, asserted or departed from. Facts which are not covered by Cls. (a) and (b) cannot be made relevant in view of Section 5, where it is stated that facts as are hereinafter declared to be relevant and *of no others* are relevant. Further only particular instances and not statements are relevant. The difference in wording in Cls. (a) & (b) may be noted. Cl. (a) speaks of a transaction by which the right or custom in question was created, modified etc., or which was inconsistent with its existence. But in Cl. (b) the three words created, modified, denied are not used as in Cl. (a). The words 'claimed', 'recognised' are common in both the clauses. Cl. (a) does not speak of the exercise of a right or custom.

The cases, this section is intended to meet, are those in which the right or custom in question is regarded as capable of surviving repeated instances of its assertion and denial, where transactions may be supposed to have gone on modifying, asserting, denying, creating, recognizing it, or being inconsistent with its existence, leaving it, after all that has been given in evidence, fair matter for judicial consideration as to whether the court should or should not decree it.[1]

2. APPLICABILITY

Originally it was thought that this section applies only to incorporeal rights[2] which was followed in *Kalidhan Chuttapadhya* v. *Shibanath Chuttapadhya*[3] and *Ramkishun* v. *Niranjan Pande*[4].

It was so held in *Gujjulal's* case on the ground that the right mentioned in the section is one which can be 'created or exercised' which expressions are appropriate when speaking of an incorporeal right; but would be wholly inapplicable to the word 'right' in its more extended sense; it would be quite correct to speak of the creation or the exercise of a right of way or of a franchise, but no lawyer would think of saying that a right to chattel or to damages had been 'created or exercised'. In the same case R.C. MITTER J., while dissenting from the majority view observed 'then it has been said that in Section 13 of the Evidence Act, the Legislature intended to refer to incorporeal right only because, in other parts of the Act, for example in Sections 32 and 48, where the same word occurs in conjunction with the word 'custom' it has been used in that sense. In the first place, it is by no means clear that Sections 32 and 48 deal with only incorporeal rights. It is not impossible to conceive of a corporeal right being of a public or general nature;..... Moreover, no reasonable ground can be suggested for the necessity of restricting the meaning of the word 'right' in Section 13 to the class 'incorporeal'..... But the contention that the

1. *Mahamad* v. *Hasan*, (1906) 31 Bom 143 : 9 Bom LR 65.
2. *Gujjulal* v. *Fatehlal*, ILR 6 Cal 171 (FB).
3. ILR (1882) 8 Cal 483 (FB).
4. AIR 1933 Pat 285 : ILR 12 Pat 285.

section in question refers only to incorporeal rights, whether of a public or private nature, does not seem to me to be warranted by any general principle..... Why should the transaction of the nature described in Section 13 be relevant when A claims a right of way over a piece of land held and owned by B, and not so when he claims the land itself, appears to me inexplicable. It seems to me that the distinction would be arbitrary." Thus according to him Section 13 applies to both corporeal and incorporeal rights.

The dissenting view of JUSTICE MITTER, found favour in some cases.[5]

The judgment in a prior suit was held admissible as an instance in which there was an assertion that certain properties belong to joint family, in a subsequent suit in which those properties were claimed to be self acquired properties.[6] A judgment sought to be adduced in a pending suit cannot be refused as not receivable on the ground that it was rendered in a subsequently instituted suit. The use of past tense in Section 13(b) refers to the date of judgment and not the institution of the suit.[7]

The term "right" includes right of ownership. Where there is a dispute about adverse possession of land and oral evidence of owners of adjoining fields and sale deeds are produced to corroborate their evidence, it was held that the sale deeds are admissible as relevant and their admissibility is covered under Section 157.[8]

The term 'right' comprehends every right known to the law.[9]

The rights contemplated by this section are plainly conceived as admitting of proof by cumulative instances and transactions, and not by a single and decisive and final way, namely the terms of a document. The whole context indicates that the section is dealing with continuing rights which may be interrupted without being necessarily destroyed.

The section is not confined to public rights but covers private rights also, *e.g.*, see the illustration to the section. The way in which a property and its income has been treated has been held relevant to consider whether it is secular or religious.[10]

Right to perform *Kali Puja* can be proved by showing that it was reasonable, ancient, and exercised openly and peaceably. It is not necessary to prove exercise of the right since time immemorial.[11] Previous judicial determination of the basis of valuation of land can be cited in a subsequent acquisition matter.[12]

Section 13 makes relevant only certain transactions and instances for the purpose of establishing the existence of any right or custom. Determination of relationship of persons as father and son is neither a question of any right nor custom.[13]

3. CUSTOM

A custom is a rule which in a particular family or in a particular district, has from long usage obtained the force of law.[14]

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5. *Tepu Khan* v. *Rajani Mohandas*, ILR 25 Cal 522; *Ranchoddas Krishnadas* v. *Bapunarhar*, ILR 10 Bom 439; *Ramasami* v. *Appavu*, ILR 12 Mad 9; *Venkataswamy* v. *Venkatadri*, ILR 15 Mad 12; *Vythilinga* v. *Venkatachala*, ILR (1892) 16 Mad 114; *Collector of Gorakhpur* v. *Palakdhari*, ILR 12 All 1 (FB); *Lakshman* v. *Amrit*, (1900) 24 Bom 591; *Mohammad Amin* v. *Hasan*, ILR 31 Bom 143, 154; *Sabran Sheikh* v. *Oday Mahnto*, AIR 1922 Pat 488. **See also** *Rangayyan* v. *Innasimuthu Mudali*, AIR 1956 Mad 226; *Mahabir Mahaton* v. *Sonmathi Kuer*, AIR 1964 Pat 66; *Raghupat Tiwari* v. *Narabadeshwar Prasad Tiwari*, AIR 1938 Pat 103; *Bhittokunwar* v. *Kesho Prasad Misra*, AIR 19 All 227 (PC).
6. *Shrnivas Krishna Rao Kango* v. *Narayan Devji Kango*, 1955 SCR 1 : AIR 1954 SC 379.
7. *Qazi Sharaf Ahmed* v. *Dau Singh*, AIR 1996 Raj 227 (paras 10-20), **dissenting from** *Shankar Lal* v. *Kailash Chand*, AIR 1939 Lah 105. **See also** *N. Subhakaran* v. *K. Rajamany*, 1996 AIHC 1024 (para 10).
8. *Abdul Ali* v. *Harija Bibi*, AIR 1972 Gau 52.
9. Per BEAMANT J. in *Mohamad* v. *Hasan*, (1906) 31 Bom 143, 154, 155 : 9 Bom LR 65, 75.
10. *Phani Bhusandas* v. *Kenaram Bhaniya*, AIR 1980 Cal 255.
11. *Puran Chandra* v. *Durlav Chandra*, AIR 1980 Cal 11.
12. *State of Bihar* v. *Mosafir Thakur*, AIR 1980 Pat 40.
13. *Ajmer Singh* v. *Jangir Singh*, AIR 1952 Pepsu 76.
14. *Hurpurashad* v. *Sheo Dyal*, (1876) 3 IA 259, 285.

4. CUSTOM AND LAW—GENERAL AND STATUTORY

As custom is 'transcendent law' according to the usages it is open to establish a custom modifying the ordinary Hindu Law *i.e.* a custom having the force of law.[15] A custom has the effect of making a variation in the general law prevailing at the time when such custom comes to be recognised.[16] Clear proof of usage or custom outweighs the written text of law.[17] A custom as stated earlier has got the effect to vary the general law prevailing at the time when such custom comes to be recognised. For depriving a party of his rights under the general law the custom must either expressely exclude him from that right or the intention to exclude must necessarily follow by implication of the proved custom.[18]

Zamindar's customary right of '*Zari Chaharam*' in U.P., to recover a fourth of the sale consideration of a house sold by '*Riyaya*' is not affected by the Transfer of Property Act since it is saved by Section 2(c) of T.P. Act.[19]

Custom affecting the fundamental rights under the Constitution are void.[20]

It should not derogate from any statute unless the statute saves any such custom or generally makes exception in favour of the rule of the custom.[21]

5. REQUISITES OF A VALID CUSTOM

A custom to be recognized by a court should be:

(1) ancient

(2) continuous and uniform

(3) reasonable

(4) certain

(5) compulsory and not optional

(6) peaceable, and

(7) not immoral.

(a) ancient

The English rule that 'a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary', does not apply to conditions in India.[22]

A period of 200 years is quite sufficient for the development of a family custom for exclusion of daughters from inheritance and it cannot be rejected as not immemorial.[23] It was held in a case where there was proof that for about 50 years the land was being used by the defendant families exclusively for burying their dead, that fact is conclusive circumstances against the land being a public *wakf*.[24]

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15. *Deivanai Achi* v. *Chidambaram Chettiar*, AIR 1954 Mad 657.
16. *Vikrama Singh* v. *Smt. Parbati Kunwar*, AIR 1961 All 97.
17. *Collector of Madura* v. *Muthu Ramalinga*, 12 M.I.A. 397; *Manohar Lal Gokul Prasad* v. *Governor General of India*, AIR 1952 All 648.
18. *Chidambara Tewar* v. *Vedyya Tewar*, AIR 1967 Mad 164; *Vikram Singh* v. *Smt. Parbati Kunwar*, AIR 1961 All 97.
19. *Lala Badri Prasad* v. *Gouri Shankar*, AIR 1973 All 162.
20. *Sant Ram* v. *Labh Singh*, AIR 1965 SC 314; *S.N. Kaya* v. *Administrator, Union Territory of Laccadives*, AIR 1967 Ker 259.
21. *Padala Lathamma* v. *Mutehi Appalaswamy*, AIR 1961 AP 55.
22. *Amarchand* v. *Shankari*, AIR 1956 Raj 51; *Ramakrishna* v. *Gangadhar Mohapatra*, AIR 1958 Ori 26; *Subhani* v. *Nawab*, AIR 1941 PC 21 **overruling** in *Bahadur* v. *Nihal Kaur*, AIR 1937 Lah 451; *Gokulchand* v. *Parvin Kumari*, AIR 1952 SC 231. ; *Harihar Prasad* v. *Balmiki Prasad*, AIR 1975 SC 733; *Homi P. Ranina* v. *Eruch B. Desai*, AIR 1996 Bom 141 (paras 12-14); *Adivalu Kirubiyugothi Fathima* v. *Hassan Ismail*, 1997 AIHC 188 (para 4) (Ker).
23. *Prem Lata* v. *Janka*, ILR (1951) 2 All 328.
24. *Abdul Salam* v. *Md. Ismail*, 1965 All LJ 898.

(b) reasonable and certain

Under the custom of *Dhar Dhura* a deep stream or a channel of a river is regarded as the constant boundary between two or more villages, irrespective of its changes in course. Prevention of quarrels and disputes between contiguous villages and estates is certainly an object beneficial to the community and judged by this test, the custom of *Dhar Dhura* cannot be held to be unreasonable.[25]

When there is a so-called custom in a village, depriving *kamins* of their manure which they required for cultivation of their lands obtained on lease or by selling which they can make money, it was held that such custom is unreasonable as the custom cast no corresponding obligation or liability upon the land holder.[26] Where a custom was claimed, claiming a right to scavenge and to mortgage or sell such a right, it was held that such custom cannot be recognised as it is unreasonable.[27] Where in a rent suit the defence was that under an alleged custom no rent is payable in respect of lands during years of inundation irrespect of the extent of land inundated or of the crops destroyed, it was held that the custom was both unreasonable and uncertain and so invalid in law.[28]

There is nothing unfair or dishonest or contrary to the public good in a custom pleaded by tenants to act and appropriate their lien on their holdings and it is not unreasonable.[29] Where a custom is upheld by courts it would be an example of a reasonable custom. A custom can be said to be void for being unreasonable, when the unreasonable character conclusively proves that the usage, even though it may have existed from the time immemorial must have resulted from accident or indulgence and not from any right conferred in ancient times. A custom that a religious office is inalienable, cannot be said to be against public policy as customs in general involve some inconsistency with the general common law.[30]

If a custom was reasonable at its inception, it continues to be valid, though subsequently it may become onerous. Where a particular tree was situated on another's land and people used to offer *puja* to that tree according to their custom, merely because that tree threatened the safety of a house which was built long after the custom had established, it was held that the owner of the house cannot be allowed to cut the tree.[31]

The period for ascertaining whether a custom is reasonable or not is the period from its inception.[32]

Instances which take place subsequent to the controversy regarding any custom in any particular case are held to be admissible and it should be shown that the custom which is alleged to have existed before was still in continuance and that there is no variation.[33]

When there is evidence that all the members of the public are entitled to use a pathway and not merely residents of the village, it was held that the custom is not proved to be certain.[34]

(c) Opposed to Morality and Public Policy

A custom must not be opposed to morality or public policy or forbidden by law.[35]

Where a custom of potters' community in Tirunelveli district in Tamilnadu that a marriage can be dissolved by one paying to other the expenses of that marriage, which was shown to be ancient was held to be not immoral as it did not ignore the marriage as a legal institution.[36]

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25. *Ram Dhanlal* v. *Radhe Sham*, AIR 1951 SC 210 : 1951 SCR 370.
26. *Mahadeva* v. *Ganesha*, AIR 1953 Pepsu 126.
27. *Radhya S/o Panna* v. *Kamraya*, AIR 1951 MB 120.
28. *Shibnarain Mookerjee* v. *Bhutnath Guchait*, ILR 45 Cal 475.
29. *Gurajkar* v. *Ranikuarmoni Singha Mandhata*, 19 Cal WN 1188.
30. *Mahamayadevi* v. *Haridas*, ILR 42 Cal 455 : 19 CWN 208.
31. *Mangree Mia* v. *Biharilal*, 61 IC 132 (Pat).
32. *Kommu Venkadu* v. *Chandrakota Subramaniah*, AIR 1954 AP 54.
33. *Amarchand* v. *Shankari*, AIR 1956 Raj 51.
34. *Kommu Venkadu* v. *Chandrakota Subramaniah*, AIR 1954 AP 54.
35. *Ramalakshmi* v. *Sivanath Perumal*, 14 MIA 570 (PC); *Rupchand* v. *Jambhuprasad*, 32 All 247; *Abdul Hussein* v. *Bibi Sonadero*, AIR 1917 PC 181; *Mookkakore* v. *Ammakuttiammal*, AIR 1938 Mad 299 (FB); *Bhikubai* v. *Manilal*, AIR 1930 Bom 517; *Wahengbam Kakngang Singh* v. *Wahengbam Mgbi Pishak Devi*, AIR 1954 Mani 9; *Mirabibi* v. *Vellayanna*, ILR 8 Mad 464; *Kesavan Sadasivan* v. *Kesavan Sivanandan*, AIR 1956 Tri/Co 167 (FB); *Koya* v. *Union*, AIR 1967 Ker 259.
36. *Shankarlingham Setti* v. *Subhan Shetti*, 17 Mad 479.

No immoral custom or usage however, much practised can be upheld by a court. The Madras High Court in *Deivanayaga Padayachi* v. *Muthu Reddy*[37], held that the test of immorality must be determined by the sense of the community as a whole and not by the sense of a section of the people.

A custom which is abhorrent to dencency or morality though long practised and recognised by a particular community cannot be enforced by a court. A custom which is contrary to the sacred writings or which is immoral cannot be upheld.[38]

Any practice which tends to promote prostitution would be contrary to the policy of law *e.g.*, Mahomadan Kanchans practising as a custom tending to prostitution as a family business.[39]

A custom must not be contrary to justice, equity, or good conscience.[40]

6. FORMS OF CUSTOM

Custom may be (a) family custom, (b) local custom, (c) general custom and (d) special custom.

(a) Family custom.—It must be ancient, certain, reasonable and invariable.[41]

Where there was a plea that Kanikkara Tribe in Kerala is governed by Marumakkathayam law and not by family custom it was held that the court cannot come to a conclusion that the family in question is governed by Marumakkathyam law merely because it was proved that there was no uniform customary law among that tribe.[42]

Difference between custom and usage of a family.—Custom carries with it idea of great antiquity and its observance by successive generations from its origin, whereas, for a family usage no such antiquity is necessary and it may be of recent origin and may be proved to be valid.[43]

In *Ramalakshmiammal* v. *Sivanahtha Perummal,*[44]; the Judicial Committee held that it is the essence of special usuage modifying the ordinary law of succession that it should be ancient and invariable: that it should be established by clear and unambiguous evidence.[45]

Where it was alleged there was a custom of devolution in an impartible estate by primogeniture and there was usage of the family to treat the movables as impartibles, after the abolition of Zamindari estate it was held by the Supreme Court that special usage modifying the general law must be established by clear and unambiguous evidence.[46]

When the family custom is in derogation of rules of law it must be construed strictly.[47]

Proof of family custom.—The burden of proving a custom in derogation of the general law being heavily on the party who sets it up, it is incumbent on him to prove by clear and cogent evidence that there is a family custom excluding females from taking as heirs. A statement as to custom from a person of the age of twenty two cannot command much weight.[48]

A family custom which is in derogation of the ordinary law in force in a territory where the parties reside, cannot be taken as proved by four instances of that custom of comparatively modern day.[49]

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37. AIR 1921 Mad 326.
38. *Balusami Reddiar* v. *Balakrishna Reddiar*, AIR 1957 Mad 97.
39. *Ghasiti* v. *Umrao Jan*, ILR 21 Cal 149 (PC) **see also** *Chinna Chammyi* v. *Tegarii*, ILR 1 Mad 168 (Reddiars of South India allowing a person to marry one's own daughter's daughter is opposed to decency or morality).
40. *Ramkrishna* v. *Gangadhar Mohapatra*, AIR 1958 Ori 26.
41. *Hurapurashad* v. *Sheodayal*, 3 Indian Appeals 259 (PC); *Kuarsen* v. *Mamman*, ILR 17 All 87.
42. *Kunjuraman* v. *Mathevan*, AIR 1971 SC 1398.
43. *Bhagwandas Dhannallal* v. *Dhannulal Chhotelal*, AIR 1951 MB 91.
44. 14 MIA 570.
45. *Abdul Hussein* v. *Bibisonadero*, AIR 1917 PC 181.
46. *Pushpavathi* v. *Visweswar*, AIR 1964 SC 118.
47. *Hurapurashad* v. *Sheodayal*, 3 IA 259 (PC); *Amarchand* v. *Shankari*, AIR 1956 Raj 51; *Ramalakshmi Ammal* v *Sivananantha Perumal*, 14 MIA 570 (PC); *Sundrabai Hanumantharao* v. *Hanmant Gurunath*, AIR 1932 Bom 398; *Wahengbam Kokangang Singh* v. *Wahengbam Omgbi Pishak Devi*, AIR 1954 Mani 9.
48. *Mahommed Baqar* v. *Naim-un-nisa Bibi*, AIR 1956 SC 548.
49. *Abid Ali Khan* v. *Secy. of State*, AIR 1951 Nag 327 **relying on** *Chandika Baksh* v. *Munnakunwar*, 24 All 273.

Where a family is of a comparatively recent origin immemorial usuage need not be proved in the case of a family custom. In fact the evidence regarding the existence of a family custom need not and cannot go beyond the time when the family is founded.[50]

The rule of succession by lineal primogeniture which may be a family custom or *kulachar* may be proved by oral evidence or by some decrees relating to dispute belonging to the same group of families.[51]

Person setting up a special custom must prove it.[52]

Where family custom of primogeniture was set-up, such custom has to be pleaded and proved.[53] When such custom is set up the evidence must be cogent, unimpeachable and such custom must be an ancient one. Where there are three branches of a same family and in two families that custom was prevailing, the members of the third branch cannot rely on such customs unless proved by cogent evidence. It is difficult to expect direct testimony of persons living at the time of the dispute, but witnesses who may otherwise be competent to speak either about the inheritance or the custom governing the succession to the property must be able to say that they heard about the custom from his ancestors during conversation with them.[54] Where the rule of primogeniture is found to prevail in several families all descending from a common ancestor at a particular place, it gives rise to a probability that such custom was prevalent in the family in question as well in that area.[55]

In *Mahanth Bhagwan Bhagat* v. *Girija Namdam Bhagat*[56] the Supreme Court held that the succession to *Mahantship* in that case was not based solely on seniority, but, ability, efficiency in management, moral character, spirit of service etc., all entered into consideration in the selection of a successor. A custom regarding succession to the properties of a *Muth* may be proved by showing instances in which a custom has been recognised or by showing a clear distinct and positive tradition in the *Muth*. On the facts it was held that the office of *Mahantship* of the *Non-Garh Muth* is not hereditary and there is a custom or usage of election.[57] A mere will of the last *Mahant* of an institution is not enough to entitle the plaintiff to succeed in the absence of proof of any custom of the particular institution sanctioning the devolution of the office by mere appointment or nomination by will of the last *Mahant*.[58]

PATANJALI SHASTRI J., in *Thangavelu* v. *Court of Wards*,[59] observed as to the custom recognising the claim to maintenance by the son of a proprietor of a *Zamindar*:—"The sons of a deceased *Zamindar* are entitled to maintenance out of the impartible estate in the hands of his successor without proof of special custom. The illegitimate son of a *Sudra* has been held to be a member of his putative father's family and to have status of a son for purposes of maintenance. His right to receive maintenance out of the father's impartible estate was recognised and given effect to as well established by judicial precedents as long ago as 1870. In these circumstances we consider that no proof of special custom is necessary to entitle the appellants to maintenance out of the *Zamindari* in the hands of the respondents 1 and 2."

When a custom is so well recognised by courts it can be taken as engrafted in the general law.[60]

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50. *Abid Ali Khan* v. *Secy. of State*, AIR 1951 Nag 327 **relying on** 13 MIA 542 (PC).
51. *Mahesh* v. *Satrughan*, 29 IA 62.
52. *Martand* v. *Malhar*, AIR 1928 PC 10.
53. *Dattajirao Bahirojirao Ghorpade* v. *Vingasinhrao*, AIR 1960 SC 1272.
54. *Kameshwar Prosad Singh* v. *Mithilesh Kishori Devi*, AIR 1964 Pat 150.
55. *Gururadhwaja Prasad* v. *Superndhwaja Prasad*, ILR 23 All 37 (PC).
56. AIR 1972 SC 814.
57. *Somar Puri* v. *Shyam Narain & others*, AIR 1954 Pat 586.
58. *Beharilal* v. *Raghunath Gir*, AIR 1951 Punj 365.
59. AIR 1947 Mad 38, 44.
60. *Sri Rajaramrao* v. *Raja of Pittapur*, AIR 1918 PC 81; *Baharsidas* v. *Sumatprasad*, AIR 1916 All 641; *Kedarnath* v. *C.T. Officer*, 1966 Cal 13; *U.M. Pathummal* v. *Bhargavan Rajan*, AIR 1964 Ker 259 (prohibiting alination of tarward properties in Laccadive Island) *Gurdita Singh* v. *Angrez Kaur*, AIR 1968 SC 142 (divorce of Hindujat of Jalander-wife can remarry during the life time of her first husband) *Janardhan Pillai* v. *Kalianna*, AIR 1968 Mad 105; *Damraiji Vrajlaji* v. *Vahuji Maharaj Chandra Prabha*, AIR 1971 Guj 188.

(b) Local Custom.—A custom observed in a particular district derives its force from the fact that it has, from long usuage, obtained in that district the force of law. It must be ancient, but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district.[61]

(c) General Custom.—In English Law a distinction was made between a general custom and public custom. Where the word 'public' is used the custom is common to all *e.g*:—Public Highway. General custom refers to right which is common to the inhabitants of one or more parishes.

The Evidence Act does not make any such distinction regarding the admissibility of relevant facts, under this section.

The *Jains* and *Marwaris* are different sects of Hindus though in various religious practice and beliefs they do not agree with the orthodox Hindu System. Except with regard to the *Marwaris* of Madras and the Punjab, the other *Marwaris* who migrated from Jaipur, Jodhpur and Bikaner are governed by the same custom.[62]

The word 'general custom' is used in Section 48 of this Act and includes public custom. And that expression is explained in Section 48 stating it includes customs or rights common to any considerable class of persons. The word 'includes' is used to bring in local custom, caste or class custom, trade custom or usage.

General custom may be varied by Special Custom.[63]

Regarding a custom among non-regenerate castes in Telengana area it was held that there is no basis to hold that they had the custom of performing rites sanctioned by local custom and not of rites sanctioned by the *Smritis* under the ordinary law.[64]

(d) Special Custom.—In this category private or local customs can be taken to fall. Such customs are confined to a particular class of people or to particular families in respect of family trade, inheritance or observance of local custom like performing puja to a particular deity in a particular village. It was observed by the Privy Council "Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate depending solely on family usage may not be discontinued, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom which is the *lex loci* binding all persons within the local limits in which it prevails. It is of the essence of family usages that they should be certain, invariable and continuous, and well-established. If discontinuance has arisen from accidental causes, the effect cannot be less, when it has been intentionally brought about by the concurrent will of the family.[65]

Among Kashi Vellalas in Travancore, there is a custom to the effect that daughters are not entitled to share in the father's estate.[66]

Trade Custom.—To prove a trade usage it has to be shown that it is consistent and reasonable, and it was acknowledged by the class of traders.[67]

There is a well-known practice among *Nattukottai Chetties* to draw *hoondies*, bills and promisory notes in favour of the agents with the '*Vilasam*' (address) of the firm. In all those cases the firm is the real payee.[68]

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61. *Subhani* v. *Nawab*, (1940) 43 Bom LR 432.
62. *Gigi Agarwalini* v. *Panna Agarwalini*, AIR 1956 Assam 100.
63. *Saligram* v. *Maya Devi*, AIR 1955 SC 266; *Subhani* v. *Nauab*, AIR 1941 PC 21.
64. *Malakayya* v. *Avathi Buchamma*, AIR 1973 AP 208; **reversing** *Malkayya* v. *Avathi Bhommayya*, AIR 1971 AP 270.
65. *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar*, (1872) 1 Cal 186 (PC).
66. *CP Mary* v. *State of Tra & Co.*, AIR 1958 Ker 85.
67. *Volkart Brothers* v. *Vettuvela Nadan*, ILR 11 Mad 459. **See also** *Mittenbaker* v. *Galstaun*, 36 Cal LJ 256.
68. *Ghulamsa* v. *Vishwanatham*, 1917 Mad WN 344.

7. PROOF OF CUSTOM

In order to prove a custom:—

The evidence should be such as to prove uniformity and continuity of the usage and the conviction of those following it that they were acting in accordance with law, and this conviction must be inferred from the evidence. Oral evidence of witnesses who depose to having heard of the customs from their deceased ancestors is admissible.[69]

The evidence of act of the kind, acquiescence in those acts, their publicity, decisions of Courts, or even of *Panchayats* upholding such acts, the statements of experience and competent persons of their belief that such acts were legal and valid will all be admissible, but it is obvious that, although admissible, evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted.[70]

It is incumbent on a party setting up a custom to allege and prove the custom on which he relies and it is not any theory of custom or deductions from other customs which can be made a rule of decision but only any custom applicable to the parties concerned that can be the rule of decision in a particular case. Custom cannot be extended by analogy and it cannot be established by a *priori* methods.[71]

The rule of custom should prevail in all cases and if any aberrations have to be corrected, such correction must take the course in the direction of re-establishing the rule of custom.[72]

A trade usage or custom may be proved in the same way as a family custom, except that it is unnecessary to show that such a custom is either ancient or continuous. A trade usage may be still in course of growth; it may require evidence of its support in each case; but in the result it is enough if it appears to be so well-known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract.[73]

A right of pre-emption was set up by Hindus on the basis of custom, on the same lines as by Muslims which was recognised judicially by long course of decisions. In such a case it was held it was not necessary for the Hindus to prove the custom by further evidence.[74]

The burden of proving a custom is on the person who asserts it.[75]

Where there is a custom in derogation of law, the burden rests on the person who sets up the custom and wishes to be governed by it.[76]

When a custom is pleaded it must be precise in terms and has to be established by evidence.[77]

It was held that the mere fact that daughters were excluded from inheritance without any dispute being raised or any claim being preferred was not sufficient to prove the existence of a custom that daughters were not entitled to inheritance. In view of the very short period from which the succession in the family of the parties opened, it could not be said that a custom was acted upon for a long time so as to outweigh the personal law, a custom must be ancient and not immoral. It must be invariable, certain and continuous and the burden to prove custom in derogation of personal law is on the party who alleges it.[78]

General custom may be proved:—

(1) by the opinion of persons having special means of knowledge thereof or likely to know of its existence.

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69. *Sri Krishan Datt* v. *Ahmadi Bibi*, (1934) 57 All 588.
70. *Gopalayyan* v. *Raghupatiayyan*, (1873) 7 MHC 250, 254.
71. *Saraswathi Ammal* v. *Jagadambal*, AIR 1953 SC 201.
72. *Rajendra Ram* v. *Devendra Doss*, AIR 1973 SC 268 **approving** *Annasami Pillai* v. *Ramakrishna Mudaliar*, (1900) 24 Mad 219.
73. *Juggomohan Ghose* v. *Manickchund*, (1859) 7 MLA 263, 282; **see also** *Rajendra Ram Doss* v. *Devendra Das*, AIR 1973 SC 268 (as to proof of customs).
74. *Audh Behari* v. *Gajadhar*, AIR 1954 SC 417 : 1955 SCR 70.
75. *Subramanian Chettiar* v. *Kumarappa Chettiar*, AIR 1955 Mad 144.
76. *Amarchand* v. *Shankari*, AIR 1956 Raj 51.
77. *Ram Kishore* v. *State of U.P.*, AIR 1966 SC 1820; *Bhagwant Kaur* v. *Daljit Singh*, (1970) 72 Punj LR 275.
78. *Mumtaz Begum* v. *Aman Ullah Khan*, AIR 1973 J&K 28.

(2) by statements of persons who are dead provided they were made before any controversy as to such custom arose.

(3) by any transaction where it was claimed, modified, recognised.

(4) by particular instances where it was claimed, recognised, exercised.[79]

The proof of invariability of the custom lies on the person/plaintiff who sets up the custom. To hold that the instances given by the defendants are not sufficient to prove the custom in opposition thereof is to propound a proposition which evidently ignores the principle that the proof of these instances destroyed the very essential feature of a valid custom, namely its invariability.[80]

Answers given in Wilson's Manual on questions of Customs in Punjab are admissible to prove the Customs there.[81]

Aboriginal Santhals in the village Kutcheri by custom have become sufficiently Hinduised and they are governed by Hindu Law. The burden to prove the custom is on the party who sets up otherwise.[82]

Where Hindus objected to the exercise of a right of Mahamadans to kill cows on festival occasions basing on their ecclesiastical law as the basis of a local custom, it was held that the burden is on the Hindus to prove that the Mahamadans have lost their legal or ecclesiastical right by which owes reason of a custom its origin to common consent and voluntary forbearance on the part of the Mahamadans.[83]

8. WHEN COURTS RECOGNISE THE CUSTOM

Where the custom is well recognised by the courts, it would not be necessary for a person who sets up such custom to prove it.[84]

In *Rajaramarao* v. *Raja of Pittapur,*[85] it was observed by LORD DUNEDIN "When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the courts of a country, the courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It becomes in the end truly a matter of process and pleading...".[86]

Where it was alleged that a family custom exists among the *Abhan Thakurs* of Oudh, in derogation of the ordinary *Mitakshara* Law in force there, that on the extinction of the line of one of the several brothers the descendants of all the other brothers take equally without reference to their nearness to common ancestors it was held by the Privy Council that by giving four instances it cannot be said that such custom is proved; as those four instances of custom were of comparatively modern date.[87]

Where the alleged custom was one prohibiting from doing an act which involves sacrilege to LORD JAGANATHA, it was held by the Orissa High Court that the general rule that where a customary right is alleged several instances of the assertion of the right and its due recognition should be proved, will not apply, as one cannot get innumerable instances in which such attempt was made and frustrated.[88]

Custom cannot be extended by analogy and it cannot be established by *a priori* methods. Oral evidence as to instances which can be proved by documentary evidence cannot safely be relied upon to establish custom, when no satisfactory explanation for withholding the best kind of evidence is given.[89]

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79. *Ramakrishna* v. *Gangadhar Mohapatra,* AIR 1958 Ori 26.
80. *Gigi Agarwalini* v. *Panna Agarwalini,* AIR 1956 Assam 100.
81. *Subhani* v. *Nawab,* AIR 1941 PC 21 : 68 IA 1.
82. *Langa Manjhi* v. *Jaba Mojhian,* AIR 1971 Pat 185.
83. *Keshwar Thakur* v. *Gulam Hussain,* AIR 1951 Pat 583.
84. *Chelladorai* v. *Chinnathambiar,* AIR 1961 Mad 42; *Suganchand* v. *Mangibai,* AIR 1942 Bom 185.
85. AIR 1918 PC 81.
86. *Jugalkishore Birla* v. *Bishunuhari Jana,* AIR 1955 Cal 419.
87. *Chandrika Bakhsh* v. *Munakunwar,* ILR (1901) 24 All 273 (PC) **see also** *Suba Dusadh* v. *Shiva Prasad,* AIR 1950 Pat 302 (one instance).
88. *Ramakrishna* v. *Gangadhar Mahapatra,* AIR 1958 Ori 26, 37.
89. *Saraswathi Ammal* v. *Jagadambal,* AIR 1953 SC 201; *Lal Singh Sukha Singh* v. *Roor Singh Bela Singh,* AIR 1953 Punj 202.

9. CUSTOMARY RIGHT

This right is normally of a public nature in which public are interested. It is not necessary to prove any fixed period of enjoyment to establish a customary right. Where a customary right is set up and user for thirty years is proved the presumption would be *prima facie* that it was as of right and it is for the party who wants to show that it was only permissive to prove it.[90]

By its very definition, a customary right cannot be the creature of a written instrument.[91]

Where there was an order of the superintendent of a former State during the settlement operation recognising the right of the villagers of certain villages to graze their cattle in the disputed land, it was held that the order is relevant under this section for proving the customary right.[92]

It is not necessary to prove the customary right from time immemorial. If the right is reasonable and ancient and has been exercised openly and peaceably without interruption and not stealthily, such right assumes the character of a customary right and it can be enforced in a court of law.[93]

In a case where Muslims were immersing the *Tazias* in a particular tank at the time of *Muharram* festival period for 15 years, it was held by the Privy Council that such period was insufficient for a finding of customary right, on the ground that such practice should have begun by permission or agreement and it must be shown to have continued for such length of time that it has come to be exercised as of right.[94]

For a valid customary right of using a place for burial—it must be ancient, invariable, certain, continuous, peaceful and open enjoyment is necessary.[95] Where a family for over fifty years was using a particular land exclusively for burying their dead, it was held that it is a conclusive circumstance for holding it as a customary right.[96]

Where out of deference to the religious susceptibilities of the Hindus and in order to respect their feelings the Mahammadans knowingly and willingly desist from exercising their right to slaughter kine, it is only to maintain good social relations and neighbourly feelings between the two communities; a custom thus arising cannot be said to be unreasonable.[97]

If a right is claimed by virtue of a custom, all the essential characteristics of a custom bearing on it, have to be established. Thus it has to be seen, whether it has been proved that the right was certain and invariable, and that its enjoyment was not by leave or permission. Then it has to be seen whether the custom could be said to be reasonable and whether it has been in existence for a fairly long period of time. Sections 13, 32(4), 43 and 48 of the Evidence Act have a bearing on the mode of proving a customary right. In the case, the witnesses for the plaintiffs had stated that plaintiff's cattle used to rest in the disputed land while going to the grazing ground and returning there from. The evidence was held relevant but since the use of the land was found fugitive and permissible, it was held that the plaintiffs had failed to establish customary right.

It was further held that where the customary right claimed to use inhabited portion of the village as resting place for cattle, it is not reasonable and cannot be enforced.[98]

10. RIWAJ-I-AM

The entry in *Riwaj-i-Am* in support of special custom is an important piece of evidence of it and the burden of proof shifts on the party challenging it.[99] Where one finds entries relating to any custom the

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90. *Goli Paddayya* v. *Chaliki Krishna Murthy*, AIR 1927 Mad 653; *King Emperor* v. *Sheo Shankar*, AIR 1954 Pat 119; *Queen Empress* v. *Chittor*, ILR 20 Mad 389; *P.K. Nayar* v. *Rangat Raghawa*, ILR 1959 Ker 1068.
91. *Rev. Fr. Joseph* v. *State of Kerala*, AIR 1958 Ker 290.
92. *Tula* v. *Sedh*, AIR 1962 HP 28.
93. *Purna* v. *Durlav*, AIR 1980 Cal 11; *Jaisukh* v. *Manohar*, AIR 1967 HP 15; *Governor General in Council* v. *Awadhoot Balwesh Rao*, AIR 1946 Nag 228 (mere effecting repairs to the road and affixing notices prohibiting public use of the road as thorough fare are not interruptions).
94. *Baba Narayan* v. *Saboosa*, AIR 1943 PC 111.
95. *Akram* v. *Makid*, AIR 1971 Cal 405.
96. *Abdul Salam* v. *Md. Ismail*, 1965 All LJ 899.
97. *Keshwar Thakur* v. *Gulam Hussain*, AIR 1951 Pat 583.
98. *Ramchandra Singh* v. *Pratap Singh*, AIR 1965 Raj 217.
99. *Labhsing* v. *Mango*, AIR 1927 Lah 241.

initial presumption must be in favour of the correctness of the entry in *Riwaj-i-Am*.[1] The Privy Council in *Beg* v. *Allah Ditta*,[2] held that the *Riwaj-i-Am* is a public record prepared by a public officer in discharge of the duties and under Government rules; that it is admissible in evidence to prove the entries therein subject to rebuttal and the statements therein may be accepted even if unsupported by instances.[3]

The Supreme Court held that the entries in *Riwaj-i-Am* of Jullunder district are unreliable and could not prove that there was no custom of divorce among Hindu Jats.[4] Where *Riwaj-i-Am* simply recites the general law no particular evidentiary value is attached to it. Most of the matters contained in it are not different from the rules of Hindu Law.[5]

See commentary on Section 35 and Section 48 under the head *Riwaj-i-Am*.

11. WAZIB-UL-ARZ

In *Balgobind* v. *Badriprasad*,[6] it was held that the record in *Wazib-ul-Arz* of custom is most valuable evidence of a custom, and is a much more *reliable* evidence than oral evidence which is given after the dispute as to the custom has arisen. Where it is prepared and attested according to law, it is *prima facie* evidence of existence of any custom. Unless rebutted by any one disputing such custom.[7] The Privy Council in *Sheobaran Singh* v. *Kulsum-ul-nissa*,[8] held that a statement in *Wazib-ul-Arz* of a village is a record of statements of persons relating to existing rights and customs and where a custom of pre-emption which is not in contravention of law is recorded it is *prima facie* evidence of such custom and it can be exercised without corroborative evidence of instances. It is not necessary in each case to give instances of the observance of the custom and the *Wazib-ul-Arz* might itself be sufficient to establish the custom, where the existence of a particular custom in a certain family is in question, other factors such as whether a similar custom prevails in the class to which the party belongs or among the caste generally, are of merely secondary importance as tending to make probable or improbable the existence of such a custom in that particular family.[9]

An *amalnama patta* in which a predecessor of a co-sharer makes a statement in derogation of his own interest is certainly admissible for the purpose of showing the existence of a *perqunnah* custom.[10]

See Commentary on Section 35 and Section 48 under this head.

12. TRANSACTION

A transaction, in the ordinary sense of the word, is some business or dealing which is carried on or transacted between two or more persons. Transaction is something which has been concluded between persons by a cross or reciprocal action and in the largest sense it means that which is done.[11]

According to STEPHEN in his digest "A transaction is a group of acts so connected together as to be referred to by a single legal name as a crime, contract, a wrong or any other subject of inquiry which may be in issue. Every fact which is part of the same transaction as the fact in issue, is deemed to be relevant to the facts in issue, although it may not be actually in issue and although if it were not part of the same transaction it might be excluded as hearsay. Whether any particular fact is or is not part of the same transaction, as the fact in issue, is a question of law upon which no principle has been stated by authority and on which single judges have given different decisions."

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1. *Kehar Singh* v. *Dewan*, AIR 1966 SC 1555; *Jai Kaur* v. *Sher Singh*, AIR 1960 SC 1118. *Salig Ram* v. *Munshi Ram*, AIR 1961 SC 1374; *Ujagar Singh* v. *Jeo*, AIR 1959 SC 1041; *Bhagat Singh* v. *Joginder Singh*, (1959) 61 Punj LR 123
2. AIR 1916 PC 129 : 44 IA 89, 97.
3. **See also** *Ahmad Khan* v. *Channibibi*, AIR 1925 PC 267; *Vaishno Ditti* v. *Rameshri*, AIR 1928 PC 294 : ILR 10 Lah 86; *Abdul Hussein* v. *Bibi Sona Dero*, AIR 1917 PC 181; *Gokalchand* v. *Parvinkumari*, AIR 1952 SC 231.
4. *Gardit Singh* v. *Angrez Kaur*, AIR 1968 SC 142.
5. *Piaralal* v. *Atnasingh*, 53 Punj LR 335 (FB) at 351.
6. AIR 1923 PC 70.
7. *Isri Singh* v. *Ganga*, ILR 2 All 876.
8. AIR 1927 PC 113.
9. *Prem Lata* v. *Janka*, ILR (151) 2 All 328.
10. *Juggal Kishore Birla* v. *Bishun Hari Jana*, AIR 1955 Cal 419.
11. *Rangayyan* v. *Innasimuthu Mudali*, AIR 1956 Mad 226.

Sale deeds are evidence *quantum valeant* as transactions and instance in which rights are asserted and recognised and so admissible under Section 13.[12] In a suit for recovery of possession of a plot and for declaration of title, the defendants denied the existence of the plot in question or possession of the plaintiff, but its existence and possession of the plaintiff over it was acknowledged in a sale deed of the adjacent plot and hence the same was held admissible in view of Sections 13(a) and 11.[13]

Will.— The word 'transaction' is not confined to a dealing with property between two persons *inter vivos* but can, without any strain on the language, be taken to include testamentary dealing with the property. A statement, therefore, in a will that the property dealt with there under is the property of the testator is admissible under Section 13(a) and also under Section 32(7) as a relevant fact.[14]

A statement in a will executed by a deceased that certain properties was joint property of the three brothers was held to be admissible under Section 32(7) read with this section, as the deceased executant was a dis-interested person being a common aunt of the three brothers.[15]

Where the question of will was directly and substantially involved in a previous litigation and a finding was recorded by the courts about its due execution it was held that it is relevant and valuable piece of evidence under this section.[16]

It was held by the Patna High Court, that a litigation between two persons is a transaction.[17]

Written statements filed in a suit is not a transaction.[18] Where a widow filed a written statement claiming the land in a partition suit it was held it was not a transaction.

Gift-deed.—Recital of the gift-deed as old as that of 1945 as to the title of the property cannot be accepted. It has got to be decided on the basis of other evidence.[19]

13. JUDGMENT NOT *INTER PARTES*

Sections 40-42 and 43 deal with judgments and their relevancy. Section 40 deals with the existence of a judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial. This principle we find in Section 11, C.P.C. as the principle of *res judicata*. For the application of that principle certain conditions have to fulfilled under Section 11, C.P.C. Section 41 deals with relevancy of a final judgment relating to probate, matrimonial, admiralty or insolvency jurisdiction. Such judgments are made relevant. Section 42, makes the judgment orders or decrees other than those mentioned in Section 41, relevant if they relate to matters of public nature relevant to the enquiry, though such judgments, orders or decrees are not conclusive proof of that which they state. Section 43 says judgments other than those mentioned in Sections 40-42 are irrelevant unless the existence of a judgment order or decree is a fact in issue or is relevant under some other provisions of this Act. The judgments which do not fall within the purview of Sections 40-42 can only be admitted under Section 43 if the existence of such judgment is a fact in issue in a case. If there is no fact in issue involved then such judgments has to come within the last portion of Section 43 *i.e.*, they are relevant under some other provisions of this Act. The question is whether judgments not *inter partes* can be made relevant under this Section 13 or not.

In *Nityamatali* v. *Gurudas*,[20] it was held that the word transaction in Section 13 included judgments which though not conclusive, would still be admissible as evidence for what they are worth, even when they might not be admissible under Sections 40-43.

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12. *Channoo* v. *Jangbahadur*, AIR 1957 Pat 293; **relying on dissenting** view of MITTER J., in GUJJULAL'S case, ILR 6 Cal 171; *Dattari Mohanti* v. *Juga Bundhoo*, 23 Suth WR 293; *Sabram Sheikh* v. *Oday Mahto*, AIR 1922 Pat 488 (FB).
13. *Kanti Lal* v. *Shanti Devi*, AIR 1997 Raj 230.
14. *Periasami* v. *Varadappa*, AIR 1950 Mad 486; **relied on** *Venkatramayya* v. *Seshamma*, AIR 1937 Mad 538; *Pramathanath* v. *Champa Dasi*, AIR 1929 Cal 473; *Chandra Kant* v. *Sharatchandra*, ILR 1954 MB 123.
15. *Chunilal Ojha* v. *Mulsankur Gjha*, ILR 1961 Cut 635.
16. *Atma Ram* v. *Parsini*, AIR 1979 Punj 234.
17. *Mahabir Mahton* v. *Sormati Kuer*, AIR 1964 Pat 66; **See contra** *Asaddar Ali Khan* v. *Province of Assam*, 1944 Cal 57; *Ranchhoddas Krishnadas* v. *Bapu Narhar*, ILR 10 Bom 439.
18. *Venkataraya-gopala* v. *Narsayya*, AIR 1915 Mad 476.
19. *Kuldeep Sharma* v. *Satyendra Kumar Sharma*, AIR 2001 All 366 (para 29).
20. 22 WR 365.

But in *Gujju Lall* v. *Fattehlall*,[21] the majority view was that the judgment was not a 'fact' within the meaning of Section 11, nor a 'transaction' within the meaning of Section 13 of this Act; that if a judgment were admissible under either of this section as a fact or as a transaction, the other provisions in Sections 40-42 would be unnecessary.[22]

But in view of subsequent pronouncements of the Judicial Committee, under certain circumstances, in certain cases, the judgment in a previous suit, to which one of the parties in a subsequent suit was not a party, may be admissible in evidence for certain purposes and with certain objects in the subsequent suit.[23]

Ramranjan Chukerbutty v. *Ram Narain Singh*[24] is an extreme case where it was held that a decree eighty years old dismissing a suit on the ground that the defendants had *mokurari* tenure was admitted as cogent evidence of their ancient possession, of the rate of rent paid, and of their title having been long ago asserted successfully. In *Dinomoni Chowdhrani* v. *Brojo Mohini*[25], the Privy Council held that: Police orders made under the provisions of the Criminal Procedure Code to prevent breaches of the peace, in cases of dispute as to immovable property were admissible in evidence on general principles as well as under this section to show the fact that such orders were made. They observed: "This necessarily makes them evidence of the following facts all of which appear from the orders themselves, *viz.*, who the parties to the dispute were; what the land in dispute was; and who was declared entitled to retain possession. For this purpose and to this extent such orders are admissible in evidence for and against everyone when the fact of possession at the date of the order has to be ascertained."

In *Gobinda Narayan* v. *Shyam Lal*,[26] the Privy Council observed at page 136 with reference to a judgment in a previous suit in which an estate called Pandra Estate was held partible in a subsequent adjudication not *inter partes*.

"They think that the judgment in question is only admissible under the provisions of Sections 13 and 43 of the Evidence Act as establishing a particular transaction in which the partibility of the Pandra Estate was asserted and recognized—namely, the partition resulting from the 1793 suit. The reasons upon which the judgment is founded are not part of the transaction and cannot be regarded, nor can any finding of fact there come to, other than the transaction itself, be relevant in the present case. The judgment, therefore, is no evidence that Thakur Sib Singh got the Achra villages by partition; it is at most evidence that he might have done so, and this is plainly not sufficient." In *Bitto Kunwar* v. *Kesho Prasad*,[27] the Privy Council held that though a decision in an earlier suit was not binding on a person who was not a party it was admissible in evidence against him. In that case the earlier decision was to the effect that a will was revoked. The Privy Council however did not refer to any section of the Evidence Act.

In *Srinivas Krishna Rao Kango* v. *Narayan Devji Kango*,[28] the Supreme Court had to consider the admissibility of judgments in prior suits for maintenance, where the widow asserted that the properties in

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21. 6 Cal 171 (FB).

22. *Gujju Lall* v. *Fatteh Lall*, (1980) 6 Cal 171 (FB); **approved in** *Surender Nath Pal Chowdary* v. *Brojo Nath Pal Chowdary*, ILR (1886) 13 Cal 352 (FB); *Subramaayann* v. *Paramaswaran*, ILR (1887) 11 Mad 116; *Nilakanta* v. *Imamsahib*, ILR (1992) 16 Mad 361; *Ranchhoddas Krishnadas* v. *Bapu Narhar*, ILR (1886) 10 Bom 439; *Ram Kishun* v. *Niranjan Pande*, ILR (1932) 12 Pat 285; *Indar Singh* v. *Fateh Singh*, ILR (1920) 1 Lah 540; *Shankar* v. *Kesheo*, (1929) 26 NLR 33 (FB); the decision in *Gujjalal* v. *Fatelal*, did not find approval in several cases. The *Collector of Gorakhpur* v. *Palakdhari Singh*, ILR (1889) 12 All 1 (FB); *Tepu Khan* v. *Rajani Mohun Das*, ILR (1898) 25 Cal 522 (FB); *Lakshman* v. *Amrit*, ILR (1900) 24 Bom 591; *Govindji* v. *Chhotalal*, (1900) 2 Bom LR 651; *Mahamad* v. *Hasan*, (1906) 31 Bom 143; *Devidatt* v. *Shriram Narayandas*, ILR (1931) 56 Bom 324; *Shreemati Purnima Debya* v. *Nand Lal Ojha*, ILR (1931) 11 Pat 50; *Runbahadur Singh* v. *Luchhokoer*, ILR 11 Cal 301; *Dinomoni Chowdhrani* v. *Brojomohini Chowdhrani*, 29 Cal 187.

23. *Ram Ranjan Chukerbutty* v. *Ram Narain Singh*, (1884) 22 IA 60 : ILR 22 Cal 533; *Bitto Kunwar* v. *Kesho Pershad*, (1897) 24 IA 10.

24. ILR 22 Cal 533 PC : 1884 22 IA 60.

25. (1901) 29 IA 24 at p. 33.

26. 58 IA 125 : AIR 1931 PC 89.

27. (1897) 24 IA 10, 19 All 277.

28. 1954 SCJ 408 : AIR 1954 SC 379. Judgment not *inter partes*, admissible. *Tirumala Tirupati Devasthanams* v. *K M Krishnaiah*, AIR 1998 SC 1132 (para 9), **following** *Srinivas Krishnarao Kango* v. *Narayan Devji Kango*, AIR 1954 SC 379 : 57 Bom LR 678 and *Sital Das* v. *Sant Ram*, AIR 1954 SC 606, **approving** *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani*, ILR (1902) 29 Cal 190 (PC); *Ram Ranjan Chakerbati* v. *Ram Narain Singh*, ILR (1895) 22 Cal 533 : 22 IA 60 (PC) and *Collector of Gorakhpur* v. *Ram Sundar Mal*, AIR 1934 PC 157 : 61 IA 286 and **disapproving** Sir JOHN WOODROFFE : COMMENTARY ON EVIDENCE Act, 1931, p. 181.

dispute were joint family properties, in a subsequent suit by her adopted son claiming partition on the ground that they are joint family properties. The Supreme Court held that the judgment was admissible under Section 13. It observed: "The argument of the appellant is that these judgments are admissible under Section 13 of the Evidence Act, as instances in which there was an assertion that the suit properties belonged to the joint family. For the respondents, it is contended that the dispute between the parties in those litigations was only about the quantum of maintenance to be awarded, that no question of title to the properties was directly involved, and that Section 13 was inapplicable. We are unable to accept this contention. The amount of maintenance to be awarded would depend on the extent of the joint family properties, and an issue was actually framed on that question. Moreover there was a prayer that the maintenance should be charged on the family properties, and the same was granted. We are of opinion that the judgments are admissible under Section 13 of the Evidence Act as assertions of Rukminibai that the properties now in dispute belonged to the joint family.

In *Sital Das* v. *Santram*,[29] the Supreme Court held that in a suit where succession to the office of a *Mahant* was in dispute, the previous judgment in which the deceased *Mahant* challenged certain alienations, was admissible as a *transaction* in which he asserted his right as a *Mahant* and on that footing got a decree.

The Supreme Court after referring to the provisions of Sections 40 to 43 observed: "It is apparent that Section 43 enacts that judgments other than those falling under Sections 40 to 42 are irrelevant unless they fall under some other provision of the Evidence Act; and, even if they do fall under any such other provision, all that is relevant, under Section 43 of the Evidence Act, is "the existence" of such judgment, order, or decree provided it "is a fact in issue, or is relevant under some other provision of this Act."[30] An obvious instance of such other provision is a judgment falling under Section 13, of the Evidence Act. The Illustration to Section 13, of the Evidence Act, indicates the kind of facts on which the existence of judgments may be relevant.

In *Special Land Acquisition Officer, Bombay* v. *Lakhamsi Ghelabhai*,[31] SHEAT J. held that judgments not *inter partes*, relating to land acquired are not admissible merely because the land dealt with in the judgment was situated near the land of which the value is to be determined. It was held there that such judgments would fall neither under Section 11 nor under Section 13 of the Evidence Act. Questions relating to value of particular pieces of land depend upon the evidence in the particular case in which those facts are proved. They embody findings or opinions relating to facts in issue and investigated in different cases. The existence of a judgment would not prove the value of some piece of land not dealt with at all in the judgment admitted in evidence. Even slight differences in situation can, sometimes, cause considerable differences in value. We do not think it necessary to take so restrictive a view of the provisions of Sections 11 and 13 of the Evidence Act as to exclude such judgments altogether from evidence even when good grounds are made out for their admission. In *Khaja Fizuddin* v. *State of Andhra Pradesh*,[32] a bench of three judges of the Supreme Court held such judgments to be relevant if they relate to similarly situated properties and contain determinations of value on dates fairly proximate to the relevant date in a case.

However in *State of Bihar* v. *Sri Radhakrishna Singh*,[33] the Supreme Court observed at page 710 (para 121): "Some Courts have used Section 13 to prove the admissibility of a judgment as coming under the provisions of Section 43, referred to above. We are, however, of the opinion that where there is a specific provision covering the admissibility of a document, it is not open to the court to call into aid other general provisions in order to make a particular document admissible. In other words if a judgment is not admissible as not falling within the ambit of Sections 40 to 42, it must fulfil the conditions of Section 43 otherwise it cannot be relevant under Section 13 of the Evidence Act. The words "other provisions of this Act" cannot cover secton 13 because this section does not deal with judgments at all.

They referred to number of decisions under Section 13 and ultimately came to the conclusion (para 133, page 712) that the cumulative effect is that a judgment not *inter partes* is inadmissible in evidence except for the limited purpose of proving as to who the parties were, what was the decree passed, and the properties which were the subject-matter of the suit and it is not admissible to support the title and

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29. AIR 1954 SC 606.
30. *C.I.T., Bangalore* v. *Narayanaiah*, AIR 1976 SC 2403, at p. 2413.
31. AIR 1960 Bom 78.
32. C.A. No. 176 of 1962, Decided on 10-4-1963 (SC).
33. AIR 1983 SC 684.

relationship. The above conclusion is no doubt supported by most of the decisions in Section 13 though as stated earlier in some of the decisions the Privy Council and the Supreme Court went further. For example in 22 I.A. 60 a previous judgment was held admissible to prove the rent paid or the fact of possession. In 1954 S.C.J. 408 it was held admissible to prove the nature of the property as joint family property. In AIR 1976 SC 2403 it was held that judgments were admissible to prove the value of the properties acquired which was the subject-matter of the later suit. But the observations of the Supreme Court in AIR 1983 SC 684 that if a judgment is not admissible under Sections 40 to 42 it must fulfil the conditions of Section 43 that otherwise it can not be relevant under Section 13 as the words "Other provisions of the Act cannot cover Section 13 because the section does not deal with judgments at all, are not justified. It is clear from the decisions referred to above the Privy Council and the Supreme Court considered judgements admissible as transactions even though they do not come within Sections 40 to 43. In Particular in AIR 1976 SC 2413, it is categorically stated that an obvious instance of other provisions in Section 43 is a judgment under Section 13. It is surprising that the Supreme Court in AIR 1983 SC 684 did not refer to a number of decisions of the Privy Council and Supreme Court referred to above and in particular to para 26 in AIR 1976 SC 2403 at 2413.

Judgments in a previous case not *inter partes* are not admissible to prove the truth of the matters decided in that judgment. The finding of fact arrived at on the evidence in one case are not evidence of that fact in another case.[34]

Judgments not *inter partes* might be admissible in evidence as establishing a particular transaction, if any, by which the relevant right was asserted, recognised, claimed or denied, but in no case the reasons and the findings of fact arrived at in them would be admissible in evidence.[35]

In the case of an adjudication not *inter partes* its existence alone is admissible under Section 43, and only in cases where such existence is relevant. Its correctness or incorrectness is not admissible, nor are the reasons on which it is based. Although judgment (*i.e.*, an adjudication) in a proceeding A v. B may perhaps be used in a subsequent proceeding A and B v. C as evidence that there was a decision on a certain point, it cannot be used as evidence that there was an accurate decision based on true facts.[36]

So far as regards the truth of the matter decided, a judgment is not admissible evidence against one who is a stranger to the suit. In a suit for possession of land a judgment in a previous suit, though admissible as evidence of assertion of a right to the land, is not evidence of the right as against a stranger.[37]

"It may be taken to be fairly settled that the judgment in a previous suit though not *inter partes* is admissible in proof of a transaction or a particular instance in which the relationship was asserted and recognised or denied. A judgment in the previous suit though not conclusive is admissible in evidence like any other fact to be weighed in the balance. It is not the correctness of the previous decision but the fact that there has been a previous decision that is established by the judgment."[38]

A judgment, not *inter partes*, and mentioning a fact not relevant in that case, is inadmissible in evidence to prove that fact in a subsequent case. Thus the previous decision not *inter partes*, in which it

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34. *Ramaji Batanji* v. *Manohar Chintaman*, AIR 1961 Bom 169; *Kesho Prasad Singh* v. *Bhagjogna Kuer*, AIR 1937 PC 69; *Mahamad Amin* v. *Hasan*, ILR 31 Bom 143; *Dinomoni Chowdharani* v. *Brojomohini Chowdhurani*, ILR 29 Cal 187 (PC); *Cocacola Co.* v. *Pepsicola*, AIR 1942 PC 40; *Gopika Raman Rou* v. *Athal Singh*, AIR 1929 PC 99; **followed in** *Shankar* v. *Keshev*, (1929) 26 NLR 33 (FB); *Gobinda Narayan Singh* v. *Shamlal Singh*, 1931 PC 89; *Gowri Shankar Shaw* v. *Anil Chandra Majumdar*, 1953 Cal 671.

35. *Gajanfar Ali Khan* v. *Province of Assam*, ILR (1944) 1 Cal 203. **See also** *Hira Lal* v. *Hari Narain*, AIR 1964 All 302, (where it is held that it is inherent in the scheme of this section that only a judgment which has become final can be said to be a transaction or an instance for the purposes of this section). **See also** *Natesa Gramai* v. *Venkatarama Reddy*, ILR 30 Mad 510; *Mudula Sitanna* v. *Kuppili Lakshminarasimha*, AIR 1940 Mad 540; *Seetapathi Rao* v. *Venkanna*, AIR 1922 Mad 71 (FB); *Kashinathpal* v. *Jagatkishore*, 20 CWN 643.

36. *Gobinda Narayan Singh* v. *Sham Lal Singh*, (1931) 58 IA 125, 136; *Devidatt* v. *Shriram Narayandas*, ILR (1931) 56 Bom 324.

37. *Kesheo Prasad* v. *Bhagjogna Kuer*, (1937) 39 Bom LR 731.

38. *Rama Chandra* v. *Gadhadhar Mohapatra*, AIR 1980 Ori 54; citing *Gopika Raman Roy* v. *Satpal Singh*, AIR 1929 PC 99 : 56 IA 119; *Gobinda Narayan Singh* v. *Sham Lal Singh*, AIR 1931 PC 89 : 58 IA 125 at 136; *Kesho Pd. Singh* v. *Bhagjogna*, AIR 1937 PC 69; *S. Govindarasu Udayar* v. *Pattu*, AIR 1999 Mad 435 (para 28). The Calcutta High Court in *Gujju Lal* v. *Fateh Lal*, (1881) ILR 6 Cal 171 (had held a judgment not relevant under section 13; The Allahabad H.C. held otherwise; *Collector of Gorakhpur* v. *Palakdhari Singh*, (1890) ILR 12 All 1 (FB).

was mentioned that N took F in adoption, when the fact of adoption was not relevant in that case is inadmissible to prove F's adoption to N in a subsequent case.[39]

In *Nataraj Pillai* v. *Subbaraya*,[40] it was held that a judgment by the French Court deciding that an adoption by a Hindu widow domiciled in French India was one which could validly be made under French Law and that it was made in such manner as French Law required for its validity, though not binding on courts in India, is admissible in evidence under Section 13, Evidence Act, even if it is not between the parties. Weight to be given to it depends on all the circumstances.

(In the circumstances of the case, it was held that the judgment in question must be given great weight in respect of all the matters dealt with by it.)

Where in a suit certain properties were claimed as self-acquired properties, a judgment in a previous litigation whereunder a lady in the family claimed maintenance on the ground that the properties are of joint family and when the court awarded the maintenance and created a charge on those properties, it was held admissible, on the ground that there on assertion of right of maintenance against the joint family property was recognised.[41]

In another case the Supreme Court held that the previous judgment in a suit by a former *Mahant* can be received in evidence under Section 13 in a suit where the succession to the office of a *Mahant* is in dispute, on the ground that the previous judgment based a transaction in which a person from whom one of the parties purported to derive his title ascerted his right as a spiritual collateral of the former *Mahant* and got a decree.[42]

The judgment of a court is a document which usually contains both a description of the litigation and the adjudication, with the reasons for the adjudication. The narrative given in a judgment not *inter partes* of the nature of the litigation, the names of the parties and witnesses, the rival assertions or claims, and the character of the evidence oral and documentary is admissible under Section 35 to prove those facts, if relevant under this or any other section. The court's written judgment is often the most convenient means of proof, and, in the case of an old proceeding, sometimes the only available proof of these matters. Thus a statement in a decree that a certain pedigree table had been put in evidence by one of the parties was admitted in evidence of that under Section 35 in a subsequent suit between other parties.[43]

In a suit for eviction against A, B, C, D, on the basis of a prior decree for ejectment obtained only against A, B, C, who was the brother of A and B, and D who was the wife of C, contended that the previous decree was not binding on them. It was held that the decision in the previous suit may not be *res judicata* against C and D, but it was good evidence of the fact that the plaintiff got a declaration of his rights, as against A and B; that C and D being merely in occupation at the instance of A and B or as members or dependents of the family they could not claim any better right to question the validity of the decree in the earlier suit.[44]

Where the previous judgment was of a *Maharaj Sabha* not being *inter partes* which gave a decision that the adoption of one F was not relevant in that case, it was held that such decision is inadmissible to prove adoption of F.[45]

14. JUDGEMENTS IN CRIMINAL CASES

A previous judgment in a criminal case is relevant in a civil suit as evidence of a particular instance where the right was claimed.[46]

A criminal court's judgment is admissible in evidence in a civil suit for a limited purpose of establishing a fact that the prosecution had ended in plaintiff's favour and not for the purpose of ascertaining the grounds on which the judgment was pronounced. It is well settled that the proceedings in

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39. *Dalu* v. *Juhar Mal*, ILR (1951) 1 Raj 166.
40. AIR 1950 PC 34 : 77 IA 33.
41. *Srinivas Krishnarao Kango* v. *Narayandevji Kango*, AIR 1954 SC 379.
42. *Sitaldas* v. *Santram*, AIR 1954 SC 606; *Abdulla* v. *Kunhammad Alias Ahmad*, AIR 1960 Ker 123.
43. *Collector of Gorakhpur* v. *Ram Sunder Mal*, AIR 1934 PC 157 (Cal) : (1934) 61 IA 286.
44. *Mahendra Prasad Singh* v. *Baldev Chandra Hazarika*, AIR 1956 Assam 115.
45. *Dalu* v. *Juharmal*, AIR 1952 Raj 91.
46. *Brajraj* v. *Ajman Nisa*, AIR 1950 Ori 19; *Rajmohan* v. *Deonarain Mahato*, AIR 1945 Pat 453; *Hosnaki* v. *State*, AIR 1956 All 81

a criminal court are not evidence in a suit for malicious prosecution and the civil court, must go into the evidence and decide.[47]

In deciding a suit for damages arising from a malicious prosecution, the judge treated the judgment of the magistrate and the evidence given before the magistrate, in the prosecution complained of, as evidence in the case. Looking at the judgment of the magistrate as being a record of the facts found, the judge came to the conclusion that the plaintiff was not present at the time when the alleged offence was committed and decreed the plaintiff's claim. On appeal, it was held that it was not permissible to the judge to utilise the judgment of the magistrate in the way he did; and that Sections 43, 13 or 11 of the Evidence Act did not apply to the case.[48]

15. FINDING OF FACTS IN A JUDGMENT

Where the two parties claimed possession of a house in dispute and which led to a criminal proceedings between those parties, a judgments of a Civil Court was relied on by a sessions judge when a second appeal was pending against that judgment. According to the judgment one party was shown as in possession of the house, and so the accused was convicted. It was held, that the provisions of Sections 40-42 and 43 only excluded judgments as pieces of conclusive evidence, but did not bar the admission of judgments as proof of the fact of litigation or its results and effect upon the parties which made a certain course of conduct probable or improbable on the part of one of the parties.[49]

Where a tenant filed a petition for fixing the standard and reduce the contractual rent and when he sought to produce findings in other cases in support of his petition, it was held that finding of fact in one case is no evidence of that fact in another case. And therefore, certified copies of judgments in other standardisation cases cannot be filed, but if parties do not object and adopt such statements as correct the court may proceed on that basis.[50]

16. IN LAND ACQUISITION CASES

Judgments in other land acquisition proceedings are relevant in considering the market value of the land in subsequent acquisition cases.[51]

17. *EX PARTE* JUDGMENT

It was held by the Punjab High Court, that an *ex parte* judgment of a High Court, where it is an instance of custom or opinion on a question of law does not become less valuable merely on the ground of the absence of a respondent.[52]

18. UNCONTESTED CASES

In an uncontested case where a custom was alleged to exist it was held to be very good proof of the existence of the alleged custom.[53]

19. DECREE AS TO POSSESSION

A decree as to possession of land is admissible under this section as it affords presumptive proof of possession in favour of decree holder.[54]

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47. *Thongam Yaimabi* v. *Thounaojam Kalisingh*, AIR 1959 Mani 32; **see also** *Adhikari Mayum Brajmaham Sarma* v. *Heikrujan Tombi Singh*, AIR 1973 Gau 38.
48. *Gulabchand* v. *Chunilal*, (1907) 9 Bom LR 1134.
49. *Shiv Charan* v. *State*, AIR 1965 All 511.
50. *Gouri Shankar Show* v. *Anil Chandra Majumdar*, AIR 1953 Cal 671.
51. *CIT Bangalore* v. *H. Narayanaiah*, AIR 1976 SC 2403; *Madan Mohan* v. *Secretary of State*, AIR 1925 Cal 481; *Maharaj Kumar* v. *State of U.P.*, ILR (1960)2 All 71; *Nageswara Rao* v. *Dy. Collector per Umamaheshwaram, J* AIR 1959 AP 52; *Prathima Gosh (Smt.)* v. *State of West Bengal*, AIR 1973 Cal 284; *State of U.P.* v. *Nathoo*, AIR 1986 All 172; *Hemanth Kumar* v. *State of W.B.*, (1975)79 Cal WN 378 **followed** *Secretary of State for India* v. *Indian General Steam Navigation and Railway Co. Ltd.* ILR 36 Cal 967 (PC); *Asstt Collector & L.A.O. Gadwal* v. *Pandu Rangaiah*, 1997 AIHC 2741 (para 21) (AP).
52. *Abdul Karim* v. *Shiv Narain*, AIR 1952 Punj 356
53. *Prem Chand* v. *Lilawati Shanti*, AIR 1956 HP 17.
54. *Hansraj* v. *State of H.P.*, 1985 CrLJ 1463.

20. JUDGMENTS ON COMPROMISE BETWEEN PARTIES

A compromise between two parties cannot bind a person to which he was not a party, but it cannot be said that it has no evidentiary value, it can be admitted under this section, and can be taken into consideration by the courts as evidence of the conduct of the parties at that time.[55]

Where after the decision of the Court in a litigation there was compromise between the parties, the compromise deprives the decision of much of its evidentiary value.[56]

21. DOCUMENTS NOT *INTER PARTIES*

The Supreme Court in *Harihar Prasad* v. *Deonarain Prasad*,[57] held that the description in a mortgage deed by the mortgagors of the land mortgaged as properties "In our Sir, and *Khas* possession" may not be regarded as admissions by the mortgagees as the deeds were executed by the mortgagors; but they are certainly admissible under Section 13 as assertions of title and when it is under these documents that the mortgagees claimed, their probative value as against them, and as against their lessees who claimed under them is high.

Recitals of boundaries in documents not *inter parties* would be admissible under this section in proper cases where the circumstances of particular case permit such a course. The recitals as to a boundary in documents between third parties is admissible to prove possession or title as against a stranger.[58] Where a *muchilika* was executed by a tenant in favour of a land-lord describing the land-lord as an adopted son of one D, in the descriptive portion of the document, it was held that the description of the land-lord as the adopted son of D was not a superfluous recital, but it was in assertion of right that the tenant was taking the lease of the land which the land-lord could lease out as the adopted son of D, and so it is admissible.[59] The recitals as to the character of the lands in dispute made in mortgage bonds executed by the plaintiff are admissible in evidence under this section.[60] In a mortgage deed executed by A and B, it was stated that B was the adopted son of his deceased brother C. It was held that admission of A is relevant under Section 32 clause 3 being against his pecuniary interests inasmuch as he would lose his share in the property of C if B was his adopted son; it also constituted evidence of B's assertion of the right that he was adopted son of C and was relevant under Section 13 read with Section 32 clause 7 as B was dead.[61]

In the case of a statement of a third party made in a document executed in favour of the defendant in a suit, about the boundaries of the land concerned in a suit, when such third party was not proved to be dead nor was he examined in the case, it was held that such statement in a document is inadmissible against the plaintiff.[62] The recitals of the boundaries in documents between third parties are inadmissible to show that any party to the suit is or is not the owner of an adjoining land which has been mentioned as one of the boundaries in such documents[63] unless the executant is examined.[64] Similarly documents between a party to the suit and a stranger in which there were recitals as to the boundary is not admissible.[65]

In the case or recitals of boundaries in document *inter parties*, it would be a joint statement made by the parties to the document, and so it is relevant against them as an admission. Where the recitals occur

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55. 1956 All WR 544.
56. *Ram Kirpal Pandey* v. *Janki Prasad Choudhury*, AIR 1951 Pat 420; *Md Ibrahim Rowther* v. *Shaik Ibrahim Rowther*, AIR 1922 PC 59.
57. AIR 1956 SC 305.
58. *Rangayyan* v. *Innasimuthu Mudali*, AIR 1956 Mad 226.
59. *Harihar Rajguru Mohapatra* v. *Naba Kishore Rajguru Mohapatra*, AIR 1963 Ori 45; *Ashfaque Ali* v. *Ashafi Mahaseth*, AIR 1951 Pat 641; *Harihar Prasad* v. *Deonarain Prasad*, AIR 1956 SC 305.
60. *Kanhaiya Singh* v. *Bhagwat Singh*, AIR 1954 Pat 326.
61. *Harihar Rajguru Mohapatra* v. *Nabakishore Rajguru Mohapatra*, AIR 1963 Ori 45.
62. *Ramautar Gope* v. *Sheonandan*, AIR 1962 Pat 273.
63. *Sakldeep Rai* v. *Sarjug Rai*, AIR 1961 Pat 460 **relying on**; *Ram Nandan Prasad* v. *Tilakdhar Lal*, AIR 1933 Pat 636; *Hari Ahir* v. *Sri Sanghai Chacha*, AIR 1934 Pat 617; *Mudanlal* v. *Durgadutt*, AIR 1958 Raj 206; *The Church of Arlerdy of Immeculate Conception* v. *State of Mysore*, 1976 Kar 675.
64. *Sadhurajan* v. *Sriramulu Naidu*, AIR 1999 Mad 377 (para 28), **relying on** *Amiappa Nainar* v. *Annamalai Chettiar*, 1972 (1) MLJ 317 : AIR 1972 Mad 154.
65. *Kalappa Siddappa* v. *Bhima Govind*, 1961 Mys 160.

in a document between a party and a stranger it would be relevant against the party as an admission but not admissible in his favour. Where the recital is in a document between strangers, it is not a particular instance which the right was claimed, recognised or exercised or a transaction by which a right was claimed or asserted within the meaning of Section 13, and hence they are inadmissible to show that any party to the suit is or is not the owner of the adjoining land which has been mentioned as one of the boundaries in such documents.[66]

A document not *inter parties* is not relevant under this section but if the executant of the document is examined as a witness the recitals contained therein may be used to corroborate his testimony under Section 157.[67] Where there is statement in a rent receipt issued by a land-lord in favour of the plaintiff in the suit describing the plaintiff as daughter of the deceased tenant, it was held that it is not admissible as the land-lord was not examined though alive.[68]

22. RECORD OF RIGHTS

Under the Santhal Parganas Settlements Regulation of 1872, it was held that the record of rights maintained under the said regulation is conclusive as to the character of the land and not as to the nature of title.[69]

23. ENQUIRY UNDER BENGAL REGULATION

A report, submitted by a local agent under Bengal Regulation 19 of 1810 in an enquiry made by him as to whether a particular temple is a private or public temple, is admissible under this section when the nature of the temple, is in question.[70]

24. *INAM* FAIR REGISTER

It was held by the Andhra Pradesh High Court, following a decision of the Madras High Court, in *Sherfuddin* v. *Kairoon Bi*,[71] that the *Inam* Fair Register is entitled to great weight as the preparation of *Inam* Register was a great Act of State and its preparation and contents were the subject of much consideration under elaborately detailed reports and minutes but that is not to say that the entries therein would override or nullify the effect of registers prepared long before; that it is only in the absence of authentic evidence that utmost importance will be given to the *Inam* Fair Register. But it will not displace earlier documents the authenticity of which could not be questioned.[72]

25. PRIVATE MAPS

Private maps are not admissible in evidence until their accuracy has been proved. But where a private map or plan is attached to or referred to in a document of title relating to property in suit and such map is a part of the document and is necessary to understand or explain the document, it is admissible in evidence under Section 13 to render the document itself intelligible.[73]

26. "BY WHICH"

In this section the expression 'any transaction *by which*' is used, and not 'any transaction *in which*'.

SESHAGIRI IYER, J. in *Saripalli* v. *Fota*,[74] and also GEIDT. J., in *Bansi Singh* v. *Mirali Amirali*,[75] held that the stress should be laid on the use of the word 'by'.

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66. *Mudanlal* v. *Durgadutt*, AIR 1958 Raj 206 **relying on**, *Choonilal Khemari* v. *Nil Madhab Barik*, AIR 1925 Cal 1034; *Karuppama Konar* v. *Rangaswamy Konar*, AIR 1928 Mad 105; *Hari Ahir* v. *Sri Sanghat Chacha Mian* AIR 1934 Pat 617; *Nanakchand* v. *Md. Konar*, 1936 Lah 114.
67. *Kunda Singh* v. *Rangi Ram*, AIR 1950 Pepsu 7 **relying on**: *Ram Nandan Prasad* v. *Tilakdhari Lal*, 1933 Pat 636.
68. *Bhogal Paswaan* v. *Bidi Nabihan*, AIR 1963 Pat 450.
69. *Parmeshwari Devi* v. *Khushali Mandal*, AIR 1957 Pat 482; **See also** *Ganesh Das* v. *Jagabandhu Prusti*, (1971)37 Cut LT 420.
70. *Commissioner of Hindu Religious Endowments* v. *Kanak Durga Thakumani*, AIR 1958 Ori 183.
71. AIR 1944 Mad 468.
72. *Lakshminarasanma* v. *Raghavayya*, (1958) 1 An WR 343.
73. *Kedarnath Bhattacharjee* v. *Mahendarnath Kandu*, AIR 1951 Cal 253.
74. 26 IC 747 (Mad).
75. 11 Cal WN 703.

By using the expression 'by which' along with the expression 'transaction' it was held that in order that the transaction should be admissible on the ground that the right was created, claimed, modified, asserted, or denied, it must be shown to be not apart from the transaction by which it was created, claimed etc.[76]

27. ASSERTED

In a case[77] one plaintiff filed a suit for recovery of possession with an alternative prayer for fixing a fair and equitable rent. The defendant claimed that the land is a rent free *Fakirana* Grant and filed two documents, a *Patta* of 1905 and a sale deed in favour of his predecessor in interest. The Madras High Court, after considering the decisions of other High Courts held that the recital in those two documents that the land was a rent free *Fakirana* Grant was admissible in evidence, on the ground that the claim was asserted and recognised in those two documents.[78]

It was held in *Rangayyan's* case that where the existence of a right is in question it is permissible for the party relying on its existence to prove any transaction by which it was recognised by means of recitals of boundaries in document not *inter partes*.

The word 'assertion' in Clause 'b' of this section includes both a statement and enforcement by an act. It is not necessary to place evidence of acts done. A verbal statement not amounting to and not accompanied by any act would also be admissible if it amounts to a 'claim'.[79]

In a suit for declaration that the plaintiff was not married to the defendant, a report of the Government handwriting expert in a criminal case arising out of a complaint by the plaintiff's father for the alleged forgery of a marriage certificate was filed into the court, it was held that the report could be used as a evidence in the suit, on the ground that a particular fact was asserted and denied in the criminal case.[80]

28. "CLAIMED"

The word 'claim' denotes a demand or assertion in relation to a thing or attribute as against, or from, some person or persons showing the existence of a right to it in the claiment.[81]

In another case it was held that the word 'claim' implies that a right is asserted to the knowledge and in the presence of a person whose right will be derogated from by the establishment of the claim. The mere assertion of the right in a document to which the person against whom the right is asserted, is not a party and of which he knows nothing, is not to claim the right.[82]

In a suit a widow claimed that her husband died in 1939, whereas others contended that he died in 1933, the court found that the husband of the widow died in 1939. In a subsequent suit that judgment was filed to prove that the widow's husband died in 1939. It was held that a judgment other than a judgment referred to in Sections 40 to 42 may be admissible to prove that a right was asserted or denied under Section 13 or to explain or to introduce facts in issue or to explain the history of the case, that the finding in regard to the date of widow's husband's death could not be held as altogether inadmissible in law, the court could accept it atleast as an instance of the fact that the right was claimed and asserted and finally recognised in the previous suit, that hence the prior judgment though not admissible under Sections 40-42, was not barred from admissibility under Section 13.[83]

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76. *Rangayyan* v. *Innasimuthumudali*, AIR 1956 Mad 226, 229; **see also** *Brojendra Kishore Roy* v. *Mohim Chandra*, 1927 Cal 1; *Subbarayulu* v. *Vengama Naidu*, AIR 1930 Mad 742; (where the distinction was emphasised).
77. *Rangayyan* v. *Innasimuthu Mudali*, 1956 Mad 226.
78. **See also** *Kanhaiya Singh* v. *Bawat Singh*, AIR 1954 Pat 326; *Ashfaque Ali Khan* v. *Asharfi*, AIR 1951 Pat 641; *Motilal* v. *Baba Baldeo Dass*, AIR 1952 Vin Pra 36.
79. *Ramakrishna* v. *Venkata Suryanarayana*, AIR 1939 Mad 432.
80. *Altaf Hussain* v. *Nasreen Zahra*, AIR 1978 All 515.
81. *Radhakrishna* v. *Sarbeswarnag*, AIR 1925 Cal 684.
82. *Brojendra Kishore Roy* v. *Mohim Chandra*, AIR 1927 Cal; *Kalappa Siddappa Udayar* v. *Bhima Govind Uppar*, AIR 1961 Mys 160; *Royah Sri Sri Jyoti Prasad Singh Deo* v. *Bharat Shah Babu*, ILR (1935) 15 Pat 260 : AIR 1936 Pat 543; **Per contra**:—*Ashfaque Ali Khan* v. *Ashari*, AIR 1951 Pat 641.
83. *Mahavir Mahton* v. *Sonmati Kuer*, 1964 Pat 66; *Motilal* v. *Baba Baldeo Dass*, AIR 1952 Vin Pra 36.

29. "RECOGNIZED"

Judicial recognition of a custom is relevant under this section as an instance of the custom being recognised.[84]

But a judicial decision is far from having the same importance as a clear-cut instance of custom recognised by the parties themselves.[85]

Facts showing existence of state of mind, or of body, or bodily feeling.

S. 14. Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue, or relevant.

***Explanation* 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.**

***Explanation* 2.—But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact.**

ILLUSTRATIONS

(a) *A* is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

(b) *A* is accused of fraudulently delivering to another person a counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, *A* was possessed of a number of other pieces of counterfeit coin is relevant.

The fact that *A* had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant.

(c) *A* sues *B* for damage done by a dog of *B*'s, which *B* knew to be ferocious.

The facts that the dog had previously bitten *X*, *Y* and *Z*, and that they had made complaints to *B*, are relevant.

(d) The question is, whether *A*, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that *A* had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant as showing that *A* knew that the payee was a fictitious person.

(e) *A* is accused of defaming *B* by publishing an imputation intended to harm the reputation of *B*.

The fact of previous publications by *A* respecting *B*, showing ill-will on the part of A towards *B* is relevant as proving *A*'s intention to harm *B*'s reputation by the particular publication in question.

The facts that there was no previous quarrel between *A* and *B*, and that *A* repeated the matter complained of as he heard it, are relevant, as showing that *A* did not intend to harm the reputation of *B*.

(f) *A* is sued by *B* for fraudulently representing to *B* that *C* was solvent, whereby *B*, being induced to trust *C*, who was insolvent, suffered loss.

The fact that at the time when *A* represented *C* to be solvent, *C* was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that *A* made the representation in good faith.

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84. *Janat Bibi* v. *Ghulam Hussain*, AIR 1934 Lah 861 : (1934) 16 Lah 307.
85. *Dewan Singh* v. *Santi*, ILR (1936)17 Lah 809 : AIR 1937 Lah 228.

(g) *A* is sued by *B* for the price of work done by *B*, upon a house of which *A* is owner, by the order of *C*, a contractor.

A's defence is that *B*'s contract was with *C*.

The fact that *A* paid *C* for the work in question is relevant, as proving that *A* did, in good faith, make over to *C* the management of the work in question, so that *C* was in a position to contract with *B* on *C*'s own account, and not as agent for *A*.

(h) *A* is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where *A* was, is relevant, as showing that *A* did not in good faith believe that the real owner of the property could not be found.

The fact that *A* knew, or had reason to believe, that the notice was given fraudulently by *C*, who had heard of the loss of the property and wished to set up a false claim to it, is relevant as showing that the fact that *A* knew of the notice did not disprove *A*'s good faith.

(i) *A* is charged with shooting at *B* with intent to kill him. In order to show *A*'s intent the fact of *A*'s having previously shot at *B* may be proved.

(j) *A* is charged with sending threatening letters to *B*. Threatening letters previously sent by *A* to *B* may be proved, as showing the intention of the letters.

(k) The question is, whether *A* has been guilty of cruelty towards *B*, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts.

(l) The question is, whether *A*'s death was caused by poison.

Statements made by *A* during his illness as to his symptoms are relevant facts.

(m) The question is, what was the state of *A*'s health at the time when an assurance on his life was effected.

Statements made by *A* as to the state of his health at or near the time in question are relevant facts.

(n) *A* sues *B* for negligence in providing him with a carriage for hire not reasonably fit for use, whereby *A* was injured.

The fact that *B*'s attention was drawn on other occasions to the defect of that particular carriage is relevant.

The fact that *B* was habitually negligent about the carriages which he let to hire is irrelevant.

(o) *A* is tried for the murder of *B* by intentionally shooting him dead.

The fact that *A* on other occasions shot at *B* is relevant as showing his intention to shoot *B*.

The fact that *A* was in the habit of shooting at people with intent to murder them is irrelevant.

(p) *A* is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant.

Principle.—This section declares that facts which show the existence of any state of (1) mind, *viz.*, intention, knowledge, good faith, negligence, rashness, ill-will, good-will or (2) body or (3) bodily feeling are relevant when such state of mind or body or bodily feeling is in issue or relevant.

Intention, knowledge, and similar other states of mind, are matters of cogent inquiry in criminal cases; in some civil cases they are very material, *e.g.*, in cases of malicious prosecution, fraud, negligence etc.

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COMMENTS

1. PRINCIPLE AND SCOPE

This section declares that facts which show the existence of any state of (1) mind, *viz.*, intention, knowledge, good-faith, negligence, rashness, ill-will, good-will or (2) body or (3) bodily feeling are relevant when such state of mind or body or bodily feeling is in issue or relevant.

Intention, knowledge and similar other states of mind, are matters of cogent inquiry in criminal cases; in some civil cases they are very material, *e.g.*, in cases of malicious prosecution, fraud, negligence, etc.

Where the question is as to knowledge, intent, motive, or any bodily or mental state, evidence of other acts alone, showing the existence of such knowledge, intent, motive, or bodily or mental state, are admissible, even though it involves the proof of other crimes. Evidence admitted for such purpose must be confined within the limits for which it is admitted.

When the existence of a mental or bodily state or bodily feeling is in issue or relevant, then the facts from which the existence of such mental or bodily state or bodily feeling may be inferred are relevant. See the illustrations. Illustrations (e), (i) and (j) deal with intention; (a), (b), (c) and (d) with knowledge; (f), (g) and (h) with good faith; (n) with negligence and knowledge; (k), (l) and (m), with mental and bodily feeling. To explain states of mind evidence is admissible though it does not otherwise bear upon the issue to be tried.

"Whenever the physical condition, emotions, or state of mind of a person are in issue, or are directly relevant to an issue, his statements indicative thereof made at or about the time in question may be given in evidence. Only the description of the physical condition, emotion or state of mind is admissible under this exception, however, and it cannot be relied on to admit a statement providing an explanation of the cause of the condition or state of mind.[1] Equally, it seems that the exception will not apply where the state of mind is only relevant in order to persuade the judge or jury to draw an inference as to how it was caused."[2]

2. STATE OF MIND OR BODILY FEELING

In considering the question as to the meaning of "state of mind" in Section 14, distinction has to be made between simple mental phenomena like knowledge, intention, etc., and complex mental phenomena like fear, apprehension, etc., An inference which is arrived at by a process of ratiocination does not stand on the same footing as a mental condition which is included in the definition of "Fact" in Section 3 of the Evidence Act.[3]

This section applies to cases "where a particular act is more or less criminal or culpable, according to the state of mind or feeling of the person who does it; as, for instance, in actions of slander or false imprisonment, or malicious prosecution, where malice is one of the main ingredients in the wrong which is charged, evidence is admissible to show that the defendant was actuated by a spirit of enmity against the plaintiff; or again, on a charge of uttering counterfeit coin, evidence is admissible to show that the prisoner knew the coin to be counterfeit, because he had other similar coins in his possession, or had passed such coins before or after the particular occasion which formed the subject of the charge. The illustrations, show with sufficient clearness the sort of cases in which this evidence is receivable. But, I think we must be very careful not to extend the operation of the section to other cases, where the question of guilt or innocence depends upon actual facts and not upon the state of a man's mind or feeling. We have no right to prove that a man committed theft or any other crime on one occasion, by showing that he committed similar crimes on other occassions."[4]

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1. *Gardner Peerage*, Le March, 169-179; *R* v. *Gloster*, (1888) 16 Cox CC 471; *Gilbey* v. *G.W. Ry.*, 102 LT 202 CA; *Amys* v. *Barton*, (1912) 1 KB 40 CA.
2. PHIPSON ON EVIDENCE, 15th Edn. (2000), p. 334 (para15-03).
3. *Anant Baburao* v. *State*, AIR 1967 Bom 109 at (para 21).
4. Per GARTH CJ in *Empress* v. *M.J. Myapoory Moodeliar*, ILR (1881) 6 Cal 655, 659, 660.

Section 14 applies to cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it. It does not apply to cases where the question is the guilt or innocence of the accused, which depends on actual facts and not upon the state of the man's mind or feeling.[5]

Both preparation for commission of an offence and the previous attempt in that direction manifestly rest on the presumption that an intention to commit the offence was in the mind of the accused, which persisted until power and opportunity were found to carry it into execution. Such evidence is admissible.[6]

The Privy Council observed : "At the trial of the appellants for the murder of Karnail Singh the approver gave evidence that he and the appellants had murdered Bhan Singh a few days before the murder of Karnail Singh, and that they proposed to conceal the murder of Bhan Singh by causing injuries to Karnail Singh and getting themselves arrested for so doing. That is today, the evidence of the approver was that the motive, or, at any rate, one of the motives, for the injuries caused to Karnail Singh was a desire to conceal the murder of Bhan Singh. The suggested motive is no doubt a singular one, but however improbable an alleged motive may be the prosecution is entitled to call evidence in support of it, and nonetheless so because such evidence may suggest that the accused has committed some crime other than that with which he is charged (see illustration (a) to Section 8 of the Evidence Act). If evidence that the appellants had murdered Bhan Singh had been given with a view to showing that they were persons likely to have committed the murder of Karnail Singh, the evidence would have been inadmissible; but it was admissible to establish motive for the murder with which they were charged."[7]

Common intention has to come into being prior to the commission of the act, in point of time, but this point of time has not to be after a long gap. A common intention may develop on the spot and suddenly.[8]

Evidence of acts and documents of a period prior to the period mentioned in the charge is generally not admissible.[9]

In a case where the plea of insanity was taken, it was held that mere proof of insanity in general is not sufficient, and the conduct of the person's, antecedent and subsequent to the commission of the crime, is relevant in view of explanation (1) of this section.[10]

In matrimonial cases, the court has jurisdiction to appoint a commission/doctor for examining the parties to know the bodily feelings, whether he or she was impotent or not, and whether he or she was able to consummate the marriage. It was held that examination, of mental or bodily state of a person, is no deprivation of personal liberty or breach of Art. 21 of the Constitution.[11]

Where the accused claimed to have found the dead body of his wife, after coming home on the night of the occurrence, and he was found calm and composed, it was held that his conduct was inconsistent with the conduct of an innocent person, and hence such evidence is admissible showing the conduct.[12] Where the father accused of murdering his two daughters jumped from the terrace of his house and was seen trying to smash his head with a brick and was thus trying to end his life, such conduct of the accused showed his dull mind that he was so much overcome by remorse and repentance for the deed done by him that he wanted to end his life. If he had not confessed to his crime by speaking any words, his conduct was more eloquent and telling.[13]

Allegations of *mala fides* against the petitioners for winding up a company can generally be substantiated by circumstantial evidence only.[14]

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5. *Emperor* v. *Abdul Wahid Khan*, ILR 34 All 93; *A.H. Gandhi* v. *The King*, AIR 1941 Rang 324.
6. *Appu* v. *State of Madras*, AIR 1971 Mad 194; *Ghurey Lal* v. *State through Ram Narain*, AIR 1965 All 206.
7. *Natha Singh* v. *Emperor*, 73 Indian Appeals 196 : AIR 1946 PC 187.
8. *Shariff Ahmad* v. *State*, AIR 1957 All 50; *Kanailal Mitra* v. *Pannasashi Mitra*, AIR 1954 Cal 589.
9. (1978)2 Cal LJ 214.
10. *State* v. *Kartik Chandra Dey*, AIR 1951 Assam 79.
11. *G. Venkatanarayana* v. *Laxmi Devi*, AIR 1985 AP 1.
12. *Tulsiram* v. *State of Maharashtra*, 1984 CrLJ 209.
13. *Phundi* v. *State of M.P.*, 1993 Cr LJ 1881 (para 7) (MP).
14. *The Aluminium Corp. of India* v. *Laxmi Ratan Cotton Mills*, AIR 1970 All 452.

Proof of Intention.—"Man must be taken to intend the natural consequence of what he had done".[15]

In *Emperor* v. *Lakshman*,[16] after referring to the judgement in *Queen-Empress* v. *Rayapadayachi*,[17] and the principle laid down in *Regina* v. *Lovett*,[18] and also the remarks in *Queen* v. *Martin*,[19] it was observed: "It cannot be disputed that mere knowledge of the possibility of annoyance, resulting from an act of trespass, is not sufficient to bring the case within the definition, but, at the same time, it must be remembered that the word 'intent' cannot be read as if it were identical with 'wish' or 'desire'. There may be no wish to annoy, but if annoyance is the natural consequence of the act and if it is known to the persons who does that act that such is the natural consequence, then there is an intent to annoy..... When it is uncertain whether a particular result will follow (as in the Madras case in which he hoped to keep his conduct secret) there may be no intent to cause that result even though it may be known that the result is likely...." Finally it was observed "Although there is a presumption that a person intends what is merely a possible result of his action or a result, which, though reasonably certain, is not known to him to be so, still it must be presumed that when a man voluntarily does an act, knowing at the time that in the natural course of events a certain result will follow, he intends to bring about that result."[20]

Whether a man has got a particular intention or not, is to be inferred from the acts of the concerned person and the surrounding circumstances.[21]

Where it becomes necessary to find out the intention of a corporate body, it is not the intention of the individual members who constituted the corporate body, but the intention of the body as a whole that has to be looked at. Thus, the Court will have to look into the resolutions passed or the acts done by the corporate body as a whole. It is only the facts mentioned in the resolution that are relevant.[22]

The conduct of each individual co-conspirator including his acts, writings and statements, irrespective of the time to which it relates, can be relied on by the prosecution to show the criminality of the intention of the individual accused, with reference to his proved participation in the alleged conspiracy, to rebut a probable defence that the participation, though proved, was innocent. Such evidence is admissible under this section.[23] Where some persons were convicted under Section 402, I.P.C. for having assembled to commit dacoity, evidence of conduct of the accused and circumstances under which they were arrested were held to be relevant, as they probabilised the existence, of an intent to commit dacoity.[24]

But in a case of conspiracy to commit dacoity, facts showing that the object of the illegal association during a period of several months prior to the dacoity in question had been the commission of thefts and other discreditable acts, were held inadmissible under this section, to throw any light on the existence of an intention to commit, or to engage in a conspiracy to commit, the dacoity charged.[25]

Common intention has to come into being prior to the commission of the act, in point of time, but this point of time has not to be after a long gap. A common intention may develop on the spot and suddenly.[26]

3. EVIDENCE OF PREVIOUS AND SUBSEQUENT EVENTS TO SHOW INTENTION

Illustration (e) of this section shows that the previous event, namely, the fact of previous publications is relevant in a libel case; similarly illus. (j) shows that the previous event, namely threatening letters which are previously sent, are relevant.

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15. *Regina* v. *Lovett*, 9 CP 462.
16. 26 Bom 558.
17. 19 Mad 240.
18. 9 CP 462.
19. 8 QB 54.
20. **See also** *Sellamuthu Sevvagaran* v. *Pallamuthi Kerappan*, ILR (1912) 35 Mad 186
21. *Ramzan* v. *Emperor*, AIR 1935 Sind 203.
22. *Guru Murthappa* v. *Corporation of Bangalore*, AIR 1962 Mys 92. **See also** *Arcot Citizens Bank Ltd* v. *State of Madras*, 1975 Mad 675
23. *Sardul Singh* v. *State of Bombay*, 1958 SCR 161 : AIR 1957 SC 747.
24. *Queen* v. *Bholu*, ILR 23 All 124.
25. *Emperor* v. *Wahiduddin* (1929) 32 Bom LR 324 : ILR 54 Bom 524 : AIR 1930 Bom 159
26. *Sharif Ahmad* v. *State*, AIR 1957 All 50. *Kanailal Mitra* v. *Pannasashi Mitra*, AIR 1954 Cal 588

A medical practitioner was charged for causing death of a patient by administering a certain quantity of extract of stramonium (*Dhatura*) and also a full leaf of the same plant. The defence was that there was report of medical experience regarding the cases in which that particular drug was successfully administered for curing Ginea Worm. The prosecution placed evidence showing similar facts of the accused doctor administering the same *Dhatura* which proved fatal. It was held that even if the accused had been ignorant of the effect of *Dhatura* on the human system or the fatal consequences of administering it in those doses, he had no excuse to continue to be ignorant or to be optimistic after the death of the previous patient, on administering the drops of tincture of stramonium and one leaf of *Dhatura*.[27]

Where there is a series of speeches, and lectures on one topic within a short period of time, they can be considered as they would throw light on the real meaning and intent and the state of mind of the speaker with reference to the subject-matter of the other speeches.[28] (Illus. (e)). In *R.* v. *Papa Sani*[29], a dancing girl was charged under Section 373, I.P.C., for procuring a girl with an intent to use her for prostitution and giving money to that girl; it was stated that it was a practice among dancing girls to acquire girls and such girls could not get married. On those facts it was held that those facts were relevant to support the intention, under this section, and they were sufficient for a conviction.[30] The conduct of parties showing prolonged cordial cohabitation as husband and wife, and the acknowledgement, by the husband of the paternity of the children and of the woman as his wife, are relevant to presume marriage between them, though the validity of such marriage is a different issue.[31] In *Chidambaram Pillai* v. *Emperor,*[32] the accused stated before the Magistrate that he did not want to make any statement, but the next day he made a statement to the District Jail Superintendent, with a request that it might be placed on record, which was sent later to the Magistrate. The question was whether such a statement, which was a subsequent fact was relevant to show the intention. It was held that even a statement which the accused had made after he had been produced before the Committing Magistrate was admissible evidence of intention under this section. Where the prosecution tendered in evidence a copy of a letter written by the accused to the editor of a newspaper, sending for publication a pamphlet charged as seditious, and the latter indicated the writer's motive, it was held that the copy was admissible under Section 9 and this section, as evidence of the accused's intention.[33] Similarly a writing made subsequent to the writing regarding which the writer was charged with sedition and which was found in his possession, was held admissible under this section as evidence of intention.[34]

4. KNOWLEDGE

In WIGMORE,[35] it is observed: "Knowledge signifies being aware. Even where the doing of the act involved, is not disputed, a knowledge existing at the time of the act may be in dispute. Thus, proof of knowledge becomes a usual necessity for certain offences, such as the uttering of forged or counterfeit paper and the possession of stolen goods; while it is rarely an element to be proved in other offences, such as robbery, rape and homicide."

The notions about knowledge, belief and consciousness are not exactly identical, but they have one common feature as to the mode of evidencing those mental states. Knowledge may be established by admissions of the persons or by evidence of other circumstances. It can be inferred from the conduct of the person.

Where a person was charged for forging one promissory note in the first court, another forged document was found in the pocket of the accused. It was held that the one which was found in the pocket

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27. *Juggaw Khan Jamshankhan* v. *State,* AIR 1963 MP 102.
28. *Chidambaram Pillai* v. *Empror,* ILR 1908 32 Mad 3; *Queen Empress* v. *Jogendra Chunder Bose,* ILR 1891 19 Cal 35; *Emperor* v. *Phanendranath Mitter,* ILR (1908) 35 Cal 945; *Queen Empress* v. *Balgangadhar Tilak,* ILR (1897) 22 Bom 112; *Omprakash* v. *Emperor,* AIR 1930 Lah 867; *Chamupati* v. *Emperor,* AIR 1932 Lah 99; *Naravan Kashinath Vaidya* v. *Emperor,* AIR 1918 Nag 248 (In all the above cases previous speeches were held admissible under this section 14).
29. 23 Mad 159.
30. **See also** *Empress* v. *Amba Prasad,* ILR (1897) 20 All 52 (FB).
31. *Razia Begum* v. *Shahebzadi Anwar Begum,* AIR 1958 AP 195.
32. ILR (1908) 32 Mad 3.
33. *Emperor* v. *Spratt No. 2,* (1927) 30 Bom LR 314.
34. *Emperor* v. *Spratt No. 3,* (1927) 30 Bom LR 315 : AIR 1928 Bom 77.
35. Vol. II. Section 300, P. 192.

was not admissible to show that the one in question was a forged one, as it was not relevant to show his knowledge.[36] The fact that a person attested a deed is no evidence in itself that he consented to it or had knowledge of its contents.[37] Where an intoxicated person killed another by repeated stab wounds, requisite knowledge that it is likely to cause death and also intention can be presumed and the offence cannot be reduced to one under rash and negligent act under Section 304, I.P.C.[38]

4A. Registration as Notice.—Registration of a compulsorily registrable document under the Registration Act is notice.[39]

There was a conflict of decisions as to whether, in the case of documents, which are not compulsorily registrable, registration amounts to notice. The conflict between the High Courts as to the question whether mere registering a document is notice by itself or not was set at rest by the Judicial Committee in *Tilak Dhari Lal* v. *Khedan Lal*,[40] *approving* the decision in *Bunwarijhan* v. *Ranjee Thakur*[41] wherein it was held: "Whether registration is or is not notice in itself depends, we think, upon the facts and circumstances of each case, upon the degree of care and caution which an ordinary prudent man would necessarily take for the protection of his own interest, by search into the registers kept under the Registration Act."

4B. Constructive Notice.—The doctrine of constructive notice means knowledge which is equivalent to knowledge of a thing.[42] Section 3 of the Transfer of Property Act states the circumstances from which presumption of constructive notice would arise:

(a) Wilful abstention from enquiry or search;

(b) Gross negligence;

(c) Registration as contained in Explanation to the definition of notice in Section 3, Transfer of Property Act;

(d) Actual possession as in Explanation II, T.P.A.; and

(e) Notice to an agent as in Explanation III, T.P.A..

It was held that this doctrine would not be applicable where a person was guilty of secrecy or fraud, for instance, where the vendor fails to discharge his obligation to disclose encumbrances over the property to a purchaser.[43] Similarly a decree holder will not be allowed to plead registration of a mortgage in his favour as constructive notice to an auction purchaser.[44]

The expression "wilful abstention from enquiry or search" was construed to imply want of *bona fides* as distinguished from an omission to make enquiries, which is not sufficient to constitute constructive notice.[45]

It may, however, be presumed that abstention from enquiry is wilful.[46]

In a case where a person borrowed money by giving security of a sale deed which recited the vendor's lien, it was held that the lender of the money would be deemed to have notice of the lien.[47]

4C. Notice Through Agent.—The Maxim "*Qui Facit Per Alium Facit Per Se*" means that he who acts through another is deemed to act in person.

Explanation III, to Section 3 of the Transfer of Property Act and its proviso place some conditions for the application of this rule: they are (1) Notice must have been acquired as an agent; (2) It must be when he is acting as an agent; (3) That notice must be in the course of his business on behalf on his

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36. *Queen Empress* v. *Prabhudas Ambaram*, 11 BH CR 91.
37. *Rajlakki Devi* v. *Gokul Chandra Chowdhuri*, (1869) 3 BLR 57 (PC).
38. In re : *Macherla Balaswamy*, AIR 1953 Mad 827.
39. *Kenchegowda* v. *Channaiya*, AIR 1953 Mys 22; *Hirachand* v. *Kashinath*, AIR 1942 Bom 339.
40. AIR 1921 PC 112.
41. 7 Cal WN 11, 18.
42. *Balakrishna Pramanik* v. *Bhawanipur Banking Corp.*, AIR 1932 Cal 521.
43. *Harmasoji* v. *Mankuvarbai*, 12 Bom HC 262; *Morgan* v. *Govt. of Hyderabad*, ILR 11 Mad 419.
44. *Ramchandra* v. *Jayaram*, ILR 22 Bom 686; *Boondo* v. *Roji*, 26 Bom 290.
45. *Kausalai Ammal* v. *Sankara Muthiah*, AIR 1941 Mad 707.
46. *Rangappa* v. *Marappa*, AIR 1958 Mad 515.
47. *Alwarchetty* v. *Jagannatha Iyer*, (1928) 54 MLJ 109.

principal; (4) Such notice must relate to the business; (5) The agent should not have fraudulently concealed the fact from the principal.

4D. Good faith.—Section 52 of the Indian Penal Code states that nothing is said to be done or believed in good faith which is done or believed without due care and attention.

4E. Negligence.—"Negligence in a legal sense is a negative rather than a positive term and, in any given circumstances, is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case, and the term 'negligence' is, therefore, not susceptible of any precise definition which will be of universal applicantion.... Where there is no duty to exercise care at all, negligence in the popular sense has no legal consequence. Where there is duty to take care, reasonable care must be taken, to avoid acts or omissions which, it can reasonably be foreseen, are likely to injure persons who are reasonably likely to be affected."[48]

Negligence presupposes want of proper care, whereas rashness conveys the idea of recklessness or doing of an act without due caution, or consideration.[49]

Where a person is under a duty, by reason of certain facts which came to his knowledge, to make further enquiries, an omission to enquire amounts to gross negligence.[50]

4F. Criminal rashness.—The criminality of rashness lies in running the risk of doing such an act with recklessness or indifference as to the consequences.[51]

Criminal rashness is different from criminal negligence. Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury, but without intention to cause injury, or knowledge that it will probably cause. Such an act would be with recklessness or indifference as to the consequences, whereas criminal negligence is the gross and culpable neglect, or failure, to exercise that reasonable and proper care and precaution, to guard against injury either to the public generally, or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the person to have adopted. JUSTICE HOLLOWAY stated "Culpable reashness is acting with the consciousness that the mischievous and illegal consequences may follow but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him and that, if he had, he would have had the consciousness. The imputability arises from the negligence of the civic duty of circumspection."[52]

5. RELEVANCE OF BAD CHARACTER

Such of those facts as would show the state of mind with reference to a particular matter, is relevant. The general tendency of an accused cannot be proved to show his intention, as that would amount to proving his bad character.[53]

6. SIMILAR FACTS

In **England** evidence of facts or transactions similar to the fact or transaction directly in issue is admissible if it is logically probative subject to two exceptions; evidence is not admissible:

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48. HALSBURY'S LAWS OF ENGLAND.
49. *Emperor* v. *Abdul Latif*, AIR 1944 Lah 163; *Re. J.C. May*, AIR 1960 Mad 50.
50. *Renukabai* v. *Bheosan*, AIR 1939 Nag 132.
51. In re : *Nidamprti Nagabhushanam*, 7 Mad HCR 119; *Chhote Lal* v. *Emperor*, AIR 1945 All 16; *State of Bihar* v. *Mangal Singh*, AIR 1953 Pat 56; *Chammanlal* v. *State*, AIR 1954 All 186; *Emperor* v. *Abdul Latif*, AIR 1944 Lah 163; *Verghese Chereyan* v. *Sarkar*, AIR 1959 Tri Cochin 14.
52. *Lazarus* v. *State*, AIR 1953 All 72; *Empress of India* v. *Idubeg*, 3 All 776; In re : *Nidampti Nagabhushanam*, 7 Mad HCR 119; *Smith* v. *Emperor*, AIR 1953 Cal 333; *State Govt. M.P.* v. *Rangaswami*, AIR 1952 Nag 268; *Bharosi* v. *State*, AIR 1957 MP 236; *State*. v. *Banshi Singh*, AIR 1960 MP 105; *State of Bihar* v. *Mangal Singh*, AIR 1953 Pat 56.
53. *Lakshmandas Chagalal Bhatia* v. *State of Bombay*, AIR 1968 Bom 400.

(1) of similar acts done by himself, if they do no more than show a general disposition, habit or propensity to commit such acts and a consequent probability of his having committed the act, or possessed the state of mind in question, and

(2) of similar acts done by others, similarly circumstanced to himself, to show that he would be likely to act as they did.

(PHIPSON ON EVIDENCE, Ch. 12, page 184, 13th Edn.) These two exceptions apply to civil as well as criminal proceedings.

LORD HERSCHELL L.C. laid down two principles. The first was "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that he is a person likely, from his criminal conduct or character, to have committed the offence for which he is being tried."[54] PHIPSON states 'This rule must be regarded as fundamental in the law of evidence and is probably one of the most deeply rooted principles of the Criminal law.[55]

LORD SUMNER added, in a well-known passage from his judgment in *Thompson* v. *R.*[56]: 'No one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime or that he is generally disposed to crime and even to a particular crime'.

LORD HERSCHELL L.C. went on to formulate the second principle, saying: "On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."[57]

Regarding the first principle in *R* v. *Thompson*,[58] it was observed that it was one of the most deeply rooted and jealously guarded principles of our criminal law and fundamental in the law of evidence.

Regarding the second principle of Lord Herschell, LORD SUMNER observed in *Thompson* v. *R.*[59]: "Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defence in order to rebut them at the outset with some damning piece of evidence."

In *Noormoahamed* v. *R.*[60] LORD DUPARCQ *re-affirmed* the two principles of LORD HERSCHELL and agreed with the dictum of Lord SUMNER. This was **followed in** *Hariss* v. *D.P.P.*[61]; *Kuruma* v. *R*[62]; *R* v. *Cook*[63]; *R.* v. *Flynn*[64] and *Selvey* v. *D.P.P.*[65]

These principles were considered by the House of Lords in *Boardman* v. *D.P.P.*[66]

PHIPSON ON EVIDENCE[67], after referring to the above decision, summarises the principles as classified in the above case, as follows:

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54. *Makin* v. *A.G. for New South Wales*, (1894) AC 57.
55. See the remarks of LORD SANKEY L.C. in *Maxwell* v. *D.P.P.*, (1935) AC 309, 317, 320. The Judicial Committee recently re-affirmed the principle in *Cottle and Laidlow* v. *The Queen*, (1976) Crim LR 440.
56. 1918 AC 232.
57. PHIPSON ON EVIDENCE, 13th Edn., p. 189.
58. 1918 AC 221 at 232.
59. 1918 AC 221.
60. 1949 AC 182.
61. 1952 AC 694, 707 : (1952) 1 All ER 1044.
62. 1955 AC 197, 203.
63. (1959) 2 All ER 97.
64. (1961) 3 All ER 58.
65. (1968) 2 All ER 497 (HL). **see also** *Amritalal Hazara* v. *Emperor*, ILR 42 Cal 957 : AIR 1916 Cal 188; *Emperor* v. *Panchu Das*, 47 Cal 671 (FB) : AIR 1920 Cal 500.
66. 1975 AC 421.
67. 13th Ed., Section 12, 09, page 190.

"1. The admission of similar fact evidence is exceptional and requires a strong degree of probative force.

2. It is for the judge to decide, firstly as a matter of law, and then as a matter of discretion, whether the evidence should be admitted. Two questions have to be answered: (i) is the evidence of similar fact admissible *i.e.*, relevant, apart from merely showing a disposition to commit the offence charged; (ii) if so, should the judge refuse to admit it as a matter of discretion, *i.e.*, does the prejudicial effect of the evidence outweigh its probative force? In practice, the two questions tend to merge into one. As has been noted, the reason for not admitting the evidence of similar facts is that such evidence may weigh too heavily with a jury. Hence the question can be put in this way: is there sufficient probative force in the similar fact evidence to get over the first hurdle of relevance and then over the much more difficult hurdle of outweighing the prejudicial effect?

3. To be admissible and gain the necessary probative force, the evidence as to the "Similar facts", and as to the main fact in issue, must display such a close or striking similarity or such an underlying unity that, if accepted, it would in common sense be inexplicable on grounds of coincidence.

4. In making his decision, the judge should apply common sense and experience. "In matters of experience he should keep close to current mores."

5. The admissibility of similar fact evidence does not depend upon any particular defence other than the general denial. It is all a question of relevance. However, it is submitted that the nature of the defence or possible defence is one of the facts which the judge should take into account in considering whether the probative force of the similar fact evidence outweighs its prejudicial effect. The categories referred to in Makin cannot therefore be regarded as closed and are better regarded by way of example than as an exhaustive list.

6. The same rule as to admissibility applies to all cases. There is no special rule for cases involving homosexual misconduct, which should now be added.

7. Where there is a real chance of collusion between witnesses, the evidence should not be admitted."

PHIPSON goes on to say in Sections 12-10, p. 191: "Formulating a test is an almost impossible task. Each case will depend on its own circumstances and in reaching a decision the judge will be guided by experience and common sense. However, as a broad guide it is submitted that, to be admissible, the similar facts must bear a striking similarity to the evidence in relation to the offence charged."

The Court of Appeal in *R* v. *Rance*[68]; and *R* v. *Scarrott*[69], considered the test of "striking similarity" propounded in *Boardman's* case and said that too much importance should not be attached to the phrase "uniquely or strikingly similar" and said that evidence was admissible if it was "positively probative" of the crime actually charged. PHIPSON is of the view that the term "positively probative" is not helpful and on the authorities the test of "striking similarity", in the absence of any more cogent test, will clearly continue in use.[70]

On the question of whether similar facts must be immediately connected with the commission of an offence, there is difference of opinion.[71]

After considering these cases it is stated in PHIPSON ON EVIDENCE[72] that similar facts falling short of offences similar to those the defendant is charged, are admissible in evidence, if (a) it was evidence of circumstances similar to those surrounding the offence; (b) a similarity was striking.[73] Evidence of similar facts not only prior to, but subsequent to, that in question may be given as well as the defendant's conduct, demeanour in connection with them and of any surrounding facts showing his motive or intention. However, the similar facts must have occurred within a reasonable time.[74]

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68. (1975) 62 Cri App R 118.
69. 1978 QB 1016.
70. PHIPSON ON EVIDENCE secs. 12-14, p. 195.
71. See *R.* v. *Johansen*, (1976) 65 Cri App R 101; *R.* v. *Novac*, (1977) 65 Cri App R 107; *R.* v. *Carrott*, 1978 QB 1016.
72. 13th Edn., sections 12-18, page 199.
73. *R.* v. *Barrington*, (1981) 1 All ER 1132
74. PHIPSON ON EVIDENCE, sections 12-30, p. 205.

At page 210 (Sections 12-35) PHIPSON gives a number of examples of similar fact evidence. A few of them may be mentioned: Abortion[75]; Murder[76]; Nuisance[77]; Prostitution[78]; Sexual Offences[79].

In all these cases evidence was held admissible.

Instances of Inadmissible Evidence are then given *e.g.* Murder[80]; Nuisance[81].

PHIPSON[82] sumsup the present position : It may now confidently be stated that the general rule of English law is that the prosecution may not adduce, as part of its case, evidence of the accused's bad character outside the present charge unless the probative value of that evidence is such as to outweigh its prejudicial effect. The House of Lords reached this conclusion in *DPP* v. *P,*[83] after an extensive review of the leading authorities. This change in the law had been anticipated in the speeches of Lords CROSS and WILBERFORCE in *DPP* v. *Boardman,*[84] but the rest of their Lordships in that case were content, more or less, to rely upon Lord HERSCHELL L.C.'s famous formulation in *Makin.*[85]

Before *DPP* v. *P,* it had seemed that, at least in those cases where similarity between the matters at hand and the accused's previous misconduct was relied upon, the similarity had to be striking in its nature. For example, in *Inder,*[86] a case involving separate allegations of sexual assault made by six young boys, the similarities between the various alleged offences were commonplace. In Lord WIDGERY C.J.'s words, they were[87] :

> "the stock in trade of the seducer of small boys and were not unique but appear in the vast majority of cases that come before the Courts."

It followed that the various allegations were not admissible, the one upon the other.

In *DPP* v. *P,* the complainants were *P*'s two daughters. Their allegations of rape and incest against their father had a number of similarities, but the Court of Appeal had found them not to be striking. For the House of Lords, it did not follow that the two sets of allegations were inadmissible, the one in relation to the other. In such a case, where the issue was not one of identity but of whether or not the events had taken place as alleged, there was no requirement that the necessary enhanced probative value be established by striking similarity. It sufficed that the probative value which the evidence did have outweighed its potential for prejudice. Nevertheless, the House did go on to refer to several similarities between the accounts given by the daughters, concluding that, taken together, they gave "strong probative force to the evidence of each of the girls in relation to the incidents involving the other".[88] It is unclear whether *some similarity* in relation to the circumstances is required or whether sufficient probative value may be found in other ways.

In *DPP* v. *P,* itself, the "similar fact" evidence of each daughter was being used to corroborate or make more credible the evidence of the other. However, nowhere in the case is it indicated that the rejection of the need for striking similarity is limited to cases of that kind. In other cases, there is no witness whose evidence calls for support in that way. Rather, the evidence of similar facts or bad character is sought to be used as circumstantial evidence going directly to the issue of guilt. There is no better example of this kind of use than *Straffen.*[89] The accused had been committed to Broadmoor in 1951, having been found unfit to plead to charges of the murder of two young girls. Though he had

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75. *King* v. *Lovegrove,* (1920) 3 KB 643.
76. (1911) 17 Cri App R 71.
77. (1857) 8 EKB 486.
78. *King* v. *Hill,* (1914) 2 KB 386.
79. *King* v. *William, (*1911) AC 47.
80. (1899) 13 How St Tr 1166.
81. *R.* v. *Fairie,* (1857) 8 E&B 486.
82. PHIPSON ON EVIDENCE, 15th Edn. (2000), pages 373-375 (paras 17-24, 17-25).
83. (1991) 2 AC 447.
84. (1975) AC 421 HL.
85. *Makin* v. *Attorney-general for new South Wales,* 1894 AC 57, 65 PC. **See also** *Hoffmann,* (1975) 91 LQR 193
86. (1977) 67 Cr App R 143 CA. **See also** *R* v. *Clarke,* (1977) 67 Cr App R 398 CA; *R* v. *Brooks,* (1990) 92 Cr App R 36, 42 CA.
87. (1977) 67 Cr App R 143, 149.
88. (1991) 2 AC 447, 461.
89. (1952) 2 QB 911 CCA.

never been convicted, it was not denied that he had been the perpetrator. On a particular day in 1952, he managed to escape from Broadmoor and was at large for about four hours. At or about the time when he was free, a young girl was murdered. There was evidence at his trial for her murder that he had admitted that he had been in the neighbourhood and, indeed, that he had seen the girl, but he had denied killing her. The prosecution was permitted to adduce evidence of the details of the earlier killings. In all three cases, the girl had been strangled, had not been sexually interefered with, had apparently not struggled and, once dead, had been left out in the open where discovery was easy. The presence of these various similarities persuaded the Court of Criminal Appeal that the trial judge had been right to allow the evidence to be given."

For full discussion on "similar facts" in criminal cases see PHIPSON ON EVIDENCE 15th Edn. (2000), pages 372 to 377; *vide* also HALSBURY Vol. 11.[90]

7. INDIAN LAW IS SAME AS ENGLISH LAW

MELVILLE, J., in *R.* v. *Parbhudas,*[91] held that the Indian Evidence Act does not go beyond the English Law of Evidence regarding the principle of this section.

In *Sardul Singh* v. *State of Bombay,*[92] it was held where the charges specified the conspiracy to commit criminal breach of trust, evidence relating to acts outside the period of the conspiracy is not admissible in evidence.[93]

In general, whenever it is necessary to rebut by anticipation, the defence of accident, mistake or other innocent condition of mind, evidence that the defendant has been concerned in a systematic course of conduct of the same specific type as that in question may be given; to admit evidence under this head, however, the other facts tendered must be of the same specific kind as that in question, and not of a different character, and the acts tendered must also have been proximate in point of time to that in question.[94]

In *Reg.* v. *Prabhudas*[95]; WEST J., said: "The possession by an accused of several articles deposed to have been stolen would, no doubt, have some probative force on the issue of whether he had received the particular articles which he was charged with having dishonestly received, and the receipt of possession, of which he denied altogether; yet, in the first illustration to Section 14, it is set forth as a preliminary to the admission of testimony as to the other articles that 'it is proved that he was in possession of the particular stolen article'. The receipt and possession are not allowed to be proved by other apparently similar instances, only the guilty knowledge which can be inferred satisfactorily through a conscious or unconscious application of the law of probabilities from a multiplication of the fractions representing in each case the ratio of probable ignorance to probable knowledge of how the goods had been come by. Illus. (o) to the same section makes previous attempts by the accused to shoot the person murdered, evidence of the accused's intention, but not of the fact that caused the death; yet, it is certain that, on the issue of whether A actually shot B or not, the fact that he had previously shot at him, would have some probative force; so too, would proof of a general malignity of disposition by evidence 'that A was in the habit of shooting at people, with intent to murder them'; yet this evidence is excluded even as proof of A's intention, either as too remotely connected with the particular intention in issue or as raising collateral questions, which could not properly be resolved in the case." In this case the accused was charged with having forged a promissory note and it was held that evidence that a number of documents apparently forged or held in readiness for the purpose of forgery, were found in the prisoner's possession was not admissible.[96]

Evidence of the possession and attempted disposal of coins of an unusual kind was considered relevant on a charge of uttering such coins soon afterwards when the factum of uttering was denied.[97] WEST, J., observed, distinguishing the case in *R* v. *Prabudas*: "The possession of documents of unknown

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90. 4th Edn. pp. 297, 208; CROSS ON EVIDENCE, 6th Edn. Ch. X pp. 310-347.
91. 11 BHCR 91
92. AIR 1957 SC 747.
93. **See also** *Rameshwar Dage* v. *State of West Bengal,* AIR 1965 Cal 38 : (1965) 1 CrLJ 26.
94. *Amrit Lal Hazara* v. *Emperor,* ILR 42 Cal 957 : AIR 1916 Cal 188; this was **followed in** *Emperor* v. *Panchudas,* ILR 47 Cal 671 (FB).
95. (1874) 11 BHCR 90, 91, 92.
96. *R.* v. *Prabhudas,* (1874) 11 BHC 90.
97. *Queen-Empress* v. *Nur Mahomed,* (1883) 8 Bom 223.

character is a common occurrence and they could not be pronounced forgeries without a trial of the fact..... Now *Halle Sikka* rupees are not in common circulation in Poona and therefore the possession of a large number of them is unsual and may suggest the coins of that description possessed by the accused formed part of the quantity of surplus coinage disposed of by Mohammad Islam."

Similarly, where the accused was charged under Section 206 of the Indian Penal Code, with fraudulently transferring three properties to three different persons on a certain day, in order to prevent their being seized in execution of a decree, and the prosecution tendered evidence of five other fraudulent transfers of property effected by the accused on the same day, and apparently with the same object, this evidence was held admissible under Sections 14 and 15 of the Evidence Act, to prove either that all those transfers were parts of one entire transaction, or that the particular transfers which were specified in the charge were made with a fraudulent intent.[1]

Where a man is prosecuted for making speeches promoting hatred and enmity between communities[2], previous speeches made by him are admissible in evidence against him to show his intention in making the speeches which are the subject-matter of the proceedings.[3] Where the printer at Bareilly claiming a copyright on printing a certain book, complained of the infringement thereof by the printers at Hathras, and the offence was tried at Bareilly, it was held that the court was justified under this section in considering the infringing copies seized at Hathras.[4]

In *Amritalal* v. *Emperor,*[5] MOOKERJI, J., held that evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction or his intent with respect thereto.[6]

The first explanation to Section 14 deals with the facts showing the existence of any state of mind, and they are relevant only if they show that state of mind in reference to the particular matter in issue. Section 15 of the Evidence Act is an application of the general rule laid down in this section; and the words of the section as well as the illus. (a) would show that it is not necessary that all the acts should form part of one transaction, but that such acts should form part of a series of similar occurrence.[7]

In a case where a doctor was charged with criminal negligence, in order to show that a particular injection given by the doctor was too strong, and to rebut the presumption that the death of a particular boy was due to an exceptional reaction to that injection in his case, the prosecution tendered evidence of symptoms, illness and death of nine other children. It was held that the evidence was admissible, not as evidence of a course of conduct of the carelessness, or negligent conduct of the doctor, but as evidence of the reaction to children who were similarly injected at the same time and place, to prove that too strong a preparation was used for the injection.[8]

If several and distinct offences are so intermixed with each other, the party's whole conduct can be looked into and proof of one can be arrived at through evidence which is given to prove the others, and the evidence is not on that account be excluded.[9]

Confession of the accused must relate to offence charged and not to a collateral offence. Where a charge of criminal misappropriation between and during certain period was made, it was held that the confession admitting the offence relating to a different period cannot be considered.[10]

8. APPLICATION TO CIVIL CASES

The principle laid down by LORD HERSHELL in *Makin* v. *Attorney General of New South Wales*;[11] was applied in a civil case in *Hales* v. *Kerrs*.[12] The facts are: A barber was sued for using dirty material whereby the plaintiff suffered barber's itch. Two other customers of the defendant who suffered with the

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1. *Queen-Empress* v. *Nur Mahomed*, (1883) 8 Bom 223.
2. Section 153A, IPC.
3. *Jagannath Prasad* v. *R*, AIR 1942 Nag 62.
4. *Ghureylal* v. *State*, AIR 1965 All 206.
5. 42 Cal 957 : AIR 1916 Cal 188.
6. 42 Cal 957
7. *R* v. *Debendra*, ILR (1909) 36 Cal 573.
8. *John Oni Akerale* v. *King*, AIR 1943 PC 72.
9. *Queen* v. *Prabhudas Ambaram*, (1874) 11 BHCR 90; *Queen* v. *Tajuram*, ILR (1892) 16 Bom 414, 430
10. *Radha Kishen* v. *State*, AIR 1951 Ajmer 15.
11. 1894 AC 57.
12. (1908) 2 KB 601.

same were examined to show the defendant's negligence in using dirty material. It was held that the principle of admissibility of similar acts can be applied.[13]

In *Cummings or Mc Williams* v. *Sir William Arrol & Co.*,[14] LORD REID expressed a doubt as to whether the same considerations which justified the exclusivinary rule in criminal cases applied to civil cases. In *Mood Music Publishing Co. Ltd.* v. *Wolfe*,[15] LORD DENNING observed at p. 127 "In civil cases the courts will admit evidence of similar facts if it is logically probative; that is if it is logically relevant in determining the matter which is in issue; provided that it is not oppressive or unfair to the other side and also that the other side has fair notice of it and is able to deal with it."

In Australia it has been held that in civil cases there is no comparable exclusionary discretion in respect of similar acts evidence on the basis of an excess of prejudice over probative force.[16]

The principle on which evidence of similar acts is admissible, is not to show that, because the accused has committed already some crimes, he would therefore be likely to commit another, but to establish the animus of the act for which he is charged, and to rebut, by anticipation, the defence of ignorance, accident, mistake, or innocent state of mind. Under Section 15 of this Act, when the acts in question form part of series of similar occurrences, evidence of similar acts is admissible to prove the intention or knowledge of the person and to rebut the defence of accident or mistake, or the same having been done without the required knowledge or intention. Where the accused is charged with embezzling certain amounts from the government treasury and falsifying the accounts to cover up those defalcations during a particular period, it was held that evidence relating to similar entries of falsification of accounts made previous to the charge period are clearly admissible under Section 15; that under Section 477A, Indian Penal Code, it is not sufficient for the prosecution to prove that the entries which are the subject-matter of the charge are wrong entries. It should go further to prove that those entries are false entries and they are made by the accused, wilfully and with intent to defraud the State; that those instances can also be proved to rebut the accused's plea that he innocently made these entries at the behest of his superiors; but that evidence cannot be used to show that the accused was guilty of temporary misappropriation in the past or to probabilise the charge levelled against him by proving his past bad conduct if any.[17]

9. FACT RELEVANT TO SHOW EXISTENCE OF RELEVANT STATE OF MIND [EXPLANATION 1]

Illustrations [(n), (o) and (p)].—Refer to Explanation 1 which says a fact would be relevant to show the existence of relevant state of mind, in regard to a particular matter in question. In particular, illus. (o) and (p) give out the principle that evidence of general deposition, habit and tendencies of an individual is not relevant;[18] and the fact must show the state of mind in reference to a particular matter in question.[19] Anything having a distinct and immediate reference to the particular matter in question is admissible.[20]

The possession of a number of infringing copies of the publication, by the accused, would tend to show that they were printed with that intention.[21]

Under this Explanation evidence of general reputation is excluded. The evidence relating to the state of mind of a person must show that the state of mind exists not generally but in reference to the particular matter in question. Evidence of general disposition, habit or tendencies is inadmissible.[22]

Where the accused were charged with belonging to a gang of persons associated for the purpose of habitually committing dacoity, evidence of previous conviction of theft or of an order for giving security as the accused habitually committed thefts, was held inadmissible on the ground that such evidence did

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13. **See discussion in** PHIPSON 13th Edn., pages 223 to 232; HALSBURY 4th Edn., Vol. 17, pp. 35 to 37.
14. (1962) 1 All ER 623 at 630.
15. 1976 Ch 119.
16. *Manenti* v. *Melbourne Tramway*, (1954) VLR 115 at 118, **See** CROSS ON EVIDENCE, 6th Edn., Ch X pp. 346, 347.
17. *Krishna Murthy* v. *Abdul Sobban*, AIR 1965 Mys 128; **relying on** *Ranjas* v. *Bryo Mohan*, AIR 1915 Cal 188.
18. *Emperor* v. *Panchu Das*, ILR 47 Cal 671 (FB).
19. *Lakshmandas* v. *State*, AIR 1968 Bom 400.
20. *Emperor* v. *Debendra Prasad*, ILR (1909) 36 Cal 573; **See** illustrations (a) and (b).
21. *Ghurey Lal* v. *State*, AIR 1965 All 206.
22. *Emperor* v. *Haji Sher Mohammed*, (1921) 25 Bom LR 214 : AIR 1923 Bom 65 : ILR 46 Bom 961.

not indicate an intention to commit the particular crime with which the accused were charged.[23] The accused conspired together, murdered a person and implicated their enemies into the offence. The persons so implicated absconded, but the truth came to light and the accused were tried for the offence. At the trial evidence was led to show that on two previous occasions the accused had committed murders but had falsely charged and got convicted some other enemies of the accused. It was held that such evidence was not admissible as it amounted to evidence of similar acts and therefore of habit on the part of the accused and was therefore inadmissible under illus. (o) and (p).[24]

If an accused is found in possession of a number of stolen articles, that fact would show the knowledge and the intention as to the articles of which he is found in possession. With one instance one cannot be shown as dishonest, but when he is found in possession of several articles which are shown to have been stolen from different people, it can be inferred that he possessed the articles in a dishonest manner.[25]

Where there was an allegation of adultery in a divorce case, the letters written by the wife to her paramour would be good evidence of her feelings towards her paramour at the time when the letters were written.[26]

Where a person who does not know English was made to enter into a contract in respect of his property which was written in English, it was held that his mental capacity cannot be said to be irrelevant, and it is on the other party to show that the contract was signed with an understanding mind.[27]

10. PREVIOUS COMMISSION OF OFFENCE AND CONVICTION A RELEVANT FACT [EXPLANATION 2]

This explanation was substituted by the Indian Evidence Amendment Act, 1891. The amendment was necessitated by reason of the decision in *Queen Empress* v. *Kartick Chunder Das*[28]; wherein it was stated that all previous convictions of an accused were admissible in every case.

This Explanation distinctly states that, where the previous commission of an offence is relevant, the previous conviction of such person should also be a relevant fact. The Explanation is a particular application of the general rule contained in the section itself. Previous convictions become relevant when the existence of any state of mind, or body, or bodily feeling, is in issue or is relevant.[29]

The fact of previous conviction must show the state of mind of the accused in reference to a particular matter in issue, according to Explanation (2) of this section.[30]

Previous conviction for the offence of theft, or an order to give security for good behaviour on the ground of being a habitual offender, is admissible in a charge under Section 401 against the accused.[31]

A warrant was issued for the arrest of the accused under the Bombay Prevention of Gambling Act. In execution of this warrant, when the police entered his room, no actual play was seen, but playing cards were found on the ground, and ten persons including the accused were found sitting in a circle. Upon these facts, the Magistrate convicted the accused of keeping a common gambling house. Amongst other facts he took into consideration the previous convictions of the accused under the Gambling Act. On appeal, it was held that the evidence that the accused had been previously convicted of the same offence was admissible to show guilty knowledge or intention.[32]

This case is of doubtful authority because the previous conviction is nothing more than evidence of bad character which is excluded by Section 54. The section does not extend to cases where the question of guilt or innocence depends upon actual facts and not upon the state of a man's mind of feeling.

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23. *Emperor* v. *Haji Mohomed*, (1921) 25 Bom LR 214 : 46 Bom 958 : AIR 1923 Bom 65.
24. *Emperor* v. *Gangaram*, (1920) 22 Bom LR 1274.
25. *Gunwant* v. *Emperor*, 38 IC 723 : AIR 1916 Nag 73.
26. *Niranjan Das Mohan* v. *Ena Mohan*, AIR 1941 Cal 146, 151.
27. *Harendralal* v. *Haridasi*, AIR 1914 PC 71.
28. ILR 14 Cal 721 (FB).
29. *Emperor* v. *Allooniya*, ILR (1903) 28 Bom 129, 135; *Wazir* v. *Queen Empress*, (1895) PR No. 7 of 1895 (Cr); (see illustrations (e) and (f) to Section 43).
30. *Lakshmandas* v. *State*, AIR 1968 Bom 400; *Sharaf Shah* v. *State*, AIR 1963 AP 314.
31. *R* v. *Thukaram*, 14 Bom LR 373; *Bonai* v. *R*, 15 Cal WN 461; *Ladmalla* v. *R*, 52 Cal 595.
32. *Emperor* v. *Allomiya Husan*, (1903) 28 Bom 129.

In *R* v. *Sher Mohammad*[33]; the Bombay High Court held that when several persons are charged as belonging to a gang of dacoits habitually committing offences of dacoity, evidence of commission of offences other than dacoity *e g.*, evidence of previous conviction of theft or that they had been ordered to give security for good behaviour, being evidence of bad character, is not admissible under this section.[34]

In the case of dacoity which is an offence under Section 400, I.P.C., the word 'belongs' was given a meaning as intimate connection with a body of persons, extending for sufficient period to warrant an inference of identification with a band committing dacoities. It was held that previous convictions for similar offences are relevant under Explanation (2) of Section 14 to prove the sharing in common, the purpose of the gang.[35] Similarly in the case of theft under Section 379 of Indian Penal Code, a previous judgment convicting the accused for the same offence is relevant to prove dishonest intention of the same accused who was tried for the same offence in respect of the same land.[36]

In a case where an order was placed for printing of prize competitions after the Prize Competition Act, 1955 came into force, and it was denied by the accused, similar orders placed and distributed in the past inviting entries were filed by the prosecution. On those facts it was held that the intention to run a competition after the Act came into force can be inferred from the previous conduct.[37]

11. FINDINGS IN CRIMINAL COURT NOT BINDING ON CIVIL COURTS

In a suit for malicious prosecution, the judgment of a criminal court and the findings therein are not binding on the civil court, as the plaintiff must prove independently in the Civil Court *mala fides* and want of reasonable and probable cause for the prosecution.[38]

12. PREVIOUS JUDGMENT

It was held that a previous judgment convicting the accused for the same offence is relevant and admissible to show dishonest intention of the accused.[39]

Facts bearing on question whether act was accidental or intentional.

S. 15. When there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

ILLUSTRATIONS

(a) *A* is accused of burning down his house in order to obtain money for which it is insured.

The facts that *A* lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires *A* received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

(b) *A* is employed to receive money from the debtors of *B*. It is *A*'s duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by *A* in the same book are false, and that the false entry is in each case in favour of *A*, are relevant.

(c) *A* is accused of fraudulently delivering to *B* a counterfeit rupee.

The question is, whether the delivery of the rupee was accidental.

The facts that, soon before or soon after the delivery to *B*, *A* delivered counterfeit rupees to *C*, *D* and *E* are relevant, as showing that the delivery to *B* was not accidental.

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33. AIR 1925 Bom 195 : ILR 46 Bom 958.
34. **See also** *Public Prosecutor* v. *Bonigiry*, 32 Mad 179.
35. *Sharaf Shah* v. *State of A.P.*, AIR 1963 AP 314.
36. *Y.M. Singh* v. *Golap Singh*, AIR 1961 Mani 43.
37. *Mahesh Chandra* v. *State*, AIR 1964 All 572.
38. *Manipur Co-op. Bank Ltd.* v. *N.E. Railway*, AIR 1951 Mani 32.
39. *Y. Mohan Singh* v. *Golap Singh*, AIR 1961 Mani 675.

COMMENTS

1. PRINCIPLE AND SCOPE

This section deals with a particular application of the general principle laid down in Section 14. It refers to the facts bearing on the question whether a particular act was accidental or intentional, and whether it was done with a particular knowledge or intention. The fact that an act, forms part of a series of similar occurences in each of which the particular person was concerned, is relevant if the question is whether the act is accidental or intentional.

Where it is uncertain whether an act was done with a guilty knowledge or intention, or whether it was innocent or accidental, proof that it formed one of a series of similar acts raises the presumption that the act in question and the others, together forming a series, were done upon system, and were therefore not innocent or accidental.

Section 14 provides that the facts showing the existence of any state of mind, such as intention or knowledge, are relevant, when the existence of any such state of mind is in issue or is relevant; and this section provides specifically for allowing evidence of similar occurrence, in each of which the person doing the act was concerned, whenever there is a question whether an act is done with a particular knowledge or intention.[40]

In this section, as in Section 14, the intention of the party is taken into account. But, if there is no common link between the fact to be proved and the evidentiary fact, they cannot form a series. A regular system worked by the common intention should be proved.

Evidence tending to show that the accused has been guilty of criminal acts, other than those covered by the indictment, is not admissible unless upon the issue whether the acts charged against the accused, were designed or accidental, or unless to rebut a defence is otherwise open to him.

Whenever, it is necessary to rebut, even by anticipation, the defence of accident, mistake or other innocent condition of mind, evidence may be given to prove that the accused has been concerned in a systematic course of conduct of the same specific kind and proximate in time to the conduct in question.[41] Where the intention which is common to other offences becomes relevant, such common intention of the accused has to come into being prior to the commission of the act in point of time. There should not be any long gap between the time when he entertains the intention and the doing of the act.[42]

P introduced himself as a *Raja's* son to a prostitute who passed into his keeping. He then introduced G as his door-keeper and both visited her house till the night of December 9, 1914, when she was found next morning to have been murdered and robbed. P and G were tried on charges of murder, conspiracy to rob, theft, and abetment of each other in commission of the theft and murder. It was held that evidence that P had similarly introduced himself as a wealthy man in 1915 and 1918 to three other prostitutes who each became his mistress, that he then introduced G as his door-keeper, that both visited the women, and suddenly disappeared, and that their disappearance was followed by discovery, by the women, in each case, of the loss of their money or ornaments, was not admissible under Sections 9, 14 or 15. Section 9 did not apply for the purpose of proving identity as the murder and theft took place in December, 1914, and the subsequent incidents in 1915 and 1918. Section 14 was not applicable, as the evidence of the subsequent occurence did not show the state of mind of the accused towards the murdered woman. The first Explanation and ills. (i), (j) and (o) to that section excluded such evidence. Section 15 was not applicable as there was no question of the acts of murder and theft being accidental or intentional or done with a particular knowledge or intent, but that they were plainly intentional. Evidence of the subsequent incidents was also not admissible under Section 11.[43]

In order to be relevant under this section, the act has to form part of a series of similar occurrences. A solitary act or instance is the very antithesis of the expression "part of the series of similar

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40. *Emperor* v. *Harjivan Valji*, AIR 1926 Bom 231 : ILR (1925) 50 Bom 174, 182.
41. *Amrita Lal Hazara* v. *Emperor*, ILR (1915) 42 Cal 957, *Emperor* v. *Harjivan Valji*, 28 Bom LR 115 : (1925) 50 Bom 174 : AIR 1926 Bom 231.
42. *Sharifi Ahmad* v. *State*, AIR 1957 All 50, *Kanailal Mitra* v. *Pannasashi Mitra*, AIR 1954 Cal 589.
43. *Emperor* v. *Panchu Das*, ILR (1920) 47 Cal 671 (FB).

occurrence."[44] The words of the section as well as of illustration (a) show that it is not necessary that all the acts should form part of one transaction, but that they should be parts of a series of similar occurrence.[45] For example under ill. (a) the fact that the shops of the same person insured against fire were successively burnt down on different occasions was relevant to prove that the incidents were not accidental but part of a design.[46] Likewise evidence of similar facts in other occurrences is relevant to show *mala fides* or bad faith.[47]

2. SIMILAR OCCURRENCES

Upon a trial for arson with intent to defraud an insurance company, evidence that the accused had made claims on two other insurance companies in respect of fires which had occurred in two other houses which he had occupied previously and in succession, was admitted for the purpose of showing that the fire which formed the subject of the trial was the result of design and not of accident.[48]

"As a general rule, a single similar act or transaction is admissible. The doubts expressed by LORD REID in *D P P.* v. *Kilbourne*,[49] do not appear to have been shared by the House of Lords in *Boardman* v. *D P P*.[50] *A fortiori*, a series of such acts will be more likely to show system or a systematic course of conduct."[51]

Where shops of the same person insured against fire were burnt down in three successive years, it was held that the successive incidents of fire indicated that they were not accidental but were designed, and the evidence of previous fires was admissible.[52]

On the trial on an indictment for endeavouring to obtain an advance from a pawn-broker upon a ring by the false pretence that it was a diamond ring, evidence was admitted that two days before the transaction in question the accused had obtained an advance from a pawn-broker upon a chain which he represented to be a gold chain, but which was not so, and that he endeavoured to obtain from other pawn-brokers advances upon a ring which he represented to be a diamond ring but which, in the opinion of the witnesses, was not so. This ring was not produced. It was held that the evidence was properly admitted.[53] On a charge against the accused of cheating by falsely representing that he was the agent of an estate and could procure for the complainant appointment to the vacant post of manager to the estate, and thereby obtaining a sum of money as a pretended security deposit, evidence of instances of similar but unconnected transactions with other persons, before and after the date of the offence charged, was held admissible under this section, not to establish the factum of the offence but to prove that the transaction in issue was one of a systematic series of frauds, and that the intention of the accused on the particular occasion in question was dishonest and fraudulent.[54] Where accused had been convicted of the wilful murder of an infant child which they had received from its mother on certain representations as to their willingness to adopt it, and upon payment of a sum inadequate for its support for more than a very limited period, and whose body the evidence showed had been found buried in the garden of a house occupied by them, the court admitted evidence that several other infants had been received by the accused from their mothers on like representations and on like terms and that bodies of infants had been found buried in a similar manner in the gardens of several houses occupied by the accused.[55]

Similarly, where the court had to decide whether a person was maliciously shot or whether the shooting was accidental, proof that the accused had at another time shot at the same person was

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44. *Babulal Choukhani* v. *Western India Theatre Ltd.*, AIR 1957 Cal 709; **see contra** *A.H. Gandhi* v. *King*, AIR 1941 Rang 324.
45. *Emperor* v. *Debendra Prasad*, (1909) 36 Cal 573; **see also** *Emperor* v. *Panchu Das*, (1920) 47 Cal 671 (FB); *A H. Gandhi* v. *King*, AIR 1941 Rang 324.
46. *Nural Amin* v. *Emperor*, AIR 1939 Cal 335 : ILR (1939) 1 Cal 511.
47. *Babulal Choukhani* v. *Western India Theatres Ltd.*, AIR 1957 Cal 709.
48. *Regina* v. *Gray*, (1866) 4 F&F 1102 **approved** in *Makin's* case (1894) AC 57.
49. 1973 (1) All ER 440; *Ante*, pp. 12-10.
50. (1975) AC 421.
51. **See** PHIPSON ON EVIDENCE 13th Edn., P. 206, Ch. 12 (para. 31).
52. *Nurul Amin* v. *R*, AIR 1939 Cal 335 : ILR (1939) 1 Cal 51.
53. *Queen* v. *Francis*, 1874 LR 2 CCR 128. For other cases relating to false pretences, **see** PHIPSON 13th Edn p. 214 (paras 12-44).
54. *Emperor* v. *Debendra Prasad*, (1909) 36 Cal 573; *Emperor* v. *Yakub Ali*, (1916) 39 All 273 : AIR 1917 All 251.
55. *Makin* v. *Attorney-General for New South Wales*, 1894 AC 57.

considered relevant.[56] Where a woman was charged with the murder of her child by poison, and the defence was that its death resulted from an accidental taking of such poison, evidence to prove that two other children of hers and lodger in her house had died previous to the present charge from the same poison, was held to be admissible.[57] Where the accused was charged for an offence of murder of a boy, held that previous attempts by the accused to kill a boy would be admissible to rebut an anticipated defence of accidental drowning.[58]

In a case where the accused was charged for murder of a woman by poisoning her, evidence was admitted by the trial court showing that the accused had previously murdered another woman under similar circumstances. Their Lordships of the Privy Council held that the admission of evidence in the previous case was not justified, as there was no direct evidence showing that the accused administered the poison. It was further observed: "If the appellant (the accused) were proved to have administered poison to Ayesha in circumstances consistent with accident, then proof that he had previously administered poison to Gooniah in similar circumstances might well have been admissible."[59] Where the accused in an offence under Section 409, Indian Penal Code for (mis-appropriation of funds) pleaded that he made payments *bona fide* to wrong persons under a mis-apprehension, the prosecution wanted to place evidence of other transactions in which the accused mis-appropriated the funds. It was held that such evidence cannot be relevant under this section as it would show general dishonesty of the accused; and it is also inadmissible for rebutting the defence of the accused.[60]

In an action for libel, instances of acts of the plaintiff more or less closely resembling the particular act of misconduct imputed to the plaintiff in the libellous statements are not admissible in evidence. The defendant must justify the libel as true in substance and in fact by proving its truth, not the truth of other acts and occasions having nothing to do with the one in question.[61] It was held by the Patna High Court that the evidence showing that the accused was connected with similar cases of forged challans is admissible to prove the knowledge and intention in regard to the cases for which specific charges have been framed against the accused; that, similar facts which were subject-matter of prior indictments can be taken into consideration as relevant under this section. This would also apply to separate indictments still to be tried; there is no warrant for the view that the other instances cannot be used in regard to the knowledge of the accused, of the nature of the main fact for which specific charges have been framed, simply because those other instances form the subject-matter of separate indictments which are tried simultaneously.[62]

Where a person was charged for an offence under Section 477A, Indian Penal Code for falsification of accounts during a particular period, it was held that, though evidence of similar unconnected acts of the accused may not be admissible to probabilise the offence in question, still such evidence is admissible under Sections 14 and 15 as evidence of intention or knowledge on the part of the accused, and where it is necessary to rebut even an anticipated defence of accident, mistake, or other innocent condition of mind. And so, similar false entries made previously are admissible.[63]

Under this section the prosecution may place evidence of criminal acts other than those charged, without waiting for the accused to set up a specific defence calling for rebuttal evidence. When the Act in question forms part of a series of similar occurrences, evidence of similar facts is admissible, to prove intention or knowledge of the person and to rebut the defence of accident, mistake, etc. The principle on which evidence of similar acts is admissible is not to show that, because the accused has committed one crime, he would, therefore, be likely to commit another, but to establish animus, and rebut by anticipation, the defences of ignorance, accident, mistake, or other innocent state of mind.[64] In a suit for

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56. *Voke's* Case, 1823 Russl. Ry. 531. **See** HALSBURY, 4th Edn., Vol. 11, p. 209, F.N. 1.
57. *Reg* v. *Cotton*, (1873) 12 Cox 400; *Reg* v. *Roden*, (1874) 12 Cox 630.
58. *R* v. *Shnakaraya*, AIR 1940 Bom 365.
59. *Noor Mahammad* v. *King*, AIR 1949 PC 161.
60. *Lloyd* v. *R*, AIR 1933 Cal 136.
61. *Nadirshaw H. Sukhia* v. *Pirojshaw R. Ratnagar*, (1913) 15 Bom LR 130.
62. *State of Bihar* v. *Kailash Prasad Sinha*, AIR 1961 Pat 451; *Shamsher Bahadur* v. *State of Bihar*, AIR 1956 Pat 404 (a case of abducting girls for illegal purpose); *K Malaiah* v. *State of Mysore*, AIR 1956 Mys 9; *Lalchand Khatri* v. *State*, AIR 1961 Pat 260, (previous three specific dacoities).
63. *Krishnamurthy* v. *Abdul*, AIR 1965 Mys 128.
64. *Kalipada* v. *Union of India*, (1963) 1 CrLJ 88 (Ker) **relying** on *Srinivas Mal Bairoliya* v. *Emperor*, AIR 1947 PC 135; *Makin* v. *Attorney General*, 1894 AC 57; *Krishnamurthy* v. *Abdul Subban*, AIR 1965 Mys 128; *Amritlal Hazra* v. *Emperor*, AIR 1915 Cal 188.

recovery of rent from the defendant, though the defendant filed certain rent receipts into Court, he did not prove them by evidence; but plaintiff wanted to place evidence of similar suits wherein defendant filed forged receipts and did not prove them. It was held that such evidence is admissible under this section.[65]

See also commentary under the head 'Similar Acts Evidence' in Section 14.

Existence of course of business when relevant.

S. 16. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

ILLUSTRATIONS

(a) The question is, whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.

(b) The question is, whether a particular letter reached *A*. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.

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COMMENTS

1. PRINCIPLE AND SCOPE

Under this section when the ordinary course of a particular business is proved, the court is asked to presume that, on the particular occasion in question, there was no departure from the ordinary and general rule. For instance, if letters, properly directed to a gentleman, are left with his servant, it is only reasonable to presume *prima facie* that they reached his hands. Section 114, illus. (*f*), lays down that the court may presume that the common course of business has been followed in particular cases. This presumption is an application of the general *maxim omnia proesumuntur rite esse acta* (all acts are presumed to be rightly done), and based on the fact the conduct of men in official and commercial matters is, to a great extent, uniform. In such cases, there is a strong presumption that the general regularity will not, in any particular instance, be departed from. This, however, is a rebuttable presumption.

2. COURSE OF BUSINESS

This must mean the ordinary course of a professional avocation or mercantile transaction or trade or business. The section covers both private and public offices.[66]

Illustration (*a*) relates to the former; illus. (*b*) to the latter, *viz.*, the post office. Illus. (*b*) only means that each one of the facts mentioned therein is relevant; it cannot be read as indicating that, without a combination of these facts, no presumption can arise.[67]

The usage in a private house, however methodical, cannot convey the same weight as the ordinary routine of an office.

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65. *Kedar* v. *R*, AIR 1935 All 521.
66. *Ningawa* v. *Bharmappa*, ILR (1897) 23 Bom 63, 65.
67. *Mobarik Ali Ahmed* v. *State of Bombay*, AIR 1957 SC 857 : 1958 SCR 328.

3. PRESUMPTION UNDER OTHER ACTS

In view of the illus. (*a*) and (*b*) given in the Act, it would be appropriate to note certain other acts whereunder a presumption can be drawn. Under Section 3 of the Commercial Documents Evidence Act (30 of 1939), a receipt granted by the Post and Telegraphs Department may be presumed to contain accurate statements. Section 94 of the Negotiable Instruments Act (26 of 1881), states that, if a notice is duly addressed and sent by post and for some reason or another it is miscarried, such miscarriage does not render the notice invalid. See also Sections 51 and 52 of Indian Companies Act (1 of 1956). Section 114 Illus. (*f*) of this Act states the courts may presume that the common course of business has been followed in particular cases. See also Section 27 of the General Clauses Act, 1897. It was held by the Calcutta High Court, in a case where a letter of demand was sent under the Companies Act by registered post, and it was returned as 'refused' on the ground that the word 'private' in the name of the Company 'Private Ltd.', was not there on the address, that there was delivery within the meaning of Section 434(1)(a), read with Section 51 of the Companies Act and the addressee was not prejudiced.[68]

4. POST

It was held by the Gauhati High Court, that the presumption of service of a notice sent under registered post is available under Sections 16 and 114(*e*) of the Evidence Act as well as under Section 27 of the General Clauses Act, only when the plaintiff proves that the letter was properly addressed and was put into the post office. The mere fact that the full address was given in the body of the notice, does not raise any presumption that the envelope containing the notice was also correctly addressed. At any rate, presumption under Sections 16 and 114(*e*) of the Evidence Act, as well as under Section 27 of the General Clauses Act, is a rebuttable one. When the person on whom the notice is said to have been served appears before the court and denies on oath that the notice was served on him, the presumption is rebutted and in such a case the evidence of the postman becomes necessary.[69]

If a letter is shown to have been handed over or left with a person, whose duty in the ordinary course of business is to carry it to the Post Office, it would be presumed that it was sent to the Post Office.[70] Where the duty of a clerk was, in the ordinary course of business, to carry it to the Post Office and when he declared that he took all the letters to the Post Office, though he did not recollect about a particular letter, in that bundle, it was held the fact was presumptively proved.[71] Where the records of the proceedings show that the requisite letter for the appearance of the petitioner was sent, it was held that under the provisions of this section and Section 114(*f*) of the Act there must be a presumption that the letter was duly received by the petitioner.[72] Where the general practice of a Bank was to deposit the cash box in a sealed condition in a police station after entering details in the account and in the cash book, showing the amount on hand from day to day, when the amount was found missing from the sealed box, it was held that as the entries were made in the course of usual business, the cash and account book were admissible to prove the contents of the box.[73]

But in another case, it was held that it was extremely doubtful, if the act of placing a bundle of circulars in the custody of an office peon is equivalent to putting it in a certain place within the meaning of illus. (*a*) under this section; but assuming it to be so, the presumption under the illustration cannot arise in a case where the particular peon who was said to be entrusted with the duty of posting one bundle of circulars could not be named.[74] However, it was held that the evidence of a general clerk, whose duty was to make over the covers containing the drafts to a peon of the office for posting, that a particular letter which was brought to him in the envelope had been sealed in his presence and he gave it to the peon, was not sufficient to prove posting of that letter in the absence of the evidence of the peon.[75]

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68. *Sarkar Estates Ltd.* v. *Kusumika & Co.*, AIR 1961 Cal 439.
69. *Mahmuda* v. *Ajit*, AIR 1978 NOC 112 (Gau).
70. *Chunilal Dwarknath* v. *H.F. Insurance Co.*, AIR 1958 Punj 440.
71. *Chunilal* v. *H.F. Insurance Co.*, AIR 1958 Pep 440.
72. *W.B. Board of Secondary Education* v. *Basana Rani*, AIR 1982 Cal 467; referring to *Jitendranath Ghose* v. *Manmohan Ghose*, AIR 1930 PC 193; *Md Akbar* v. *Mian Musharaf Shaf*, AIR 1934 PC 217; *Sailabala Dassee Smt* v. *H.A. Tappassier*, AIR 1952 Cal 455 (entry in the office peon's book); *Fazal Ahmad* v. *K.N. Jain*, 2001 AIHC 464 (para 11) (All).
73. *Bilaspur Central Co-operative Bank Ltd* v. *State of M.P.*, AIR 1959 MP 77.
74. *Hulas* v. *Allahabad Bank*, AIR 1958 Cal 644.
75. *Bank of Bihar* v. *Tata Scob Deals*, AIR 1960 Cal 475.

Where a reply notice, though typed and unsigned, was received by the plaintiff through post in the common course of business, it was held that it would be presumed that the reply notice was on behalf of the defendant.[76]

Invitation cards, bearing postal stamps of the place of posting and also the place of destination are admissible in evidence under this section.[77]

5. POSTAL STAMP

Where the question was whether a letter was sent on a given date, the postal mark upon the letter would be a relevant fact.[78]

The evidence relating to a post mark involves three facts:—

(1) The mark was genuinely affixed by the officer of the Post Office concerned.

(2) It is in evidence that the postal mark was placed on the cover on the date the impression bears.

(3) It is in evidence that the place or office mentioned therein was actually the place where it was affixed.

The fact that a notice bears a certain date is not proof that it must have been posted on the same day. It is the postal mark that becomes relevant to show when it was posted.[79]

6. ILLUSTRATION (b)—NON-RETURN OF POSTED LETTER, RELEVANT

If a letter is put into a post office, that is *prima facie* evidence till rebutted, that the addressee received it in due course. The post marks on letters are considered as evidence of the dates and places mentioned therein. Where a notice to quit was sent by a registered letter, the posting of which was proved, and which was produced in court in the cover in which it had been despatched and on the cover there was an endorsement purporting to be by an officer of the post office stating the refusal of the addressee to receive the letter, it was held that this was sufficient service of notice.[80]

When a notice was sent by registered post by the Income Tax Department, it was held that there was a presumption of proper service and it was for the party to rebut the presumption.[81]

Each case depends upon the circumstance of that case. Statement on oath by the addressee that such letter was not tendered to him was held to be sufficient to rebut the presumption.[82]

7. ENDORSEMENT OF REFUSAL

When a letter or article was sent by registered post and returned with an endorsement 'refused' it is *prima facie* evidence that the addressee had an opportunity to accept it and the service thus effected, is therefore, a good and valid service.[83] Where service of notice on a tenant under Section 106, T.P. Act was sought to be effected by post, and there was an endorsement 'refused' by the postman, it was held that presumption of service arose and bare denial of refusal by the tenant was not sufficient if it was inherently unreliable.[84] A person refusing a registered letter sent by post cannot afterwards plead ignorance of its contents.[85]

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76. *Nathu Ram* v. *Firm Bhohraylal Hiralal,* ILR (1971) 21 Raj 472.

77. *Vandavasi Karthikeya* v. *S. Kamalamma,* AIR 1994 AP 102 (para 25).

78. *Gobinda Chandra Saha* v. *Dwarka Nath Patma,* 26 IC 962 : 15 CWN 489.

79. *Gobinda* v. *Dwaraka,* 19 CWN 489 : AIR 1915 Cal 313.

80. *Jogendro Chunder Ghose* v. *Dwarka Nath Karmokar,* (1888) 15 Cal 68.

81. *Commer. of I.T* v. *Malchand,* AIR 1956 Cal 537; *Balbhadar Mul Kuthiala* v. *Commer., of I.T.,* AIR 1957 Punj 284.

82. *Appabhai* v. *Lakmichand,* AIR 1954 Bom 159; *Meghji* v. *Kundanmal,* AIR 1968 Bom 387; *Ram Devi* v. *Sethi,* 1963 All WR 472 (case of money order) *Sailabala* v. *Atul,* AIR 1948 Cal 63.

83. *Haripada* v. *Joygopal,* 39 Cal WN 234; *Jogendra* v. *Dwaraka,* ILR 15 Cal 681; *Rajani* v. *Baikuntha,* 39 CWN 1041; *Louis Dreyfus and Co.* v. *Himandas,* 50 IC 194; *Lal Jugalkishore Jodhalal* v. *Bom. Revenue Tribunal,* AIR 1959 Bom 81; *Balbhadas Mulkuthialu* v. *Commissioner of I.T.,* AIR 1957 Punj 284; *Ram Autar* v. *Savitri Devi,* AIR 1976 All 515; *Pudi Lazarus* v. *Rev. Johnson Edward,* AIR 1976 AP 243.

84. *Anil Kumar* v. *Nanakchandra Verma,* AIR 1990 SC 1215 **overruling** AIR 1980 All 280 and AIR 1976 Del 111.

85. *Loolf Ali Meah* v. *Pearce Mohun Roy,* (1871) 16 WR (Civil) 223; *Budha* v. *Bedariya,* AIR 1981 MP 76.

Section 114 of this Act in general deals with presumptions which can be drawn. It is not obligatory on the part of the Court to draw the presumption. As the section itself says "The court may presume", it is not obligatory or mandatory to draw a presumption as to the correctness of the postal endorsement of 'refusal', where the court entertains any doubt.[86]

8. WHETHER EXAMINATION OF POSTMAN NECESSARY

In a case where a notice was sent by the landlord by registered post, terminating the tenancy of the tenant (who was in jail), giving the jail address, and when it was returned with a postal endorsement of refusal, it was held that the presumption is that the endorsement as well as the initials are that of the postman, and that it is not necessary to examine the postman to prove the same. It was further held that the acknowledgment made by the Jail Superintendent gives rise to the presumption that the notice sent to the tenant had been received by the tenant.[87] The Supreme Court held that, where a notice was sent by a registered post and it was returned with an endorsement as 'refused', it is not always necessary to examine the postmen who tried to effect the service on the addressee. A denial of service can be given by a party.[88]

The Bombay High Court had, however, in an earlier case, held that where a postman who took the letter for service and brought it back was not examined, the postal endorsement of refusal was not proved.[89]

But, this case was explained in *Sushil* v. *Ganesh*,[90] stating that if the addressee denies the service on oath, the presumption of due service stands rebutted.

9. ACKNOWLEDGEMENT RECEIPT

A detenu under National Security Act contended to have sent his representation by registered post and produced the copy of the served postal acknowledgement receipt but it did not contain the signature on behalf of the addressee, service on the Central Government could not be presumed.[91]

10. CERTIFICATE OF POSTING

A detenu under COFEPOSA contended that he posted a letter under certificate of posting withdrawing his statement. He filed a photo copy of the certificate of posting but not of the letter itself. The letter was also not traceable in the Department. No presumption of posting was raised.[92]

11. COMPUTER HEARSAY

"Where a program is run on a computer, the results produced by the computer depend on underlying statements as to the nature of the interaction of the machine with the program and of the program with the data. We think that it is these buried statements which emanate the whiff of hearsay; but we nonetheless do not think that the documents output by computers are of themselves hearsay. The reason is that the underlying statements are not statements of fact the truth of which is to be assumed or held by the Court before the Court can rely on them. A computer program is not a series of statements but a set of *instructions* : and the implied statement as to the effect of the program is a *prediction*, and therefore not a statement of fact. The operator of a computer is for these purposes an expert who is in a position where he is able to predict the workings of the machine, and, in his capacity as a factual witness, is also able to authenticate the actual running of the program. Certainly the Courts have, no doubt wisely, refused to characterise the products of computer programs as hearsay.

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86. *Budha* v. *Bedariya*, AIR 1981 MP 76; *Lal Jugalkishore* v. *Bombay Revenue Tribunal*, AIR 1959 Bom 81.
87. *Saeed Ahmed* v. *S.Q. Ali*, AIR 1973 All 24 **following** *Gangaram* v. *Phulwati*, AIR 1970 All 446 (FB); *Pakhar* v. *Kishan*, AIR 1974 Raj 112; *Kunhabdulla* v. *Krishnan*, AIR 1957 Ker 33; *Bapayya* v. *Venkataratnam*, AIR 1953 Mad 884; ***Lal Jugulkishore* v. *Bombay Revenue Tribunal*, AIR 1959 Bom 81.**
88. *Puvada Venkateswara Rao* v. *Chidamana Venkataramanna*, AIR 1976 SC 869.
89. *Vaman* v. *Khanderao*, AIR 1935 Bom 247.
90. AIR 1958 Cal 251.
91. *Abdul Shakur Khan* v. *R.D. Tyagi*, 1999 Cr LJ 1524, 1532-33 (Bom).
92. *L.M.S. Umma Saleema* v. *B.B. Gujral*, AIR 1981 SC 1191.

In *R* v. *Wood*[93] data had been obtained from computer analyses of the chemical composition of certain metals which were subsequently stolen. These were compared with the results of an analysis of metals found in the accused's possession after the theft. The evidence was held admissible, and *R* v. *Pettigrew*[94] was said to be concerned only with the question of how the statute operated; and it is implicit that it would have been decided otherwise had the hearsay question been argued. In *R.* v. *Wood*,[95] the prosecution were able to call not only those who had run the machine but those who had programmed it. In *R* v. *Ewing*[96] however, it was never suggested that the personal knowledge of anyone other than the operator was relevant to the admission of computer records. That case turned on the application of the statutory provisions then in force which enabled such records to be introduced in evidence. Nonetheless, it is thought that the Courts have succeeded in avoiding the conclusion that the relevance of evidence of this kind depends on assumptions as to the truth of implied statements of fact."[97]

See also p. 352 *ibid*, and HALSBURY 4th Edn., para 59, pages 47 to 49 and The Information Technology Act, 2000, S. 92, Sch. II.

ADMISSIONS

Admission defined

S. 17. An admission is a statement, [98][oral or documentary or contained in electronic form], which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

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COMMENTS

1. THE INFORMATION TECHNOLOGY ACT, 2000—DEFINITION OF ADMISSION

Definition of admission would now include statements *contained in an electronic form*, besides including oral or documentary statements as the italicised words in the text of the section have been inserted by the Information Technology Act, 2000.

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93. (1982) 76 Cr App R 23 CA.
94. (1980) 71 Cr App R 39 CA.
95. (1982) 76 Cr App R 23 CA.
96. (1983) QB 1039 CA; see commentary by *J.C. Smith*, (1983) Crim LR 472. **See also** *R.* v. *Van Vreden*, (1973) 57 Cr App R 818 CA; *R* v. *Nicholls*, (1976) 63 Cr App R 187 CA. **See also** *R* v. *Minors*, (1989) 2 All ER 208 CA; *Sophocleus* v. *Ringer*, (1988) RTR 52 DC.
97. PHIPSON ON EVIDENCE, 15th Edn. (2000), pages 648-649 (para 25-19).
98. *Substituted by the Information Technology Act*, 2000 S. 92, Sch. II (w.e.f. 17.10.2000).

2. PRINCIPLE AND SCOPE

This section starts by saying that an admission is a statement, oral or documentary, suggesting an inference as to any fact in issue or a relevant fact. A statement in relation to a fact or circumstance which is not in issue or is not a relevant fact, is not an admission.[1] The latter part of this section says that an admission made by any of the persons and under the circumstances hereinafter mentioned is relevant. The circumstances are detailed in the succeeding Sections. BLACK'S LAW DICTIONARY defines "admission" as a voluntary acknowledgement made by a party of the existence of certain facts which are inconsistent with his claim in an action.

A statement, if not denied, is tentamount to a waiver of the necessity of proving the fact which is admitted and, if such admission is not explained away, it would be tentamount to estoppel.[2]

3. ADMISSION—MEANING

According to STEPHEN, "An admission is a statement, oral or written, suggesting an inference as to any fact in issue or relevant or deemed to be relevant to any such fact, made by or on behalf of any party to any proceeding".[3]

An 'admission' is a statement of fact which waives or dispenses with the production of evidence by conceding that the fact asserted by the opponent is true. Admissions are admitted because the conduct of a party to a proceeding, in respect to the matter in dispute, whether by acts, speech, or writing, which is clearly inconsistent with the truth of his contention, is a fact relevant to the issue.

Admission should be clear cut and accurate specific statement of that very person in his own words. Inference drawn by someone else can not be admission.[4]

Admission is confession or voluntary acknowledgement, made by a party or some one identified with him in legal interest, of the existence of certain facts which are in issue or relevant to an issue in the case. The predominant characteristic of this type of evidence consists of its binding character. Admission can be made the foundation of the rights of the parties.[5] Admission is a positive act of acknowledgement or confession. Merely because the allegations have not been denied, it can not be admitted to be established.[6]

Admissions must be made on the basis of personal knowledge of the facts stated.[7]

An admission is of evidentiary value only to the extent that its maker has personal knowledge of the matters it contains.[8] Statements made by a person that an article was manufactured in U.S.A. which was based on markings was held not admissible. If a man admits something of which he knows nothing, it is of no real evidential value. A party's statement however of his own age is admissible although the party cannot be said to have personal knowledge.[9] Where the contents of the application of the plaintiff for old age pension were not put to her when she appeared in her suit, the statement by her in cross-examination that she was getting old age pension and that her form was filled by the *'pradhan'* cannot be treated as admission in respect of the contents of her application for old age pension.[10]

Admissions may be oral or may be contained in documents, *e.g.*, letters, depositions, affidavits, plaints, written statements, deeds, receipts, horoscopes.[11]

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1. *Sita Ram Bhau Patil* v. *Ramchandra Nago Patil*, AIR 1977 SC 1712.
2. **See** CROSS-EVIDENCE, p. 245.
3. STEPHEN'S DIGEST, 7th Edn., Article 15. page 24.
4. *H.G. Ramchandra Rao* v. *Srikantha*, 1997 Cr LJ 347 (Kant).
5. *Ajodhya Prasad Bhargava* v. *Bhawani Shankar Bhargava*, AIR 1957 All 1 (FB).
6. *Mukesh Kumar Ajmera* v. *State of Rajasthan*, AIR 1997 Raj 250.
7. *Raghavan* v. *Soumini Amma*, AIR 1957 Ker 178; *Union of India* v. *S.P.L. Lekku Reddiar*, AIR 1956 Mad 176, *Dominion of India* v. *Firm Museram Kishunprasad*, AIR 1950 Nag 85.
8. 1966 AC 367 at 371.
9. *R.* v. *Twiner*, (1910) 1 KB 346 at 362.
10. *Twarku* v. *Surti*, AIR 1997 HP 76.
11. *Satish Mohan* v. *The State*, AIR 1986 All 126.

Under Section 9(1) of the Civil Evidence Act (England) admission includes any representation of facts made in words or otherwise.

When denial of things said against a person could reasonably be expected his silence would amount to an admission.[12]

According to BARON ALDERSON 'what a person is over-heard saying to himself would even be evidence.'[13]

It is more satisfactory for a body entrusted with functions such as the customs authority, to take the precaution of getting the admission of the accused in writing, when its decision mainly depends upon such admission.[14]

It is immaterial to whom the admission is made. An admission made to a stranger is relevant.

Statement given by the accused to the doctor examining him as to the cause of injuries sustained by him, amounts to admission.[15] Where a party accepts his statement made in an earlier proceeding, it amounts to admission.[16] Where the accused police official stated that the deceased party started firing on the police party which necessitated the opening of fire by them and the first part of his statement was not proved from the evidence on record, the second part of his statement could be utilised as an admission.[17]

Classification of admissions.—Admissions are broadly of two categories:—

(1) Judicial admissions

(2) Extra-judicial admissions.

Judicial admissions are formal admissions made by a party during the proceedings of a case. Extra-judicial admissions are informal admissions not appearing on the record of the case. Judicial admissions are fully binding on the party that makes them. They constitute a waiver of proof.[18]

Admission in a pleading in the court is a judicial admission and it can be made the foundation of the rights of the parties.[19]

A pleading should not be construed strictly as an admission.[20] An averment in an application for setting aside an award, regarding the misconduct of the arbitrator by a party would not constitute 'admission' under Section 17.[21]

An admission by a party in a plaint may be used against him in another suit.[22]

Extra-judicial or informal admissions are also binding on the parties against whom they are set-up. Unlike judicial admissions, however, they are binding only partially, and not fully, except in cases where they operate as or have the effect of estoppel, in which case again they are fully binding and may constitute the foundation of the rights of the parties. (Section 31 *infra*).[23]

4. EFFECT OF ADMISSIONS

(1) An admission constitutes a substantive piece of evidence in the case and, for that reason, can be relied upon for proving the truth of the facts incorporated therein.

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12. *Bessela* v. *Stern*, (1877) 2 CPD 265.
13. *R.* v. *Simmons*, (1834) 6 C&P 540.
14. *Ambalal* v. *Union of India*, AIR 1961 SC 264.
15. *Ammini* v. *State of Kerala*, AIR 1998 SC 260 : 1998 Cr LJ 481 (para 17) (SC).
16. *Alpana* v. *Mohanlal*, 1993 Cr LJ 1008 (para 6) (HP).
17. *Brijlala Pd. Sinha* v. *State of Bihar*, AIR 1998 SC 2443 : 1998 Cr LJ 3611.
18. See Section 58 of this Act.
19. *Satish Mohan* v. *State of U.P.*, AIR 1986 All 126.
20. *Bharath Fire and General Insurance* v. *Parameswari Prasad Guptha*, AIR 1968 Del 68.
21. *Malik Ghulam Ahmed* v. *J&K State Forest Corporation*, 1996 AIHC 4426 (para 10) (J&K).
22. *Basant* v. *Janaki*, AIR 1967 SC 341.
23. *Ajodhya Prasad Bhargava* v. *Bhawani Shankar Bhargawa*, AIR 1957 All 1 (FB).

(2) An admission has the effect of shifting the onus of proving to the contrary on the party against whom it is produced, with the result that it casts an imperative duty on such party to explain it. In the absence of a satisfactory explanation, it is presumed to be true.

(3) An admission, in order to be competent and to have the value and effect referred to above, should be clear, certain and definite, and not ambiguous, vague or confused.[24]

Admissions as defined in Sections 17 and 20 and fulfilling the requirements of Section 21 are substantive evidence *proprio vigore*.[25] In *Union of India* v. *Moksh Builders and Financiers Ltd.*,[26] it was held that an admission by a party is substantive evidence of the fact admitted, and admissions duly proved are admissible evidence, irrespective of whether the party making them appeared in the witness box or not, or whether that party, when appearing as witness, was confronted or not with those statements in case he made a statement contrary to those admissions. (The court cited a statement from WIGMORE ON EVIDENCE (Vol. 4, 1048) to the effect that an admission need not be contrary to the maker's interest.[27]

In a previous suit filed by the wife for maintenance, the husband made a statement in his counter that she was his wife. In a later similar suit, he resiled from that statement. It was held that as the previous admission was against his own interest, it was relevant and it required no proof.[28] An admission of a party giving certain land to a particular person on sub-lease is substantive evidence.[29] As an admission is substantive evidence, there is no need to confront a party to a proceeding with such statement before acting upon it, as it becomes conclusive unless the admission is properly explained.[30]

Where in a case of specific performance of an agreement to sell, the defendant did not plead hardship in the written statement, it was held that mere admission by the plaintiff that the defendant would be left with only one *bigha* of land after the sale, could not be read as evidence to support the defendant's case in absence of any pleading to that effect.[31]

5. PRESUMPTION OF GENUINENESS

When an admission of party is satisfactorily proved, it can reasonably be presumed to be true, unless rebutted by other evidence.[32]

6. PROOF OF ADMISSION

When facts are admitted, they do not require any proof and they are presumed to be true unless the contrary is shown.

Proof of admission or confession can be offered by a witness who heard the admission or the confession.[33] Admission can be proved whether the maker is examined or not, or whether he is confronted with it or not, when examined.[34] An admission cannot be proved by recital in a judgment.[35]

In a criminal case, certain documents which were filed, though not proved by the prosecution, were put to the accused during the examination under Section 313, Cr. P.C.; the accused admitted those documents. It was held that the documents can be held as proved on the basis of the admission by the accused.[36]

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24. *Ajodhya Prasad Bhargava* v. *Bhawani Prasad Guptha*, AIR 1957 All 1 (FB).
25. *Thiru John* v. *Returning Officer*, AIR 1977 SC 1724.
26. AIR 1977 SC 409.
27. **See also** HALSBURY 4th Edn., Vol. 17, p. 53; *Bharath Singh* v. *Bhagirathi*, (1966) 2 SCJ 53 : AIR 1966 SC 405; *Maimuna Bibi* v. *Rasool Mian*, AIR 1991 Pat 203.
28. *Ellammal* v. *Veeraswamy*, 1975 Cr LJ 28.
29. *Hanifabi Sheikh Abbas* v. *Balaji Ramaji*, AIR 1976 Bom 219.
30. *Yash Pal Malhotra* v. *S. Inderjit Singh*, (1976) 12 DLT 53.
31. *Ram Dhan* v. *Kalu Ram*, 1997 AIHC 1935 (paras 10 and 11) (All).
32. *Nagubai* v. *Shama Rao*, AIR 1956 SC 593; *Jawaharbeg* v. *Abdul Aziz*, AIR 1956 Nag 257; *Sowcar* v. *S.I. Prasad*, AIR 1978 Karnt 25.
33. *Sahoo* v. *State of U.P.*, AIR 1966 SC 40.
34. *Bharat Singh* v. *Bhagirathi*, AIR 1966 SC 405; *Union of India* v. *Moksh Builders*, AIR 1977 SC 409.
35. *Dundbahadur Singh* v. *Durga Prasad Singh*, AIR 1953 Pat 346.
36. *Premeshwar* v. *State*, 1981 Bom CR 798 : 1982 Cr LR 39.

An admission only binds the party who makes it to the extent of the admission and cannot be extended further.[37]

Admission of a document means admission of facts contained in the document.[38]

Admission of a signature on a document cannot be treated as an admission of the execution of a document.[39]

Execution implies conscious execution and knowledge of its contents.

When there was a statement of one A, that he and B are joint monthly tenants of a certain premises under a landlord, it was held that the statement of A, must be regarded as an admission on the part of A.[40]

Even when two executors who were members of the family acted upon the will, still it cannot be treated as admission by the members of the family, that a statement in the will is true.[41]

7. EXCEPTIONS TO GENERAL PRINCIPLE

An admission by one party may be given as evidence as against the maker but cannot be used against any other party. This general principle is accepted with two recognised exceptions: the first one is that when a party having a joint interest with others, makes an admission relating to a subject matter, it can be used against others; the second exception is that an admission which can be used against the maker can also be used against the heir of the maker and against the persons who claim the interest of the maker relating to the subject matter of the admission.

In *Chalho Singh* v. *Jharo Singh*,[42] it was held that a person who stands in the shoes of the party making the admission will be bound by the admission of the person through whom he claims as he derives this title from him.

When a person sues in a personal capacity admissions made by him in a representative capacity may be proved against him but not *vice versa*. Admission by a mother of her adultery was held not admissible in proceedings against her as administratrix of her husband's estate in which the legitimacy of the child was in issue.[43]

"So, where the admission has been made by a party's predecessor in title, or others in privity with him: *Prive* v. *Woodhouse*,[44] in which a copy of a judgment that had been dealt with by such predecessor was held primary evidence against the successor, though another copy which was merely found deposited among his papers was only received as secondary evidence after proof of the existence and loss of evidence."[45]

Where there is joint interest, whether in the case of co-plaintiffs or co-defendants in civil suits, or among the accused persons where there was conspiracy to commit an offence, or some common object to achieve, admission of one is relevant against the others. These principles are contained in a concise form in Section 18 of this Act, and were recognised in *Kowsulliah Sundari Dasi* v. *Mukita Sundari Dasi*,[46] and *Meajan Matdor* v. *Alimuddin Mia*,[47]. In the latter case the plaintiff's pleader gave evidence that a month prior to the institution of the suit, the second defendant approached him for a compromise. It was held that statement made by the second defendant was admissible against the other defendant.[48] Where several persons are jointly interested in the subject-matter of the suit, an admission by any one of them is

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37. *Sitaram Motilal* v. *Santanum Prasad*, AIR 1966 SC 1697; *Banarsidas* v. *Kanshiram*, AIR 1963 SC 1165; *Rulhu Ram* v. *Than Singh*, AIR 1967 Punj 328.
38. *Sitaram Motilal* v. *Santanu Prasad*, AIR 1966 SC 1697; *Birendra Nath Banerjee* v. *Shibaram Adityal*, AIR 1953 Cal 283.
39. *Githabai* v. *Dayaram, Shankar*, AIR 1970 Bom 160; *Birbal Singh* v. *Harphool Khan*, AIR 1976 All 23; *Brijmohan Bakhshi* v. *Amarnath Bakhshi*, AIR 1980 J & K 54.
40. *Shaw Prasad Agarwal* v. *Anil Ganguli*, 1963 Cal LJ 75 : 68 Cal WN 786.
41. *Pattabhiram Rao* v. *Mandavilli Narayanamoorthy*, AIR 1922 PC 102.
42. ILR 39 Cal 995.
43. *Legge v.Edmonds*, (1855) 25 LJ Ch 125 at 141.
44. 3 Exch 616.
45. PHIPSON ON EVIDENCE, 15th Edn. (2000). page 1109-1110, (para 41-11).
46. (1855) 11 Cal 588.
47. ILR 44 Cal 130 : 1917 Cal 487.
48. *Meajan* v. *Alimuddin*, AIR 1917 Cal 487 : 44 Cal 130. **See also** *Yagganna Obanna* v. *Kutagulla Gangaiya*, AIR 1945 Mad 361.

receivable against himself and his fellows, provided the admission related to the subject-matter in dispute.[49]

Admission by one defendant cannot bind other co-defendants nor can it be evidence against them.[50] In a suit, the respondents were alleged to be tenants of a portion of land in dispute, and some of them were tenants in the other portion. But, in evidence, the other persons stated that they and the respondents were not tenants of the suit property. It was held that the allegation cannot be taken as relevant[51]. An admission made by one defendant does not bind other defendants unless he along with others is jointly interested to have some privity of title or obligation.[52] Normally, a statement of one person cannot be regarded as the admission of another person on the ground that the two persons are in collusion. Admissions bind the parties and their privies but not strangers.[53] Though an admission of a co-defendant jointly interested in the subject-matter of the suit would bind other defendants, as the evidence was contradictory it was held that his admission lost its binding nature.[54]

8. STATEMENT—MEANING OF

The word 'statement' has been used in Sections 14 to 21, 32, 39 and 145 in its primary meaning of something that is stated; and communication is not necessary in order that it may be stated.[55]

A post-dated cheque in satisfaction of debts amounts to acknowledgment of liability irrespective of the fact whether the cheque is honoured or not.[56]

When there was an omission in the plaintiff's statement and it was explained by him, it was held that it would not be possible for the defendant to rely upon the said omission. It is doubtful as to whether an omission can be termed as a statement as contemplated by Section 17.[57]

Conduct by itself is no proof of a fact unless it amounts to a waiver or acquiesence. Where the trustees were not fully conscious of their rights and were not aware of the state of law, their conduct in keeping quiet cannot be taken as an admission.[58] Admissions may be implied from the acquiescence of a party.

Mere conduct does not amount to admission as defined in Section 17, for making it eligible to be used as admission under Section 21.[59]

However in PHIPSON ON EVIDENCE, 15th Edn. (2000), pages 717-718, Para 28-16 it is stated "Conduct may amount to an admission. The admission may be inferred from positive acts or from demeanour (for example silence[60] after a direct accusation except, it would appear, in criminal cases[61] save where the parties are speaking on even terms)[62] in a particular situation.[63] Indeed a party's

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49. *Bhura* v. *Bahadur Singh*, AIR 1976 Raj 249.

50. *Phuljhari Devi* v. *Mithailal*, AIR 1971 All 494.

51. *Joao Andrade Souza* v. *Kashinath S. Vediekar*, AIR 1971 Goa 2.

52. *Jagabandhu Senapati* v. *Bhagu Senapati*, AIR 1974 Ori 120; *Harihar Rajguru Mahapatra* v. *Mabakishore Rajguru Mahapatra*, AIR 1963 Ori 45.

53. *Moati Ram* v. *Sri Lal*, AIR 1934 All 684.

54. *Ram Pukar Singh* v. *Sita Ram Mahton*, AIR 1973 Pat 310.

55. *Bhogilal Chunilal Pandya* v. *State of Bombay*, AIR 1959 SC 356. **Also see** *CBI* v. *V.C. Shukla*, AIR 1998 SC 1406 : 1998 Cr LJ 1905.

56. *Rajpati Pd.* v. *Kaushalya Kuer*, AIR 1981 Pat 187.

57. *Tulsiram Jagannath* v. *Maroti Doma Koshe*, 1980 Mah LJ 205.

58. *Bihar State Board of Religious Trust* v. *Acharya Mahanthy Amrit Das*, AIR 1974 Pat 95.

59. *S. Narain Singh* v. *Baleshwar Singh*, AIR 1974 Pat 91.

60. In, *e.g. Bessela* v. *Stern*, (1877) 2 CPD 265, silence after oral accusation held to be an admission: cf. *Wiedemann* v. *Walpole*, (1891) 2 QB 534, failure to reply to letters alleging that defendant had promised to marry, held no admission could be inferred, but **see** *Gaskill* v. *Skene*, (1850) 14 QB 664. **See** *Lustre Hosiery Ltd.* v. *York*, (1935) 54 CLR 134, 143. **See** too, Chap. 26, *post*.

61. *R.* v. *Hall*, (1971) 1 All ER 322.

62. *R.* v. *Parkes*, (1977) 64 Cr App R 25 : (1976) 3 All ER 380.

63. *Way* v. *Penrikyber Colliery*, (1940) 1 KB 517 CA (payment of compensation by employers after an accident was held to be an admission that a workman had met with an accident arising out of and in the course of his employment); *James* v. *Biou*, (1826) 2 Sim & St 606 : 4 LJ Ch 202; *Chapman* v. *Beard*, (1797) 3 Anst 942 **per contra**, *Hart* v. *L. & Y. Ry.*, (1870) 21 CT 261 in which the fact that a company adopted additional precautions after an accident was held not to be admission by conduct of their previous negligence, BRAMWELL B. remarking: "People

admission by conduct as to any material fact may generally be proved against him,[64] and evidence to explain or rebut such admissions is receivable in his favour.[65]

. . . . . PHIPSON refused to accept that conduct could amount to hearsay and accordingly, although he conceded that conduct may amount to an admission, he did not regard such an admission as being admissible under an exception to the hearsay rule. Rather, so thought PHIPSON, admissions by conduct are, properly, original evidence receivable either as constituting, wholly or in part, a fact in issue, as where *A* makes an offer to *B*, and B assents to it by his conduct; or as relevant facts from which a fact in issue may be inferred, *e.g.*, guilt from the fabrication or suppression of evidence by the accused. The admissions by conduct of deceased persons against interest have been held receivable even against strangers,[66] but not those of third persons not deceased."[67]

Where the Government paid the price as ordered by the civil court subsequent to their taking possession, it was held that the conduct on the part of the Government in paying the price as ordered does not amount to an admission of a fact that payment represents the market price.[68] Where a person was paying for publication of a book containing pedigree, as a matter of grace, it was held that it cannot be taken as an admission of pedigree.[69] In a case there was an agreement between some tenants and landlord to divide the compensation paid under the Land Acquisition Act, in a certain proportion, it was held that such an agreement cannot be treated as an admission and hence cannot bind the tenants claiming higher amount if they are so entitled to it according to law.[70] The deposit of rent by the tenant in a proceeding under Section 7(1) of the Rent Control Act, does not amount to an admission of relationship of Landlord and Tenant within the meaning of this Act.[71] Any statement made by a guardian of a minor which would be adverse to the interests of the minor cannot be taken as admission on behalf of the minor.[72]

9. IMPLIED ADMISSION

Failure to deny the allegations in a plaint may be taken as an admission of the claim therein for the purpose of that suit, but not for purposes of subsequent litigations.[73] A statement in a draft deed of partition, not signed by both parties, though it might not amount to a contract would amount to an admission.[74]

Where a defendant remained *ex parte* in a suit, it was held that he cannot be deemed to have admitted the claim.[75]

10. BINDING NATURE

Admissions to be binding on a person must be very specific and should not be vague and secondly, an admission on a question of fact is binding on a party unless it is proved to be contrary or has been successfully withdrawn.[76]

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do not furnish evidence against themselves simply by adopting a new plan to prevent the recurrence of an accident. . . . Because the world gets wiser as it gets older, it was not therefore foolish before."

64. *Moriarty* v. *L.C. and D. Ry.*, (1870) LR 5 QB 314; *R.* v. *Watt*, 20 Cox 852.
65. *Melhuish* v. *Collier*, 15 QB 878.
66. *Gerry* v. *Redman*, 1 QB 161.
67. *Watts* v. *Lyons*, (1844) 6 M & G 1047.
68. *Nageshwar Rao* v. *Deputy Collector*, AIR 1959 AP 52.
69. *Maharaj Hari Singh* v. *State*, ILR (1951) 1 Raj 741.
70. *Palghat Valia Raja* v. *T.S. Veera Raghava Iyer*, AIR 1961 Ker 222.
71. *Sheikh Hossain* v. *Naubahar Bibi*, AIR 1972 Cal 446.
72. *Kamla Devi* v. *Rodreshwar Prasad Singh*, 1976 Hindu LR 185.
73. *Narayana Pillai* v. *Kesara Pillai*, 1962 Ker LJ 389; *Ramabai Shrinivas Nadgir* v. *Govt. of Bombay*, AIR 1941 Bom 144; *Diali* v. *Lachhman Singh*, AIR 1946 Lah 256.
74. *Hemachandra Gupta* v. *Omprokash Gupta*, 1987 Cal 69.
75. *Govindan Asari Kesavan Asari* v. *Sankaran Asari Balakrishnan Asari*, AIR 1958 Ker 203.
76. *Anurag Misra* v. *Ravindra Singh*, AIR 1994 All 174 (paras 11-13),

Admissions which are made in Income Tax Returns can be used in a limited way for the purpose of Income Tax proceedings only.[77] Where a statement was made by a firm in the Income Tax return showing the suit item as a debt by a firm to the plaintiff, it was held that it constituted an admission of liability of the firm to the plaintiff in respect of the amount mentioned therein.[78]

Admissions are as much binding on the crown as on ordinary persons.

An admission made in ignorance of legal rights or under duress cannot bind the maker of the admission.

For an admission to have the effect of substantive evidence it must be voluntary. In a case where a candidate was given permission to appear for Part 2 of the law examination on the basis of an undertaking that if he would not be able to get requisite permission from his employer to join law classes he would abide by any order that may be passed by the university, it was held that, as the candidate was anxious to appear for the examination, the undertaking given was *in terrorem* and in complete ignorance of his legal rights. He was, therefore, not bound by the undertaking.[79] Similarly, an admission made by a party in a previous criminal proceeding in order to get rid of the chances of conviction was held to be *in terrorem* and, therefore, of very little significance.[80] However in *Morlays of Brickstone* v. *Minoff*,[81] it was held that an admission made under threat or pressure may affect its weight but is not inadmissible.

Where the accused while admitting a statement to be his own did not complain to the court that it was not voluntarily given, the statement must be deemed to be voluntary even though, it was given in Hindi and recorded in English,[82] fraud or coercion is no admission, and it can be challenged in a court of law.[83]

11. ADMISSION—CLEAR AND PRECISE

An admission must be clear, precise, not vague or ambiguous. If the admission is capable of two interpretations, an interpretation unfavourable to the person making it, should not be put on his admission.[84] The admission must be clear and conclusive in that matter.[85] Before a right of property can be considered to have been defeated on the basis of an alleged admission by a person, the implication of the statement made by him must be clear and conclusive; there should not be any doubt or ambiguity about the alleged admission.[86]

Admission of the accused can be determined only if the plea of guilt has been recorded as nearly as possible in the words used by the accused. Where the accused simply said that he was guilty of the charge, it does not constitute an admission of guilt.[87] Where the witness produced to prove an admission was unable to give what actually were the words used by the parties, and where he was alleged to have admitted the title of the opposite party, it was held that the statements cannot be relied on to prove the alleged admission.[88] Where the Railway Authority issued a receipt for loading some bags, with a statement, "Wagon said to contain 200 bags", and later it was found that there was short delivery, it was held that there was no admission on the part of the Railway Authority that the wagon contained 200 bags.[89]

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77. *Gadadhar Ramanujdas* v. *Collector of Agri. Income-tax, Cuttack*, AIR 1953 Ori 283.
78. *Somanna* v. *Subba Rao*, AIR 1958 AP 200.
79. *Sri Krishna* v. *Kurukshetra University*, AIR 1976 SC 376; *Mohammad S. Labbai* v. *Mohammad Hanifa*, AIR 1976 SC 1569; *Bombay Agarwal Co.* v. *Ramchand*, AIR 1953 Nag 154.
80. *Mohd.* v. *Mohd.*, AIR 1976 SC 1569.
81. (1982) ILR 144.
82. *Shankerdai* v. *Asst. Collector of Customs*, (1968) 1 SCWR 237.
83. *John Martin* v. *State of W.B.*, 1975 CrLJ 637 : 78 Punj LR 127.
84. *Ramji Batanji* v. *Manohar Chintaman*, AIR 1961 Bom 169; *Ajodhya Prasad Bhargava* v. *Bhawani Shankar Bhargava*, AIR 1957 All 1 (FB); *State of Bihar* v. *Charanjitlal*, AIR 1960 Pat 139; *Melagiriyappa* v. *Tumalappa*, AIR 1996 Kant 150 (para 9).
85. *Chikkam Koteswara Rao* v. *Chikkam Subba Rao*, AIR 1971 SC 1542.
86. *Koteswararao* v. *Subba Rao*, AIR 1971 SC 1542; *Nagubai Ammal* v. *B. Shama Rao*, AIR 1956 SC 593; *Bharat Singh* v. *Bhagirathi*, AIR 1966 SC 405; *State of Bihar* v. *Charanjitlal*, AIR 1960 Pat 139.
87. *Sashidhara Kurup* v. *Union of India*, 1994 Cr LJ 375 (para 7) (Gau).
88. *Gangaram Kanhyalal* v. *Gulab Pooran*, AIR 1954 MB 58.
89. *Union of India* v. *S.P.L. Lekhu Reddiar*, AIR 1956 Mad 176. **Also see** *Union of India* v. *Roop Naravan*, AIR 1997 Raj 123.

12. ADMISSION CAN BE DISPROVED

Admission can be used against the maker of it; but it is open to the maker of the admission to prove the admission as erroneous.[90]

13. ADMISSION—TO BE TAKEN AS A WHOLE

Admission must be taken as a whole and not in part, or rejected as whole.[91] Statements in pleadings are admissions against the party making them. A person cannot be heard to rely upon favourable parts and overthrow the rest of oral evidence.[92]

However, it was held by the Supreme Court that the Court has got power to reject the exculpatory part of the confession, and it is not bound to believe or disbelieve the admission as a whole, when there is other evidence which is reliable.[93] Admission in the debit side of an account contained an admission against the party; credit side may be taken advantage by the party against the adversary.[94]

14. ADMISSION—SUBJECT TO CONDITION OR QUALIFICATION

Where an admission is made subject to a condition or qualification, the condition or the qualifying part of the statement must also be taken and considered.[95] Where a person made a statement admitting the execution of a promissory note accompanied by an allegation that the pronote was discharged, it was held that the accompanying qualification for the admission should also be taken into consideration.[96]

It was held by the Supreme Court that where an admission consists of distinct and separate matters, the admission relating to one matter can be relied on without reference to the admission relating to the other matter.[97]

15. ADMISSION—CONFESSION

In English Law the term 'admission' is used in civil cases; whereas the term 'confession' is used in criminal cases as acknowledgement of guilt. This distinction is not maintained in the Evidence Act, and Sections 17 to 22 are applicable to civil as well as criminal cases.

A confession is one species of admission, namely an admission consisting of a direct assertion, by the accused in a criminal case, of the main fact charged against him or of some fact essential to the charge.[98] The expression 'confession' is not defined in the Act, but it occurs in the category of admissions. Confessions are sub-species of a 'statement' and a species of 'admission'.[99]

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90. *Duana Moliko* v. *Bhagabat Biso*, AIR 1967 Ori 110; *Shamsher* v. *Rustam*, AIR 1988 Raj 188.
91. *Md Koya* v. *Muthu Koya*, AIR 1979 SC 154 : (1979) 1 SCR 664; *Aghnoo Nagesia* v. *State of Bihar*, AIR 1966 SC 119; *Sk. Khadhimul Heque* v. *Maridubey*, AIR 1965 Pat 262; In re : *Pagoti Sanyasi Rao* v. *State*, 1968 Cr LJ 1345; *Jaswant Singh* v. *State*, AIR 1966 Raj 83; *Indermal Tekhaji Mahagan* v. *Ram Prasad Gopilal*, AIR 1970 MP 40; *Dharam Narain Sahu* v. *Kapil Deo*, ILR (1973) 52 Pat 117 : 117 BLJR 749; *Mahendra Manilal Nanavati* v. *Surhila Mahendra Nanavati*, AIR 1965 SC 364 (Admission witness box); *Abida Kaahtoon* v. *State*, AIR 1963 All 260; *Hara Chanda* v. *Rex*, AIR 1950 All 355; *Hanumant Govind* v. *State of M.P.*, AIR 1952 SC 343; *Bachuran Kar* v. *State*, AIR 1956 Cal 102; *Velupillai Pudakalingam* v. *Paramanandam Yesudasan*, AIR 1954 Tri-Cochin 152; *Rosetta Evelyn Att-aullah* v. *Justin Attaullah*, AIR 1953 Cal 530 (SB); *Jaswant Singh* v. *State*, AIR 1966 Raj 83; *Dharamvati Bai* v. *Shiv Singh*, AIR 1991 MP 18; *Charan Singh* v. *State*, 1961 All WR 67 : 63 Punj LR 629; *Ishar Singh* v. *Babu Gajadhar Prasad Singh*, AIR 1957 Pat 174; *Bachuran Kar* v. *State*, AIR 1956 Cal 102; *Ramsurat Devi* v. *Satragi Kuer*, AIR 1975 Pat 168.
92. *Sunil Chandra* v. *Hemevdra*, AIR 1985 Cal 233.
93. *Nishikant* v. *State of Bihar*, AIR 1969 SC 422; *Kemalaghankar Bhute Shankar Dave* v. *State of Gujarat*, AIR 1963 Guj 312; *Shivram* v. *Shivcharan Singh*, AIR 1964 Raj 126.
94. *Harrison* v. *Turner*, (1847) 10 QB 482.
95. *Fatheh Chand Muralidhar* v. *Juggilal Karnlapat*, AIR 1955 Cal 465; *Essobhoy* v. *Mulji Haridas*, AIR 1915 PC 2 : ILR 39 Bom 399.
96. *Sundara Rajali* v. *Gopal*, AIR 1934 Mad 100; *Min. Sin* v. *Ko Kye*, AIR 1941 Rang 117.
97. *Karnail Singh* v. *State of Punjab*, AIR 1954 SC 204 : 1954 CrLJ 580.
98. STEPHEN'S Digest Art. 24.
99. *Azimaddy* v. *Emperor*, AIR 1927 Cal 17; *Sahoo* v. *State of U.P.*, AIR 1966 SC 40; *Queen Empress* v. *Babulal*, ILR 6 All 509 at 539 (FB).

A confession may be defined as an admission of the offence by a person charged with an offence. It consists of several parts and may reveal not only the commission of the crime but also motive, preparations, the opportunity, the provocation, the weapon used, the intention, the concealment of the weapon and subsequent conduct.[1]

Statements by the accused are admissions under Sections 17 and 18, and *prima facie* evidence against the maker, but not in his favour.[2]

Every admission made by an accused person is not, in the view of the law, a confession, nor can it be held that admission means only statements made by parties to civil proceedings. Every statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, made by an accused person is an admission under Sections 17 and 18, and under Section 19 an admission may be proved as against the person who makes it unless, under some provision of the Evidence Act or other law, it is rendered inadmissible. Under Sections 24-26, statements made by accused persons are inadmissible, subject to the provisions of Sections 27-29, when such statements are confessions.[3] A confession which is inadmissible may yet, for other purposes, be admissible as an admission under Section 18 against the person who makes it in civil matters.[4] Thus, admission of guilt by a person to a Police Officer, though not receivable in evidence in a criminal trial, may be proved in civil proceedings as an admission under this section and Sections 18 and 21.[5] Admission regarding motive in committing the murder of the deceased is admissible.[6]

All admissions are not confessions but all confessions are admissions.[7]

In criminal cases a statement by the accused, not amounting to confession, but giving rise to an inference that the accused might have committed the crime, is his admission. A statement of the accused giving suggestion that he might have been present when the offence was committed is an admission.[8]

A confession is an admission by an accused in a criminal case, of his guilt and if he does not incriminate himself it cannot be taken as a confession.[9] An accused admitted the offence immediately after the incident, that she stabbed the deceased in self-defence. As that statement justified her action, it would not amount to a confession.[10] Where an accused, in his statement under Section 164 Cr P.C. *intra alia* stated: "In fear of my own life I snatched his knife and assaulted him with it", the Assam High Court held that the statements of the accused cannot be treated as a confession of guilt and that on the other hand, he had thereby claimed a right of private defence.[11] Where the accused made a statement admitting the offence which formed the first information report, it was held that, as it was a confession made to a Police Officer, no part of it can be used as an admission.[12] The Allahabad High Court in *Ram Singh* v. *State*, stated that the acid test which distingishes a confession from an admission is that where conviction can be based on the statement alone, it is a confession, and where some supplementary evidence is needed to authorise a conviction, then it is an admission; that no statement which contains exculpatory matter can amount to a confession.....that a confession admits in terms what constitute the offence; that an admission of a gravely incriminating fact, even a conclusively incriminating fact, is not in itself a confession.[13] If the statements of the accused suggest only that he committed the crime but do not show

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1. *Aghhoo Negesia* v. *State of Bihar*, AIR 1966 SC 199.
2. *Azimaddy* v. *Emperor*, (1926) 54 Cal 237 : AIR 1927 Cal 17.
3. *Illahi Baksh* v. *The Empress*, 1886 PR No. 16 (Cr); *Raj Mal* v. *The Empress*, 1879 PR No. 3 of 1880 (Cr); *Shree Singh* v. *The Empress*, 1881 PR No. 21 of 1881 (Cr).
4. *Queen Empress* v. *Tribhovan Manekchand*, (1884) 9 Bom 131, 134.
5. *Bishen Das* v. *Ram Labhaya*, (1915) PR No. 106 of 1915 (Civil).
6. *Baleswar* v. *State of Bihar*, (1963) 2 SCR 433.
7. *Beoparia* v. *State of Ajmer*, AIR 1955 Ajmer 10.
8. *Nishikant* v. *State*, AIR 1969 SC 422; *Kanda Padayachi* v. *State of Tamil Nadu*, AIR 1972 SC 66; *Chintamani Das* v. *State of Ajmer*, AIR 1970 Ori 100.
9. *Sohar Singh* v. *State of Bihar*, AIR 1966 Pat 448; *Thingon Sashi Kumar* v. *Manipur Administration*, (1963) 2 CrLJ 562 Mani (though confession was retracted).
10. *State of Orissa* v. *Nirupama Panda*, 1989 CrLJ 621 (Ori).
11. *Manik Malakar* v. *State of Assam*, 1976 Cr LJ 1921 (Gau).
12. *Banarasi Das* v. *State of Punjab*, 1981 CrLJ 1235 (P&H); *Ugar Singh and Birendra Mohan Singh* v. *syed Akbar Hussain and Mukheshwar Prasad*, AIR 1966 Pat 210.
13. *Ram Singh* v. *State*, AIR 1959 All 518; **See also** *Malik Malakar* v. *State of Assam*, 1976 CrLJ 1921 (Gau); *Gadhapurni* v. *State*, 1980 CrLJ 188 Ori; *Sohar Singh* v. *State of Bihar*, AIR 1966 Pat 448; *Pakala Narayanaswamy* v. *R.*, AIR 1939 PC 47.

that he admitted in terms the offence, or substantially all the facts which constitute the offence, it was held that such statements individually or taken together cannot amount to a confession of the crime.[14]

Where an accused, after he had made an extra-judicial confession to a *Tahsildar*, was handed over to the police, who produced the accused before the first class magistrate, and the evidence of the magistrate was that the accused wanted to make a confession of his guilt after the police had been asked to withdraw, it was held that the alleged confession cannot be admitted in evidence as admission of guilt.[15]

An incriminating statement by the accused, though it does not amount to a confession, can be used as an admission as it is made against his interest.[16]

16. ADMISSION—CONSTRUCTION

Every admission should be given a plain, literal and fair meaning, and its scope should not be widened or restricted on the basis of suspicions or surmises.[17]

17. ADMISSION—NOT CONCLUSIVE AGAINST THIRD PARTIES

Any admission by a party is not conclusive against the third parties.[18] Admission cannot bind the third party unless he has derived some title or interest from the person admitting.[19] Admissions made by a witness in another suit are admissible against him alone but not against others.[20]

18. ADMISSION—NOT CONCLUSIVE PROOF

The law by no means regards admission as conclusive proof of the matters admitted. This is because, to a Court of Law, admissions are but statements which do no more than suggest an inference as to some fact or facts in issue. An admission is not conclusive proof of the matter admitted though in certain circumstances it may operate as an estoppel.[21]

Where a person executing a document admitted the title of his brother to certain property and the alienation of that property by his brother to a third person, it was argued that statement in the document amounted to estoppel against the person who executed the document. It was held by the Supreme Court that the document was relevant when relied on by the third person who purchased the property, as an admission and not as an estoppel.[22]

For a court to draw an adverse inference against a party on the basis of what he is stated to have admitted, the admission must be unequivocal. It must also be comprehensive. It must go the whole hog on the point at issue. If a party's admission falls short of the totality of the requisite evidence needed for a legal proof of a fact in issue, such an admission would be only a truncated admission.[23] Admission in a gift deed that donor has delivered possession of gifted property to the donee is a substantive evidence but it is not a conclusive proof, as it can be proved to be wrong from the circumstances appearing in the evidence.[24]

19. ADMISSION IN PLEADING WHETHER CAN BE USED IN OTHER SUITS

The Supreme Court in *Basant Singh* v. *Janki*[25] held that an admission by a party in a plaint signed and verified by him may be used as evidence against him in other suits, that such admission cannot however, be regarded as conclusive and the party can show it as not true.[26]

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14. *Omprakash* v. *Stateof U.P.*, AIR 1960 SC 409; *Palvinder* v. *State*, AIR 1952 SC 354; *Veera* v. *State*, AIR 1976 SC 1167.
15. *Gurubasanaiah* v. *State of Karnataka*, 1979 CrLJ 204 (Kar).
16. *Pingla Khadia* v. *State*, AIR 1969 Ori 249; *Chintamani Das* v. *The State*, AIR 1970 Ori 100.
17. *Soraisem Kamini Singh* v. *Chongtham Iboyaima Singh*, AIR 1954 Mani 11; *Sirdar Bahadur Sirdar Indira Singh* v. *Commissioner of Income Tax, Orissa and Bihar*, AIR 1943 Pat 169.
18. *Bhaironlal* v. *Ram Parshad*, AIR 1954 Raj 49.
19. *Sujan Singh* v. *Dinanath*, AIR 1988 J & K 77.
20. *Ambika Prasad* v. *Ram Ekbal*, AIR 1966 SC 605.
21. *K.S. Srinivasan* v. *Union of India*, AIR 1958 SC 419 : 1958 SCR 1295.
22. *Dattatraya* v. *Rangnath*, AIR 1971 SC 2548.
23. *M. Manoharan Chetti* v. *M/s. C. Coomara Swamy Naidu and Sons, Madras*, AIR 1980 Mad 212.
24. (1973) 3 Simla LJ 241. **See also** *Federal Bank Ltd.* v. *State*, AIR 1995 Ker 62 (paras 14 and 16).
25. AIR 1967 SC 341.
26. *Rajkumar* v. *Gopinath Varman*, AIR 1971 All 273 (unless the statement amounts to an admission); *M/s. Luxmi Narayan Arjun Das* v. *S.B.I.*, AIR 1969 Pat 385; *Biswa Nath Rana* v. *Laxman Rana*, AIR 1971 Ori 267; 1966 Cut LJ 573; *Ghanchi Pirbhai Kala* v. *Maghmal Sirumal*, (1989) 1 Guj LR 183.

A person making an admission in a pleading cannot take advantage of it, but a party in whose favour it is made may get its benefit.[27]

Where an admission is made by a person in a proceeding to which another was not a party, such admission is not admissible against the other in a subsequent suit in which both were co-defendants.[28]

Any statement made by a person in his pleadings against his own interest would be admissible.[29]

A defendant in a written statement admitted that his father was married to the plaintiff's mother according to '*Henga*' custom of marriage, but he did not come to the witness box. On those facts it was held that the defendant cannot be allowed to contend that the plaintiff's mother was not married according to '*Mange*' custom of marriage.[30]

Where an admission was made in Court by a party in respect of certain affairs, the opposite party who not knowing those facts did not refer to the facts in his pleading will not be disentitled to rely upon the admission merely because of absence of plea in his pleadings.[31]

20. ADMISSION BY AN INFANT

Section 11 of the Indian Contract Act deals with the incompetency of a minor (below the age of 18) to contract with any one. But it was held that admissions made by an infant himself may be proved in an action brought against him after he attains majority.[32]

In a case where a minor represented to another that he was a major and borrowed money on a promissory note, it was held, in the suit for recovery of the money on the basis of the pronote, that he was estopped from pleading his minority.[33]

21. COUNTER ADMISSIONS

In a case where the plaintiff alleged in his plaint that he was a minor on a particular day, and the defendant alleged in his written statement that the plaintif was major on that date, when the matter came in appeal, each of them wanted to rely upon the admission of the other in the first court; it was held that the admissions by both the parties set the matter at large and the question must be determined on the facts of the case.[34]

However, it was held that the court may accept one admission in preference to the other but it will not be possible to consider both the admissions.[35]

22. ADMISSION BY ONE ACCUSED AGAINST ANOTHER

An admission by one accused cannot be used against another.[36] But it can be used if there is other evidence in the case.[37]

Even if a statement is not admissible as a confession as it does not fall within the definition of a confession, still the portions of the statement will be admissible if they are in the nature of admissions.[38]

23. VOLUNTARY

Where a document called '*na dabi patra*' was found to be executed in favour of a party much before taking possession of the property, it was held to have been obtained by fraud as, if it was genuine, the

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27. *Surajnath Prakash Kedarnath* v. *The Union of India*, AIR 1975 Cal 203.
28. *Amarjit Kaur* v. *Kishan Chand*, 1980 Rajadhani LR 43.
29. *R. Ammal* v. *S.R. Srinivasan*, 1978-1 MLJ 56 : 1978 Hindu LR 525.
30. *Rasamani Das* v. *Patrabala Devi*, AIR 1981 Gauh 42.
31. *Debi Singh* v. *Bhim Singh*, AIR 1971 Del 316.
32. *Dharmaji Vaman* v. *Gurrav Shrinivas*, (1873) 10 Bom HCR 311.
33. *Jasraj Bastimal* v. *Sadashiv Mahadev*, 22 Bom LR 975.
34. 1973 WLN 981 (Raj).
35. *Tolsiram Jagannath Saoji* v. *Maroti Doma Koshe*, 1980 Maha LJ 205.
36. *Sohar Singh* v. *State of Bihar*, AIR 1966 Pat 448.
37. *Chintamani Das* v. *State*, AIR 1970 Ori 100; *Sohar Singh* v. *State of Bihar*, 1966 BLJR 861: AIR 1960 Pat 448.
38. *Asst. Collector of Customs* v. *Shantilal Laxmichand Modi*, ILR (1971) 2 Del 584.

beneficiary must have taken possession soon after the execution of the document.[39] Where the admission was found to be involuntary and in the nature of explanation and no warning was given as required under Section 164(2), Cr.P.C. , the admission was not admissible against the maker or the co-accused.[40]

24. VOLUNTARY CONFESSION PARTLY NOT TRUE

Where there was voluntary confession by an accused but the circumstantial evidence for proving the guilt of the accused showed that some part of the confession as false, it was held that the Court can reject that part of the confession which proved to be false, and accept the rest of the confession.[41]

25. OPINIONS AS TO CUSTOM

Where there is a question as to who under the law or custom is entitled to succeed to a property, any statement of a witness as to his notion of the law or custom is not binding on the party.[42]

26. AFFIDAVIT

The statement made in an affidavit may be used as an admission. As a matter of fact any statement made on oath may be used against its maker as an admission. Though not a substantive evidence, its contents can be proved through the maker.[43]

27. ADMISSION ON A POWER OF LAW

Where a defendant had admitted in a previous suit between the parties that the document in the suit was duly registered and in the latter suit he denied it, it was held that admission of a party cannot make a document a registered one unless there had been due compliance with the Registration Act, and it would not be sufficient to hold that the admission amounted to an estoppel.[44]

An admission, so far as the facts are concerned, would bind the maker but not so far as it relates to a question of law.[45]

Though the defence expressly stated that they were not urging that a certain statement was wrongly admitted in evidence, it was held that their concession on a question of law would not justify the court to depend upon it for any purpose.[46]

But an admission by an advocate regarding a fact is binding on his client.[47]

28. VALUE OF ADMISSIONS

It is well settled that a party's admission, as defined in Sections 17 to 20, fulfilling the requirements of Section 21, Evidence Act, is substantive evidence *proprio vigore*. An admission, if clearly and unequivocally made, is the best evidence against the party making it and, though not conclusive, shifts the onus on to the maker as it must necessarily be presumed to be true and until the presumption is rebutted the fact admitted must be taken to be established."[48] Admission is the best evidence that an opposite party can rely upon. Though it is not conclusive, it is decisive of the matter unless it is

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39. *Pramila Debbarma* v. *Gitasree Debbarma*, AIR 1997 Gau 78.
40. *Asstt. Collector of Central Excise (L&A)* v. *Fibre Foils (P) Ltd.*, 2001 Cr LJ 748 (paras 5-8 and 11) (Kant).
41. *Budn Gowda* v. *State*, AIR 1965 Ori 170 : (1965) 2 CrLJ 385; *Keshoram Bera* v. *State of Assam*, (1978) 2 SCC 407.
42. In re : *Mahabir Singh*, AIR 1963 Punj 66.
43. *Michael Mascarenhas* v. *John Mascarenhas*, AIR 1996 Kant 348 (para 10).
44. *Sharnappa* v. *Pathru Saheb LR/by Chandrakanth*, AIR 1963 Mys 335.
45. *Banarsi* v. *Kainsi Ram*, AIR 1963 SC 1165; *Income Tax Officer* v. *Shambhoo Dayal Om Prakash & Co.*, AIR 1968 All 203; *Ram Ekbul Singh* v. *Ghamandi Singh Yadam*, 1966 BLJR 409.
46. *Marudevi Avva* v. *State*, AIR 1958 Ker 8; *Bishan Devi Khanna* v. *Pirthi Singh*, AIR 1953 Punj 66 (Law relating to succession).
47. *Nishi Kant Jha* v. *State of Bihar*, AIR 1969 SC 422.
48. *Thiru John Subrahamanyan* v. *Returning Officer, Madras* AIR 1977 SC 1724; *Ramji Dayawala* v. *Invest Import*, AIR 1981 SC 2085 : (1981) 1 SCR 899.

successfully withdrawn or proved to be erroneous.[49] Admission goes a long way to establish the case unless rebutted.[50]

However in *Latafat Hussain* v. *Lala Onkar Mal*[51] and *Raja Partab* v. *Raja Rajgan*,[52] it was held that admissions are a very weak kind of evidence and the court may reject them if it is satisfied from other circumstances that they are untrue.

When there are contradictory admissions made by each of the parties, the court may accept one admission in preference to the other, but it will not be possible to consider both the admissions.[53]

In a proceeding under Section 97, Cr.P.C. the wife admitted the *factum* of marriage between her and the husband. When a question arose under the Hindu Marriage Act whether there was solemnization of the marriage according to the Section 7 of the Act, it was held that the admission by the wife was not sufficient for proving legal and valid marriage and the evidence regarding the performance of necessary ceremonies should be placed on record.[54] Acknowledgement by a man or a woman to the effect that they have been living as husband and wife and they have got children, would not be sufficient to determine the question whether there was a valid marriage. The other party has to adduce evidence bearing upon the issue of marriage. In any view of the matter, a declaration as to the status of a petitioner as a wife, being a judicial act, cannot be founded on admissions but on evidence.[55]

Regarding admission made during the conduct of the suit, the courts are not precluded from taking into consideration the effect of such admissions. Where a party produces a document containing admissions made by the opponent, it can be used as evidence without drawing the attention of the opponent to those admissions in the cross-examination.[56]

An admission by a person in a suit that he was a tenant; can be used in a subsequent suit to show that possession was permissive.[57]

Previous admissions though they are not conclusive, can be admitted without confronting the party with such admissions when he is in the witness-box.[58]

29. WITHDRAWAL OF ADMISSION WHICH IS GRATUITOUS

When a person makes a gratuitous admission that he has no right in the property in certain estate, there is nothing to prevent him from withdrawing the said admission unless there is some obligation not to withdraw the gratuitous admission made by him.[59]

Where there was an admission in a suit filed by a party, mere withdrawal of the suit by him cannot destroy the effect of the admission made therein.[60]

30. GENERAL CASES DEALT SEPARATELY

It was held by the Supreme Court that by reasons of the admissions of a party, title to the property does not pass, the reason being that transfer of title to the party can only pass by a registered instrument.[61]

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49. *Bihar State Board of Religious Trust Patna* v. *Harkishun Das*, AIR 1971 Pat 363; *Narayan* v. *Gopal*, AIR 1960 SC 100.
50. *Bharat Nidhi* v. *Shri Meghraj*, AIR 1967 Del 22.
51. (1934) 10 Luck 423 : AIR 1935 Oudh 41.
52. (1936) 12 Luck 371.
53. *Tolsiram Jagannath Saoji* v. *Maroti Doma, Koshe*, 1980 Mah LJ 205.
54. *Nasib Chand* v. *Surinder Kaur*, 1980 Hindu LR 157.
55. *Razaia Begum* v. *Sahebzadi Anwar Begum*, AIR 1958 AP 195; **See also** *Muhammad Allahadad Khan* v. *Muhammad Ismail Khan*, 1886 ILR 10 All 289.
56. *Veerabasa Varydhya* v. *Devotees Lungada Gudi Mutt*, AIR 1973 Mys 280.
57. *Madhao Pandurang* v. *Yeshwanth*, AIR 1974 Bom 12.
58. *Punjab University, Chandigarh* v. *Premchand Handa*, AIR 1971 Punj 177.
59. *Ramachandra* v. *Keshav Kanderao*, AIR 1953 MB 184; *Izhar Fatma Bibi* v. *Ansar Fatma Bibi*, AIR 1939 All 348; *Ramratanlal* v. *Kashinath Tiwari*, AIR 1966 Pat 235; *Aribam Kesharjit Sarma* v. *Kanjenbam Anq Singh*, AIR 1969 Mani 23.
60. *Chandrakanta* v. *Ram Mohini*, AIR 1956 Cal 577 : 60 Cal WN 1006.
61. *Ambika Prasad* v. *Ram Ekbal*, AIR 1966 SC 605, 612; *Ambika Prasad Thakur* v. *Ramekbal Rai*, 1966 BLJR 147 : AIR 1966 SC 605.

Where the recitals in a gift deed show that possession was delivered to the donee, the burden lies on the donee to prove absence of delivery.[62]

Where an admission or a conduct of a party is in question, if the party making the admission is alive and capable of giving evidence, he must come forward to explain and if he fails to do so, adverse inference can be drawn against him.[63]

Where an admission of a patent of the plaintiff made against the interests of the plaintiff was sought to be used against the plaintiff, it was held that it was incumbent on the defendant to plead this admission in the written statement; that every admission is capable of being withdrawn, that, as the alleged admission was made in an application in a police case in which the plaintiff company was in danger of being prosecuted, such admission cannot be used against the plaintiff, and it cannot be treated as an admission.[64]

Admission by party to proceeding or his agent;

S. 18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions.

by suitor in representative character;

Statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

Statements made by—

by party interested in subject-matter;

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

by person from whom interest derived.

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, are admissions, if they are made during the continuance of the interest of the persons making the statements.

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62. *S.V.S. Muhammad Yusuf Rowther* v. *Muhammad Yusuf Rowther*, AIR 1958 Mad 527.
63. *Arjun Singh* v. *Virendra Nath*, AIR 1971 All 29.
64. *Bombay Agarwal Co.* v. *Ramchand Diwanchand*, AIR 1953 Nag 154.

COMMENTS

1. PRINCIPLE AND SCOPE

Sections 18 and 19 indicate the persons by whom an admission can be made.

Section 18 lays down five classes of persons who can make admissions—

(1) Party to the proceeding;

(2) Agent authorized by such party;

(3) Party suing or sued in a representative character, making admissions while holding such character;

(4) Person who has any proprietary or pecuniary interest in the subject-matter of the proceeding, during the continuance of such interest;

(5) Person from whom the parties to the suit have derived their interest in the subject-matter of the suit, during the continuance of such interest.

2. STATEMENT

For meaning see Section 17 commentary.

3. ADMISSION BY SILENCE

No acknowledgement of admission can be inferred from a silence. Admission should be in an express term and there must be a conscious and deliberate act of making acknowledgement by a party relating to the existence of certain facts which are in issue or relevant to an issue in the case. Mere silence or inaction on the part of a person (say non-responding to a show cause notice) does not amount to admission.[65]

4. PARTIES TO THE PROCEEDINGS

In PHIPSON ON EVIDENCE, 15th Edn. (2000), page 707 (para 28-01), it is stated : "The general rule both in civil and criminal cases is that any relevant statement made by a party is evidence against himself."[66]

What is admitted by a party to be true must be presumed to be true unless the contrary is shown;[67] but before this proposition can be invoked, it must be shown that there is a clear and unambiguous statement by the party such as will be conclusive unless explained.[68] A statement made by a party in a former suit between the same or different parties is admissible. The proceeding may be civil or criminal.[69] An admission made by a party in a suit may not be used as evidence against that party in another suit. However, it can raise suspicion.[70] Admission by a party, after parting with his interest in the property, is not admissible.[71] A statement made by a party in a pleading cannot be evidence in subsequent proceedings before a court of law unless it amounts to an admission.[72] Where the defendant admitted about the oral agreement of sale and putting the plaintiff into possession in pursuance of it and there was evidence of mediators establishing the plaintiff's case, the plaintiff was held entitled to the decree of specific performance.[73]

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65. *State of Rajasthan* v. *Bhanwari Devi*, 1997 AIHC 2335 (para 17) (Raj).
66. *R.* v. *Erdheim*, (1896) 2 QB 260, 270, per Lord RUSSELL of KILLOWEN C.J.
67. *Nathoo Lal* v. *Durga Prasad*, AIR 1954 SC 355.
68. *Nagubai* v. *B. Shama Rao*, AIR 1956 SC 593.
69. *Dattatraya Shripati* v. *Shankar*, (1959) 61 Bom LR 792 : AIR 1960 Bom 153.
70. *Rashmi Nagrath* v. *M/s Sarva Priya Co-operative House Building Society Ltd.*, 1998 AIHC 4769 (para 38) (Del).
71. *Chironjilal* v. *Khatoon Bi*, AIR 1995 MP 238 (para 11).
72. *Raj Kumar* v. *Gopi Nath*, AIR 1971 All 273.
73. *Moturi Seeta Ramabrahmam* v. *Bobba Rama Mohana Rao*, AIR 2000 AP 504 (paras 12 and 14).

It was held by the Supreme Court in *Mahendra* v. *Sushila,* that a court can base its decision on the admission of the parties. It confirmed the finding of the trial court based on an admission of the wife that the child was conceived by her before marriage. It was also held that the High Court was not right in remitting the case for recording on the question whether the child was conceived after the marriage, ignoring the admission.[74] Where in a suit for declaration and rendition of account, the trial Court decreed the suit on the basis of unequivocal admissions made by respondent in the written statement in the earlier proceedings but the appellate Court without pointing out any circumstance took the view that the admissions were made under constraint and compelling circumstances, it was held that the admissions in the written statement in the earlier proceedings, though not conclusive, in the absence of any reasonable and acceptable explanation, is a telling evidence heavily loaded against the respondent and the finding of the trial Court based on the evidence on issues was *in extenso* justified.[75]

The Court is not free to ignore or to get over a clear admission made by the parties in the witness-box on the ground that they were made by inadvertence or mistake, especially when there was no suggestion made in the examination of the witness to that effect.[76]

A statement by a plaintiff in the evidence can be treated by the defendant as an admission and used against the plaintiff.[77] The statements made by a co-plaintiff admitting the case of the defendant squarely bind the other plaintiff.[78]

The Privy Council in *Chandrakunwar* v. *Chaudary Narpat,*[79] relying on the decision in *Slatterie* v. *Pooleu,*[80] held that what the party himself admits to be true must necessarily be presumed to be so, and it is for him to establish circumstances to show that it is not true and hence not binding on him.[81] But the party who makes it can adduce evidence of a cogent and satisfactory nature as to the possibility of error or probable reason or motive for his statement, and show that it was incorrect and untrue, unless in the situation such admission amounts to an estoppel.[82]

Mere withdrawal of a suit does not destroy the effect of an admission made by the plaintiff therein.[83] Where one of the parties to the suit, a beneficiary to the suit property, admitted in an earlier proceeding that the said property was partitioned years back by virtue of a deed, the same would be admissible in proof of partition asserted subsequently.[84] In a suit for permanent injunction on the ground of agreement to sell the joint family property, the vender admitted the possession of the vendee on the suit property during trial as the possession was handed over before the execution of the sale deed, it was held that possession of the vendee was proved and he was entitled for permanent injunction.[85]

5. ADMISSION BY DEFENDANT

Where the defendant merely pleaded ignorance about the facts pleaded in the plaint, it was held to amount to admission unless by necessary implication it amounted to denial of the fact.[86]

6. ADMISSION BY ACCUSED

"In *criminal* cases statements made out of Court by an accused are similarly admissible against him though they are subject to special conditions of admissibility and are usually called "confessions." Confessions which comply with these special conditions, and other statements made by a party or an accused person are admissible *against* him as evidence of the truth of the facts asserted, and are termed

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74. *Mahendra* v. *Nanavati,* AIR 1965 SC 364.
75. *Sitaramcharya* v. *Gururajacharya,* AIR 1997 SC 806 : (1997) 2 SCC 548.
76. *Narayanan* v. *Krishnan Venki,* AIR 1955 Tri 199.
77. *Sampat Ragho* v. *Surajmal Kaluram,* AIR 1959 Bom 504.
78. *Dulal Chandra Adak* v. *Gunadhar Patra,* AIR 1998 Cal 150 (para 6).
79. ILR 29 All 184 (PC).
80. (1840) 6 MW 664.
81. *Amimaddin Manshi* v. *Tajaddin,* AIR 1932 Cal 538; *Abdul Rafiq* v. *Bhjan,* AIR 1932 All 199.
82. *Parasnath Rai* v. *Tileshra Kaur,* 1965 All LJ 1080; *Munnaiyya and Co.* v. *Varadharajulu,* AIR 1964 AP 17 (recitals in a document amounting to an admission).
83. *Chandrakanto Goswami* v. *Ram Mohini Debi,* AIR 1956 Cal 577.
84. *Krishtappa Shetty* v. *Rajivi Shedthi,* 1998 AIHC 2371 (paras 12 and 13) (Kant).
85. *Girdharbhai* v. *Patil* v. *Ganpatbhai Kalubhai,* 1998 AIHC 3865 (para 15) (Guj).
86. *Roopi Bai* v. *Mahaveer,* AIR 1994 Raj 133 (para 15).

informal admissions.[1] Such admissions, unlike formal admissions, do not bind their maker but may be contradicted or explained."[2]

Statements by the accused are admissible under Section 18.[3]

In a case where an accused charged under the Foodgrains Control Order, made a general statement that he used to keep the foodgrain bags left by a businessman; it was held that as the statement did not make out the necessary ingredients of the offence to prove that the bags were stored for the purpose of sale, he could not be convicted on that statement.[4]

Where accused charged for an offence of grievous hurt under Section 326, Penal Code, filed an application stating that they never intended to cause injury to the complainant, and it was caused accidentally and they are sorry for it and may be pardoned, it was held that as the statement did not amount to an unequivocal admission of guilt, the conviction based on the alleged admission would be illegal.[5]

A previous statement made by the accused can be tendered in evidence against him in the course of a criminal trial, but what value should be attached to it, when proved, is for the court to decide.[6]

An admission by an accused in respect of a marriage cannot be taken as an evidence in a case for the offence of bigamy or adultery. In such a case proof of the second marriage or adultery by the accused has to be given.[7]

A statement made to a Police Officer is not admissible as evidence of confession of guilt, but such statement can be proved as an admission in a civil case.[8] Confessional statements of the accused made before custom officers, they not being Police Officers within the meaning of Section 25, are admissible in evidence.[9] The statement made by an accused admitting the execution of a document is admissible under this section.[10]

An incriminating statement, not amounting to a confession, but made against his interest, can be used as an admission under this section.[11]

An accused admitted that he was driving a truck at the time of the accident. It was held that it cannot be used as substantive evidence against him for proving the guilt but it can be used as an admission to lend support to the other evidence of the witnesses.[12]

The letters written by an accused person can be taken as evidence against him.[13]

When the accused admits certain facts in the statement made in the court under Section 342, Cr PC (Old), such admission is admissible subject to the provisions of Sections 24-27 of this Act, but the prosecution cannot be relieved from proving the guilt.[14]

7. ADMISSION BY CO-OWNER

Admission by one of the co-owners of a joint-property, regarding the right of the other co-owner can be relied upon.[15]

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1. Basically, these are pleadings in civil proceedings and admissions in criminal proceedings.
2. PHIPSON ON EVIDENCE, 15th Edn. (2000), pages 707-708 (para 28-02).
3. *Azimaddy* v. *Emperor*, (1926) 54 Cal 237 : AIR 1927 Cal 17.
4. *Sital Prasad* v. *State*, AIR 1953 All 101; *Mani* v. *State*, 1963 Ker LT 969.
5. *State of Mysore* v. *Sahib Gunda*, (1964) 1 CrLJ 460 (Mys)
6. *Tejumal* v. *State*, AIR 1958 Raj 240.
7. *Kanwal Ram* v. *H.P. Administration*, AIR 1966 SC 614.
8. *Biswanath Agarwalla* v. *Smt. Dhapu*, AIR 1960 Cal 494.
9. *Banshidhar Maharana* v. *State of Bihar*, 1993 Cr LJ 1310 (para 14) (Pat).
10. *Hardevi Malkani* v. *State*, AIR 1969 All 423.
11. *Pingal Khadia* v. *State*, AIR 1969 Ori 245; *Chintamani Das* v. *State*, AIR 1970 Ori 100.
12. *Tejmani* v. *State of Rajasthan*, AIR 1976 Raj 71.
13. *Sardul Singh* v. *State of Bombay*, AIR 1957 SC 747.
14. *Divisional Manager* v. *Sharif Ahmad*, AIR 1968 All 422.
15. *Raj Kumar* v. *Official Receiver, M/s Chiranji Lal Ram Chand*, AIR 1996 SC 941 (para 8).

8. ADMISSIONS OF CO-PLAINTIFFS AND CO-DEFENDANTS

"When several persons are jointly interested in the subject-matter of the suit, the general rule is that the admissions of any one of these persons are receivable against himself and others, whether they be all jointly suing or sued, or whether an action is brought in favour of or against one or more of them separately, provided the admissions related to the subject-matter in dispute, and are made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.[16]

An admission by one of several defendants in a suit is no evidence against another defendant. No defendant can, by an admission or consent convey the right, or delegate the authority to one, for more than his own share in property.[17] Thus, the admission by one defendant will not be relevant against a co-defendant, because it would be unjust to bind a co-defendant by the admission of another whom he has had no opportunity to answer or cross-examine; it would afford to the plaintiff opportunities of defeating his opponent by unfair means. Even a confession of judgment by one of several defendants is no evidence against another defendant.[18]

Admission made by one defendant is not binding on the co-defendants unless interest of the defendants in the suit be joint.[19]

In *Sri Chand Gupta* v. *Gulzar Singh*,[20] the landlord of a building filed a petition for eviction on the ground that the tenant B sublet the premises to his brother A. A had filed an affidavit before the Income Tax Authorities that he was the exclusive tenant. It was held that this statement could not be used against B as an admission that by sublet the premises to his brother A as A cannot be said to have any joint interest or derivative interest with or from B within the meaning of this section.

The Kerala High Court held that it is not a correct proposition of law to state that the only kind of admissions by parties to a litigation which will either be relevant to or conclude the matter in issue are admissions operating as estoppels. There are other admissions which are equally, if not more, effective, namely: (1) admissions contained in the pleadings in a case which would circumscribe the issues and avoid the necessity for proof; and (2) admissions made by parties to a suit on earlier occasions, either in prior proceedings in a court of law or in statements made out of court. But the admissions made by one defendant will not bind his co- defendant, though they would bind the party making them.[21]

9. ADMISSION BY WITNESS

An admission made by a witness cannot be treated as an admission of the party and is not binding on the party.[22]

10. ADMISSION BY TENANT

Where a married daughter of a tenant claimed possession of the premises whereas the tenant had earlier admitted that he was residing in the premises all alone after the death of his wife and the daughter never proved his admission erroneous nor he even withdrew his admission, the vacancy was rightly declared.[23]

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16. TAYLOR, 12th Edn., s. 743, p. 475; *Meajan Matbar* v. *Alimuddin Mia*, ILR (1916) 44 Cal 130, 143, 144 : AIR 1917 Cal 487.
17. *Lachman Singh* v. *Tansukh*, ILR (1884) 6 All 395; *Azizullah Khan* v. *Ahmad Ali Khan*, (1885) 7 All 353 ; *Basanti Roy* v. *Manindra Roy*, 2000 AIHC 2624 (para 7) (Gau) : AIR 2000 NOC 71 (Gau).
18. *Amritlal Bose* v. *Rajoneekant Mitter*, (1874) 75 2 IA 113 : (1875) 23 WR 214.
19. *Paras Ram* v. *Dayaldas*, AIR 1965 HP 32; *Rampukar Singh* v. *Sitaram Mahton*, AIR 1963 Ori 45; *Gangram Kanhyalal* v. *Pooran Gulab*, AIR 1954 MB 58; *Ambikaprasad* v. *Ram Ekbal*, AIR 1960 SC 605; *Jagabandhu Senapati* v. *Bhogu Senapati*, AIR 1974 Ori 120; *Ambar Ali* v. *Lutfeali*, ILR 1945 Cal 159; *Tikoo Ram* v. *Jhabar*, ILR (1960) 10 Raj 6 (a case where several persons are jointly interested in the proceedings to grant of patta).
20. AIR 1992 SC 123.
21. *Chandi Avira* v. *Thomman Varkey*, AIR 1951 Tri-Co 109 (FB); *Phuljhari* v. *Mithai*, AIR 1971 All 494; *Prabhudas* v. *Lallubhai*, AIR 1932 Bom 117; *Kanta* v. *Makhan*, 39 CWN 227.
22. *Krishna Mohan* v. *Bal Krishna Chaturvedi*, AIR 2001 All 334 (para 42) : AIR 2001 All 334.
23. *Malini Agrawal* v. *Rent Control and Eviction Officer, Allahabad*, 2000 AIHC 4170 (para 10) (All), relying on *Narayan* v. *Gopal*, AIR 1960 SC 100.

11. ADMISSION BY AGENT OF A PARTY

The admissions of an agent are admissible because the principal is bound by the acts of his agent done in the course of business and within the scope of his authority. A statement made by an agent whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized to make it, is admissible though it was not made on oath.[24] *e.g.* a statement by an agent before a settlement officer that his principal was a bastard.[25]

It must also be proved that the person making the admission is an agent.[26] Where a principal was sought to be bound by the admission made by his agent, it was held that the relationship of agency between the principal and the agent should be pleaded and established, that in the absence of a proper pleading and in the absence of an amendment later, the question of agency cannot be raised at the time of hearing of the suit.[27] For a statement to be received as an admission of an agent it must be shown that he was expressly or impliedly authorised to make the admission.[28] The court may presume agency from the circumstances in which the admission was made.[29]

Where a party to the suit makes unambiguous statements on oath and, on that basis, his counsel makes certain confessions, it was held that the admission by the advocate on the fact is binding on the party.[30] An admission of a fact contained in the memorandum of appeal filed by an advocate, though it is not verified, is binding on the client.[31] Facts secured from the counsel across the bar amount to an admission so far as they go against the interest of the party and must form part of the record.[32]

A statement which was recorded in a judgment or order of a Court, about what had taken place in the Court, is conclusive and if the party is agrieved he can only apply for review.[33]

Suggestions put in the cross-examination by counsel are no evidence at all and on the basis of such suggestions no inference can be drawn against the accused that he admitted the facts referred to in the suggestion.[34]

Where there was no privity of contract between two persons, an admission by one will not bind the other.[35]

A person called by a party as his witness cannot, however, be regarded as his agent within the meaning of this section.[36]

12. ADMISSION BY SOLICITORS AND COUNSEL

The admission of a party's solicitors before the commencement of litigation are not relevant. Observation of formalities is, however, something different. The testimony of counsel that the thumb impression taken as a specimen was that of his client cannot be excluded on the ground that a counsel cannot admit facts on client's behalf.[37]

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24. *Govindji* v. *Chotalal*, (1900) 2 Bom LR 651.
25. *Raja Fateh Singh, Thakur* v. *Baldeo Singh, Thakur*, (1928) 3 Luck 416 : AIR 1928 Oudh 233.
26. *Brijsundar Sharma* v. *Election Tribunal Jaipur*, AIR 1957 Raj 189.
27. ***Kedarnath Bojoria*** **v.** ***State of Bengal***, AIR 1954 SC 660.
28. ***Raja Fateh Singh*** **v.** ***Baldeo Singh***, AIR 1928 Oudh 233 (Raj); ***Brij Sundar Sharma*** v. *Election Tribunal Jaipur*, AIR 1957 Raj 189.
29. *Raja Braja Sunder Deb* v. *Raja Rajendra Naraya Bhanj Deo*, AIR 1941 Pat 260.
30. *Mt Lachmi* v. *Anant Ram*, AIR 1956 HP 68 (admission regarding a custom in the matter of land allienation), *Prithwi* v. *Sukhraj*, 1940 FC 25.
31. ***Ghanshyam Das*** **v.** ***State***, 45 Cut LT 524 : ILR 1978 Cut 5.
32. ***Sunder*** **v.** ***Calter Ltd.***, AIR 1969 Bom 24.
33. ***Virabhadra Rao*** **v.** ***Sakalchand***, AIR 1951 Mad 796.
34. ***Trikam*** **v.** ***State***, AIR 1969 Guj 69.
35. ***Venkata Raman & Co.*** **v.** ***State***, AIR 1966 SC 1089.
36. *Prabhu Gordhan Das* v. *Lallubhai Khushal*, AIR 1932 Bom 117.
37. ***Raghunath*** **v.** ***State of U.P.***, AIR 1973 SC 1100.

13. ADMISSION BY COUNSEL

Admissions of facts made by a pleader in the conduct of a suit on his client's behalf are binding on the client.[38]

Admission by the counsel of a party on a point of law is not binding on the party and amounts to no more than his view that the question is unagreable.[39] A party is not bound, generally speaking, by a pleader's admission in argument on what is a pure question of law.[40] An admission by a counsel or a pleader on a point of law cannot, therefore, bind the client.[41]

In a suit for possession, defendants contested that they were joint tenants with the last owner and they also were the next reversioners, and that the surrender by the widow of the last male-holder was not binding on them. The plaintiff was a lessee from a *lambardar* to whom the suit land was surrendered by the widow. In the lower appellate court the defendant's counsel stated that they are not defending the suit on the ground of their being reversioners. It was found that the surrender was bad. It was held that the statement by the counsel is not binding the defendant, so as to preclude the defendant in a second appeal from raising the pure question of law, namely, whether the surrender which was not for legal necessity was binding on the reversioners.[42]

There cannot be an admission by counsel in a criminal case, to relieve the prosecution of the duty of satisfying the court by proper evidence, in respect of the guilt of the accused.[43]

A pleader cannot give up any portion of his client's case without express authority, nor is he entitled to admit the claim of the other party.

14. ADMISSION BY PARTNERS

Partners are agents of one another insofar as the business of partnership is concerned. Where several persons are engaged in one common business or dealing, a statement made by one of them with reference to any transaction which forms part of their joint business, has always been held to be admissible as evidence against the others.[44] Each member of a firm, being the agent of the others for all purposes within the scope of the partnership business, admissions by one member are binding on all. Admissions by a partner of a dissolved firm are binding on the other partners when they have an identical interest in the subject-matter of the suit.[45] Entries made by a partner in the firm's account books though made behind the back of other partners, are binding and are *prima facie* evidence against other partners.[46] Where a partner admits the infringement of a trade mark, the admission, if made in a representative capacity, is evidence against the firm.[47] Any admission made by one partner, which is not in respect of the affairs of the business of the firm, or is not made in the ordinary course of the business, would not bind the other members of the firm.[48]

It was held that acknowledgement of debt by one partner, in order to save limitation under the Limitation Act, would not bind the other partners unless he has authority, express or implied, from the other partners.[49] But the Bombay High Court, has held that even if the partner had no express authority

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38. *Khajan Abdool Ghani* v. *Bour Monee Debia*, (1868) 9 WR (Civil) 375; *Mahadev* v. *Sundrabai*, (1901) 3 Bom LR 467; *Emperor* v. *Bansilal Gangaram*, (1928) 30 Bom LR 646 : AIR 1928 Bom 241.
39. *Shanker Lal* v. *Motilal*, AIR 1957 Raj 267; *Veeramma* v. *Appayya*, AIR 1957 AP 965; *P.L. Singh* v. *M.M. Singh*, AIR 1956 Mani 18; *Jetmull Bhojraj* v. *State*, AIR 1967 Pat 287; *Shiv Singh* v. *S.T.A. Tribunal*, AIR 1969 All 14; *Union of India* v. *Jagesors*, ILR (1976) 2 Del 515; *Narayan* v. *Venkatacharya*, ILR 28 Bom 408; *Krishanji* v. *Rajmal*, ILR 24 Bom 360; *Societe Belge de Banaue* v. *Rao Girdhari Lal Chaudhary*, AIR 1940 PC 90.
40. *Narayan* v. *Venkatacharya*, (1904) 6 Bom LR 434: 28 Bom 408.
41. *Krishnaji* v. *Rajmal*, ILR (1899) 24 Bom 360: 2 Bom LR 25.
42. **See** *Surya Prakaso Rao* v. *Mahanti Rajaram*, AIR 1945 Mad 256.
43. *S.C. Mitter* v. *State*, AIR 1950 Cal 435; *State of Orissa* v. *Lachhmi Munshe*, (1978) 46 Cut LT 122 (a case of concession by a prosecutor).
44. *Kowsulliah Sundari Dasi* v. *Mukta Sundari Dasi*, (1885) 11 Cal 588.
45. *Sohanlal* v. *Gulab Chand*, AIR 1966 Raj 229.
46. *Valliammai* v. *Ramanathan*, AIR 1969 Mad 257.
47. *Thomas Bear & Sons Ltd.* v. *Rulia Ram*, AIR 1934 Lah 625.
48. *Seth Abdeali* v. *Askaran*, AIR 1924 Nag 411.
49. *Valasubramania* v. *Ramanathan Chettiar*, ILR 32 Mad 421; *Pandiri Veeranna* v. *Grandhi Veerabhadra Swami*, 41 Mad 427 : AIR 1919 Mad 1140.

to sign the acknowledgement of debt, he must be presumed to have had authority from the other partners.[50]

One member of a firm can borrow money from the business of the firm by executing promissory notes and other partners are liable for the debt under the promissory notes.[51]

15. ADMISSION BY OFFICERS, SUBORDINATES *ETC.*

Admissions of officers of a company have been received against the company when made during transactions with third persons.[52]

Admission by a station master has been received against a railway undertaking.[53]

In the absence of express authority, statements made by subordinates do not normally constitute admissions binding on their employers.[54]

16. ADMISSION BY GUARDIAN

The admissions of a guardian *ad litem,* or next friend, do not bind the minor. The guardian of an infant has no power to bind him by admissions. According to the Bombay and the Madras High Courts, a guardian appointed under the Guardians and Wards Act can sign an acknowledgement of liability in respect of, or pay in part the principal of, a debt, so as to extend the period of limitation against his ward, provided the guardian's act was for the benefit of the ward's property.[55] If a guardian makes an acknowledgement of debt to save limitation, it is not ordinarily sufficient to revive the debt, but if it was done for the benefit of the minor, it can be equated with that of an agent duly authorised in that behalf, and it gives a fresh start of limitation.[56] A guardian *ad litem* can make admissions if they are made in good faith and for the benefit of the minor. Where the guardian made some admissions regarding the title of the minor to a property, it was held that it was not made for the benefit of the minor; as there was want of good faith on the part of the guardian, the admissions were not admissible against the minor in a subsequent suit brought by him after his attaining majority.[57]

17. STATEMENTS MADE BY PARTIES SUING OR SUED IN A REPRESENTATIVE CAPACITY

This means trustees, executors, administrators, managers in the character of an executor or administrator, or the assignee of a bankrupt.

However, where a public institution is a party to the suit it was held that the personal conduct or admissions of the trustee of the institution cannot prejudice the interest of the institution.[58]

It is important that such persons must make the statement in their character of persons so interested. A statement made by a trustee, executor or administrator, is not admissible against him when sued as trustee, etc., if it was made before he became trustee, etc. This principle is grounded on the fact that a statement against the interest of person making it will not be made unless truth compelled it. But the fact that two persons have a common interest in the subject- matter does not entitle them to make admissions respecting it, as against each other.[59]

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50. *Gordhandas* v. *Bhulabhai Ranchoddas,* AIR 1932 Bom 316
51. *Shanmuganatha Chettiar* v. *Srinivas Iyer,* 40 Mad 727 : AIR 1970 Mad 108.
52. *Panorama Developments* v. *Fidelis Furnishing Fabrics,* (1971) 2 QB 711.
53. *Kirkstall Brewery Co.* v. *Furness Ry. Co.,* (1874) LR QB 468.
54. *Johnson* v. *Lindsaey,* 1891 AC 371 (manual labourer); *Tustin* v. *Arnold,* (1915) 84 LJ KB 2214 (Driver); *Edwards* v. *Brooks,* (1963) 3 All ER 62.
55. *Annapaguada* v. *Sangadyapa,* (1901) 3 Bom LR 817 : ILR 26 Bom 221 (FB); *Kailasa Padiachi* v. *Ponnukannu Achi.,* ILR (1894) 18 Mad 456; See Limitation Act, 1963, s 20(1).
56. *Ramcharan* v. *Gaya Pandi,* ILR 30 All 422.
57. *M.C. Singh* v. *C.N.M. Devi,* AIR 1957 Mani 32.
58. *Balak Ram High School Panipat* v. *Nanumal M.,* AIR 1930 Lah 508.
59. STEPHEN'S DIGEST, Art. 17.

An admission of a *Mutawalli* cannot estop him from claiming his share in the *wakf* property as heir, if the *wakf* is avoided.[60] Statements made by previous *Mahants* are not binding on his successor or the worshippers of the *Mutt*.[61]

Where a father or other managing member makes an admission while acting on behalf of the family, for protecting the interest of the family or for acquiring properties for the family, he does so on his own behalf and on behalf of the members of the family; and in that representative capacity it binds all the members of the family.[62] The father can maintain suits on behalf of the family, execute decrees, receive payments and give valid receipts binding on the family.[63] However, he cannot revive a time barred debt unless specifically authorised by other members.[64] It was held by the Calcutta High Court that when a payment was made by the managing member, it was to be treated as by an agent duly authorised within the meaning of the Limitation Act 25 of 1877.[65]

When a creditor of the family was dealing not only with the managing member but also with other members of the family as co-obligors, it was held he cannot rely upon an acknowledgement on behalf of all co-obligors, so as to avoid the question whether the transaction was really for the benefit of the family.[66]

If an admission was made by the father or managing member of the family in furtherance of his own interest such admission cannot bind his sons.[67]

18. PRINCIPAL AND SURETY

The admissions of a principal can sometimes (but only seldom) be received as evidence in an action against the surety upon his collateral undertaking. In these cases the main inquiry is whether the declarations of the principal were made during the transaction of the business for which the surety was bound, so as to become part of the *re gestae*. If so, they are admissible; otherwise, they are not.[68]

In a suit filed by a principal against his agent and his surety, the accounts which were settled after the agency had ceased were held to be admissible against the surety.[69]

However, where a public institution is a party to the suit it was held that the personal conduct or admissions of the trustee of the institution cannot prejudice the interest of the institution.[70]

19. STATEMENTS AGAINST PROPRIETARY OR PECUNIARY INTEREST OF THE PARTIES

When several persons are jointly interested in the subject-matter of a suit, an admission of any one of these persons is receivable not only against himself but also against the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.[71] If the document is *inter partes* it would amount to a joint statement by the parties

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60. *Rukeya Banu* v. *Nazira Banu*, AIR 1928 Cal 130.
61. *Ram Parsad* v. *Shiromani Gurudwara Prabandak Committee, Amritsar*, AIR 1931 Lah 161.
62. *Nagaya Sami* v. *Kochadai*, AIR 1969 Mad 329; *Kandasami Asari* v. *Somaskanda*, ILR (1912) 35 Mad 177 (He is not an agent in the strict sense of the term); *Kota Ramasami Chetty* v. *Bangari Sushamma*, (1881) 3 Mad 145; *Jagan Nath* v. *Munnulal*, ILR 16 All 231 (In the absence of fraud or collusion it is binding).
63. *Sheo Shamrar Ram* v. *M.V. Sammat Jado Kunwar*, 36 All 383 : 18 Cal WN 968 (PC); *Jaganath* v. *Lachman Das*, ILR 34 All 549 (FB); 38 Mad 685.
64. *Chinnaya* v. *Gurunatham*, ILR (1881) 5 Mad 169 (FB); *Kailasa* v. *Ponnukannu*, 18 Mad 456; *Dinkar* v. *Appaji*, ILR (1894) 20 Bom 155.
65. *Ramcharan* v. *Gaya Pandit*, ILR 30 All 422 (FB) **Contra** *Kandaswami Asari* v. *Somaskanda*, ILR (1912) 35 Mad 177.
66. *Narayan* v. *Venkataramana*, ILR 25 Mad 220 (FB).
67. *Nagayasami* v. *Kochadai*, AIR 1969 Mad 329.
68. TAYLOR 12th Edn., Vol. I, s. 785, p. 494; *Bain* v. *Cooper*, (1842) 9 M&W 701; *Retikchan*, In re : (1881) 17 ChD 668; **see also** PHIPSON ON EVIDENCE 13th Edn., p. 392.
69. *Parmeswara* v. *Viyathen*, 25 MLJ 51.
70. *Balakra High School Panipat* v. *Nanumal M.*, AIR 1930 Lah 508.
71. *Meajan Matbar* v. *Alimuddin Mia*, ILR (1916) 44 Cal 130, 143; TAYLOR, 12th Edn., s. 743, p. 475.

to the document, and therefore, relevant against all of them as an admission.[72] Recitals in a mortgage deed executed by mortgagors that they are in *Khas* Possession cannot be treated as admissions by mortgagees under this section, but are admissions under Section 13 as assertions of title if the mortgagees claim their probative value as against them and as against their lessees whom claim under them.[73] A recital in a gift deed that possession was given to the donee, (as such recital is an essential condition for the validity of the gift deed), would be binding on the donor, and, if he dies, on those claiming under him.[74]

In a suit for declaration of title, a statement by the suitor's father that the defendant was in possession was admitted.[75] Admissions made by a person about his ownership of property after he had transferred it are not relevant to the prejudice of the buyer's interest. After transfer he no longer has any interest in the property.[76] An admission made by one of several parties in fraud of the others jointly interested will not bind the others.

The recitals of boundaries in a document between a party to the suit and a stranger, are admissible against the party as an admission. But, it cannot be taken in his favour, unless the fact recited is deposed in the court by the executant of the document, in which case the recital will become admissible under Section 157, to corroborate the evidence of the executant, or under Section 155 to contradict such evidence.[77]

20. ADMISSIONS BY PERSONS FROM WHOM PARTIES DERIVED THEIR INTEREST

Statements made either by parties interested or by persons from whom the parties to the suit have derived their interest are admissible only if they are made during the continuance of the interest of the persons making the statements. The admissions of a former owner of property, after he had ceased to have any interest in it, are not evidence against the party in possession.[78] Where the children from the first wife brought a suit for possession of their father's property disputing the second marriage of their father, the admission of their deceased father that the defendant, his second wife, was his legally wedded wife was binding on the plaintiffs.[79]

A, a landowner, filed a suit for ejectment against B, a tenant. B alleged he was a permanent tenant at a fixed rent under an agreement with the original owner of the land, who was dead, and put in evidence statements made by the original owner after he had transferred his interest. It was held that the statements were inadmissible.[80]

This clause indicates that there ought to be a privity, *i.e.*, mutual or successive relationship to the same right of property. Privies are of three kinds:—

(1) Privies in blood, such as a heir, an ancestor, and coparceners.

(2) Privies in law, as executor and testator, administrator and a person dying intestate.

(3) Privies in estate or interest, as vendor and purchaser, lessor and lessee, mortgagor and mortgagee, donor and donee.

The grounds upon which admissions are evidence against those in privity with the party making them are that they are identified in interest. Where it was proved that an agreement sued on was made by the plaintiff on behalf of himself and the other proprietors of a theatre, evidence of the declarations one of such other proprietors was held admissible on the part of the defendant.[81] The recitals in a sale deed are statements made at a time when the vendor has interest in the property, and those statements are

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72. *Rangayyan* v. *Innasimuthu Mudali*, AIR 1956 Mad 226.
73. *Harihar Prasad* v. *Deonarain Prasad*, AIR 1956 SC 305.
74. *Md. Yusuf Rowther* v. *Md. Yusuf Romther*, AIR 1958 Mad 527.
75. *Shahdeo* v. *Board of Revenue*, AIR 1980 All 408.
76. *Hardatt Sharma* v. *Jaikishen Sham Lal & Son*, AIR 1983 J&K 29.
77. *Rangayyan* v. *Innasimuthu Mudali*, AIR 1956 Mad 226; *Radha Krishna* v. *Sarabeswar*, AIR 1925 Cal 684; *Sheik Ketabuddin* v. *Nafar*, AIR 1927 Cal 230; *Dasmal* v. *Sunder Singh*, AIR 1937 Lah 480.
78. *Khenum Kuree Chowdhrain* v. *Gour Chunder Mojoomdar*, (1866) 5 WR 2678.
79. *Nirmala* v. *Rukminibai*, AIR 1994 Kant 247 (para 11).
80. *Shwe Yat Aung* v. *Da Li*, (1916) 9 LBR 27.
81. *Kemble* v. *Farren*, (1829) 3 C&P 623.

admissible against his successor in interest in respect of the same property.[82] Where a mortgage was executed by A and B, and in that A admitted that B was the adopted son of his deceased brother C, when the question arose whether that admission was binding on the grandson of A, it was held that the words 'during the continuance of the interest' only means while the interest was subsisting and before that interest was parted with; that, as A was having interest in the property which was mortgaged at that time, that admission was binding on the grandson of A.[83] Where there was recital in a gift deed executed by a deceased donor that possession of the property was delivered to the donee it was held that it was an admission not only binding on the deceased donor but also on the persons claiming under him, and they had to prove that delivery of possession was in fact not given to the donee.[84]

Any subsequent statements of a vendor after the sale deed are not binding.[85] Any admission by a party is not binding upon a person who does not claim any interest through that property.[86] Where a person had made an admission that his deceased brother's widow adopted a boy, and in a subsequent suit by the sons of that person after the widow's death, claimed declaration of their reversionary rights, it was held that the admission of their father was not binding on them since they claimed in their own right and not as sons of their father.[87] Where a gift deed executed by the father contained certain admissions, it did not bind the sons because they were claiming not through him, but in their own right as co-parceners.[88] Admissions by husband in respect of some property will not be binding on the wife unless she derives title to the property through her husband.[89]

When a statement in evidence is made by a person, it not only binds the maker but also those who claim through him.[90]

Where a lease deed contained a clause giving option for renewal of the lease, the lessee exercised that option by issuing a registered letter to his lessor before the expiry of his lease and also before the lessor contracted for sale of that property to another. In a proceeding when the transferee of the land attempted to eject the assignee of the lessee, the original lessor of the land admitted having received the registered letter under which the lessee exercised the option in the lease deed for renewal. It was held that the assignee from the lessee was entitled to take advantage of that admission, from the original lessor and claim benefit of the option exercised by his assignor.[91]

21. LUNATIC

A lunatic, either himself or through his guardian or his advocate, cannot admit or deny that he is a lunatic because a lunatic, by the very fact of his deranged mind, will be unable to know whether he is of sound mind or unsound mind.[92]

As Order 32, Rule 15, C.P.C. provides for a judicial enquiry before the court declares a person as a lunatic, and a person cannot be judged a lunatic on the opinion of others, the court may take the opinion of an expert.[93]

22. STATEMENT BY THIRD PARTIES

Where an office note put up for sanction of certain amount contained a statement to the effect that amount was towards consideration for relinquishment of a co- parcenary right by a person in an impartible estate, it was held that it was a statement by a third party who put up the note and cannot have

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82. *Krishna Subala Bose* v. *Dhanapati Dutta*, AIR 1957 Cal 59; *Gangaram Kanhyalal* v. *Pooran Gulab*, AIR 1954 MB 58.
83. *Harihar* v. *Nabakishore*, AIR 1963 Ori 45.
84. *Md. Yusuf Rowther* v. *Md. Yusuf Rowther*, AIR 1958 Mad 527.
85. *Gangaram Kanhyalal* v. *Pooran Gulab*, AIR 1954 MB 58; *Ram Singh* v. *Gainda Ram*, AIR 1953 Punj 163 (a case of pre-emption).
86. *Hutche Gowda* v. *Chennige Gowda*, AIR 1953 Mys 49; *Kaliammal* v. *Sundarammal*, AIR 1949 Mad 84.
87. *Gopal Singh* v. *Hukam Singh*, AIR 1950 All 644.
88. *Avtar Singh* v. *Atma Singh*, AIR 1982 J&K 141.
89. *Goru Satyarajulu* v. *T.C. Panigrahi*, ILR 1964 Cut 274.
90. *Collector of Gorakhpur* v. *Ram Sunder Mal*, AIR 1934 PC 157; *Gopaldas* v. *Shri Tahakurji*, AIR 1943 PC 83; *Shamboonath* v. *Kapoor Singh*, AIR 1967 J&K 52.
91. *Kochuvareed* v. *Mariappa Goundan*, AIR 1954 Tri-Co 10; *Sankara Pillai* v. *Ananda Pillai*, AIR 1958 Ker 307.
92. *Balakrishnan* v. *N.B. Balachandra*, (1956) 21 Mad LJ 459.
93. *Ramanathan* v. *Somasundaram*, (1941) 1 MLJ 234; *Mohd. Ibrahim* v. *Shaik Mohammad*, (1948) 2 MLJ 277.

any probative value nor can it be relevant evidence against a person who is not a party or signatory to such note.[94]

Admissions by persons whose position must be proved as against party to suit.

S. 19. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

ILLUSTRATION

A undertakes to collect rents for *B*.

B sues *A* for not collecting rent due from *C* to *B*.

A denies that rent was due from *C* to *B*.

A statement by *C* that he owed *B* rent is an admission, and is a relevant fact as against *A*, *A* denies that *C* did owe rent to *B*.

COMMENTS

1. PRINCIPLE

This section forms an exception to the rule that statements made by strangers to a proceeding are not admissible as against the parties. Ordinarily statements by strangers to a proceeding are not relevant as against the parties. This section makes it possible to take in the evidence of admissions of third persons who are strangers to the suit. This section and Section 20 are the two exceptions to the general rule contained in Section 18. These exceptions would show when and under what circumstances the admissions of strangers who are not parties to the suit are relevant and admissible. In *Appavu* v. *Nanjappa*,[95] it was observed: "The object of this section is not to lay down that certain statements are relevant or admissible, but merely to add to the category of persons by whom a statement may be made before it can be considered to be an admission within the terms of the Indian Evidence Act. The statements referred to in Section 19 become admissible provided they satisfy the requirements of Section 17 as regards their nature, and Section 21 or any of the following sections, as regards their liability."

In that case in an action by the trustees of a bankrupt, the latter's admissions, made before the act of bankruptcy, were held admissible in proof of the petitioning creditor's debt. It was further observed: "The admission in the written statement of one co-mortgagee of the receipt of the whole mortgagee debt is admissible in evidence against the other co-mortgagee."[96]

The admission of a third person against his own interest, when it affects his position or liability, and when that position or liability has to be proved as against a party to the suit, is relevant against the party. Admission of due execution of a will by the testatrix by the preferential heirs to her estate against their own interest is relevant.[97]

The illustration given under this section explains how a statement of a third party becomes relevant and admissible. The illustration exemplifies how, when the liability of a person who is one of the parties to a suit, depends upon the liability of a stranger to the suit, then an admission by the stranger in respect of his liability amounts to an admission on the part of that person. In *Ali Moidin Ravuthan* v. *Elayachanilathi Kombi Achan*,[98] two persons A and B jointly borrowed some money from a lender C, who brought an action against A alone. A raised an objection saying that B should also be joined as a party as there is joint liability on him. It was held that the admission of B, while borrowing the amount, as to his joint liability is relevant between A and C, though B was alive and was not cited as a witness.

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94. *Rajchy Sivarama Prasad* v. *Y Venkata Ramalingama Prasad*, ILR (1961) 1 AP 538 : (1961) 1 An WR 183.
95. ILR 25 Mad LJ 329.
96. *Appavu Chettiar* v. *Nanjappa Goundan*, (1913) 25 MLJ 329; TAYLOR, 12th Edn., s. 759, Vol. I, p. 484.
97. *Laxmi Bai* v. *C. Chandravati*, AIR 1995 Ori 131 (paras 14 and 15).
98. (1913) 5 Mad 239.

2. STATEMENT—MEANING OF

The statements referred to in this section become admissible provided they satisfy the requirements of S. 17 as regards their nature and S. 21 or any of the following sections as regards their liability.

The Supreme Court held that the word 'statement' in Sections 17 to 21 is used in its ordinary sense, *i.e.*, something said, and communication is not necessary in order that it may be a 'statement'.[1]

Where there was a question whether A agreed to purchase a land from B on a certain date, a letter written by B to a third party was sought to be relied by B. It was held that the latter is not admissible against A.[2]

Admissions by persons expressly referred to by party to suit.

S. 20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

ILLUSTRATION

The question is, whether a horse sold by *A* to *B* is sound.

A says to *B*—"Go and ask *C*, *C* knows all about it." *C*'s statement is an admission.

SYNOPSIS

1. *Principle and Scope*	... 263	6. *Agreement is necessary between the parties*	... 265
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COMMENTS

1. PRINCIPLE AND SCOPE

This section forms another exception to the rule that admissions by strangers to a suit are not relevant. Under it the admissions of a third person are also receivable in evidence against, and have frequently been held to be in fact binding upon the party who has expressly referred another to him for information in regard to an uncertain or disputed matter.[3]

There must be an express reference for information in order to make the statement of a person referred to admissible. The section makes vicarious admission in a dispute admissible. Where the parties refer expressly to a third person for information or an opinion regarding their dispute, the statements made by the third person, who may be called as a referee, are admissible. When once a matter is referred to a third person, it means that the parties to the dispute, in anticipation of the opinion to be given in the dispute, approve of it and adopt it as if it were their own. In *Hirachand Kothari* v. *State of Rajasthan*,[4] it was held that, where a party refers to a third person for information in respect of a matter in dispute, the statements made by the third person are receivable as admissions against the party making the reference; the reason being that, when a party refers to another person for his views by way of a statement, the party approves his utterance in anticipation and adopts it as his own. The principle is the same as that of a reference to arbitration, but, in any case, there must be clear admission to refer, and such admissions are generally conclusive.

In *Himachal* v. *Jatwar*,[5] the following observation of Taylor was quoted; "Mr. Taylor observes that the purposes of justice and policy are sufficiently answered by throwing the burden of proof on the opposing party, as in the case of an award, and by holding him bound, unless he can impeach the test

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1. *Bhogilal Chunilal Pandya* v. *State of Bombay*, AIR 1959 SC 356.
2. *Richard Gullive* v. *Posho Ltd.*, AIR 1939 PC 146.
3. TAYLOR, 12th Edn., s. 760, p. 484.
4. AIR 1985 SC 998.
5. ILR 46 All 710 : AIR 1924 All 570.

referred to by clear proof of fraud or mistake.... Parties agreeing to be bound by any statement which a third person to whom they agreed to refer, may make; the statements of such referee may be regarded as admissions of the parties under the section."[6] Though, admissions are not conclusive, where the two parties agree to abide by the statement or information of the referee, the statement of the referee becomes an admission of both the parties as binding on them. Where there has been between the parties mutuality, it becomes an agreement between them and their conclusiveness follows from the principle of estoppel; then the parties cannot be allowed to go back upon it and, therefore, the admission is conclusive against both and can be said to operate as an estoppel.[7]

PHIPSON observes (13th Ed., p. 402): "When a party refers to a third person for information or opinion on a given subject, the information or opinion so given is receivable against the referrer as an admission. And it will be conclusive where there has been an agreement to refer, or where the position of the party tendering the evidence has been altered thereby."

"Where a party agrees to be bound by what a third person says, or refers an opposite party to a third person for information or an opinion on a given subject, the third person's reply is admissible against the party so agreeing or referring; and if the reference has been made by agreement, it will be conclusive." (HALSBURY'S 4th Ed., Vol. 17, Para. 74, Page 57).

According to this section, there are three parties concerned with the dispute. The party who refers the matter, the opposite party, and the party to whom the reference is made, for information. The party who refers the matter would be presumed to undertake the opinion or the information of the referee as his own.[8]

If one party in a cause offers to the other party to settle it, provided that a witness makes a statement on oath as to a certain fact in dispute, and the statement is made, it shall bind the party making the offer.[9] Where the defendant said: "If C will say that he did deliver the goods, I will pay for them," it was held that C's statement was admissible and the defendant was bound by it.[10] Similarly a person cannot resile from the admissions of the person whom he has given the power of attorney.[11]

The rule contained in Section 20 must not be understood as giving the force of an admission to statements made by a witness, as against the party who calls him. There must be an express reference for information, in order to make the statement an admission.

The Privy Council, in *Chabba Lal* v. *Kallu Lal*,[12] observed: "It is obvious that a reference to an outside party to decide matters in dispute in a suit and the question of costs is not a reference to that party for information in reference to a matter in dispute, and if the references is to be regarded as made only under Section 20, it is a bad reference."

2. PRINCIPLE APPLIES TO CRIMINAL CASES ALSO

The principle underlying this section applies to criminal cases also. It was held that, where the accused told a constable that his wife would make out a list of the properties and when subsequently a list was made out by her, it would be evidence against her husband.[13]

3. ENGLISH LAW

Under the English Law the principle applies in respect of facts or of law. It is immaterial whether the disputed matter be one of law or fact; whether the referee has, or has not, any peculiar knowledge on the subject; or whether the reference is made expressly, or by conduct evincing an intention to rely on the statement as correct.

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6. *Chinna Venkata Swami* v. *Venkataswami Naiker*, ILR 42 Mad 625.
7. *Akbari Begum* v. *Rahmat Hussain*, AIR 1933 All 861, 880 (FB).
8. *D Cruz* v. *Secy of State*, 40 Cal WN 865; *Bhattacharjee* v. *Sentinel Assurance Co*., AIR 1955 Cal 594.
9. *Lloyd* v. *Willian*, (1794) 1 Esp 178.
10. *Daniel* v. *Pitt*, (1806) 1 Camp 366n.
11. *Ram Sahai* v. *Jai Prakash*, AIR 1993 MP 147 (paras 13 and 16).
12. AIR 1946 PC 72 : 73 IA 52.
13. *R* v. *Mallory*, (1884) 13 QBD 33.

4. INFORMATION

Explaining the term "information", the Supreme Court has said: "The word 'information' occuring in S. 20 is not to be understood in the sense that the parties desired to know something which none of them had any knowledge of. Where there is a dispute as regards a certain question, and the Court is in need of information regarding the truth on that point, any statement that the referee may make is nevertheless information within the meaning of S. 20".[14] The court accordingly regarded the report of an assessor, an "information" within the meaning of the section. The court said that it would also include reference to arbitration.

This section postulates an express reference for information in respect of a matter in dispute, in order to make the statement of the person referred to admissible.

It was held that the information referred in Section 20 "need not be information specially within the knowledge of the person" referred to. The information may be gathered by inspection of the lands or by reference to accounts or by any other means.[15]

The word 'information' includes decision of any kind. Where there was an agreement of parties, they referred the dispute to a referee, an appointed arbitrator. In that case, it was held that as the referee was to evaluate evidence not beyond his jurisdiction, he is not bound to make statement contemplated under Section 20.[16]

5. REFERENCE IS AKIN TO ARBITRATION

An admission by a person referred to by the party comes very near to the case of arbitration (STEPHEN DIG. 7th Edn., Note to Art. 19, p. 1789). If a reference is made over a disputed matter to a third person, not in the nature of a submission to arbitration, but rather as an aid to the settlement of the differences existing between the parties and to enable the parties themselves to effect a settlement on the information, in such cases the party is bound by the declaration of the person referred to in the same manner and to the same extent as if it was made by himself.[17] A referee is deemed to be an arbitrator and his decision is an award.[18] It may be noted here that under the Arbitration Act the parties to a dispute in a court of law may request the court to refer the dispute to an arbitrator. Apart from that, there may be provision in the contract between two parties, to refer if any dispute arises, to arbitration. In such cases the arbitrator, after going through the evidence that may be placed before him, comes to a finding. If that happens in the proceedings before the court, the parties will have an opportunity to raise objections which have to be considered by the court, which will pass a decree either in terms or in modification of certain findings of the award. All that procedure will not be available if a reference is made to a third party for his opinion under this section. So it would not be proper to call the statement of the referee as an award. So far as the reference contemplated under this section is concerned, the Supreme Court held that the principle is the same as that of a reference to arbitration.[19]

In *Ramjilal* v. *Ram*,[20] it was held that though parties expressly empower a third person to make enquiries in the dispute and give information to the court and that referee makes a statement, Section 20 is not applicable to such a statement, as the statement of a third person is in the nature of an arbitration award.

6. AGREEMENT IS NECESSARY BETWEEN THE PARTIES

Where a suit was filed against the insurance company to recover money on the basis of an insurance policy, and a certain report of a medical officer was sought to be relied on in defence, it was held that the statement contained in the report of the medical officer, which was given to the company on a reference

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14. *Hirachand Kothari* v. *State of Rajasthan*, AIR 1985 SC 998 at 1000-1.
15. *Seetaramacharyulu* v. *Ranganayakamma*, AIR 1958 AP 304; *Akbari Begum* v. *Rahmat Hussain*, AIR 1933 All 861 at 879.
16. *Shanbhu Nath Gognka* v. *Madan*, ILR (1977) 1 Del 247.
17. *Sloman* v. *Herme*, (1799) 2 Esp. 695; *Williams* v. *Bridges*, (1817) 2 Stark 42.
18. *Ramjilal* v. *Ram*, AIR 1978 All 351. **See also** ILR (1977) 1 Del 247; *Sadliu Ram* v. *Vobe Ram*, AIR 1967 Punj 179.
19. *Hirachand Kothari* v. *State of Rajasthan*, AIR 1985 SC 998.
20. AIR 1978 All 351.

made to him, should not be treated as statement made under an implied agreement for medical reference between the company and the insured.[21]

Where an assured made a claim against an insurer who referred the assured to a surveyor for certain information, it was held that the contents of the surveyor's report were "admission" against the insurer under Section 20, and they could not be regarded as "admissions" against the assured, as there was no express agreement for a reference to a surveyor.[22] Where a surveyor was appointed by a Fire Insurance Co., to assess the loss caused to the plaintiff, who was informed about the appointment of the surveyor, it was held that, as the surveyor failed to supply a copy of the report to the plaintiff, the report of the surveyor is not admissible and Section 20 does not apply.[23] Where a person filed a suit against a corporation for buying his house for a certain price, basing on an agreement to that effect, and the corporation repudiated that agreement on the ground that there was a defect in title, and the plaintiff produced a report of surveyors on which basis the corporation passed a resolution accepting the terms of the plaintiff with knowledge of imperfect title, it was held that the report of the surveyor was not admissible as there was no agreement by the plaintiff to refer to a surveyor.[24] Similarly, where a master called for a report from a servant regarding the conduct of another servant who was later dismissed for misconduct, in a suit filed by the dismissed servant, it was held that the report of the servant is not admissible as there was nothing to indicate that the master intended to regard the servant's report as conclusive, and as there was no express agreement by the dismissed servant to refer to the other servant for a report and abide by it.[25]

7. BINDING NATURE

Where there was an agreement between the parties to abide by the statement of the referee, and when the referee gave his statement to the court, it was held that it was binding on the parties.[26] If a party in a civil suit offers that he will be bound by a statement of the other party if such statement is made on oath, it was held that if it is accepted by the other party, the party who offered is bound by the statement given by the opposite party, though it did not fall under the Oaths Act.[27] The repeal of the Oaths Act 1873 by Section 9 of the Oaths Act of 1969, does not affect the application of Section 20 of the Evidence Act. The oath administered as per the petitioner's statement that he would be bound by the oath would amount to an admission of the respondents claim within the meaning of Section 20 of the Evidence Act.[28]

If once the referee makes a statement which becomes an admission, it operates as an estoppel.[29]

Where the question is in regard to the genuineness or the validity of a will, a reference can not be made to a referee under this section.[30]

8. WHEN CAN A PARTY RESILE FROM THE AGREEMENT

A party may resile from the agreement before the referee makes his statement.[31] The same view was expressed in *Gianchand* v. *Bansi*,[32] stating that the word agreement is not adjustment of the suit within the meaning of Order 23, Rule 3, C.P.C., and so a party is not debarred from resiling from an agreement

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21. *Oriental Government S.L. Assurance Co.*, v. *Narasimha*, ILR 25 Mad 183.
22. *Industrial Electrodes & Ganges Ltd.* v. *Hemouer Insurance Co.*, ILR (1973) 2 Cal 392.
23. *Bhattacharjee* v. *Sentinel Assurance Co.*, AIR 1955 Cal 594.
24. *Cooper* v. *Metropolitan Board of Works*, (1883) 25 ChD 472 (CA).
25. *D'Cruz* v. *Secy of State*, 40 Cal WN 865.
26. *Ram Narayan* v. *Santosh Kumar*, AIR 1952 Punj 344; *Gian Chand* v. *Bansi Lal*, AIR 1961 Punj 31; *Chinna Venkataswami* v. *Venkataswami*, 42 Mad 625; *Keshoram* v. *Piara*, AIR 1923 All 443; *Himachal* v. *Jatwar*, 46 All 710
27. *Himachal Singh* v. *Jatwar Singh*, ILR 46 All 710 **referring to** *Muhammad Asherali* v. *Muhammad Imtiaz Ali*, 1898 Awn 200; *Keshoram* v. *Piar*, 21 ALJ 209 : AIR 1923 All 443; *Babu Bishunath Singh* v. *Lalajamuna*, AIR 1937 Oudh 67; **See also** *Chinna Venkata Swami* v. *Venkataswami*, ILR 42 Mad 625.
28. *Munuswami Naidu* v. *Thyaraja Chettiar*, AIR 1977 Mad 273 and *Thakur Singh* v. *Inder Singh*, AIR 1976 P&H 287 **referred to** with **approval** *K.M. Singh* v. *Secretary, Association of Indian Universities*, AIR 1992 SC 1356.
29. *Umrai* v. *Intizami*, AIR 1939 All 176; *Ram Narain* v. *Santosh Kumar*, AIR 1952 Punj 344.
30. *Suraj Kaur* v. *Som Dutta*, 1976 Pun LR 46.
31. *Tumman* v. *Sheo Darshan*, ILR 52 All 235; *Joginder* v. *Bahadur*, (1978) 2 Rent Law R 708.
32. AIR 1961 Punj 31.

before the referee makes the statement. However, in a later Punjab case,[33] overruling[34] it, it was held that, according to the provisions of this section, when one person offers to refer the dispute to a third party for information or opinion and when the other party accepts it; it becomes an agreement under the Law of Contract and thereupon none of the parties can resile therefrom.[35]

In *Bishambar* v. *Shri Takurjee Maharaj*,[36] it was held that the statement of the referee is to be considered in the nature of a pronouncement in the case, and so, before the statement is made, a party can resile. It was further held that the agreement was a valid contract and did not amount to adjustment of the suit; that it amounts to an agreement or a procedure which may end in an adjustment of the suit; and until the referee makes his statement there cannot be any question of adjustment.

The Madras High Court treated such an agreement as an adjustment of the claim.[37]

9. STATEMENT

See commentary under 'Statement' in Sections 18 and 19.

Proof of admissions against persons making them, and by or on their behalf

S. 21. Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:—

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under Section 32.

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

ILLUSTRATIONS

(a) The question between *A* and *B* is, whether a certain deed is or is not forged. *A* affirms that it is genuine, *B* that it is forged.

A may prove a statement by *B* that the deed is genuine, and *B* may prove a statement by *A* that the deed is forged; but *A* cannot prove a statement by himself that the deed is genuine, nor can *B* prove a statement by himself that the deed is forged.

(b) *A*, the captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. *A* may prove these statements, because they would be admissible between third parties, if he were dead, under Section 32, clause (2).

(c) *A* is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

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33. *Florabel Skinner* v. *J.B.K.M. Ram Lila Mandal*, AIR 1980 Punj 284 (FB).
34. *Thakur Singh* v. *Inder Singh*, AIR 1976 Punj 287.
35. **See also** *Sahebram* v. *Ram Newaz*, AIR 1952 All 882; *Ramchaj* v. *Dunichand*, AIR 1926 Lah 240; *Kundan* v. *Kartara*, (1967) 69 Punj LR 651; *Rustum* v. *Financial Commissioner*, (1981) 83 Punj LR 759.
36. 53 All 673.
37. *Chunnavenkataswami* v. *Venkataswami*, ILR 42 Mad 625; **See also** *Basdeo Singh* v. *Ram Raj Singh*, AIR 1932 All 166; **relying on** *Himachal Singh* v. *Jatwar Singh*, ILR 46 All 710.

The statement in the date of the letter is admissible, because, if *A* were dead, it would be admissible under Section 32, clause (2).

(d) *A* is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(e) *A* is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding *illustration*.

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COMMENTS

1. PRINCIPLE

This section lays down as a general rule that admissions are relevant and may be proved against the person who makes them or his representative in interest. Admissions must be clear if they are to be used against the person making it. Admissions are substantive evidence by themselves, in view of S. 17 and this section, though they are not conclusive proof of the matters admitted. The effect usually given to admissions proved against persons who make them is destructive, not constructive. Whether they are true or not does not matter. The effective point is that they destroy the force of inconsistent statements made later.

Where there was a suit against an insolvent and the official assignee for the sale of the mortgage property, evidence of a witness whom the plaintiff informed before his adjudication as an insolvent, that certain documents relating to the land were deposited with him as security by a person, was held inadmissible[1] by the Privy Council which observed: "Section 21 of the Indian Evidence Act, 1872, enacts that admissions are relevant and may be proved as against the person who makes them or his representative in interest, but they cannot be proved by or on behalf of the person who makes them or by his representative in interest except in three cases named, of which the present case is not one. The meaning of this section is very plainly illustrated by the illustration (*a*) to the section."

An admission cannot confer title on a person, but it would only shift the burden on the person making such admission to prove the want of title in persons in whose favour the admission is made.[2]

In certain circumstance an admission may operate as an estoppel.[3] What a party himself admits to be true may reasonably be presumed to be so, and until that presumption is rebutted, the fact admitted should be taken to be established.[4]

PHIPSON observes: "(1) It is sometimes said that a party's admissions are receivable against him as a *waiver of proof*. This, however, can only apply to admission voluntarily made with a view to the trial and

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1. *Miller* v. *Madhodas*, ILR 19 All 76 (PC) : 23IA 106, 116.
2. *Abid Ali Khan* v. *Secretary of State*, AIR 1951 Nag 327 **relying on**, 26 Cal 31 (PC).
3. *Srinivasan* v. *Union of India*, AIR 1959 SC 419.
4. Per BARON PARKE in *Sletterie* v. *Pooley*, (1840) 6 M&W 664 at 669; *Reyappa* v. *Madhava Rao*, AIR 1960 Mys 97.

not to those used as evidence, for the latter usually consist of casual statements made before litigation was contemplated, which are not conclusive, but which the jury are at liberty accept or reject, either wholly or in part, as they see fit.

(2) A second ground suggested is that the declarations, being against interest, are probably true. This however, seems equally unsatisfactory, since statements made against interest were not, at common Law, receivable *per se*, but only if the declarant be dead; and, moreover, statements by a party are receivable against him even though, when made, they were, in fact, *in* his interest. Thus, if A states that B owes him a debt, and A afterwards sues C for the same debt, this statement though *in* A's interest when made, may be proved against him by C as an admission (cf. *Lucas* v. *Declacour*);[5] while conversely, a statement by A, though against his interest when made, would not be receivable if tendered in his own favour.

(3) A third and more specious ground sometimes advanced is that furnished by the analogy of contradictory statements by witnesses, *i.e.* that admissions are receivable against a party not as evidence of their truth and so as exceptions to the hearsay rule, but merely as being inconsistent with, and so discrediting, the case afterwards set up. The condition that admissions, to be receivable, must be "unfavourable to the conclusion contended for by the party" was also adopted in *Stephen's Digest* (1st Edn.), art. 15, but was abandoned in later editions in consequence of a criticism in 20 S.J. 894. Although, however, this is the usual reason for tendering them, it is by no means an essential one, since a party is entitled to prove any material fact by his opponent's declaration, even though such fact be not necessarily inconsistent with the latter's case.

(4) The most generally accepted ground of reception appears to be that a party's declarations, whether for or against his interest when made, may always be taken to be true as against himself.[6]

The weight of the declaration is, of course, a totally different matter; this may vary with the circumstances, and will, no doubt, be greater if against interest at the time, than the contrary".[7]

SIR JAMES STEPHEN observes: "The general rule with regard to admissions, which are defined to mean all that the parties or their representatives in certain degrees say about the matter in dispute, or facts relevant thereto, is that they may be proved as against those who made them, but not in their favour. The reason of the rule is obvious. If A says, "B owes me money", the mere fact that he says so does not even tend to prove the debt. If the statement has any value at all, it must be derived from some fact which lies beyond it; for instance, A's recollection of his having lent B the money. To that fact, of course, A can testify but his subsequent assertions add nothing to what he has to say. If, on the other hand, A had said "B does not owe me anything" this is a fact of which B might make use and which might be decisive of the case."[8]

NORTON says that it would be unsafe to allow a person to make admission in his own favour which would affect his opposite party.[9]

The true meaning of this section is plainly illustrated by illus (a) to the section.[10]

In *Jeremiah* v. *F.S. Vas*,[11] it was observed that this section refers to an admission made before the start of the proceedings in which it may be given in evidence; that it does not refer to the pleading in a case or to an admission contained in the proceedings. Simply because a landowner sought exemption from the Urban Land Act in respect of a certain piece of land, it could not be taken to be an admission that his land was amenable to the said Act.[12]

This section states two propositions. Firstly, an admission would be relevant and may be proved against the maker of it and his representative in interest; as already seen, Section 17 provides how an admission is to be considered as good evidence against the maker. This section binds the representative

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5. 1 M&S 249 (two partners sued to receiver goods alleged to belong to the partnership. An admission by one partner that the goods were his sole property was held to be admissible to reject the joint claim).
6. *Sletterie* v. *Pooley*, 6 M&W 664, per PARKE B.: "Whatever a party says is evidence against himself.... what a party himself admits to be true may be presumed to be so."
7. PHIPSON ON EVIDENCE, 15th Edn. (2000), p. 708-709 (para 28-03).
8. INTRODUCTION TO THE EVIDENCE ACT, p. 164-165.
9. NORTON'S EVIDENCE, 151
10. *Miller* v. *Babu Madhohas*, ILR 19 All 76, 92 (PC).
11. ILR 36 Mad 457.
12. *Dilipsinh Mohansinh* v. *S.J. Mansha*, AIR 1995 Gau 1 (para 5).

in interest also.[13] Secondly, an admission can be proved on behalf of the maker but it is subject to the three exceptions contained in the section.

Where the question was whether a certain transaction was *benami* and it was contended by the opposite party that the question cannot be examined on the basis of statements made several years after the date of transaction, it was held by the Supreme Court that as those statements were made against the proprietary interest of the maker thereof, they were admissible under Section 21 and also Section 32, clause (3) of the Act.[14]

Where during its pendency, of a suit for partition there was an agreement between the parties to take specific shares in the family property, it was held that such statements in the agreement of the parties amounted to an admission and could be relied on as admissions within the meaning of this section, and so the parties were bound by the agreement.[15] Where the tenant had admitted the execution of a sale deed in favour of the landlord by the original landlord, the sale deed not be proved by the landlord by submitting the original sale deed or by adducing secondary evidence.[16]

An admission in a document can be admitted against its maker.[17]

A statement given before a Police Officer is admissible as an admission in a civil case.[18]

Where the letter tendered in evidence before the substituted defendant came to depose did not contain any admission or any statement by the substituted defendant but contained the statement by the original defendant, it was held that the letter was not an admission as such requiring to be confronted with the substituted defendant.[19]

2. REPRESENTATIVE IN INTEREST

This expression will include those who are privies in blood, law or estate. The purchaser at an ordinary execution sale is in privy with, and is the representative in interest of the judgment-debtor so as to be bound by the latter's admission.[20] There is a distinction between the position of a purchaser in a private sale and in a public sale in execution of a decree. In the former he derives his title through, and cannot acquire a better title than the vendor: in the latter he acquires his title by operation of law adversely to the judgment-debtor and so freed from all alienations and incumbrances effected by the debtor subsequently to the attachment of the property sold in execution.[21] But the purchaser in a public or a private sale acquires only the right, title and interest of the judgment-debtor with all its defects and the creditor takes the property subject to all equities which would affect it in the debtor's hands.

3. ADMISSION IN PRIOR PROCEEDINGS

An admission made by a party in a plaint signed and verified by him may be used against him in other suits. In other suits, this admission cannot be regarded as conclusive, and it is open to the party to show that it is not true.[22] If an admission in a pleading is made subject to a condition, it must be either accepted subject to that condition or not accepted at all.[23] The value of an admission depends upon the

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13. *Biharilal* v. *Makhdum Bakhsh*, ILR 35 All 194; *Kheturam* v. *Harphool*, AIR 1927 Lah 800; *Bakshi Ram* v. *Liladhar*, ILR 35 All 353; *Ramchand* v. *Chunnun Mal*, AIR 1925 Lah 371 (FB).
14. *Bhim Singh* v. *Kamnsingh*, AIR 1980 SC 727.
15. *Kalu* v. *Bhawanji*, AIR 1954 Hyd 211; *Sohanlal Pachisia and Co* v. *Bilasray Khemani*, (In the case of partnership firm) AIR 1954 Cal 179.
16. *Gopal Kishan* v. *Bajrang Lal*, 1996 AIHC 4064, at p. 4066 (Raj).
17. *Neminath Appayya Hammannavar* v. *Jamboorao Satappa Kozheri*, AIR 1966 Mys 154.
18. *Biswanath* v. *Dhapu*, AIR 1960 Cal 494.
19. *Salil Kumar Roy* v. *Badu Devi Bhansali*, AIR 1999 Cal 270 (para 22). The Court referred to *Sitaram Bhau Patil* v. *Ram Chandra Nago Patil*, AIR 1977 SC 1712.
20. *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar*, (1896) 24 Cal (62) FB; *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy*, (1895) 22 Cal 909 : 22 IA 129.
21. *Dinendronath Sannyal* v. *Ramcoomar Ghose*, (1880) 8 IA 65, 75 7 Cal 107.
22. *Basant Singh* v. *Janki Singh*, AIR 1967 SC 341. **Contra** : *Rashmi Nagrath* v. *M/s. Sarva Priya Co-operative House Building Society Ltd.*, 1998 AIHC 4769 (para 38) (Del).
23. *Calcutta National Bank* v. *Rangaroon Tea Co.*, AIR 1967 Cal 294.

circumstances in which it was made. Where those circumstances had not been properly investigated, the court was not able to determine the value of the alleged admission.[24]

Admission by a party in a previous suit is admissible in a subsequent proceeding.[25] Where a person made a statement as a defendant in a written statement in a former suit, it was held admissible in a subsequent suit filed by him as a plaintiff, though the weight to be given is a different matter and such admission is capable of rebuttal.[26] Where there was a compromise between A and B and a decree was passed and A had also admitted the compromise in an earlier application, his subsequent statement that he did not sign the compromise, has to be rejected in view of his earlier admission.[27] Where a party accepts his statement made in his earlier proceeding, it amounts to admission and before using the same in the later proceeding opportunity to explain the same by calling him as witness need not be given.[28] Where a land owner in a prior requisition proceedings made an admission that the land was not useful for building purposes no decision was taken in those proceedings, on that admission. In a subsequent proceeding under the Land Acquisition Act for acquiring the land to establish a township there, it was held that the previous admission was not binding in the subsequent proceeding and it did not preclude the land owner from contending that the compensation should be fixed on the basis that the land was suitable for building purposes when the land acquired had potential value as a building site.[29] Admission in prior proceedings must be clear, and must not admit of any doubt or ambiguity, before it is admitted against the maker in a subsequent proceedings.[30]

Failure to deny allegation in the plaint may be taken as an admission of the claim therein for the purpose of that suit; but not for the purpose of subsequent litigation.[31]

Where a husband was charged with the murder of his wife who was missing for some days; and when a photograph was published in a newspaper, of an unidentified dead body recovered by the police the husband made a statement indicating a disturbed mind, it was held that such statement was admissible under this section and also under Section 8, para-2.[32]

The person against whom an admission is proved is at liberty to show that it was mistaken or untrue. When an admission is duly proved and the person against whom it is proved does not satisfy the court that it was mistaken or untrue, the court may decide the case in accordance with it. An erroneous admission does not bind the person making such admission. Admission must be considered as a whole.[33]

Though admission is not conclusive it can be used against the maker unless explained by the maker.[34]

4. ADMISSION NOT BINDING ON THIRD PARTY

Admissions of a party can be used as evidence against the party making it and they cannot be used against the third person.[35]

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24. *Prem Ex-serviceman Co-operative Society* v. *Haryana*, AIR 1974 SC 1121.
25. *Mohammed Seraj* v. *Adibar Rahaman Sheikh*, AIR 1968 Cal 550.
26. *Padma Charan Pavtari* v. *Commissioner, Hindu Religions Endowments*, ILR 1961 Cut 183; **following** *Narayan* v. *Gopal*, AIR 1960 SC 100; *Lal Singh Didarsingh* v. *Guru Granth Sahib*, AIR 1951 Pepsu 101; *Ramkrishna Ajabrao* v. *Vithal Laxman Vanmal*, 1980 Mah LJ 477; **see Contra** *Lala Laxminaryan* v. *Rukhmabai*, ILR 1950 Nag 834; *Satyadeo Prasad* v. *Chanderjoti Debi*, AIR 1966 Pat 110; *Janki* v. *Koshalyanandan*, AIR 1961 Pat 293; *Chandra Choor Deo* v. *Bibhuti Bhushan Deva*, AIR 1945 Pat 211; *Sarvabhtatla Thatapalle Chendrikamba* v. *Kamala Indrikanti Vishwanathamayya*, AIR 1939 Mad 446; *Jairam Maniaton* v. *Lokenath Mahton*, AIR 1930 Pat 405.
27. 1971 All LJ 1027.
28. *Alpana* v. *Mohanlal*, 1993 Cr LJ 1008 (paras 6 and 7) (HP).
29. *M G Dunne* v. *Callector*, ILR 1961 MP 845.
30. *Ram Prasad* v. *Smt. Kalyani*, AIR 1973 Raj 208; *Koteswara Rao* v. *Subbarao*, AIR 1971 SC 1542; *Nagubai Ammal* v. *B Shama Rao*, AIR 1956 SC 593.
31. *Narayana Pillai* v. *Kesaua Pillai*, 1962 Ker LJ 389.
32. *Arun* v. *State*, AIR 1962 Cal 504.
33. *Mahendra* v. *Sushila*, AIR 1965 SC 364; *Abida Khatoon* v. *State of U.P.*, AIR 1963 All 260.
34. AIR 1974 Mys 280.
35. *Basant Singh* v. *Janaki Singh*, AIR 1967 SC 341; *Idayanath Sahu* v. *Rathnakar Bej*, AIR 1967 Ori 130 (Statement by one member of the family is not binding on the other member.); *Shanti Sarup* v. *Radhaswami Satsang Sabha, Dayalbagh, Agra*, AIR 1969 All 248.

Where a mother gave information about her giving birth to a child and mentioned her husband's name, and that was recorded in the birth register and when she produced the extract of the birth register before the court in a case dealing with the legitimacy of the child, it was held by the Madras High Court that such admission is not binding on the presumed father as there cannot be any presumption of law as to paternity.[36]

5. ADMISSION AND FORMER STATEMENT OF A WITNESS

An admission is distinct from the former statement of a witness which is cited to contradict him. An admission can be proved without confronting the maker with his earlier statements.[37] Admissions, when proved, are substantive evidence, even though the parties are not confronted with the statements; but their weight which has to be given is a matter for the court to decide.[38] Where a witness's statement contains certain admissions in a previous matter, it was held that such admissions would fall within the section and it requires no proof; when such statements are admitted by the witness, it is substantive evidence and it is not obligatory to draw the attention to those admissions in the cross-examination.[39]

In *Malik Desraj* v. *Piara Lal*,[40] three important principles in this regard were enuniciated: (1) A previous admission of a party is relevant under this section and it can be used if the maker does not choose to appear in the witness box.

(2) If the maker appears as a witness but makes no statements inconsistent with the previous admission, or if he does not deny the previous admission, it can be used. In such a case Section 145 of the Act would not apply.

(3) When the maker comes into the witness box and makes a statement inconsistent with the previous admission it cannot be used unless his attention is drawn to that admission in accordance with Section 145 of this Act.[41]

When a document contained an admission by the opponent and it was admitted by the opponent's counsel, it was held that it can be admitted without drawing the opponent's attention to it in the cross-examination.[42] Where a document contained an admission by a witness and there was contradiction by the party with reference to a previous admission and explanation for such contradiction was offered, it was held that the document can be used to contradict him without drawing his attention to that admission.[43] A party producing documents can be permitted under this section to use them as substantive evidence in the case without drawing the attention of the opponent in cross-examination to those admissions; that though the admission should ordinarily be put to the party in the witness box on principle of fairness, the admission of the parties, which is otherwise relevant under this section, does not become irrelevant by reason of his attention not being drawn in the course of cross- examination. The rule of fairness embodied in Section 145 of the Act that if a witness is under cross-examination on oath he should be given an opportunity, if the documents are to be used against him, to tender his explanation and to clear up the particular point of ambiguity or dispute, should also be applied to parties who enter the witness box, but the omission to follow this procedure in the case of a party who is examined as a witness does not make his admission, which is otherwise relevant under this section, inadmissible.[44]

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36. *B. Mahadeva Rao* v. *Yesoda Bai*, AIR 1962 Mad 141. **See also** *Satya Gupta* v. *Om Prakash*, 2001 AIHC 1276 (paras 44 and 47) (All).

37. *Biswanath Pd.* v. *Dwarka Pd.*, AIR 1974 SC 117.

38. *Bharat Singh* v. *Bhagirathi*, AIR 1966 SC 405; *Punjab University* v. *Premchand Handa*, AIR 1971 P&H 177; *Veerabasava Radhya* v. *Devotees*, AIR 1973 Mys 280; *Arjun* v. *Monda*, AIR 1971 Pat 215; *Murlidhar Bapuji Valve* v. *Yallappa Lalu Chaugule*, AIR 1994 Bom 358.

39. *Venkatlal* v. *Kanhiyalal*, AIR 1963 MP 155.

40. AIR 1946 Lah 65 (FB).

41. *Janaki* v. *Koshalyanandan*, AIR 1961 Pat 293; *Ramkishun* v. *Kausal*, AIR 1958 Pat 294; *Ramachandra* v. *Rajendranarayan*, AIR 1957 Ori 104; *Parasram* v. *Champalal*, 1957 MB 118; *Harihar* v. *Nabhakishore*, AIR 1963 Ori 45; *Pannalal* v. *Union of India*, AIR 1956 Vindh Pra 26.

42. *Ajoydhya* v. *Bhavani*, AIR 1957 All 1 (FB).

43. *Venkatalal* v. *Kanhiyalal*, AIR 1963 MP 155.

44. *Seethamma* v. *Hanumantha*, (1959) 2 Andh WR 7 : 1960 Andh LT 118; *Channo* v. *Jang*, AIR 1957 Pat 203; **following** *Dargahan Bibi* v. *Jyoti Prasad Singh Deo*, AIR 1934 Pat 35; *Ramkeshwar Das* v. *Baldeo Singh*, AIR 1936 Pat 588.

The Supreme Court following its previous decision in *Bharath* v. *Bhagirati*,[45] observed: "There is a cardinal distinction between a party who is the author of a prior statement and a witness who is examined and is sought to be discredited by use of his prior statement. In the former case an admission by a party is substantive evidence if it fulfils the requirements of Section 21; in the latter case a prior statement is used to discredit the credibility of the witness and does not become substantive evidence. In the former there is no necessary requirement of the statement containing the admission having to be put to the party because it is evidence *proprio vigore*; in the latter case the court cannot be invited to disbelieve a witness on the strength of a prior contradictory statement unless it has been put to him, as required by Section 145.[46]

Where a person made an admission in an application in a police case, in which his company was in danger of being prosecuted, it was held that such admission cannot be used against him without affording an opportunity to explain it or, if so advised, to withdraw the admission.[47]

6. ADMISSION BY ACCUSED

There is nothing in Sections 18 to 21 to suggest that they apply to civil cases only; they apply also to admissions in criminal cases.[48] The accused went to a police station and lodged a first information of murder, narrating the events preceding the commission of the offence and stating further how the offence was committed. It was held that the narrative of the antecedent events was admissible as admissions not amounting to confessions.[49] Illustration (a) exemplifies this rule.

The scheme of Sections 21 to 27 shows that this group of sections relates to admissions, of which a confession made by an accused is a species, and to certain circumstances which may prohibit the proof of such confessions or admissions. A confession is a kind of admission and there is no clear-cut line of demarcation between the two. Again, admission may be relevant in civil as well as in criminal cases, and admissions that might be proved in civil cases are not inadmissible in criminal cases as such.[50]

Where the accused whilst in police custody made a statement before the doctor that the injury on his person was caused by the murdered person, as the statement does not amount to a confession, it is not barred and can be relied upon as an admission under S. 21 of the fact that he was in the deceased's room.[51]

This section has to be read subject to the special provisions dealing with confessions and statements of the accused persons in Sections 24, 25 and 26 in this Act, and also Sections 164 and 364 of the Cr. P.C. (Old), Section 281, Cr.P.C. (New). Confessions or statements of the accused persons which are not recorded in accordance with the provisions of Sections 164 and 364, Cr.P.C. may be proved as admissions of the accused.[52]

While dealing with this aspect one has to remember the different circumstances under which a person, who may be an accused or later becomes an accused, makes a statement. Firstly, a person may make a statement before the starting of any proceedings or investigation, or a person, may, immediately after the occurrence, state to another person or may go directly to a police station and make a statement. Secondly, a person may go directly to a magistrate and make a statement. The magistrate may record a statement or may not record a statement. If he records the statement, he may or may not follow the strict procedure as required under Section 164, Cr.P.C. Thirdly, a person may make a statement to the police after the first information report was registered, and the investigation started. Fourthly, during the investigation the person may give a statement to a magistrate who records it as per the provisions of Section 164 or 364, Cr.P.C. Fifthly, he may give a statement during his examination under Section 342, Cr.P.C. (Old) or 313, Cr.P.C. (New).

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45. AIR 1966 SC 405.
46. *Biswanath Prasad* v. *Dwarka Prasad*, AIR 1974 SC 117; *Narayan* v. *Gopal*, AIR 1960 SC 100; *Madan Mohan* v. *Brundaban Pal*, (1972) 2 Cut WR 1842 : 38 Cut LT 1323.
47. *The Bombay Agarwal Co.* v. *Ramchand Diwanchand*, AIR 1953 Nag 154.
48. *Md. Baksh* v. *Crown*, (1914) Ker 257.
49. *Legal Remembrancer* v. *Lalit Mohan Singh Roy*, (1921) 49 Cal 167 : AIR 1922 Cal 342; *Pakala Narayana Swamy* v. *King- Emperor*, ILR (1937) 17 Pat 15 (PC).
50. *Ramachandran, In re* : (1960) Mad 191 (DB).
51. *K. Padayachi* v. *State of Tamil Nadu*, AIR 1972 SC 66. **Also see** *N. Rajan* v. *State*, 1994 Cr LJ 322 (para 16) (Ker).
52. *Queen-Empress* v. *Bhairab Chunder*, (1898) 2 Cal WN 702.

In re.: *Natesan*,[53] it was held that where the Magistrate records a statement of the accused without complying with the formalities u/s. 164, Cr.P.C. during the course of the investigation, it cannot be held that such admissions are admissible u/s. 21, unless they fall within the mischief of Section 24, 25 of this Act.[54]

7. STATEMENT MADE TO A MAGISTRATE BEFORE STARTING THE PROCEEDINGS OR INVESTIGATION

There is a distinction between admissions and confessions made to a magistrate not enquiring or investigating the case; nor with any facts connected with the case and before the investigation or enquiry under Section 164, Cr.P.C. on the one hand, and statements recorded by him during the course of investigation under Section 164, Cr. P.C. on the other hand. In the first two cases, the admissions and confessions are provable under this section, whereas in the latter case, as the recording by the magistrate was during the investigation or the enquiry of the case, it is an official act and is admissible provided the formalities under Section 164, Cr.P.C. are complied with. The statement recorded, not in accordance with Section 164, Cr.P.C. cannot be treated as a judicial confession.[55]

8. ADMISSIONS AND CONFESSIONS DURING THE COURSE OF INVESTIGATION

If admissions and confessions are recorded by a magistrate under Section 164, Cr.P.C., during the course of the investigation of the case, the Privy Council, in *Nazir Ahmad* v. *King Emperor*,[56] held that if the provisions of 164, Cr.P.C. had been followed, they would be admissible; if the provisions are not followed, such confessions are not admissible. That view was followed in a Madras case. In re.: *Thothan*,[57] but the latter part of the view of the Privy Council *viz.*, that, if the provisions of Section 164, Cr.P.C. had not been followed, they would not be admissible, would have to be read alongwith the observations of the Supreme Court in *Slaney* v. *State of M.P.*[58] It observed therein: "The true test in all such cases is whether the non-compliance was so vital as to cut at the root of the jurisdiction, or so abhorrent to natural justice—that a serious prejudice has been occasioned. Where it is not the case, even a departure from the strict terms of Section 164, Cr.P.C. may not necessarily render a judicially recorded confession inadmissible." In this connection, it is to be noted that Sections 24 to 26 of this Act would show that certain conditions are to be complied with before confession is admissible. They do not make any difference as to admissions which would not amount to confessions. That is the reason why the statements made to a Police Officer before the investigation starts are admissible. If once the investigation is started, the statements may be admitted in evidence only as admissions under this provision, provided such statements would amount to confessions and are hit by Section 162, Cr.P.C.[59]

Letters written by the accused to third parties concerning the offence in question were held to be admissible against the accused.[60]

Where the accused and his lawyer signed statements before the customs authorities, and when the accused admitted the signatures on the statement, it was held that the statement was proved and was admissible and that the lawyer need not be examined.[61] A person gave a statement to a police after the occurrence, and it was registered as a first information report, and subsequently he became an accused in that case and was tried on the charge of murder. It was held by the Supreme Court that the statement given by the accused was not a confessional first information report, but was an admission by him of

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53. AIR 1960 Mad 443.
54. **See contra** *Laldin* v. *The State*, 1952 CrLJ 133: AIR 1952 HP 3; *State* v. *Lobsang Sharap*, 1973 CrLJ 85 (HP)
55. *Heera Lal* v. *State of U.P.*, 2001 Cr LJ 2849 (para 28) (All).
56. AIR 1936 PC 253.
57. AIR 1956 Mad 425.
58. AIR 1956 SC 116.
59. *Akal Sahu* v. *King Emperor*, AIR 1948 Pat 62; *Pakala Narayanaswamy* v. *Emperor*, AIR 1939 PC 47, In re : *R Titus*, AIR 1941 Mad 720; *Muhamad Baksh* v. *Emperor*, AIR 1941 Sindh 129, *Queen- Empress* v. *Nilmadhieb Mitra*, (1888) 15 Cal 595 (FB).
60. *Sardul Singh* v. *State of Bombay*, AIR 1957 SC 747, *State* v. *Darshan Singh*, ILR 1961 MP 403 (Statement by each individual accused when questioned by a Superior Official immediately after the event.)
61. *Vallabhadas* v. *Assistant Collector*, AIR 1965 SC 481.

certain facts which had a bearing on the question to be determined by the court, and was admissible to prove against him, his admission being relevant under Section 21.[62]

The first information report, when given immediately after the occurrence by the accused, is neither a confession nor a statement made to a police officer during the course of investigation; and its admissibility is not barred either by Section 25 of the Evidence Act or by Section 162, Cr.P.C.[63]

Where a report of an accident given by the driver of a motor vehicle, as required under the Motor Vehicles Act, contained a statement that the accused was driving the motor vehicle at the time of the accident, it was held that the report was not a first information report within the meaning of Section 154, Cr.P.C.—and that the admission would be relevant under this section, as the question as to who was driving the vehicle at the time of the accident was a relevant fact.[64] A person, after killing the deceased, went to a magistrate and stated that he killed the deceased, the statement was recorded and it was signed by the accused. It was held that the statement was admissible, as it was given before the arrest of the accused and the investigation was started, and that where the statement was exculpatory but contained various features which were in the nature of admissions, the statement can be relied upon against the accused.[65] Where the accused gave a statement before the police giving his version of the occurrence and stated that he had acted in the right of private defence, it was held that such a statement is an exculpatory statement within the rule propounded in *Pakala Narayanaswamy's* case,[66] and is not a confession in any sense of the term, and it is admissible under this section as a piece of admission and can be used against the matter.[67] Where the accused prepared a cross-complaint to the police, and an uncertified copy was produced through a defence witness, and when the accused himself did not choose to examine himself in the court, it was held that the cross-complaint given by the accused can be used as an admission against him but not in his favour.[68] An admission regarding the motive in committing the offence was held admissible under this section.[69] Where an admission was contained in a letter written by A to B, that A had association with a co-accused K and had business dealing with him, it was held that such admission is binding on the maker A though it is not binding against K.[70] When a person detained a married woman with a criminal intent and admitted in his statement under Section 313, Cr. P.C. that she was a married woman, it was held that his admission can be received under this section. Accordingly the conviction was upheld.[71]

Where the accused showed the place wherefrom certain articles were recovered and in the recovery memorandum, the accused admitted his guilt, it was held that such an admission is not admissible as it comes under the exception in Section 24 of this Act.[72] Where the accused admitted to the commission of murder in the first information report; it was treated as a confession made to a Police Officer, it was held that no part of it could be used as an admission under this section.[73]

The procedure laid down in Section 145 does not apply to admissions which come within the purview of Section 17 and Section 21.[74]

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62. *Faddi* v. *State of M P*, AIR 1964 SC 1850; *Reading* v. *Fletcher*, 1917 PC 25 : (1917) 1 Ch 339; *State* v. *Shiv*, AIR 1962 Raj 3; *The State* v. *Balchand*, AIR 1960 Raj 101: 1959 All LJ 340; *Maina* v. *Niranjan*, AIR 1976 Raj 71; *The State of Assam* v. *Upendra Nath Rajkhowa*, 1975 CrLJ 354 (Gau). **Also see** *B.A. Ramaiah* v. *State of A.P.*, AIR 1997 SC 496.
63. *Faddi* v. *State of M.P.*, AIR 1964 SC 1850; *Sankaran Nair Challeppen Nair* v. *The State of Kerala*, (1965) 2 CrLJ 647 : AIR 1965 Ker 248 (Accused gave incidence of previous day and not relating to occurrence); *Ram Sajiwan* v. *The State of U.P.*, AIR 1964 All 447; *Jawan Singh* v. *State*, AIR 1963 Guj 111.
64. *Jawan Singh Ramsing* v. *State of Gujarat*, AIR 1963 Guj 111; *Maina* v. *Niranjan*, AIR 1976 Raj 71 (held; though it is not substantive evidence it lends support to other evidence that he was the owner of the vehicle).
65. **In re** : *Yendra Narasimha Murthy*, AIR 1966 APO 131 : 1966 CrLJ 509.
66. 1939 PC 47.
67. *Mathai* v. *State of Kerala*, 1959 Ker LR 839; *Reading* v. *Fletcher*, AIR 1917 PC 25; *State* v. *Kartar Singh*, AIR 1958 All 90.
68. *Lalpratapsing Shivsahay Sing* v. *State*, (1963) 1 CrLJ 355 (Guj); *Mahendra Manilal Nanavati* v. *Sushila Mahendra Nanavati*, AIR 1965 SC 364.
69. *Baleshwar Rai alias Nepali Master etc.* v. *The State of Bihar*, (1963) 2 SCJ 128 : (1964) 1 CrLJ 564 (SC).
70. *Khali Sahu* v. *State*, (1975) 41 Cut LT 751.
71. *Sonu Pujari* v. *Arjun Bissoyi*, (1980) 49 Cut LT 207 (Ori).
72. *Mahfuz Ali* v. *State*, 1953 CrLJ 340 : 1953 All 110.
73. *Banarsi Dass* v. *State of Punjab*, 1981 CrLJ 1235 (P&H); *Badri* v. *State of U.P.*, 1973 CrLJ 1478 (All).
74. *Arjun* v. *Monda*, AIR 1971 Pat 215.

Where an accused made some admission in a bail application, it was held that it cannot be taken into consideration as the admission was not put to the accused when he was examined under Section 342, Cr.P.C.[75]

9. AS AGAINST THE PERSON WHO MAKES THEM

The rule as regards statements made by a person is that they may be proved only when they are against him; otherwise a party may manufacture any amount of evidence in his own favour.[76]

Where the statements are against the interest of the person making them, there is a natural presumption of truth, and they may be proved. An admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel.[77]

An admission by a plaintiff of her marriage with a person, made before there was any dispute about such marriage, may be proved by or on behalf of her under cl. (1) of this section read with Section 32.[78]

A receipt is nothing but an admission by the party making it that he has received the amount specified in the document. It is an admission against his own interest and he is, of course, bound by it, and so are those who claim through or under him.[79]

Where the accused lodged the F.I.R., it was held that it cannot be used to contradict the evidence of prosecution witnesses or to corroborate the defence evidence. It can only be used against the maker (accused) himself.[80]

10. VALUE OF ADMISSION

The Supreme Court, in *Nagubai Ammal* v. *Shamarao*,[81] held that what a party himself admits to be true may reasonably be presumed to be so, but before this rule can be invoked, it must be shown that there is clear and unambiguous statement by the opponent, that such admissions will be conclusive unless explained. It was held that a statement by a party that certain proceedings were fraudulent in character would not be sufficient, without more, to sustain a finding that the proceedings, where collusive as there is a clear distinction between a proceeding that is fraudulent and a proceeding that is collusive. It is well-settled that the effect of an alleged admission depends upon the circumstances in which it was made and that it can be evidence against the maker unless explained under what circumstances he made such admission.[82] Where there is no clear and unequivocal admission it affords no evidence in the case.[83]

Self-serving statements of a party in previous proceedings cannot be used as substantive evidence in subsequent proceedings against that maker.[84]

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75. *Satyavir* v. *State*, AIR 1958 All 746 : 1958 CrLJ 1266.

76. *Ramani Pershad Narain Singh* v. *Mahanth Adaiya Gossain*, ILR (1903) 31 Cal 380; *Mahendra* v. *Sushila*, AIR 1965 SC 364.

77. *Nagubai* v. *B. Shama Rao*, AIR 1956 SC 593.

78. *Musammat Bashiram* v. *Mohammad Hussain*, ILR (1941) 16 Luck 615.

79. *Akal Sahu* v. *King-Emperor*, ILR (1947) 26 Pat 49 : AIR 1948 Pat 62.

80. 1982 Law Summary 68 (AP).

81. AIR 1956 SC 593 **following**; *Chandra Kunwar* v. *Chaudhary Narpat Singh*, ILR (1906) 29 All 184 (PC) : 34 IA 47; **See also** *Revappa* v. *Madhava Rao*, AIR 1960 Mys 97; *Jhunkari Bahu alias Katrawali* v. *Phoolchand alias Manickchand Chhotelal Jain*, AIR 1958 MP 261; *Ulfat* v. *Zubaida*, AIR 1955 All 361 AIR 1974 SC 280; *Krishnawati* v. *Hansraj*, (1974) 2 SCR 524 (As substantive evidence in subsequent proceedings against the maker).

82. *M/s. Prem Ex-Servicemen Co-operative Tenant Farming Society Ltd.* v. *State of Haryana*, AIR 1974 SC 1121.

83. *Guru Satyara Julu* v. *T.C. Panigrahi*, ILR 1964 Cut 274.

84. *Krisnawati* v. *Hansraj*, AIR 1974 SC 280.

It was held by the Madras High Court that the usual rule of law is that the admissions of *ryots* that they have no occupancy rights in *ryoti* lands will have little value, in the face of a statute conferring occupancy rights, if they are proved, as a matter of fact, to be *ryoti* lands.[85]

Where an admission is capable of two interpretations, an interpretation unfavourable to the person making it, should not be put on his admission.[86]

In a prior sale deed executed in favour of a plaintiff and the widow of one G, it was stated that the plaintiff was the adopted son of G. In a subsequent will executed by the widow, it was stated that she had no son. Thus there were two statements (different) in the two documents, to which the widow was a party. It was held that the mention of the plaintiff as the adopted son in the earlier document is of little value unless the change in the second document can be explained. As the widow gave the explanation for the recital in the first document that the plaintiff was intended to be adopted and so his name was mentioned as an adopted son, and as the evidence in respect of the adoption was thoroughly unreliable, the explanation given by the widow was accepted as plausible.[87]

11. EXCEPTIONS

Maker of admission dead [EXCEPTION 1]

Admissions cannot be proved by or on behalf of the person who makes them, or by representative in interest, except when:

(1) it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under Section 32;

(2) it consists of a statement of the existence of any state of mind or body made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable;

(3) it is relevant otherwise than as an admission.

Admissions cannot be proved by, or on behalf of, the person who makes them, because a person will always naturally make statements that are favourable to him. Thus the opinion of a person as to the valuation of his property which is under acquisition is not relevant.[88]

Under this clause, an admission of a person may be proved by or on behalf of the person making it when such admission is of such a nature that if the person making it were dead it would be relevant as between third parties under Section 32. For example, a wife will have special means of knowledge about her marriage and if she says that she is the wife of one G, it is admissible under this clause if the statement was made before the dispute in respect of her marriage arose.[89] Similarly, where in a previous deposition long before the present dispute arose, a pedigree of the family, showing two individuals are brothers, was relied upon, it was held that such pedigree was admissible.[90]

Where a husband had written some letters to his wife making reference to a settlement and asking her to do certain acts to forward the settlement, it was held such statements in the letters are admissible under Section 32(2) of the Act read with this section.[91]

Illustrations (*b*) and (*c*) are examples of this first exception to clause 1. It may also be noted here that the illustrations given under Section 32 also deal with the same principle. The principle underlying this exception is necessitated by the unavailability of the person making the admission.[92]

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85. *Marian* v. *Rourther*, (1959) 1 Mad LJ 22 : 1959 Mad WN 251.
86. *Ramaji Batanji* v. *Manohar Chintaman*, AIR 1961 Bom 169.
87. *Bajji* v. *Bhairon*, AIR 1957 Raj 261.
88. *Mariam* v. *State*, AIR 1980 Ker 176.
89. *Bashiram* v. *Md. Husain*, AIR 1941 Oudh 284.
90. *Jadhunath Sarkar* v. *Mahendranath*, 12 Cal WN 266.
91. *Ramamurthi* v. *Subbarao*, AIR 1937 Mad 19.
92. See commentary under Section 32 of this Act.

Admission made in a particular mental or physical state [EXCEPTION 2]

The state of a man's mind or body is relevant under S. 14; and statements narrating such facts, indicating the state of mind or body, may be proved on behalf of a person narrating them. But such statements should have been made at or about the time when such state of mind or body existed; see illustrations (d) and (e). Section 14 merely declares that such statements are relevant. This clause shows that such facts or statements may be proved on behalf of the person making them, notwithstanding the general rule that persons cannot make evidence for themselves by what they choose to say.

In *Mutual Life Insurance Co.* v. *Hillmon*,[93] GRAY J., observed: "Letters from him (a person) to his family and to his betrothed were the natural, if not the only attainable evidence of his intention.....A man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture, or by sounds or words, spoken or written..... The existence of a particular intention in a certain person at a certain time, being a material fact to be proved, evidence that he expressed that intention, at that time, is as direct evidence of the fact as his own testimony that he then had that intention would be. After his death, there can hardly be any other way of proving it and while he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation."

A declaration as to the religion of a person in his will is admissible under this exception and also under Section 14.[94]

Admission relevant otherwise than admission [EXCEPTION 3]

This clause states that an admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission. In this connection Section 6 of this Act may be referred to, wherein it is stated, that facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant whether they occur at the same time and place or at different times and places; to put it in other words, as part of *res gestae,* or as a statement accompanying or explaining a particular conduct; but it is impossible to held that a statement which is inadmissible as an admission under the general rule can be made admissible as such under this cl. (3).[95]

Where a house was built over half a century back, it was held that old documents showing by whom it was built may be admissible under Section 11(2) and Section 13(*b*) of the Act.[96]

NORTON observes: "A fact which is relevant under Section 8, clause (1) and Section 11, clause (1) as inconsistent with a relevant fact, *e.g.*, the establishment of a prisoner's innocence by circumstances incompatible with the facts on which his guilt has been sought to be established, or under Section 14, as evidence of intention, knowledge, or good faith, shall not be rejected simply because it assumes the form of an admission. Illustrations (*a*) and (*e*) sufficiently exemplify this clause."

Where a defendant in his previous deposition in proceedings under Section 145, Cr. P.C. admitted the plaintiff's right as a *shebait* to certain lands of the deity, it was held that such admission can be used in a subsequent civil suit.[97] A statement by a deceased donor in his will that the gift deed executed by him was fictitious was held to be an admission under this exception.[98]

Where defendants No. 2 and 4 sold a property to defendant No. 1, which they obtained under a partition, and subsequently colluded with the plaintiff and denied the partition as well as the sale, the statements made by them in a petition and a written statement filed by them in certain previous suits, which went to show that there had been a partition and that they had changed their attitude, were held to be admissible as against them under clause (3) of this section and S. 11(2).[99] Where the question was whether there was subletting, and the respondent relied principally upon some previous self-serving

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93. 145 US 285 : 36 Law Ed P 706.
94. *Leong Hohe* v. *Leon Ah. Foon,* ILR 7 R 120 : AIR 1930 R 42.
95. *Paschand Nixon,* AIR 1930 Oudh 441.
96. *Raghunath* v. *Bindeswari,* AIR 1942 All 526.
97. *Janaki Raman Prasad Mishra* v. *Koshalyanandan Prasad Mishra,* AIR 1961 Pat 293.
98. *Ram Bharose* v. *Diwan,* 1938 Oudh 26.
99. *Gyannessa* v. *Mobarakannessa,* AIR (1897) 25 Cal 210.

statements made in another legal proceeding, it was held that they could not be used as substantive evidence in the present case.[1]

If an admission becomes admissible in favour of a person who made it under some other section of this Act, it would not be rendered inadmissible by the rule in this section. Where there are entries in account books regularly maintained and kept, they are admissible under Section 34, even if those entries amount to admission in one's own favour.[2]

When oral admissions as to contents of documents are relevant

S. 22. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

COMMENTS

1. PRINCIPLE AND SCOPE

The contents of a document which is capable of being produced must be proved by the instrument itself and not by parol evidence. Oral admissions as to the contents of a document are excluded under this section.

This section, however, contemplates giving evidence of oral admissions as to the contents of a document on two grounds. A party who seeks to rely on such admission must show that he is entitled to give secondary evidence of the contents of such a document according to the provisions contained in this Act, or that the genuineness of the document itself is in question.

In England, the rule is contrary to the principle underlining this section. In PHIPSON ON EVIDENCE[3] it is observed: "When the admission concerns the contents of a document which cannot be proved even by secondary evidence, it will still be admissible notwithstanding the absence either of a notice to produce or of an explanation for the whereabouts of the original.[4] An admission may take the form of an acknowledgment of the truth of a statement made in the party's presence.[5] Equally, an admission may be implied where it is the only inference to be drawn from words used in particular circumstances.[6] If the words are ambiguous or if there is a material uncertainty as to what they were, such an inference cannot be drawn."[7]

In a case before the Privy Council the plaintiff sued for a sum of money said to be due on a settlement of account. He produced evidence to prove the admission of the debt instead of producing and proving the account between him and the defendant. The Privy Council held "They consider that it is a very dangerous thing to rest a judgment upon verbal admissions of a sum due, without very clear evidence, especially when there are other means of proving the case, if a true one,"[8] where it was observed that this present section does away with the rule in *Slattery* v. *Pooley*,[9] and adopts the Irish view expressed in *Lawless* v. *Quelae*.[10]

2. WRITTEN ADMISSIONS

This section states that oral admissions as to the contents of a document are not relevant. They are, however, admissible when the party is entitled to give secondary evidence of the contents of such document under Sections 65 and 66. Such admissions are also admissible when the genuineness of the

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1. *Gyannessa* v. *Mobarakannessa*, AIR (1897) 25 Cal 210.
2. *Rajbali Lal* v. *Partappur Co. Ltd.*, AIR 1940 Pat 622.
3. 15th Edn. (2000), p. 716, para 28-14.
4. *Slatterie* v. *Pooley*, (1840) 6 M&W 664; *Earle* v. *Picken*, (1833) 5 C&P 542.
5. *R.* v. *Christie*, (1914) AC 545 and generally Chap 26.
6. *R.* v. *Brown*, (1964) Crim LR 397 (CCA).
7. *R.* v. *Norton*, (1910) 2 KB 496. *Vide* also HALSBURY 4th Edition, Vol. 17 (para 62).
8. *Sheopershad* v. *Juggernath*, 10 IA 79; **See also** *Raghubar Dayal Sahu* v. *Bhikya Lal Misra*, 12 Cal 69.
9. (1840) 6 M&W 669.
10. (1845) 8 ILR 382.

document produced is in question. Written admissions in contradistinction with oral admissions are relevant. A written admission is admissible under Section 65, clause (*b*) of this Act as secondary evidence of the contents of a document.[11]

Section 65 states in which cases secondary evidence relating to documents may be given. Under clause (*a*), if a document is in the possession or power of the person against whom the document is sought to be proved, after giving notice as required under Section 66, if the other party does not produce it, then secondary evidence can be given. Under clause (*b*), when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest, secondary evidence may be given. The other clauses state when secondary evidence can be given, when the original is lost or destroyed or cannot be brought to court, or when the original is a public document, etc.

Under Section 91 of this Act when the terms of a contract or of any other disposition of property have been reduced to the form of a document, or in cases in which it is required by law to be reduced to the form of a document, no oral evidence can be given except the document itself, or secondary evidence of its contents wherever it is admissible under the provisions of the Act.

Section 58 of this Act says that no fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing. Even before the hearing they can agree in writing to admit. By a rule of pleading, they may also be deemed to have admitted. Of course, the court may in its discretion require the facts admitted to be proved otherwise than by such admissions.

3. WHERE THE GENUINENESS OF A DOCUMENT IS IN QUESTION

So far as the contents of a document are concerned, secondary evidence can be given as pointed out earlier, but when the question is whether the document is genuine or not, it may be proved in different ways, as contemplated by different sections of this Act. It may be proved under this section and Section 70 which says that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested. An attesting witness may be produced to prove the document which is required by law to be attested under Section 68. A document may be proved by comparison of handwritings according to Section 73, or by getting opinions of experts as provided under Section 45.

In a suit regarding a promissory note, when it was found that the pronote was inadmissible in evidence for want of stamp, it was held that plaintiff cannot rely merely on the admission of the contents of the document in the written statement of the defendant.[12]

Where a plaintiff admitted in a deposition about the contents of the document and not in the pleadings, it was held that it was only secondary evidence and it did not take the place of the document itself.[13]

When oral admission as to contents of electronic records are relevant.

[14][S. 22A. Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question.]

COMMENTS

1. THE INFORMATION TECHNOLOGY ACT, 2000 ORAL ADMISSIONS AS TO CONTENTS OF ELECTRONIC RECORDS

The Information Technology Act, 2000 has added a new Section 22A providing that oral admissions as to the contents of electronic records are relevant unless the genuineness of the electronic record produced is in question.

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11. *Jaigopal* v. *Divisional Forest Officer*, AIR 1953 Pat 310; *Hira Lal* v. *Ram Prasad*, AIR 1949 All 677.
12. *Damodhar Jagganath* v. *Atmaram Babaji*, ILR (1888) 12 Bom 443.
13. *Shakil Ibrahim* v. *Purvata*, 8 Bom HCR 163.
14. Inserted by the Information Technology Act, 2000, S. 92, Sch. II (w.e.f. 17-10-2000).

"Provision is made for the required evidence of reliability to be provided by a certificate purporting to be signed by a person occupying a responsible position in relation to the operation of the computer.[15] The Court has power to require oral evidence of anything of which evidence could be given by such a certificate.[16] However, evidence by certificate is merely one option. The conditions of admissibility may be proved by oral evidence from a person familiar with the operation of the computer who can give evidence of its reliability and such a person need not be a computer expert or someone qualified to sign a certificate.[17] The Court is not entitled to rely on the maxim *omnia praesumuntur rite esse acta*.[18] The conditions of admissibility must be proved beyond reasonable doubt if the document is tendered by the prosecution,[19] but on the balance of probabilities if tendered by the defence.[20] If the conditions of admissibility are in dispute, a trial within a trial may be required."[21]

Admissions in civil cases, when relevant.

S. 23. In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

***Explanation.*—Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under Section 126.**

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COMMENTS

1. PRINCIPLE

This section excludes the admission of parties in civil cases under two circumstances:—firstly, if the admission is made upon an express condition that evidence of it is not to be given; secondly, under circumstances from which the court infers that the parties agreed that evidence of the admission should not be given. However, according to the explanation, the admission of any barrister or pleader or attorney or vakil who may be compelled to give evidence under Section 126 of this Act, is not excluded under this section.

This section is based, firstly, on public policy and, secondly, as a matter of privilege or confidentiality. It is based on the maxim "*Interest rei publical at sit finis liticem*" (it is in the interest of the State that there should be an end to litigation).

This section protects communications made 'without prejudice'. Confidential overtures of pacification and any other offers or propositions between litigating parties, expressly or impliedly made without prejudice, are excluded on grounds of public policy. For, if parties were to be prejudiced by their

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15. Police and Criminal Evidence Act, 1984, Sched. 3, Part II (para. 8).
16. *Ibid*., (para 9) (as amended), but examining justices have no such power.
17. *R* v. *Shephard, ante. Cf. Darby* v. *DPP, The Times*, November 4, 1994, DC (police officer's evidence as to the working of a speed trap device).
18. *R* v. *Shephard, ante*, **overruling** *R.* v. *Spiby*, (1990) 91 Cr App R 186; *R.* v. *Governor of Pentonville Prison, ex p. Osman*, (1990) 90 Cr App R 281, 307 DC.
19. *R.* v. *Minors and Harper*, (1989) 90 Cr App R 102.
20. As in the case of proof of admissibility under the Criminal Justice Act 1988, Ss. 23, 24.
21. *R* v. *Minors and Harper*, (1989) 90 Cr App R 102, 103-104. PHIPSON ON EVIDENCE, 15th Edn. (2000), p. 700 (para 27-34).

efforts to compromise it would be impossible to attempt any amicable arrangement of differences.[22] The expression 'without prejudice' means without prejudice to the writer of the letter if the terms he proposes are not accepted. It means that: "I make you an offer which you may accept or not, as you like; but if you do not accept it, my having made it is to have no effect at all."[23] If the terms proposed in the letter are accepted, a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.[24] If letters marked "without prejudice" are tendered in evidence and the other party admits them, the admission implies that the privilege is withdrawn and the letters are free to be used as evidence in a judicial proceeding. Letters so marked show the writer's desire as to the privilege, but unless there are circumstances from which it can be inferred that the other party agreed to respect the privilege, the letters cannot be excluded under this section.[25]

There would not be any attempt by the parties for any compromise or adjustment of their disputes if their private talks during negotiations are not excluded from being let in as evidence.

LORD MANSFIELD in *Walker* v. *Wilsher*,[26] observed: "All men must be premitted to buy their peace, without prejudice to them, should the offer not succeed; such offers being made to stop litigation, without regard to the question whether anything is due or not. If, therefore, a defendant, on being sued for £ 100 should offer the plaintiff £ 20, at the same time stating that he made such offer 'without prejudice', evidence of the offer would not be admissible in evidence; for it is irrelevant to the issue; it neither admits nor ascertains any debt, and is no more than saying that he would give £ 20 to be rid of the action. An offer made 'without prejudice' cannot be looked at even upon a question of costs."

Confidential overtures of pacification, and any other offers of propositions between litigating parties, expressly or impliedly made without prejudice, are excluded. This is on grounds of public policy.

It is considered necessary to allow the parties to speak somewhat freely in attempting settlements, and to disclose their cases to each other to some extent. It is usual, and certainly advisable, expressly to state that the communications in question are made without prejudice; but it seems clear that the rule of exclusion would apply if it appeared from the circumstances that it was intended that the communications should not be used as evidence.[27]

Negotiations when conducted with a view to settlement, should be deemed to be conducted "without prejudice" and it is not open to either party to give evidence of an admission made by the author.[28]

WIGMORE[29] observes: "The true reason for excluding an offer of compromise is that it does not ordinarily proceed from and imply a specific belief that the adversaries' claim is well founded but rather a belief that the further prosecution of that claim, whether well founded or not, would in any event cause such annoyance as is preferably avoided by the payment of the sum offered. In short, the offer implies merely a desire for peace, not a concession of wrong done."

2. SCOPE

From the opening sentence of this section it is clear that the section applies only in civil cases and not to criminal cases.

Offers of compromise made expressly or impliedly "without prejudice" cannot be given in evidence against a party as admissions; the law, on grounds of public policy, protecting negotiations *bona fide* entered into for the settlement of disputes. The rationale of the doctrine is a complex of factors. The policy of the law is to encourage settlements[30]; it is thought to be "unfair" that advantage should be taken of the willingness of one party to negotiate.[31] and some cases discover an express or implied contract between the parties that without prejudice communications should not be disclosed.[32] Wigmore (4

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22. *Hoghton* v. *Hoghton*, (1852) 15 Beav 278.
23. In re : *River Steamer Company*, (1871) LR 6 Ch 822, 832.
24. *Walker* v. *Wilsher*, (1889) 23 QBD 335 (CA).
25. *The Lucknow Improvement Trust* v. *P.L. Jaitly & Co.*, (1929) 5 Luck 465.
26. (1889) 23 QBD 335 (CA).
27. *Copy* v. *Bretton*, (1830) 4 C&P 462; *Jones* v. *Foxall*, (1852) 21 LJ Ch 725.
28. *P.C. Gangoly* v. *Nawn Estates (P) Ltd.*, 72 CWN 852 at 857.
29. Vol. 4, Section 1061, P-28.
30. *Tennant* v. *Hamilton*, (1839) 7 Cl & Fin 122 (HL); *Scott* v. *Drayton Paper Works*, (1927) 44 RPC 151.
31. *Rabin* v. *Mendoza*, (1954) 1 WLR 271; *Bell* v. *University of Auckland*, (1969) NZLR 1029 (SC).
32. *Rabin* v. *Mendoza* (*ante*); *Whiffen* v. *Hartweight*, (1848) 11 Beav 111; but **see** Vaver, loc. cit. p. 99.

Wigmore, Evidence (3rd ed.) 27 p. 1061) thought that the doctrine was based on the fact that the statement was conditional, but this is inconsistent with the English and Commonwealth authorities.[33]

According to HALSBURY[34] "The contents of a communication made "without prejudice" are admissible when there has been a binding agreement between the parties arising out of it,[35] or for the purpose of deciding whether such an agreement has been reached.[36] and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place[37]; but they are not otherwise admissible. Thus, they cannot be used as admissions, or as acknowledgments to prevent a debt from becoming statute-barred[38]; or, normally, for the purpose of deciding the question of costs[39] or to show malice,[40] although it has been held that they may be admitted to prove matters not connected with the merits of the dispute.[41]

The consent of both parties to the dispute is required for the privilege to be waived,[42] even if there has been only one communication.[43] In the absence of an agreement between the parties that evidence of the statements is not to be given, they are admissible.[44] It was held by the Privy Council that where there was an offer to accept a smaller amount as a result of a compromise, it cannot be treated as an admission.[45]

In *Shibcharandas* v. *Gulabchand,*[46] negotiations were conducted with a view to settlement. It was held that the negotiations must be taken to have been conducted without prejudice and if one party offers to take something less than what he claims it must not be used against him as an admission. In *Nageswarsabu* v. *Shah Bahadur,*[47] it was observed: "Parties often make admission for purpose of effecting a compromise to which it would be unfair to hold them if the compromise falls through" following the above decisions and that of *Surjit Kaur* v. *Gurcharan Singh,*[48] it was held in *B. Mohanty* v. *S C. Mohanty,*[49] that where a compromise petition was signed by the parties but was not acted upon and filed into court, the recitals were not intended to be treated as evidence by the parties and recitals thereon could not be treated as evidence.

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33. *Waxman & Sons Ltd.* v. *Texaco Canada Ltd.*, (1968) 67 DLR (2d) 295. PHIPSON ON EVIDENCE 13th Edn., Page 373 (para-19.10).
34. 4th Ed., Vol. 17 (para 213) Page 152.
35. The agreement which has been reached may thus be construed. *Holdsworth* v. *Dismsdale,* (1871) 19 WR 798; *Re, River Steamer Co., Mitchell's Claim,* (1871) 6 Ch App at 832; *Re, Leite, Leite* v. *Ferreita,* (1881) 72 LT JO 97; Cf. *Walker* v. *Wilsher,* (1889) 23 QBD 335 (CA) : (1910) 45 LJ 326.
36. *Tomlin* v. *Standard Telephones and Cables Ltd.*, (1969) 3 All ER 201 : (1969) 1 WLR 1378 (CA). Such a communication may also be looked at by the judge (though not by the jury) to decide the question of its admissibility: *Re, Daintrey, ex parte Holt,* (1803) 2 QB 116. The question of admissibility is decided at the hearing: *Re, Jessopp* (a Solicitor) (1910) 54 Sol JO 543 (CA).
37. *E.g.* when there is an allegation of laches: **see** *Walker* v. *Wilsher,* (1889) 23 QBD 335 at 338. Per LINDLEY LJ. **See also** *Janes* v. *Foxall,* (1852) 15 Beav 388.
38. *Cory* v. *Bretton,* (1830) 4 C&P 462; and **see** *Re, River Steamer Co., Mitchell's Claim,* (1871) 6 Ch App 822. Cf. *Froysell* v. *Lewelyn,* (1821) 9 Price 122. **See also** LIMITATIONS OF ACTIONS.
39. *Walker* v. *Wilsher,* (1889) 23 QBD 335 (CA); *Stotesbury* v. *Turner,* (1943) 1 KB 370. Dicta to the contrary in *Woodard* v. *Eastern Countries and London and Blackwall Rly. Co.*, (1885) 1 Jur NS 899, must be regarded as wrong. However, in matrimonial proceedings relating to finance a party may make a compromise offer in respect of financial provision or property without prejudice to that issue at the hearing, but reserving the right of the party making the offer to it on the issue of costs; **see** *Calderbank* v. *Calderbank,* (1976) Fam 93 : (1975) 3 All ER 333 (CA). There is a comparable practice in collision actions in the Admiralty Court: **See** ADMIRALITY, Vol. 1 (para 438).
40. *Watt* v. *Watt,* (1905) AC 115 (HL).
41. *Waldridge* v. *Kennison,* (1794) 1 ESP 143 (Admission by defendant during "without prejudice" discussion that a document was in his handwriting).
42. *Mc Taggart* v. *Mc Taggart,* (1949) p 94 : (1948) 2 All ER 754 (CA) and *Blow* v. *Norfolk Country Council,* (1966) 3 All ER 579 : (1967) 1 WLR 1280 (CA). As to waiver of privilege generally, **see** para 235, *post.*
43. *Walker* v. *Wilsher,* (1889) 23 Q3D 335 (CA) **disapproving** the contrary opinion expressed in *Williams* v. *Thomas,* (1862) 2 Drew & Sm 29.
44. *Firm Bulaki* v. *Bhagath,* AIR 1926 Lah 548.
45. *Chandrika* v. *B.B. & C.I. Rly Co.*, AIR 1935 PC 59.
46. AIR 1936 All 157.
47. AIR 1922 Oudh 231.
48. AIR 1973 Punj 18.
49. AIR 1992 Ori 136.

A debtor acknowledged the debt in a postcard and sent it to the plaintiff. The defendant specifically wrote on the card "without prejudice". When the suit was filed, the defendant pleaded *inter alia* that the claim was barred by limitation. The plaintiff relied on that postcard to show that there was an acknowledgement of the debt. CANDY J. observed: "But, even if the card is admitted in evidence, what does it amount to? What do the words 'without prejudice' mean? simply this:— "I make you an offer: if you do not accept it, this letter is not to be used against me".[50] When an assessee files a statement before the Income Tax authorities admitting the matter in dispute without affecting the merits of the issue in a civil litigation, it is open to the assessee to mark the statement as "without prejudice" which means that the statement is for a limited purpose of income tax assessment.[51]

Where a person filed a written statement in a suit on the basis of a compromise arrived at earlier and when that written statement was sought to be relied on by the plaintiff, it was held that, where the draft compromise provides that the parties to it are free to repudiate any condition of the proposed compromise by which in their opinion, their rights were prejudicially affected, it should be excluded.[52]

In another case it was held that the admission in the written statement cannot be looked into.[53]

3. WAIVER OF PRIVILEGE

Where there was an inscription 'without prejudice', on two letters produced by the plaintiff in evidence, the defendant's counsel admitted those letters. It was held that the admission on the part of the counsel implied that the privilege was withdrawn and the letters were not inadmissible, as there was nothing to show either by implication or otherwise any circumstances from which it could be inferred, that the plaintiff also agreed to respect the privilege.

The consent of both parties to the dispute is required for the privilege to be waived, even if there has been only one communication.[54]

4. APPLICATION BETWEEN HUSBAND AND WIFE

The principle under this section has greater relevancy in matters where marital relationship is concerned. Where a petition under the Hindu Marriage Act was pending, a letter written by one of the parties containing an admission of cruelty and seeking an apology was filed. That letter was written during the period of negotiations for a compromise between the parties. It was held that the letter is a privileged document and it may be inferred that the parties did not want to let in evidence in respect of the letter.[55]

5. FROM WHICH CIRCUMSTANCES THE COURT CAN INFER THAT THE PARTIES AGREED TOGETHER THAT EVIDENCE OF IT SHOULD NOT BE GIVEN

Circumstances must be of such a character that the court must naturally come to the conclusion that the parties agreed together that evidence of it should not be given. In a suit for rent, there was a talk of settlement between the plaintiff's pleader and one of the defendants when the suit was about to be instituted. It was held that the mere fact of the conversation taking place when the parties were contemplating that a suit might be instituted was not in itself sufficient to prevent the conversation from being put in evidence.[56]

The reply to a letter written 'without prejudice' cannot be admitted in evidence even though not guarded in a similar manner. The words once used will exclude an entire correspondence.

The rule which excludes documents marked 'without prejudice' has no application unless some person is in dispute or negotiation with another and terms are offered for the settlement of the dispute or negotiation.[57]

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50. *Madhavrao Ganeshpat Oze* v. *Gulabbhai Lallubhai*, ILR (1893) 23 Bom 177.
51. *Gadadhar Ramanuj Das* v. *Collector of Agricultural Income-tax, Orissa*, AIR 1953 Ori 283.
52. *Surendra Persad Lahiri* v. *Govindadas*, 48 Cal WN 15.
53. *Tilkayat Govindlalji* v. *State*, AIR 1962 Raj 196.
54. HALSBURY 4th Edn., Vol. 17 (para 213), Page 152.
55. *Surjit* v. *Gurcharan*, AIR 1973 Punj 18.
56. *Meajan Matbar* v. *Alimuddin Mia*, ILR (1916) 44 Cal 130.
57. *Madhavrao* v. *Gulabbhai*, ILR (1898) 23 Bom 177, 180.

An admission made to a stranger, under whatever terms as to secrecy, is not protected by law from disclosure.

6. EXPLANATION—LEGAL COUNSEL NOT PREVENTED FROM GIVING EVIDENCE

Under the Explanation the legal adviser of the party will not be prevented from giving evidence of any communication made in furtherance of any illegal purpose of any fact showing that crime or fraud has been committed since his employment.

Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.

S. 24. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

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COMMENTS

1. PRINCIPLE AND SCOPE

The substantive law of confession is contained in Sections 24 to 30 of the Evidence Act and in Sections 164, 281 and 463 of the Criminal Procedure Code, 1973. Confessions are received in evidence in criminal cases upon the same principle on which admissions are received in civil cases, namely on the presumption that a person will not make an untrue statement against his own interest. A man of sound mind and full age, who makes a statement in ordinary simple language and has not been the victim of malpractice, threat or inducement in making such statement, must be bound by the language of the statement and by its ordinary plain meaning and the act spoken of must be given its legal consequence.[1] Deliberate and voluntary confessions of guilt if clearly proved, are among the most effectual proofs in law.[2]

The principle of receiving voluntary confession is on the presumption that no person would voluntarily make a statement which is against his interest, unless it is true. The presumption of truth as to the incriminating statement is based upon the sentiment of mankind that a person will not, as a general rule, make a statements against himself unless they are true.

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1. Per MEARS, CJ in *Raggha* v. *Emperor*, (1925) 23 A LJR 821, 826 (FB) : AIR 1925 All 627.
2. *Emperor* v. *Narayen*, (1907) 9 Bom LR 789 (FB).

When there is no statutory inhibition for using a confession on the premise that it was not recorded during the investigation of a particular offence which is under trial, there is no need or reason for the Court to introduce a further fetter against the admissibility of the confessional statement. It often happens that a confessor would disclose a very many acts and events including different facets of his involvement in the preparation, attempt and commission of crimes including the acts of his co-participators therein. But to expel every other incriminating disclosures than those under investigation of a particular crime from the ambit of admissibility is not mandated by any provision of law. Therefore, there is absolutely no doubt that a confession, if usable under Section 15 of the TADA Act, would not become unusable merely because the case is different or the crime is different. If the confession covers that different crime it would be a relevant item of evidence in the case in which that crime is under trial and it would then become admissible in that case.[3]

2. APPEARS TO THE COURT TO HAVE BEEN CAUSED BY ANY INDUCEMENT, THREAT OR PROMISE

(a) Principle

According to the section, a confession by an accused is irrelevant, if it is caused by (1) inducement; (2) threat; or (3) promise. The inducement, threat, or promise should have (a) reference to the charge against the accused; (b) proceeded from a person in authority, and (c) sufficiently given the accused person reasonable grounds for supposing that by making the confession he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Administration of caution to a person summoned under Section 40 of the Foreign Exchange Regulation Act, 1973 to make statement that not making a truthful statement would be an offence, does not amount to use of pressure to extract the statement. Such caution is rather in the interest of the maker of the statement.[4]

A confession is relevant—

(1) if it is made after the impression caused by any such inducement, threat or promise has been fully removed (Section 28). The fact that the confessional statement was made by the accused while he was in custody of the Intelligence Officer and he had retracted the same, was no ground to discard it as having been made under threat or pressure.[5]

(2) if it is not made to a Police Officer (Section 25). The Intelligence Officer of the Narcotic Control Bureau is not a police officer. The confession statement recorded by him is admissible in evidence.[6]; or

(3) if it is made in the presence of a Magistrate when the accused is in the custody of a police-officer (Section 26). A confessional statement of an accused can be recorded only by a Judicial Magistrate and not by an Executive Magistration. One recorded by the latter will not be admissible in evidence.[7]

(b) Object

This section is mainly intended to safeguard the interest of the accused, on the ground of public policy and for proper administration of justice. The Supreme Court observed: "It is abhorrent to our notions of justice and fair play, and is also dangerous, to allow a man to be convicted on the strength of a confession unless it is made voluntary and unless he realises that anything he says may be used against him; and any attempt by a person in authority to bully a person into making a confession, or any threat or coercion would at once invalidate it, if the fear was still operating on his mind at the time he makes the confession, and if it 'would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him'."[8]

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3. *State of Gujarat* v. *Mohammed Atik*, AIR 1998 SC 1686 : 1998 Cr LJ 2251 (paras 6 and 7).
4. *C. Sampath Kumar* v. *Enforcement Officer, Enforcement Directorate, Madras*, (1997) 8 SCC 358.
5. *Pon Adithan* v. *Deputy Director, Narcotics Control Bureau, Madras*, 1999 Cr LJ 3663 (para 7) (SC) : AIR 1999 SC 2355.
6. *Nandi Francis Nwazor* v. *Narcotics Control Bureau*, 1995 Cr LJ 665 (paras 18 and 19) (Del).
7. *State of Haryana* v. *Parmanand*, 1995 Cr LJ 396 (para 11) (P&H).
8. *Aher Raja Khima* v. *State of Saurashtra*, AIR 1956 SC 217.

LORD SUMNER in *Ibrahim* v. *R.*,[9] observed: "Even the rule, which excludes evidence of statements made by a prisoner when they are induced by hope held out, or fear inspired by a person in authority, is a rule of policy."[10]

Law does not presume that such confessions are untrue, but because of the danger of receiving such evidence, judges thought it better to reject it for the due administration of justice. When hope or fear in respect of the confession was not in question, such statements were admitted as relevant, though with some reluctance and subject to strong warnings as to their weight.[11]

In PHIPSON ON EVIDENCE, 13th Edn., pages 418-419, para 22.08 it is stated: "The ground for the rejection of confessions which are not voluntary is the danger that the prisoner may be induced by hope or fear to incriminate himself falsely."[12]

"One possible ground of exclusion was said to be that, it would not be safe to receive a statement made under any influence of fear.[13] However, LORD DIPLOCK said that "the underlying rationale of this branch of the criminal law, though it may originally have been based on ensuring the reliability of confessions is, in my view, now to be found in the maxim, *memo debet proderese ipsum,* no one can be required to be his own betrayer, or in its popular English mistranslation 'the right to silence".[14]

Another suggested rationale for the rule was that it was intended thereby to restrain law enforcement agencies from oppressive behaviour.[15] In *R.* v. *Sang,*[16] LORD DIPLOCK disapproved of this theory in clear terms and said that it was no part of the judges' function to exercise disciplinary powers over the police or prosecution. It is thought that there is more than one factor at the base of the rule.[17] For present purposes, "the question whether the rule is based on 'the reliability principle' or 'the disciplinary principle'..... is only of academic interest. It does not touch the effect or undoubted validity of the rule."[18] The rule is often criticised as devised to meet circumstances which no longer obtain.[19]

"It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised[20] or held out by a person in authority"[21] or by oppression. The addition of the words or by oppression" appears to have originated in an *obiter dictum* of Lord PARKER C.J. in *Callis* v. *Gunn,*[22] and it became enshrined in a revised preamble to the Judges' Rules[23] and was approved in

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9. AIR 1914 PC 599.
10. *P.K. Adimoola Chettior,* In re : (1957) 2 MLJ 358.
11. *Reg.* v. *Baldry,* 5 Cox CC 523; *Ibrahim* v. *Emperor,* AIR 1914 PC 155.
12. *R* v *Warwickshall,* (1783) 1 Leach 263, *R.* v. *Thomas,* (1826) 7 C&P 345; *R.* v. *Mansfield,* 14 Cox 639.
13. Per POLLOCK C.B. in *R.* v. *Baldry,* (1832) 2 Den 430. **Approved by** LORD SUMMER in *Ibrahim* v. *R., ante.*
14. *R* v. *Sang,* 1979 2 All ER 1222, 1230b also **reported at** (1979) 3 WLR 263; **see also** per LORD SCARMAN at p. 1245 *et seq* It is worthy of note that their Lordships extended no approval of the maxim, and see the advice of the Privy Council delivered by LORD DIPLOCK in *Haw Tua Tau* v. *Public Prosecutor,* (1981) 3 WLR 395 and *Sundran Jaykumal* v. *Public Prosecutor,* (1981) 3 WLR 408. They held that a warning by the judge that adverse inference might be drawn from the accused's failure to give evidence, and a similar warning by the police as to failure to disclose his defence, was not contrary to natural justice. These warnings were given as a result of a change in the law of Singapore which has no counterpart in English Law.
15. *R.* v. *Baldry, ante*; *Ibrahim* v. *R., ante*; **see** Criminal Law Revision Committee, 11th Report—, Evidence General (1972) Cmnd, 1991.
16. (1979) 2 All ER 1222 also reported at (1979) 3 WLR 263.
17. See generally the speech of LORD REID in *Commissioners of Customs and Excise* v. *Harz and Power,* where the privilege against self-crimination is given a role in justifying the rule.
18. *D.P.P.* v. *Ping Lin,* (1975) 3 All ER 419, per LORD SALMON at p. 188e-f.
19. *D.P.P.* v. *Ping Lin,* (1975) 3 All ER 419 per LORD HAILSHAM at 182d-g (and cases there cited); but the remedy is no longer in the hands of the judiciary. (*Ibid*).
20. This may be a misprint for "excited"—*DPP* v. *Ping Lin,* (1976) AC 574, 598 per Lord HAILSHAM.
21. *Ibrahim V R.,* (1914) AC 599, 609 **approved in** *Commissioners of Customs and Excise* v. *Harz and Power,* (1967) 1 AC 760 HL and *DPP* v. *Ping Lin,* (1976) AC 574 HL.
22. (1964) 1 QB 495, 501.
23. (1965) (para (e)).

subsequent cases.[24] "Oppression" was described as importing "something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary."[25]

There was extensive case law on who was to be regarded as a person in authority. Although the question of what was a relevant threat or promise was, or should have been,[26] essentially a question of fact there was also a body of authority on that question. The most unsatisfactory aspect of the law was the test of voluntariness. Very few confessions are voluntary in the sense that they are volunteered without the process of arrest and questioning. The Court of Appeal recognised that in an important judgment in *R.* v. *Rennie,*[27] where Lord LANE L.C.J., delivering the Court's reserved judgment, said :

> "Very few confessions are inspired solely by remorse. Often the motives of an accused person are mixed and include a hope that an early admission might lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if prompted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible."[28]

The reading of this section would show that the court will have to perform a three-fold function. Firstly, it has to determine the sufficiency of the inducement, threat or promise as affording certain grounds for giving the confession. Secondly, it will have again to clothe itself with the mentality of the accused to see whether the grounds would appear to the accused reasonable for a supposition that, by making the confession, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. Thirdly, it has to see if the confession appears to have been caused in consequence of the inducement, threat or promise. If the circumstances would show anything ranging between the barest suspicion on the one hand and absolute certainty on the other hand, would be sufficient to satisfy the requirements of the section.[29]

CAVE J., laid down a test for the admissibility of a confession which is as follows: "it was preceded by any inducement to make a statement held out by a person in authority. If it is proved to be free, and voluntary, and it was not made in consequence of an inducement, threat or promise by a person in authority, it can be taken into consideration."[30] It was held by the Patna High Court that the principle is the same in our country also.[31]

SHAH J., in *State of U.P.* v. *Deoman Upadhyaya,*[32] after dealing with Sections 24-27 individually, observed as follows:

"On an analysis of Sections 24 to 27 of the Indian Evidence Act, and Section 162 of the Code of Criminal Procedure, the following material propositions emerge:

(a) Whether a person is in custody or outside, a confession made by him to a Police Officer, or the making of which is procured by inducement, threat or promise, having reference to the charge against him and proceeding from a person in authority, is not provable against him in any proceeding in which he is charged with the commission of an offence.

(b) A confession made by a person whilst he is in the custody of a Police Officer to a person other than a Police Officer is not provable in a proceeding in which he is charged with the commission of an offence unless it is made in the immediate presence of a Magistrate.

(c) The part of the information given by a person whilst in police custody, whether the information is confessional or otherwise, which distinctly relates to the fact thereby discovered but no more, is provable in a proceeding in which he is charged with the commission of an offence.

(d) A statement, whether it amounts to a confession or not, made by a person when he is not in custody, to another person, such latter person not being a Police Officer, may be proved if it is otherwise relevant.

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24. *E.g. R* v. *Prager,* (1972) 56 Cr App R 151 CA; *R.* v. *Rennie,* (1982) 1 WLR 64 CA.
25. *R* v. *Priestley,* (1965) 51 Cr App R 1, per SACHS J., **adopted in** *R.* v. *Prager,* (1972) 56 Cr App R 151 CA.
26. *DPP* v. *Ping Lin,* (1976) AC 574 HL.
27. (1982) WLR 64 CA.
28. PHIPSON ON EVIDENCE, 15th Edn. (2000), pp. 748-749 (para 31-04).
29. *Emperor* v. *Panchkowri Dutt,* (1925) Cal 587; *Emperor* v. *Bhagi,* 8 Bom LR 697.
30. *Queen* v. *Thompson,* (1893) 2 QB 12.
31. *Krishnandan Prasad Verman* v. *State,* AIR 1958 Pat 166; **See also** *Emperor* v. *Dewan Kahar,* AIR 1923 Pat 13.
32. AIR 1960 SC 1125.

(e) A statement made by a person to a Police Officer in the course of an investigation of an offence under Chapter 14 of the Criminal Procedure Code cannot except to the extent permitted by Section 27 of the Indian Evidence Act, be used for any purpose at any enquiry or trial in respect of any offence under investigation at the time when the statement was made in which he is concerned as a person accused of an offence.[33]

A confession made and recorded even during a trial can be corroborated by the evidence already recorded. It may be made and recorded in the court of a committing Magistrate and materials already in the possession of the police may be used for the purpose of corroboration.[34]

The Supreme Court in *Shankaria* v. *State of Rajasthan,*[35] observed: "It is well settled that a confession, if voluntarily and truthfully made, is an efficacious proof of guilt. Therefore, when in a capital case the prosecution demands a conviction of the accused primarily on the basis of his confession recorded under Section 164 Cr. P.C., the court must apply a double test:

(1) Whether the confession was perfectly voluntary?

(2) If so, whether it was true and trustworthy?

Satisfaction of the first test is a *sine qua non* for its admissibility in evidence. If the confession appears to the court to have been caused by any inducement, threat or promise, such as is mentioned in Section 24, Evidence Act, it must be excluded and rejected *brevi manu.* In such a case, the question of proceeding further to apply the second test, does not arise. If the first test is satisfied, the court must, before acting upon the confession, reach the finding that what is stated therein is true and reliable. For judging the reliability of such a confession or, for that matter, of any substantive piece of evidence, there is no rigid cannon of universal application. Even so, one broad method which may be useful in most cases for evaluation of a confession may be indicated. The court should carefully examine the confession and compare it with the rest of the evidence, in the light of the surrounding circumstances and probabilities of the case."[36]

This section places the heaviest responsibility on the court. Under the latter part of the section, the court has to form an opinion that the inducement, threat or promise by the person in authority is sufficient to give the accused person grounds which would appear to him reasonable for supposing that, by making it, he would gain any advantage or avoid any evil of a temporal nature. The responsibility of the court would be great because the court must relegate itself to the position of the accused and see whether the inducement, threat or promise given to the accused would appear reasonable to make the accused feel that he would gain an advantage or avoid any evil of a temporal nature with reference to the charge against him.[37] Thus, it can be seen that this section through its wording has given the fullest discretion to the court to reject the alleged confession if it entertains a suspicion. The usage of the word "appears" in the first part of the section indicates a lesser degree of probability than 'proof' as defined in Section 3. On the other hand the court is saddled with the delicate task of enquiring into the facts which were passing in the mind of the accused at the time of making the confession.[38] If it appears to the court, from the facts and circumstances of the case, that the confession is not voluntary but it is the result of inducement, threat or promise, it should be rejected. It is not easy for an accused to show positively that the confession is the result of inducement, threat or promise.[39]

In all the cases the general principle would be what a prudent man believes on the same set of facts and circumstances. This was pointed out in *Pyarelal* v. *State,*[40] by the Supreme Court stating that the standard of a prudent man is not completely displaced, but the stringent rule of proof is relaxed, though it

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33. *Rajkishore Bhuyan* v. *State,* AIR 1969 Ori 190.
34. *Hem Raj* v. *State of Ajmer,* 1954 SCR 1133.
35. AIR 1978 SC 1248.
36. *Devendra Prasad Tiwari* v. *State of U.P.,* AIR 1978 SC 1544; *State of Gujarat* v. *Subamiya Dosmahmeh,* 1979 Cr LR (Guj) 366; *Mobeni Minji* v. *Union Territory of Arunachal Pradesh,* 1982 Cr LJ (NOC) 39; *Kuthu Goala* v. *State of Assam,* 1981 Cr LJ 424 (Gou); *Jai Singh* v. *State,* AIR 1967 Del 14.
37. *Pyare Lal Bhargua* v. *State of Raj,* AIR 1963 SC 1094; *Mst. Kistoori* v. *State of Rajasthan,* AIR 1967 Raj 98; *Satbir Singh* v. *State of Punjab,* AIR 1977 SC 1294.
38. In re : *Ahmad,* AIR 1950 Mys 82.
39. *R.* v. *Panchkouri,* AIR 1925 Cal 587; *Emperor* v. *Jamuna,* AIR 1947 Pat 305; *Raggha* v. *Emperor,* AIR 1925 All 627 (FB); *R.* v. *Saw Min,* AIR 1939 Rang 219.
40. *Pyare Lal Bhargua* v. *State of Raj.,* AIR 1963 SC 1094.

does not warrant a court's opinion based on pure surmise that a *prima facie* opinion based on evidence and circumstances may be adopted as a standard laid down by this section.[41]

Even when the judge feels that it is doubtful whether an explanatory statement by the accused was not given as a result of inducement, threat or promise, the confession should not be admitted in evidence.[42] A confession must be voluntary and uninfluenced by anything.[43] Unless the court is satisfied that the confession is voluntary it cannot be used against the accused.[44] The criterion for the admissibility of a confession is not whether an accused is questioned immediately by the police and the accused spontaneously comes out with confession of his guilt; the criterion is whether it is voluntarily made before the Magistrate under Section 164 Cr. P.C.[45] The confessional statement made under S. 164 Cr.P.C. and retracted later on during the examination of the accused under Section 313, is presumed to be voluntary.[46]

Where the Magistrate while recording a confession has elicited answers by questioning the accused, it cannot be said that the answers given are voluntary statements of the accused.[47]

MAHMOOD J., stated that the rule underlying this section is, speaking strictly, a rule of relevancy, called forth by the abstracts principles of evidence and not a positive prohibition necessitated by exigencies. It is a rule of exclusion because, this section declares that a confession made by an accused under certain circumstances is irrelevant in a criminal proceeding. Therefore, it is only the satisfaction of the court that is necessary, though there may not be a decision in so many words that a confession is not relevant.[48]

A confession can be admitted only if it is voluntary; and one obtained by inducement, threat or promise held out by a person in authority is not to be admitted.[49] Inducement, threat or promise need not be express, but may be implied from the conduct of the person in authority, the declarations of the accused, or the circumstances of the case.[50]

The Nagpur High Court held that a well-grounded conjecture is also sufficient to exclude a confession. But that conjecture must be reasonably based upon the circumstances shown in the evidence.[51]

The inducement that is contemplated under this section, is to make a statement relating to the charges by influencing the mind of the accused with respect to the escape from the charge.[52] A confession made by an accused on the faith of a promise made by the police-officer making the inquiry, that he would be let off if he made a disclosure is not admissible.[53] Where the accused, in making a confession before a Magistrate, admitted that he had been asked to tell the truth by the Sahib who said he would be released, if he told the truth, it was held that the confession was vitiated by inducement.[54] A confession made before a Magistrate who had told the accused that if he made a full confession he would

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41. *R.* v. *Dewan Kahar,* AIR 1923 Pat 13; **See also** *Abraham* v. *State,* AIR 1965 Ker 175; *Budhoo* v. *R.* AIR 1928 Lah 676; *Roshanlal* v. *Union of India,* AIR 1965 HP 1 **distinguishing** *Vidymati* v. *State,* AIR 1951 HP 82.
42. *Abraham* v. *State,* AIR 1965 Ker 175; *Joymangal* v. *State,* 59 Cal WN 993.
43. *Tilak* v. *State of M.P.,* 1978 Cr LJ 112 (MP).
44. *Alier Raja Khima* v. *State of Saurashtra,* AIR 1956 SC 217 : 1956 Cr LJ 426; *Devendra Prasad Tiwari* v. *State of U.P.,* AIR 1978 SC 1544; *Sankaria* v. *State of Rajasthan,* AIR 1978 SC 1248; *Eapen and Eapen* v. *State,* AIR 1954 Tr-Co 282: 1954 Cr LJ 491; *Bhabananda Banerjee* v. *Emperor,* AIR 1993 Cal 747.
45. **Re :** *Kakana Ramana Reddy,* AIR 1953 Mad 74 : 1953 Cr -LJ 264 (Mad).
46. *Dev Dass* v. *State,* 1996 Cr LJ 1441 (para 10) (Cal), **relying on** *Sankaria* v. *State of Rajasthan,* AIR 1978 SC 1248 (para 49) at p. 1258.
47. *Lingiah,* (1954) Mys 27; *State of M.P.* v. *Dayaram Hansraj,* AIR 1981 SC 2007.
48. *Queen-Empress* v. *Babulal,* ILR 1884 6 All 509.
49. *Kuruma* v. *The Queen,* (1955) AC 197.
50. *Reg* v. *Gills,* (1866) 11 Cox 69; *King-Emperor* v. *Akhileshwari Prasad,* ILR (1925) 4 Pat 646; *Babu Lal,* (1956) Raj 359; *Amrut* v. *State of Bombay,* AIR 1960 Bom 488.
51. *Mst. Bhukin* v. *Emperor,* AIR 1948 Nag 344; *Mst. Viran Wali* v. *State,* AIR 1961 11.
52. *Chaman Lal* v. *State of J&K,* 1976 Cr LJ 1310.
53. *Mussammat Nurai* v. *The Empress,* ILR (1881) PR No. 8 of 1882 (Cr) or would get a pardon, was held inadmissible in evidence. *Emperor* v. *Misri,* ILR (1909) 31 All 592 (FB); *Emperor* v. *Khetal,* ILR (1923) 45 All 300 : AIR 1923 All 352; *Muhammad Shaffi* v. *Queen-Empress,* (1899) Pr. No. 1 of 1899 (Cr); *Emperor* v. *Cunna,* (1929) 22 Bom LR 1247, in which there was a difference of opinion amongst the Judges as to the admissibility of evidence of the accused by virtue of Section 339(2) of the Criminal Procedure Code.
54. *Emperor* v. *Dinanath Sundarji,* (1920) 45 Bom 1086 : 22 Bom LR 338 : AIR 1921 Bom 70.

take that fact into consideration in awarding punishment, is inadmissible.[55] Where a Magistrate recorded a statement from an accused produced in hand-cuffs from the police custody, after giving him only 15-20 mts time to compose himself, and no question was put to the accused as to why he was making a confession, it was held that the confession was within the mischief of this section.[56]

Where a confession was recorded by a Magistrate in the presence of the escorting police, it was held that, as the escorting police are not connected with investigation it was voluntary.[57] The Supreme Court rejected a confession made to a villager with a request that he should arrange for surrender as it was unnatural because the police was already in the village and there could have been a direct surrender. [58] The Privy Council, held that, when the record of the Magistrate proves positively that the confession was voluntary, the fact that the accused confessed in the hope of pardon, will not justify its rejection, as being improperly induced, in the absence of evidence to suggest that any Police Officer or other person in authority did or said anything which could possibly be construed as holding out a hope of pardon.[59] In the absence of evidence to show that any inducement, threat or promise was made to the accused, when the accused was not continuously questioned all the time, but only at intervals, the mere fact that the accused was taken to the house of the *Mukhia,* and it took two or three hours time, did not make the confession made to the *Mukhia* any the less free and voluntary.[60]

The question whether a confession is voluntary or not is always a question of fact. And there is no rule of law that, if a certain period is not given for reflection it is sufficient to exclude the confession. But, at the same time, all the circumstances including the important factor of the time given for reflection must be considered, before deciding whether the court is satisfied that, the impression caused by any inducement, threat or promise has been fully removed as provided in Section 28.[61] Where sufficient time was given for reflection, and the Magistrate took care to see if the accused was in a state of mind fit to make a voluntary statement, and to comprehend the implication of his admission, it was held that it was a voluntary confession, though the Magistrate did not put any pointed and searching questions.[62] Where only 3½ hours time was given for reflection to an accused, it was held that it was not a valid confession.[63] However where only 3 hours time was given to the accused who made a confessional statement before the Judicial Magistrate the Supreme Court observed that it is not possible to reject the confessional statement merely because only 3 hours time had been given for reflection if it is otherwise acceptable. But the court added that the Magistrate would have been well advised if he had given more time for reflection to the accused.[64]

Even in a case of confession recorded by a Magistrate in the form of question and answers, where questions virtually amounted to cross-examination of the accused the Supreme Court held that the rejection of confession was proper.[65]

It is quite injudicious on the part of the Magistrate to go in the company of the Police Officers to the jail premises for recording a confession, as it is likely to be mis-understood or mis-interpreted by others.[66] Where the Magistrate recorded the confession in his chamber, and it was closed, and the police men were sitting on a parapet wall of the veranda, which abutted the court room, it was held that the possibility of duress was ruled out.[67]

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55. *Queen-Empress* v. *Nga Paw Lon,* (1884) SJLB 289.
56. *Chatru* v. *State,* AIR 1953 Bilaspur 3 : 1953 Cr LJ 708.
57. *Ramesh Ch. Choudhury* v. *Mokeswar Khataniar,* (1961) 1 Cr LJ 464. Confession voluntary, *Ram Lal* v. *State,* 1994 Cr LJ 736 (para 4) (J&K).
58. *Jagta* v. *State of Haryana,* AIR 1974 SC 1545.
59. *Mukand Singh* v. *Emperor,* 1927 PC 215; **See also** *Emperor* v. *Sher Singh,* AIR 1933 Lah 388.
60. *Ratan Goud* v. *State of Bihar,* AIR 1959 SC 18.
61. *Vali Isa Mahmed* v. *State,* (1962) 1 Cr LJ 755 : 1963 Guj 135 **following** *Sarwan Singh* v. *State of Punjab,* AIR 1957 SC 637.
62. *Gendra Brahma* v. *State of Assam,* 1981 Cr LJ 430 (Gau).
63. *Kadraka Sitana* v. *State,* 1976 Cr LJ 414 (Ori).
64. *H W. Roberts* v. *State of Assam,* AIR 1985 SC 823; **See also** *Heramba* v. *State of Assam,* AIR 1982 SC 1595.
65. AIR 1981 SC 200.
66. *Birey Singh* v. *State,* 1953 Cr LJ 1817 All : 1953 All 78.
67. 1985 Cr LR (Mah) 96.

3. CONFESSION

The word 'confession' has not been defined anywhere in the Act. A 'confession' is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime.[68] A confession is a statement which either admits in terms the offence or at any rate substantially all the facts which constitute the offence.[69]

Admission includes confession. Statement is genus, admission is species and confession is sub-species.[70]

A confession differs from an admission.

(1) A confession is a statement made by an accused person, which is sought to be proved, against him in a criminal proceeding to establish the commission of an offence by him; while an admission usually relates to a civil transaction and comprises all statements amounting to admissions as defined in Section 18.

(2) A confession, which if deliberately and voluntarily made, will be accepted as conclusive in itself of the matters confessed.[71]

(3) A confession always goes against the person making it; an admission may be used on behalf of the person making it under the exceptions provided in Section 21.

(4) The confessions of one of two or more accused jointly tried for the same offence can be taken into consideration against the co-accused (Section 30). But an admission by one of several defendants in a suit is no evidence against another defendant.

A composite disclosure statement made by one of the accused relating to all the weapons allegedly used for the commission of the crime cannot be said to a confession.[72]

See comment on Section 17, *supra*.

4. RECORDING OF CONFESSION

Omission to obtain the signature of the accused at the end of confession is curable under Section 463 Cr.P.C. and it was held that the said confession would be admissible.[73]

5. ESSENTIALS OF A CONFESSION

Admissions and confessions are exceptions to the hearsay rule, they are placed in the category of relevant evidence in Sections 17-30 presumably on the ground that, being declarations against the interest of the person making them, they are probably true. Their probative value does not depend upon their communication to another, though, just like any other piece of evidence, they can be admitted in evidence only on proof which can be offered by witnesses who heard the admission or the confession, as the case may be.[74] Before a confession is relied on, it must be clear and unequivocal, whether it is a judicial or extra-judicial confession. Where the alleged confession was made by a large number of

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68. STEPHEN'S DIGEST, 12th Edn., Art. 22; *Queen-Empress* v. *Babu Lal*, (1884) 6 All 509, 539 (FB); *Queen Empress* v. *Nana*, (1889) 14 Bom 260 (FB); *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Bhaju Majhi*, ILR (1929) 57 Cal 1062 : AIR 1930 Cal 291.

69. *Dhanapati De* v. *Emperor*, AIR 1946 Cal 156.

70. *Sahoo* v. *State of U.P.*, AIR 1966 SC 40.

71. *Queen-Empress* v. *Sangappa*, (1889) Unrep Cr C 463, Cr R No. 22 of 1896; *Emperor* v. *Narayen*, (1907) 9 Bom LR 789, 801 : 32 Bom 111 (FB); an admission is not a conclusive proof of the matters admitted, but may operate as an estoppel.

72. *Gopalakrishnan* v. *State of Kerala*, 1996 Cr LJ 2438 (para 13) (Ker).

73. *State of T.N.* v. *Nalini*, 1999 Cr LJ 3124 (paras 128 and 129) (SC) : AIR 1999 SC 2640, **overruling** *Abdul Razak Shaikh* v. *State of Maharashtra*, 1988 Cr LJ 382 and *Neharoo Mamgtu Satnami* v. *Emperor*, AIR 1937 Nagpur 220 : 1937 (38) Cr LJ 642.

74. *Sahoo* v. *State of U.P.*, AIR 1966 SC 40; extra-judicial confession need not be addressed to any particular person, *Luku Paike* v. *State of Orissa*, 1995 Cr LJ 1207 (para 9) (Ori).

persons before a *panchayat*, it was held to be more in a gener and vague term and could not be relied upon.[75]

Before a confession can be accepted in evidence, it must be established by cogent evidence what were the exact words used by the accused. Even if so much is established, prudence and justice demand that such evidence cannot be made the sole ground of conviction. It may be used only as a corroborative piece of evidence.[76] The Supreme Court prescribed this guideline in a case where it held that the evidentiary value of a confession was not destroyed by the facts that the accused was taken from one place to another because of the non-availability of a Magistrate there and that a police-station was in the vicinity of the judicial lock-up.

If it appears that the confession has been improperly induced, then the Court is bound to exclude it, no matter how true it may be.[77] Where the Magistrate did not ask any question whatsoever to ascertain whether the accused was making the confession voluntarily, it was held that the High Court was not at all justified in entertaining the confession as a piece of evidence.[78] Where confession was made under fear on account of threat given by the village *patel*, it had lost its credibility.[79]

Where the effect of the statements might at most be described as suggesting the inference that the accused committed the crime, but they did not show that the accused admitted in terms the offence, or substantially all the facts which constituted the offence, the statements individually or taken together do not amount to a confession of the crime.[80] Where the accused on questioned pleaded guilty but did not explain the exact crime or accusation, the same did not amount to admission of guilt.[81]

A confession must either admit in terms the offence, or at any rate substantially all they acts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not itself a confession. A statement that contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to have been confessed. A statement which, when read as a whole, is of an exculpatory character and in which the prisoner denies his guilt is not a confession and cannot be used in evidence to prove his guilt.[82]

If the confession is an extra-judicial confession, it must pass the test of reproduction of exact words. The reason or motive for confession and the person in whom confidence is reposed by the accused are essential for its truthfulness.[83]

An admission of a fact, however incriminating, but not by itself establishing the guilt of the maker of such admission, does not amount to a confession within the meaning of Sections 24 and 25 of the Evidence Act.[84] A statement made under S. 164 of the Criminal Procedure Code, which does not amount to a confession, can be used against the maker as an admission within the purview of Ss. 18 to 21.[85] In a case, a truck driver made a statement under Section 18 of the Customs Act, that he was not aware that the packages which were loaded in the truck were contraband goods and they were not loaded under his instructions, it was held that it was not a confession within the meaning of Section 21.[86] Where the

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75. *Kishan Lal* v. *State of Rajasthan*, 1999 Cr LJ 4070 (paras 23 and 24) (SC) : AIR 1999 SC 3062, **reversing** 1998 Cr LJ 452 (Raj).
76. *Sahoo* v. *State of U.P.*, AIR 1966 SC 40.
77. *Emperor* v. *Bhagi*, (1906) 8 Bom LR 697, 699. **Contra :** *Valiyaveetil Ashraf* v. *State*, 1994 Cr LJ 555 (para 32) (Ker).
78. *Preetam* v. *State of M.P.*, AIR 1997 SC 445. **Also see** *Naresh* v. *State*, 1997 Cr LJ 3793 (All).
79. *Narain* v. *State of M.P.*, 1998 Cr LJ 3183 (paras 6 and 7) (MP).
80. *Om Prakash* v. *State of U.P.*, AIR 1960 SC 409 **reversed** AIR 1957 All 388; *Pakala Narayanaswamy* v. *Emperor*, AIR 1939 PC 47; *Palvinder Kaur* v. *State of Punjab*, AIR 1952 SC 354. Accused not admitting his complicity in crime, *Valiyaveetil Ashraf* v. *State*, 1994 Cr LJ 555 (para 22) (Ker).
81. *Tarakeswar Prasad Sah* v. *State of Orissa*, 1994 Cr LJ NOC 121 (Ori), **relying on** 1966 Cr LJ 68 (SC).
82. *Abdul Hanan* v. *State of Orissa*, (1963) 2 Cr LJ 229; *Om Prakash* v. *State of U.P.*, AIR 1960 SC 409 **following** *Pakala Narayanswami* v. *Emperor*, AIR 1939 PC 47; *Veera Ibrahim* v. *State of Maharashtra*, AIR 1976 SC 1167; *Jasoda Haldar* v. *Sailendranath Samantha*, 1957 Cr LJ 707: AIR 1957 Cal 372; *Ashutosh Roy* v. *State*, 1959 Cr LJ 1197 : AIR 1959 Ori 159; *Anwarul Hasan* v. *State*, 1953 Cr LJ 385 : AIR 1953 All 142; *Palvinder Kaur* v. *State of Punjab*, AIR 1952 SC 354; *Behera Tanti* v. *State*, 1950 Ori 202; *Lal Chand* v. *Rex*, 1951 Ajmer 15; *Ram Chandra Singh* v. *State*, ILR (1973) 56 Pat 528.
83. (1985) 2 Cr LC 189 : (1985) 1 Ori LR 638; *Palani* v. *State*, 1993 Cr LJ 1679 (para 18) (Mad).
84. *Kanda Padayachi* v. *State of Tamil Nadu*, AIR 1972 SC 66; *Sohar Singh* v. *State of Bihar*, AIR 1966 Pat 448.
85. *Ghulam Hussain* v. *King*, (1949) 52 Bom LR 508 : 77 IA 65.
86. *Veera Ibrahim* v. *State of Maharashtra*, AIR 1976 SC 1167.

accused stated that he killed the deceased because of the threat to kill him with an axe, it was held that the statement, being self-exculpatory, did not amount to confession.[87] Where the statement made by the accused contained an admission that she had placed the dead body of her husband in a trunk and had carried it in a jeep and thrown it into a well, but with regard to the cause of the death, the statement made by her was that her husband had accidentally taken a poisonous substance which was meant for washing photos, erroneously thinking it to be a medicine, it was held that the statement read as a whole was exculpatory in character and that the whole statement was inadmissible in evidence.[88] When the accused makes an extra-judicial confession saying that, as the deceased threatened to kill him, he killed the deceased, it is self-exculpatory and it does not amount to a confession.[89]

Where the accused gave reasons in his statement before a Magistrate, for giving blows by a dagger on the body of the deceased, it was held that it amounted to a confessional statement.[90] The accused, seven days after being remanded to judicial custody made confession before the Magistrate giving full length of the role played by him alongwith the other accused and the Magistrate certified that in his opinion the confession was voluntary. It was held that it could not be said that the accused was pressurised by the police or prevailed upon by any extraneous influence to make confession as prior to it he had been in police custody and was produced before the Magistrate on three occasions.[91] Where the accused stated that, as he presumed that the deceased would kill him he committed the offence, it was held that such statements giving the reason amount to a plea of justification but not a denial of what he did so it was not self-exculpatory, and hence it was admissible.[92] A statement by the accused to the effect that he fired the rifle amounts to an admission of a grave incriminating circumstance, though he did not say that he had fired to kill or to cause such bodily injury as was likely to result in the victim's death.[93]

An admission of a gravely incriminating fact is not in itself a confession.[94]

Any confessional statement not relating to the alleged crime, which is not the subject matter of the indictment, cannot be relevant under this section and cannot be relied upon.[95]

6. HELD NOT AMOUNTING TO A CONFESSION

Where the accused keeps silence and does not speak, it would not amount to a confession of guilt; the confession should be an unequivocal one, admitting the commission of the crime.[96] Where the accused does not implicate himself either directly or indirectly, it cannot be a confession.[97] Where the Honorary Secretary of a Co-operative Society was found to have deposited lesser amount that what he received from the members towards the share money, he wrote a letter, on being threatened by the President of the Society with criminal proceedings, stating that out of inexperience he made a mistake in totalling the amount, and Rs. 17/- was due on him, which he deposited, it was held that it was only an explanation and not an admission of guilt of misappropriating the money.[98] Where a person admitted that he accompanied the co-accused as an informer, it was held that it did not amount to a confession.[99] Where an accused stated that he was the owner of the knife which caused the death and was in recent

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87. *Jaisingh Madakami* v. *State*, 1986 Cr LJ 117 (Ori); *Vallabha alias Munna Govan* v. *State of Gujarat*, (1962) 2 Cr LJ 540 (Guj).
88. *Palvinder Kaur* v. *State of Punjab*, (1953) SCR 94 : AIR 1952 SC 354; **See further** *Keshoram Bora* v. *State of Assam*, AIR 1978 SC 1096: 1978 Cr LJ 1089; *Mohan Lal* v. *Ajit Singh*, AIR 1978 SC 1183 : 1978 Cr LJ 1107; *Bhagwan Singh Rama* v. *State of Haryana*, AIR 1976 SC 1797, noted elsewhere under this section.
89. *Jaisingh Madakami* v. *State*, 1986 Cr LJ 117 (Ori); *Vallabha alias Munna* v. *State*, (1962) 2 Cr LJ 540 (Guj).
90. *Amar Singh* v. *State*, AIR 1956 MB 107 : 1956 Cr LJ 408.
91. *State of T.N.* v. *Kutty*, 2001 Cr LJ 468 SC (paras 15, 17 and 18) : AIR 2001 SC 2778.
92. *Bnda Kirsoni* v. *State*, ILR 1965 Cut 369 : (1905) 31 Cut LT 804; *Anand Prakash* v. *State*, (1960) 62 Punj LR 781.
93. *Ram Chandra Singh* v. *State*, ILR (1977) 56 Pat 528.
94. *Palvinder Kaur* v. *State of Punjab*, ILR (1953) Punj 107 : 1953 SCR 94.
95. *Rajkishore Sahu* v. *State*, 1983 Cr LJ 1715 (Ori).
96. *Isher Dass* v. *State*, AIR 1954 J & K 19 : 1954 Cr LJ 505.
97. *Harbans Singh* v. *State*, AIR 1960 Cal 722 : 1960 Cr LJ 1577; *State* v. *Rambali*, AIR 1953 All 163.
98. *Anwarul Hasan* v. *State*, AIR 1953 All 142 : 1953 Cr LJ 385.
99. *Kanan* v. *State of Kerala*, AIR 1979 SC 1127; *Provash Kumar* v. *King*, AIR 1951 Cal 475 : 52 Cr LJ 819; In re : *Vokkaligara Yengtappa*, AIR 1952 Mad 535; *State* v. *Rambali*, AIR 1953 All 163.

possession of it, it is not a confession.[1] Where the accused stated before *Panchayatdars* that the other accused gave her a bottle for being kept in safe custody, and she produced that bottle containing arsenic, it was held that, it was not a confession.[2] Where the accused makes a statement giving out some facts, which if true, would bring his act within the general exceptions of Sections 96-105 of the Penal Code, such statements cannot held to be a confession.[3] Where a mother stated that she put her child into the pond, it was held that it was not a confession of murdering the child, but might be an admission of an incriminating fact, especially when the cause of the child's death was not known.[4] Where an accused wrote on a piece of paper in Assamese, in answer to the questions of the witnesses about the whereabouts of the wife and three daughters of the accused, and that paper showed that they were not in this world, it was held that it was not a confession and was, at the most, an admission of a fact, admissible under Section 21 of the Act. It was further held that even the oral statements are of the same category.[5]

The statement of the accused recorded by an official referred in Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1988 cannot be used as evidence for prosecution in the form of confession.[6]

7. MADE BY AN ACCUSED

The expression 'accused person' in Section 24 and the expression 'a person accused of any offence' in Section 25 have the same cannotation and describe the person against whom evidence is sought to be led in a criminal proceeding. It does not predicate a formal accusation against him at the time of making the statement sought to be proved, as a condition of its applicability.[7]

Where a Customs Officer making inquiry under Section 107 or Section 108 of the Customs Act, recorded a statement, it was held that the Customs Officer was not a police-officer and, secondly, the person against whom enquiry was made was not an accused person. And therefore, it is not statement made by a person accused of any offence within the meaning of Section 24.[8]

Section 24 refers not only to a person who is an accused at the time when he made a confession, but also to one who becomes an accused subsequently. The section refers to the status of the person, at the time when the confession is being considered by the court and when he is undoubtedly an accused person.[9] When a person states that he has done certain acts which amount to an offence, he accuses himself of committing the offence, and the statement is, therefore, a confession by an "accused person" within the meaning of this section.[10]

The moment a suspicion is entertained by a person that for all practical purposes, he would become an accused, and if he makes self-incriminating statements subsequently and if he is induced by any promise, threat or violence for making the statements, such statements are inadmissible under this section though he becomes an accused at a later stage.[11] When a confession was made before a report was given to the police and when the person confessing was accused of an offence by others by that time, it was held that the confession must be regarded as one made by an accused person.[12] Where a person made a confession during the course of investigation in another case, it was held relevant.[13] Where the statements were recorded under Section 40 of Foreign Exchange Regulation Act, and it was contended

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1. *Behera Tanti* v. *State*, AIR 1950 Ori 202 : 51 Cr LJ 1493.
2. Re : *Vokkaligare Yengtappe*, 1952 Cr LJ 1150 : AIR 1952 Mad 535.
3. *Gopal* v. *The Crown*, AIR 1950 HP 18 : 51 Cr LJ 786 **following** *Narayanaswamy* v. *Emperor*, AIR 1939 PC 47.
4. *Kalliani* v. *State of Kerala*, 1961 Ker LT 201.
5. *State of Assam* v. *Upendranath Rajkhowa*, 1975 Cr LJ 354 (Gau).
6. *Shahid Khan* v. *Director of Revenue Intelligence, G.O.I.*, 2001 Cr LJ 3183 (para 48) (AP).
7. *State of U.P.* v. *Deoman Upadhyaya*, AIR 1960 SC 1125; *Punja Mava* v. *State of Gujarat*, AIR 1965 Guj 5.
8. *Perey Rustomji Basta* v. *State of Maharashtra*, AIR 1971 SC 1087; *Ramesh Chandra* v. *State of W.B.*, AIR 1970 SC 940; *K.I. Pavunny* v. *Asstt. Collector (HQ), Central Excise Collectorate*, (1997) 3 SCC 721 : 1997 SCC (Cri) 444.
9. *Viran Wali* v. *State*, AIR 1961 J & K 11 **relying on** *State* v. *Memon*, AIR 1959 Bom 534; *Amin* v. *State*, AIR 1958 All 293; *Emperor* v. *Cunna*, AIR 1920 Bom 270 (FB); *Santhoki Beldar* v. *Emperor*, AIR 1933 Pat 149 (FB); *Pakala narayanaswamy* v. *Emperor*, AIR 1939 PC 47; *R.* v. *Bhagwandas*, AIR 1941 Bom 50; *Smith* v. *Emperor*, AIR 1918 Mad 111.
10. *Santhoki Beldar* v. *Emperor*, AIR 1933 Pat 149 : (1932) 12 Pat 241 (FB). **See also** In re : *Ahmad*, (1950) Mys 82.
11. *Amin* v. *State*, AIR 1958 All 293 : 1958 Cr LJ 462.
12. In re : *Ahmad*, AIR 1950 Mys 82; *Santoki Beldar* v. *Emperor*, AIR 1933 Pat 149.
13. *Public Prosecutor* v. *Kandi Katla*, AIR 1943 Mad 661.

that those statement s were not hit by Section 24 of the Evidence Act, as the maker was not an accused at the time of making the statement, it was held that the contention was not available to him.[14]

8. CONFESSION OF THE CO-ACCUSED

A distinction is made between the effect of a confession as against the maker and as against others. A rule of caution has been adopted by all courts that A should not be convicted on the basis of B's confession without material corroboration.[15] However, confessional statement of a co-accused can be taken into consideration for confirmation of the conclusion as to the participation of the accused in the commission of crime.[16] Where there was reasonable ground to believe that the other accused had conspired together in committing the offence, confession of the one accused could be used against the other accused also.[17]

Where the accused police official stated that the deceased party started firing at the police party which necessitated the opening of fire on them and the first part of his statement was not proved from the evidence on record, the second part of his statement could be utilised as an admission. However, the other police official will not be bound by such admission.[18]

Confession of a co-accused cannot be treated as substantive evidence[19] and made basis of conviction of the accused who made no confessional statement.[20] The extra-judicial confession of the co-accused, without any direct or circumstantial evidence recorded regarding the involvement of the accused in the said event, cannot form the sole basis of conviction of the accused.[21]

Where the confession of the co-accused was rejected by the High Court and he was acquitted, his confession could not be used to corroborate the confession of the accused.[22]

9. INVOLUNTARY CONFESSION

If the facts and the circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the Court may refuse to act upon the confession even if it is admissible in evidence, *e.g.* the instant case.[23] Where the accused was allowed three hours time during which period he was kept near the undertrials in the presence of a number of Police Officers, it was held that it was not voluntary.[24] Extra-judicial confession cannot be said to be voluntary when the same was obtained after a prolonged custody of the accused for than 14 days in the police station. Such confession cannot be relied upon without corroboration.[25] Tape recording of the alleged extra-judicial confession made to a total stranger denotes influence and involuntariness.[26] Where the Magistrate failed to ascertain the voluntary character of the confessional statement, it could not form the basis of conviction of the accused.[27] Where the accused was brought to the Court in custody about two months after being granted bail on his surrender in the Court, for recording of his confessional statement, it was held that the action was indicative of asserting authority, if not coercing or forcing a confession and it was not voluntary.[28] Where the accused in custody was not allowed to meet his family or any other relative for a period of three months and he categorically stated that the Recording Officer obtained his signatures on some written papers under threat promise and coercion, the confession could not be said to be voluntary.[29]

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14. *Deputy Director, Enforcement Directorate Madras* v. *P. Mansoor Md. Ali Jinnah*, 1989 Cr LJ 2138.
15. *Birey Singh* v. *State*, AIR 1953 All 785.
16. *Hari Charan Kurmi* v. *State of Bihar*, AIR 1964 SC 1184.
17. *Ammini* v. *State of Kerala*, AIR 1998 SC 260 : 1998 Cr LJ 481 (para 22) (SC).
18. *Brijlala Pd. Sinha* v. *State of Bihar*, AIR 1998 SC 2443 : 1998 Cr LJ 3611.
19. *Balbir Singh* v. *State of Orissa*, 1995 Cr LJ 1762 (para 5) (Ori).
20. *Maharaj Deen* v. *State*, 1996 Cr LJ 506 (paras 15, 18 and 19) (All). **See also** *Burja Panda* v. *State of Orissa*, 1996 Cr LJ 904 (para 4) (Ori).
21. *Raj Kumar* v. *State of Bihar*, 2001 Cr LJ 3570 (para 11) (Jharkhand).
22. *State of T.N.* v. *Kutty*, 2001 Cr LJ 4168 (SC) (para 19) : AIR 2001 SC 2778.
23. *Pralhad D. Gajbhiye* v. *State of Maharashtra*, 1996 Cr LJ 2558 (para 9) (Bom).
24. *State* v. *Thingnam Dhabalo Singh*, AIR 1955 Mad 1 : 1955 Cr LJ 139
25. *Palani* v. *State*, 1993 Cr LJ 1679 (para 18) (Mad), **relying upon** *Hari Ram* v. *State*, 1972 Cr LJ 961. **Also see** *Nathu* v. *State of U.P.*, AIR 1956 SC 56 : 1956 Cr LJ 152. **Also see** *State of H.P.* v. *Raj Kumar*, 1994 Cr LJ 894 (para 24) (HP); confession in police custody, *Kausar Ali Gazi* v. *State*, 1996 Cr LJ 1745 (para 29) (Cal).
26. *State of Haryana* v. *Ved Prakash*, 1994 Cr LJ 140 (para 5) : AIR 1994 SC 468.
27. *Shivappa* v. *State of Karnataka*, AIR 1995 SC 980 (paras 5 and 8).
28. *Kanti alias Kanta* v. *State of U.P.*, 1994 Cr LJ NOC 428 (All).
29. *Hardev Singh* v. *Union of India*, 2000 Cr LJ 2585 (para 48) (P&H). **See also** *Shahid Khan* v. *Director of Revenue Intelligence, G.O.I.*, 2001 Cr LJ 3183 (para 46) (AP).

10. VOLUNTARY CONFESSION

Where the accused spent four days in judicial custody and was not under the influence of the investigating officer, confession made before the executive magistrate was held to be voluntary.[30] Where the investigating police officer stated in the evidence that the accused made the confession after he 'tackled' the accused, it was held that it cannot be said that any undue pressure was exerted so as to render the confession involuntary.[31] Where the accused admitted: "I have misappropriated securities of the order of Rs. 20,00,000 of the Bharath Insurance Co. Ltd., I have lost this money in speculation", the High Court did not consider it safe to rely upon it, as it considered that, it was made under circumstances which implied an offer of amnesty being granted to him. He made that confession to a chartered accountant who was appointed by the Central Government to investigate into the affairs of the Insurance Co. Before the High Court, it was contended that the accused thought it best to make a statement because, by doing so, he hoped to avoid the discovery of his entire scheme of conspiracy which had made it possible for him to mis-appropriate such large amount. According to the High Court, even if the confession was made for that purpose, it would not be voluntary. The Supreme Court, however, differed from the High Court and held that the confession was voluntary.[32] Where the confession was retracted at a late stage in the Sessions Court, it was held that it is a strong circumstance in favour of the confession being held to be voluntary.[33] Where there was inordinate delay between the willingness of the accused to confess and the actual day of recording, it was held that the voluntary character of the confession under Section 164 Cr. P.C. cannot be doubted.[34] Where one of the persons arrested along with the accused died in the lock-up allegedly due to physical torture but neither the prosecution nor the defence could show how he died in police custody and defence did not ask the Investigating Officer about the result of the inquiry conducted by the Magistrate into the matter, in such circumstances the voluntariness of the confession recorded by the Judicial Magistrate could not be doubted.[35] The statement made by the person summon under Section 40 of the Foreign Exchange Regulation Act, 1973 cannot be presumed to be always involuntary.[36] Merely because the confession was recorded a day or so before the police remand was to expire, it does not become involuntary.[37]

11. TEMPORAL NATURE—SPIRITUAL EXHORTATION

An accused charged with murder, being a few days short of fourteen, was told by a man who was present who was not a constable, "Now kneel you down, I am going to ask you a very serious question, and I hope you will tell me the truth, in the presence of the Almighty." The accused in consequence made certain statements. It was held that the statements were admissible in evidence.[38] The inducement must be of a temporal kind, *i.e.* not spiritual or religious. Confessions obtained by spiritual exhortations are admissible in evidence. A mere exhortation to tell the truth is not objectionable.[39] When one makes a statement, consequent on moral exhortation or suggestion to speak the truth in the name of God, if it relates to the charge, it is admissible, unless it is shown that it influenced his mind with respect to the escape from the charge.[40]

Where a priest was charged for contravention of Foreign Exchange Regulation Act, he stated that 'it is written in moral theology that penal laws do not oblige in conscience which means that only after

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30. *Abdul Razak* v. *State of Maharashtra*, AIR 1970 SC 283.
31. *Rajib Domb alias Raju Domb* v. *State*, ILR 1963 Cut 567 : 29 Cut LT 531; *Thingom Sashikumar and others* v. *Manipur Admn.*, (1963) 2 Cr LJ 562; *State of Orissa* v. *Sorji dei*, ILR 41 Cut LT 1144; *State* v. *Mitu*, ILR 1977 Cut 113 : 1977 CrLJ 1018 (Ori); *State* v. *Shankariya*, 1977 Cr LJ 684 (Raj); *State of Orissa* v. *Suruji Dei and another*, 1976 Cr LJ 938 (Ori). **Also see** *Kailash* v. *State of U.P.*, 1994 Cr LJ 142 (para 4) (SC) : AIR 1994 SC 470 (paras 4 and 5).
32. *R.K. Dalmia* v. *Delhi Administration*, AIR 1962 SC 1821; *Nand Lal More* v. *State*, (1965) 1 Cr LJ 393.
33. *Findal* v. *State*, 1953 Cr LJ 1900 : AIR 1954 HP 11 : 1984 Cut Cri J 150; *State of Orissa* v. *Chakradhar Sahu*, (1983) 2 Cr LJ 532.
34. *Kirpa* v. *State*, 1952 Cr LJ 1495 : 1952 HP 68.
35. *Lokeman Shah* v. *State of W.B.*, 2001 Cr LJ 2196 (para 4) (SC) : AIR 2001 SC 1760.
36. *C. Sampath Kumar* v. *Enforcement Officer, Enforcement Directorate, Madras*, (1997) 8 SCC 358.
37. *State of T.N.* v. *Nalini*, 1999 Cr LJ 3124 (para 405) (SC) : AIR 1999 SC 2640.
38. *Wild's case*, 1885 Moody CC 452.
39. *King-Emperor* v. *Akhileshwari Prasad*, ILR (1925) 4 Pat 646.
40. *Chaman Lal* v. *State*, 1976 Cr LJ 1310 (J&K).

catching me I became a sinners it was held that the statement could be said to be pointer to their genuineness, voluntariness and reliability.[41] Where an extra-judicial confession was made to an independent and dis-interested witness who had given evidence, it was held that, that it was voluntary.[42] Where various details were given by the accused which could be only within his personal knowledge, before the customs authority, and when the accused did not complain before the Magistrate, it was held, repelling the contention that he was beaten before he made the statements, that it was voluntary.[43] Where the interrogation was for about two hours in the presence of many persons, regarding the discovery of the handle of a knife, of which the blade was found lying near the dead body, it was held that the disclosure statement was voluntary and it falls within the purview of even Section 27 as the 'fact discovered' was the place from which various articles were produced.[44] Where a police officer read over to the accused the statements which he had taken from others and then told him, "I know the whole thing now", and the accused thereupon made a statement in consequence of which he was arrested and his confession was subsequently recorded before a Magistrate, it was held that the confession recorded under those circumstances was free and voluntary and was perfectly admissible in evidence.[45] A confession otherwise voluntary does not cease to be so simply because the accused aside the confession on his own belief that to confess his guilt would be the only way of saving himself, unless such expectation under which the accused made the confession was shown to have been the result of any inducement, threat or promise.[46] Where the head of a *Mutha* holds an important position among the people there and if the accused was threatened with sound beating, it was held that it may reasonably be inferred that the confession was extracted by threat from a person who, in the opinion of the accused, had sufficient authority to put him in the imminent fear of his life or at any rate to seriously injure him unless he confessed his crime.[47] When an accused person was given a promise that he would be made an approver, it was held that it was not a voluntary confession.[48] A confession made by an accused on the faith of a promise made by the police-officer making the inquiry that he would get off if he made a disclosure,[49] or would get a pardon,[50] was held inadmissible in evidence. Similarly, a confession made before a Magistrate who had told the accused that if he made a full confession he would take that fact into consideration in awarding punishment, was inadmissible.[51] Where the accused, in making a confession before a Magistrate, admitted the *Sahib* who told him to tell the truth and he would be released, it was held that the confession was vitiated by inducement.[52] The two accused stubbornly refused to confess. They were taken separately to the senior officer and each confessed. The court presumed that they must have been influenced.[53] Where the accused was promised with immunity from further action, it was held that such confession cannot be acted upon.[54] Where a delinquent officer made a confession to his superior officer who administered an oath to the delinquent, though he was not empowered to do so, it was held by the Supreme Court that such confession was inadmissible under this section.[55] Where an accused made an extra-judicial confession of rape, when he was a sort of prisoner in the house of the prosecutrix and his hands were tied, it was held that it was given under a threat and is not admissible.[56] Where accused was brought tied down by a rape before a *Panchayat* and the *Kotwal* threatened him that

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41. *Fr. Maria Pires* v. *Director of Enforcement, Delhi*, 1982 Cr LJ 461.
42. *Tanguru Pradhan* v. *State of Orissa*, (1984) 2 Crimes 576.
43. *Sri Pad Bhiku Nagavellar* v. *State of Mysore*, 1971 Cr LJ 1636 (Mys).
44. *Mohan Lal* v. *Ajit Singh*, AIR 1978 SC 1183.
45. *King-Emp.* v. *Rango*, (1901) 3 Bom LR 404.
46. *Kesavan Gopalan* v. *State*, AIR 1954 Tri/Co 456 : 55 Cr LJ 1498.
47. *Sanatan Badchat* v. *State*, AIR 1953 Ori 149 : 1953 Cr LJ 1008.
48. *State* v. *Babulal and Berumal*, AIR 1956 Raj 67 : 1955 Cr LJ 550; *Devappa* v. *State*, (1972) 1 Mys LJ 499.
49. *Mussammat Nurai* v. *The Empress*, (1881) PR No. 8 of 1882 (Cr).
50. *Emperor* v. *Misri*, ILR (1909) 31 All 521 (FB); *Emperor* v. *Khetal*, ILR (1923) 45 All 300; *Muhammad Shaffi* v. *Queen-Empress*, ILR (1899) PR No. 1 of 1899 (Cr); *Emperor* v. *Cunna*, ILR (1920) 22 Bom LR 1247, in which there was a difference of opinion amongst the Judges as to the admissibility of evidence of the accused in virtue of S. 339(2) of the Criminal Procedure Code.
51. *Queen-Empress* v. *Nga Paw Lon*, (1884) SJLB 289.
52. *Emperor* v. *Dinanath Sundarji*, ILR (1920) 45 Bom 1086 : 23 Bom LR 338.
53. *Satbir Singh* v. *State of Punjab*, AIR 1977 SC 1294.
54. *Devabpa* v. *State*, (1972) 1 Mys LJ 499; **relying on** *Nader Chand Karar* v. *State of W.B.*, AIR 1971 SC 1871.
55. *Brijbasi Lal Srivasthava* v. *State of M.P.*, AIR 1979 SC 1080.
56. 1979 Raj Cri C 85.

if he did not speak the truth he would be handed over to the police, it was held that it was not voluntary but was given under a threat.[57]

In every case the court has to see from the circumstances of the case whether the confession was due to inducement, threat or promise.[58] It has to be seen whether certain words used have or have not had certain effect on the mind of the accused.[59] It is only when a confession is made under an inducement, threat or promise and that too proceeding from a person in authority that it is not relevant under this section. The mere existence of the threat, inducement or promise is not enough, unless, in the opinion of the court, the said threat, inducement or promise shall be sufficient to cause a reasonable belief in the mind of the accused that, by confessing, he would get an advantage or avoid any evil of a temporal nature in reference to the proceedings against him. While the opinion is that of the court, the criterion is the reasonable belief of the accused. The section, therefore, makes it clear that it is the duty of the court to place itself in the position of the accused and to form an opinion as to the state of his mind in the circumstances of the case.[60] When once the existence of inducement, threat or promise has been established there is a presumption of its continuance till the accused makes the confession, and the prosecution has to prove that the impression caused in the mind of the accused was fully removed when the accused made the statement. [61]

Every threat, inducement or promise, even though emanating from a person in authority such as customs officer, does not make the confession irrelevant under Section 24.[62] Where the customs officer inquring in connection with smuggling of goods told a person that the law requires such person to tell the truth and explained the consequences of Section 193, Penal Code, it was held such explanations by the customs officer do not constitute threat under this section.[63]

While dealing with an extra-judicial confession, the court has to consider from the point of view of the confessing accused as to how inducement, threat or promise proceeding from the person in authority would operate on his mind.[64]

12. BURDEN OF PROOF

It must be affirmatively proved that the confession was free and voluntary. Bald assertion by the prisoner that he was threatened, tutored, or that inducement was offered to him cannot be accepted as true without further evidence.[65] It is not necessary for the accused to prove positively that the confession was brought about by any inducement, threat or promise, but there must be something to show that there was such inducement, threat or promise, or to point out certain circumstances which arouse suspicion.[66] A judgment convicting the accused on the basis of his confession is no evidence regarding the truth of the confession.[67]

The words 'appears to the court' in Section 24, however, show that positive proof of the fact that there was any inducement, threat, or promise is not necessary. The confession itself, the evidence adduced on behalf of the prosecution and the defence, if any, and all the circumstances of the case have to be taken into consideration. If, upon such consideration, the court feels that the accused made the

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57. *Podyami Kowa* v. *State of M.P.*, (1984) 3 Crimes 65.
58. In re : *Ahmad*, AIR 1950 Mys 82; *Jangir Singh* v. *State*, AIR 1952 Pepsu 19.
59. *Satbir Singh* v. *State of Punjab*, AIR 1977 SC 1294; *Mst. Kistoori* v. *State of Rajasthan*, AIR 1967 Raj 98 : 1967 Cr LJ 518.
60. *Pyare Lal Bhargava* v. *State of Rajasthan*, AIR 1963 SC 1094; *Shobha Param* v. *State of M.P.*, AIR 1959 MP 125; In re : *Ahamad*, AIR 1950 Mys 82.
61. *Shoba Param Kachhi* v. *State of M.P.*, AIR 1959 MP 125 : 1959 Cr LJ 476; *Sparks* v. *R*, (1964) 1 All ER 727 (PC) (It continues even when he acknowledges a caution that he was not obliged to say anything).
62. *Perey Rustomji* v. *State of Maharashtra*, AIR 1971 SC 1087; *H.P. Admn.* v. *State of Maharashtra*, AIR 1971 SC 44; *Son's Vallabhdas Liladhar* v. *Asst. Collector, Customs*, AIR 1965 SC 481; *Hazari Singh* v. *Union of India*, AIR 1973 SC 62.
63. *Percy Rustomji* v. *State of Maharashtra*, AIR 1971 SC 1087; *Heera, H Advani* v. *State of Maharashtra*, AIR 1971 SC 44; (Statement under section 171A Sea Customs Act).
64. *Satbir Singh* v. *State of Punjab*, AIR 1977 SC 1294.
65. *Hemraj Devilal* v. *State of Ajmer*, AIR 1954 SC 462; *Nathu* v. *State of U.P.*, AIR 1956 SC 56; *Vidhyamati* v. *State*, AIR 1951 HP 82; *Krishna Nandhan Prasad Verma* v. *State*, 1958 Pat 166; *Mst. Bhagan* v. *State of Pepsu*, 1955 Pepsu 33; *Nathuram* v. *State*, AIR 1951 HP 1.
66. *Krishna* v. *State*, ILR (1951) 1 Raj 929.
67. *Birey Singh* v. *State*, AIR 1953 All 785.

confession as a result of any inducement, threat or promise having reference to the charge or, even if the court entertains a reasonable doubt that there was such inducement, threat, or promise, it cannot be satisfied that the confession is free and voluntary; and hence it has to exclude the confession from consideration. But the court cannot exclude a confession on mere conjecture or surmise.[68] The appropriate meaning of the word "appears" is "seems". It imports a lesser degree of probability than proof. The standard of a prudent man is not completely displaced, but the stringent rule of proof is relaxed. Even so, the laxity of proof permitted does not warrant a court's opinion based on pure surmise. A *prima facie* opinion based on evidence and circumstances may be adopted as the standard laid down.[69] It is not necessary to prove strictly that a confession was brought about by improper inducement. It is quite sufficient, for excluding the confession, if circumstances are placed before the court, which would make it appear that the confession was so induced.[70] It is only when it appears to the court that the confession has been made as a result of some inducement held out by a person in authority that it becomes irrelevant; a mere possibility of there having some inducement is not sufficient.[71] The word 'appears' is not so strong as the expression 'proved'.[72] The word 'appear' imports judicial discretion. It shows that the court has to decide the preliminary question of admissibility, on a consideration of the evidence and surrounding circumstances.[73] The court has to determine the sufficiency of the inducement, threat or promise as affording certain ground, to see whether the ground would appear reasonable for the supposition mentioned in the section, and to judge whether the confession appears to have been caused in consequence of the inducement, threat or promise. A well-grounded conjecture, reasonably based on the circumstances in the evidence, is sufficient to exclude the confession. The mentality of the accused rather than that of the person in authority has to be taken into account by the court in determining the effect of the inducement, threat or promise. It has to consider not merely the actual words, but also the words, coupled with the acts or conduct of such person, which might be construed by the accused, in his position, as amounting to an inducement, threat or promise. A perfectly innocent expression, coupled with the acts and conduct and the surrounding circumstances may amount to the same.[74]

If the accused raises an objection to the admissibility of the confession, there may be a formal decision as to the relevancy. That question may be decided during the trial for the purpose of this section.[75]

The practice of attestation of a confessional statement by certain witnesses was deprecated by the Kerala High Court on the ground that it prejudices the accused to safeguard whose interest the legislature has enacted Sections 24-26 and it has no legal sanction behind it.[76]

Confession made by an accused during the time when there was some restriction on his movement or where he was under some sort of surveillance by a person in authority will not *ipso facto* vitiate the confession as being involuntary, and such confession is not hit by the provisions of this section.[77]

The threat, to come under this section, must be sufficient to give the accused grounds for supposing that, by making the confession, he would gain an advantage.[78]

When a promise, inducement or threat is held on or made to an accused person by or on behalf of the prosecutor, and, as a result, business books and documents are produced by the accused person, those books and documents stand on the same footing as an oral or written confession which is brought into existence by a promise, inducement or threat, and are inadmissible in evidence against the accused person at his trial.[79]

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68. *Krishnanandan Prasad Verma* v. *State*, AIR 1958 Pat 166; *Mst. Bhagan* v. *State of Pepsu*, AIR 1955 Pepsu 33.
69. *Pyare Lal Bhargua* v. *State of Rajasthan*, AIR 1963 SC 1094.
70. *Emperor* v. *Thakur Das Malo*, AIR 1943 Cal 625; *Raggha* v. *Emperor*, AIR 1925 All 627 : (1925) 23 ALJR 821 (FB); *Partap Singh* v. *Crown*, (1925) 6 Lah 415.
71. *Hashmat Khan* v. *The Crown*, ILR (1934) 15 Lah 856.
72. *Khiro Mandal* v. *The Emperor*, ILR (1929) 57 Cal 649.
73. *Emperor* v. *Narayen*, (1907) 9 Bom LR 789, 799 : 32 Bom 111 (FB).
74. *Emperor* v. *Panchkari Dutt*, ILR (1914) 52 Cal 67 : AIR 1925 Cal 587; *Queen-Empress* v. *Basvanta*, (1990) 2 Bom LR 761 at 765 : ILR 25 Bom 168.
75. In re : *Navanith Ammal*, AIR 1939 Mad 3.
76. *M. Karunakarn* v. *State*, , ILR 1960 Ker 1202; In re : *Bottu Satha Lavadan and another person is authority*, AIR 1939 Mad 515.
77. *Harbansingh* v. *State*, (1968) 71 Bom LR 599.
78. *S.N. Mukerjee* v. *Queen-Empress*, (1899) 1 UBR (1897-1901) 147.
79. *Rex* v. *Barker*, (1941) 2 KB 381.

An approver's disclosure is in its very nature always the result of an inducement or promise, *viz.*, the inducement to confess upon a promise of pardon; and it is only when it is exhorted as the result of undue duress, such as threats or violence, that this section is applicable and the statement must be ruled out of evidence.[80]

A promise or threat made to the accused will not render a confession made by another, who was present and heard the inducement, irrelevant.[81]

The mere existence of the threat, inducement or promise is not enough, but, in the opinion of the court, the said threat, inducement or promise shall be sufficient to cause a reasonable belief in the mind of the accused that, by confessing, he would get an advantage or avoid any evil of a temporal nature in reference to the proceedings against him; while the opinion is that of the court, the criterion is the reasonable belief of the accused.[82] An unambiguous confession, free from any suspicion suggesting its falsity, is no doubt a valuable piece of evidence, but the court has to be satisfied with its voluntariness and that it was not the result of inducement, threat or promise, or some consideration suggesting that it may not be true, before accepting the same.[83]

Where the accused was not warned that, even in case of confession, he would not be taken as an approver, such an omission was held to be fatal to the admissibility of the confession as it casts great doubt on the voluntary nature of the confession.[84]

This section does not require positive proof as defined in Section 3, of improper inducement. A well-grounded conjecture, reasonably based upon circumstances disclosed in the evidence, is sufficient to exclude a confession.[85]

It is not sufficient to render a confession irrelevant under this section that there may have been added to it a statement which has been improperly induced by threat or promise. In order to make a confession irrelevant it must be shown that the confession itself was improperly induced.[86] It is the duty of the court to inquire very carefully into all the circumstances under which the confession was made, and particularly as to the length of time during which the accused was in custody.[87]

13. HAVING REFERENCE TO THE CHARGE AGAINST THE ACCUSED PERSON

'Charge' means a criminal charge or a charge of an offence in a criminal proceeding. The inducement, threat, or promise, must be with reference to the offence, with which the accused is charged. A confession obtained by an inducement relating to some collateral matter unconnected with the charge will not be excluded from evidence.

Where an accused, having confessed his guilt, is acquitted under one Act, his confession would be admissible in trial for offences under other Acts which too were tied along with that Act.[88]

14. PERSON IN AUTHORITY

This expression does not mean a person having control over the prosecution of the accused.[89] The test would seem to be whether the person has authority to interfere in the matter under inquiry as, for example, a person engaged in the apprehension, detention or prosecution of the accused, or who is

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80. *Ram Nath* v. *The Crown,* ILR (1928) 9 Lah 608.
81. *Reg.* v. *Jacobs,* (1849) 4 Cox 54.
82. *Pyare Lal Bhargua* v. *State of Rajasthan,* AIR 1963 SC 1094.
83. *Santhosh Kumari (Smt.)* v. *State,* 1973 Cr LJ 1651.
84. **Re** : *Madithati Venkata Reddi,* AIR 1951 Mad 331.
85. *Mst. Bhukin* v. *King-Emperor,* AIR 1948 Nag 344 : ILR (1948) Nag 147.
86. *Emperor* v. *Narayen,* (1907) 9 Bom LR 789, 801 : 32 Bom 111 (FB).
87. *Queen-Empress* v. *Narayan,* (1901) 3 Bom LR 122, 124 : 25 Bom 543.
88. *State of T.N.* v. *Nalini,* 1999 Cr LJ 3124 (para 85) (SC) : AIR 1999 SC 2640, **overruling** *Bilal Ahmad Kaloo* v. *State of A.P.,* (1997) 7 SCC 431 : 1997 Cr LJ 4091 : 1997 AIR SCW 3574 : AIR SC 3483 (para 5).
89. *Reg* v. *Navorji Dadabhai,* (1872) 9 BHCR 358.

empowered to examine him[1] and any concern or interest in it would be sufficient to give him that authority.[2] The belief of an accused that the persons to whom he made a confession were "persons in authority" is not sufficient to bring them within the term.[3]

The following persons are held to be '**person in authority**' within the meaning of this section:—

(a) Chief Secretary of the State Government.[4]

(b) Officers of the Department of Customs under the Customs Act.[5]

In *Sevanti Lal* v. *State of Maharashtra,*[6] the Supreme Court observed that it is undisputed that the concerned officers of the Department of Customs were "persons in authority" within the meaning of Section 24. In *Hazari Singh* v. *Union of India*[7], it was observed at p. 64, citing *Soni Vallabhadas* v. *Asst. Collector of Customs*[8] and *R.C. Mehta* v. *State of West Bengal*[9] that confessions made to a customs officer have been held by this court not to come within the inhibition of Sections 24 and 25, because they are not police officers, within the meaning of those provisions. These cases cited held that customs officers were not police officers, within the meaning of Section 25 and did not deal with the question whether these were persons in authority. The distinction between "persons in authority" and "Police Officers" is not borne in mind by the Supreme Court in *Hazari Singh* case. It has to be considered as authority only for the proposition that customs officers and not police officers under Section 25. A person may be a "person in authority" without being a police officer.[10]

A confession made by an accused in the custody of customs officials for purposes of enquiry, in pursuance of an order passed by a Magistrate, would not come within the purview of the Sections 24 and 25 of the Act.[11] Where the statement of the accused was that the confession recorded by the Magistrate was not voluntary and true and it had no actual date and time of occurrence, it was held to be unreliable.[12]

(c) Assistance Sales Tax Officer under the Orissa Sales Tax Act.[13]

(d) Excise Officer.[14]

(e) If a person is interested, or is concerned with the investigation of a case, it would be sufficient to give him that authority. Village *Lambardars and Zaildars* are part of the machinery for investigation and their duty is to report a cognizable offence and join the investigation of such offences. They are persons in authority.[15]

(f) Panchayat.—Where an inducement to confess a crime proceeded from the members of a *panch*, the Bombay High Court held that the confession made in virtue of the inducement was not bad, the

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1. *Santokhi Beldar* v. *King-Emperor*, ILR (1932) 12 Pat 241 (FB).
2. *Emperor* v. *Kutub Bux*, (1929) 57 Cal 488.
3. *Emperor* v. *Ganesh Chandra Goldar*, ILR (1922) 50 Cal 127.
4. *Pyarelal Bhargava* v. *State of Rajasthan*, AIR 1963 SC 1094.
5. *Sevanti Lal Karsondas Modi* v. *State of Maharashtra*, AIR 1979 SC 705; *Soni Vallabhdas Liladhar* v. *Assistant Collector, Customs* AIR 1965 SC 481; *State of Punjab* v. *Barkat Ram*, 1962 SC 276; *Laxman Padma Bhagat* v. *State*, AIR 1965 Bom 195 : (1965) 2 Cr LJ 616; *Illias* v. *Collector of Customs*, AIR 1970 SC 1065; **See Contra** *Hazari Singh* v. *Union of India*, AIR 1973 SC 62; *Jai Singh* v. *State*, AIR 1967 Del 14; *Badaku Joti Svant* v. *State of Mysore*, AIR 1966 SC 1746.
6. AIR 1979 SC 705.
7. AIR 1973 SC 62.
8. AIR 1965 SC 481.
9. AIR 1970 SC 940. **See also** *Arya Abhushan Bhandar* v. *Union of India*, 1999 AIHC 1302 (para 8) (All), the Court referred to *Harbans Singh Sardar Lenasingh* v. *The State of Maharashtra*, AIR 1972 SC 1224 : 1972 Cr LJ 759 and *Percy Rustomji Basta* v. *The State of Maharashtra*, AIR 1971 SC 1087 : 1971 Cr LJ 933.
10. *State of Maharashtra* v. *P.K. Pathak*, AIR 1980 SC 1224.
11. *Assistant Collector Central Excise* v. *C. Fernandes*, 1983 SCC (Cri) 109 : (1984) 3 SCC 512.
12. *Mumammal* v. *Inspector of Police, Dindigul*, 1996 Cr LJ 163 (paras 10 and 12) (Mad).
13. *State of Orissa* v. *Bhouri Lal*, (1962) 1 Cr LJ 835.
14. *Harban Singh* v. *State*, (1968) 71 Bom LR 1234.
15. *Mst. Bhagan* v. *State*, 1955 Pepsu 33 : 1955 Cr LJ 537; *Nannhu Goboriya* v. *State*, AIR 1960 MP 132; *Raghunath Pandit* v. *State of Bihar*, 1977 Cr LJ (NOC) 164 (Pat).

member of the *panch* not being a person in authority.[16] But the Calcutta and Patna High Courts have held that a *panch* is a person in authority within the meaning of this section. A confession is inadmissible when, in answer to the enquiry of the accused as to whether he would be saved from the consequences if he confessed, the *panchayat* assured him that he would be let off if he disclosed everything, and the confession was made as the result of such assurance.[17] Where the village *panch* told the accused that the truth had come out and that he had better say what he knew and the accused thereupon confessed his guilt, it was held that the confession was inadmissible in evidence.[18] Where the extra-judicial confession was alleged to have been made before a *Panchayat* which failed to obtain the signature of the accused on the *panchnama* and the Investigating Officer present there at that time failed to arrest him, it was held to unreliable.[19]

A village Magistrate.[20]

Sarpanch of a *Grama Panchayat*.[21]

Sarpanch or *Naib Sarpanch* under Orissa Grama Panchayat Act. Member of a Panchayat.[22]

A house surgeon of a hospital ward on whose recommendation the confirmation of a probationary nurse attached to the ward is made.[23]

A police *patel* of a village.[24]

Mukhiya and *Chaukidar*, a collecting *Panch*.[25]

Mukhia, Sarpana and *Panch* under Bihar Panchayat Raj Act.[26]

(g) An Assistant Registrar of Co-operative Societies making an enquiry under the Co-operative Societies Act can be considered as a person in authority and is not necessarily inadmissible.[27]

(h) An attorney engaged in the investigation of a crime, for the purpose of getting up a prosecution, is a person clothed with authority to offer such an inducement.[28] So is a police officer invested with the powers of an Additional District Magistrate.[29] Similarly, a Sub-Inspector's man, holding out an inducement to the accused that the Sub-Inspector would treat him leniently if they confessed, is a person in authority and the confession so made is inadmissible.[30] Where a confession was made to a *tahsildar* who was a person of some influence in the village, but had no interest in the prosecution of the accused, other than the interest which every citizen has in the maintenance of law and order, and the confession was made in consequence of questions put, and a promise made by him, it was held that as the *tahsildar* was not a person empowered to examine the accused or one who could legitimately influence the course of the proceeding, the confession was not excluded by this section.[31]

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16. *Emperor* v. *Fernand*, ILR (1902) 4 Bom LR 785. A *mukhia* is not a person in authority; *Emperor* v. *Hari Piari*, ILR (1926) 49 All 57.
17. *Emperor* v. *Ganesh Chandra Goldar*, ILR (1922) 50 Cal 127.
18. *Kunja Subudhi* v. *King Emperor*, ILR (1928) 8 Pat 289.
19. *Virendra Kumar Yadav* v. *State*, 1996 Cr LJ 231, (paras 32-35 and 37) (Del).
20. *Thandray Mudaly* v. *Emperor*, ILR 26 Mad 38.
21. *Mohanlal* v. *State*, 1972 Raj LW 437; In re : *Sathalavadan*, AIR 1939 Mad 515 (President of a Panchayat Vigilance Committee).
22. *Mulimayandi* v. *Emperor*, 45 MLJ 845; *Emperor* v. *Mohanlal*, ILR 4 All 46.
23. *Mst Viran Wali* v. *State*, AIR 1961 J&K 11 : (1961) 1 Cr LJ 258; *Bhagabaticharan* v. *Emperor*, AIR 1933 Cal 644; *Ganga Prasad* v. *Emperor*, AIR 1945 Cal 360; *Emperor* v. *Attur Sing*, AIR 1932 Sind 64; *Smith* v. *Emperor*, AIR 1918 Mad 111.
24. *Nanhu Gobrya* v. *State*, 1960 MP 132 : 1960 Cr LJ 605; *Emperor* v. *Fakira Appaya*, AIR 1915 Bom 249.
25. *Dukharan Mian* v. *State of Bihar*, 1971 BLJR 641; *Ram Din* v. *Emperor*, AIR 1948 All 101; *Emperor* v. *Ganesh Chandra*, AIR 1923 Cal 458; *Emperor* v. *Haripiari*, AIR 1926 All 737; *Kunja Subudhi* v. *Emperor*, AIR 1929 Pat 275.
26. *Ratan Goud* v. *State of Bihar*, AIR 1959 SC 18.
27. In re : *Narayana Murbii*, AIR 1942 Mad 654.
28. *The Queen* v. *Croydon*, (1846) 2 Cox 67.
29. *Jas Bahadur Thapa* v. *King-Emperor*, AIR 1930 Rangoon 227 : ILR (1929) 8 Ran 52.
30. *Bulaqi* v. *The Crown*, (1928) 9 Lah 671.
31. *Santokhi Beldar* v. *King-Emperor*, ILR (1932) 12 Pat 241 (FB); *Taula* v. *King-Emperor*, AIR 1929 Oudh 272 : ILR (1929) 5 Luck 91 (it was held that a ziladar serving under a big estate was a person in authority.

W, a travelling auditor in the service of the G.I.P. Railway Company, having discovered defalcations in the accounts of the accused, who was booking-clerk of the company, went to him and told him that, "he had better pay the money than go to jail", and added that "it would be better for him to tell the truth", after which the accused was brought before the Traffic Manager in whose presence he signed a receipt for, and admitted having received, a sum of Rs. 826.80. The accused was subsequently put on his trial for criminal breach of trust in respect of this and of other sums. It was held that the words used by W, the travelling auditor, constituted an inducement to the accused to confess, that W was a person in authority, and that the receipt signed by the accused was, therefore, not admissible in evidence on his trial.[32]

(i) A person in authority within the meaning of Section 24 should be one who, by virtue of his position, wields some kind of influence over the accused.[33]

(j) Superior Officer.—The accused, a post-office clerk, under suspicion, fell at his departmental inspector's feet begging to be saved if he disclosed everything, and the inspector replied that he would try his utmost to save him if he told the truth; whereupon the accused said that he would tell anything to the post-master, and the postal inspector said that he would do all he could to get the accused saved. It was held that such inducement held out by the postal investigating officer, who was a person in authority, had the effect of inducing the accused to make a confession of his guilt.[34]

(k) Military Authorities.—Where extra-judicial confession was made before military authorities voluntarily and without any threat or coercion, it could be relied upon and could form the basis of conviction.[35]

The captain of a vessel said to one of his sailors suspected of having stolen a watch—"That unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle—you are a damned villain, and the gallows is painted on your face." It was held that the confession made by the sailor after this threat was not receivable in evidence on his trial for the felony.[36]

It was held that the following persons are **Not person in authority:**

Officer of Railway Protection Force.[37]

Officer under Prevention of Food-Adulteration Act of 1954.[38]

Gaothia under the abolition of *Goathia* system in Bihar.[39]

Ram Rakhi not being a police officer, confession made before him admissible.[40]

The accused made a confession of his guilt to the medical officer of his regiment, who told the accused, when he was under his treatment in the hospital, that it would be better for him to tell the truth as to how he came about certain wounds. It was held that the medical officer was not a person in authority in respect of any proceedings which might be contemplated or taken against the accused who made the confession to him; and that all that he represented to the accused was that, on medical grounds, it would be for the accused's benefit if he told the truth as to how he came by the wounds.[41]

Statement made to a person appointed as an investigator under Section 33, of the Insurance Act is not covered by Section 24.[42]

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32. *Reg.* v. *Navroji Dadabhai*, (1872) 9 BHCR 358; *Nga Pye* v. *King-Emperor*, (1904) 2 LBR 316.
33. *Nannhu Gobrya* v. *State of M.P.*, AIR 1960 MP 132.
34. *Bhagabaticharan Patra* v. *Emperor*, ILR (1933) 60 Cal 719.
35. *State of Maharashtra* v. *Vinayak Shivajirao Pol*, 1998 Cr LJ 306 (Bom). **Also see** *Pakkirasamy* v. *State of T.N.*, AIR 1998 SC 107 : 1998 Cr LJ 89.
36. *Rex* v. *Parratt*, (1831) 4 C&P 570.
37. *Ramesh Chandra Mehta* v. *State of W.B.*, AIR 1970 SC 940.
38. *State* v. *Subash Chand Sharma*, (1985) 1 FAC 69.
39. *Dhuleswar Behera* v. *State*, 1982 Cr LJ 2346 (Ori).
40. *Khageswar Khatua* v. *State*, 1993 Cr LJ 2374 (para 8) (Ori), held *Madan Undu Barik* v. *The State*, (1977) 43 CLT 512 : 1977 Cr LJ NOC 132 (Ori) no longer a good law, **following** *Raj Kumar Karwal* v. *Union of India*, AIR 1991 SC 45 : 1991 Cr LJ 97.
41. *Emperor* v. *Mahamadbuksh*, (1906) 8 Bom LR 507.
42. *R.K. Dalmia* v. *Delhi Administration*, AIR 1962 SC 1821.

A coffee planter is not a person in authority *vis-a-vis* a cooly in the estate.[43]

When a father found that his son had committed a crime and he put pressure on the son to disclose the truth, it cannot be stated that the confession so obtained was extorted as the father was not a person in authority to whom it was made.[44]

Though a Police Officer is undoubtedly a person in authority within this section, the cases of confession made to a police officer, or made while in the custody of a police officer, are dealt with specifically in Sections 25 and 26 respectively. In the case of a person in authority, other than a police officer, the confession would be inadmissible only if the conditions laid down in the latter part of Section 24 are satisfied. In the case, however, of a confession to a police officer it is absolutely inadmissible. A confession, made while in the custody of a police officer, is inadmissible, unless it is made in the immediate presence of a Magistrate.

Confessional statements made by persons who are not in custody are admissible unless they are procured as mentioned in Section 24 or are made to a police officer under Section 25, whereas confessional statements while in custody, except those in the presence of the magistrate under Section 26, are not provable except to the extent permitted by Section 27 of the Act. It is only so much of information which distinctly relates to the facts thereby recovered, and no more, is admissible under Section 27.[45]

15. RETRACTED CONFESSION

It is not the law that once a confession was retracted, the Court should presume that it was tainted and be thrown overboard.[46]

Though a retracted confession which was believed to be true and voluntarily made can form the basis for a conviction, the rule of practice and prudence requires that it should be corroborated by independent evidence.[47] Dealing with the recovery of the smuggled goods by the customs officials, the Supreme Court, held that if the retracted confessions made before customs officers by the accused persons, is corroborated in material particulars by other independent evidence, it is admissible and can be relied on.[48] Retracted confession can legally form the basis of conviction, though as a matter of prudence courts try to look for corroboration from some independent source so as to satisfy their conscience that the confession is true.[49] Where the retracted confession was corroborated by medical and circumstancial evidence, conviction and sentence was sustained.[50] A charge was held to be proved when confession was corroborated by independent evidence of a circumstantial character. In *H.W. Roverts* v. *State of Assam*,[51] the Supreme Court held that the circumstantial evidence lent assurance to the genuineness and voluntary nature of the retracted confessions. It is sufficient if there is general corroboration of the important incidents mentioned in the confessions. It is not necessary that a retracted confession should be

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43. In re : *Ahmed*, AIR 1950 Mys 82.
44. *Biswambar Meher* v. *State of Maharashtra*, 1989 Cr LJ 271.
45. *Punjamava* v. *State of Gujarat*, AIR 1965 Guj 5; *State of U.P.* v. *Deo Man Upadhyaya*, AIR 1960 SC 1125.
46. *State of T.N.* v. *Kutty*, 2001 Cr LJ 4168 (paras 12 and 13) (SC) : AIR 2001 SC 2778.
47. *Subramania Goundan* v. *State of Madras*, AIR 1958 SC 66; *K.I. Pavunny* v. *Asstt. Collector (HQ), Central Excise Collectorate*, (1997) 3 SCC 721 : 1997 SCC (Cri) 444; *Sakharam Shankar Bansode* v. *State of Maharashtra*, 1994 Cr LJ 2189 (para 4) : AIR 1994 SC 1594.
48. *State of Maharashtra* v. *P.K. Pathak*, AIR 1980 SC 1224.
49. *Abdul Ghani* v. *State of U.P.*, AIR 1973 SC 264; *Nika Ram* v. *State*, 1972 Cr LJ 204 (HP); *Pyarelal Bhargava* v. *State of Rajasthan*, AIR 1963 SC 1094; *Kandhai S/o. Manfer* v. *State of Vin. Pra.*, AIR 1953 Vin Pra 38; *Nandkumar* v. *State of Rajasthan*, (1963) 2 Cr LJ 702 : (1965) 2 SCR 890; *Himath Singh, Badhar Singh* v. *State of Gujarat*, AIR 1965 Guj 302; *Sarwan Singh, Ratan Singh* v. *State of Punjab*, AIR 1957 SC 637; *State of Bihar* v. *Ramchandra Prasad Sharma*, (1963) 2 Cr LJ 579; In re : *Ahmed*, AIR 1950 Mys 82; *Serajuddin Ahmed* v. *State*, AIR 1953 Assam 203; *Puran* v. *State of Punjab*, AIR 1953 SC 459; *Narayana Pillai* v. *State*, AIR 1954 Tri Co 321; *Sant Ram* v. *State*, AIR 1953 HP 105; *Muthuswamy* v. *State of Madras*, AIR 1954 SC 4; *Neelkantan Vasu* v. *State*, AIR 1954 Tri Co; *State* v. *Kanbi Vashram Kanju*, AIR 1959 Sau 129; *Mathai Mathew* v. *State*, AIR 1952 Tri Co 305; *Krishna Nandan Prasad Verma* v. *State*, AIR 1958 Pat 166; *Arjuna* v. *Indian Union*, AIR 1959 Ori 235; In re : *Ramaswamy Konar*, AIR 1954 Mad 1006; Mst. *Bhagan* v. *State of Pepsu*, AIR 1955 Pepsu 33; *Roshan Lal* v. *Union of India*, AIR 1965 HP 1; *Ganesh Gogai* v. *State*, AIR 1955 Assam 51.
50. *Jillela Madhu* v. *State of A.P.*, 1994 Cr LJ NOC 320 (AP). **Contra :** *Indrajit Deb* v. *State of Tripura*, 1995 Cr LJ 2715 (paras 17 and 18) (Gau).
51. AIR 1985 SC 823.

corroborated in each material particular.[52] Even if a confession is retracted, it is open to the court, after consideration of the whole evidence in the case, to come to the conclusion that the confession is true, provided that the confession is corroborated in material particulars by credible independent evidence[53]; but it cannot be relied upon unless found to be creditworthy.[54] Where an extra-judicial confession was retracted in a case of dacoity, it was held that, as a matter of caution and prudence, corroboration on material particulars which connected the accused with the crime in question is required before a conviction can be based upon a retracted confession.[55] The material particulars on which corroboration is required are the factum of crime and the identity of the participants in the crime.[56] The rule of prudence usually observed with reference to retracted confession does not require that each and every circumstance mentioned in the confession with regard to the participation of the accused person in the crime must be separately and independently corroborated. In the case of the person who has confessed but has resiled from his statement, general corroboration is sufficient. In addition, the court must feel that the reasons given for the retraction in the case of a confession are untrue.[57] The nature and extent of corroboration would depend on the object with which it is required; the object may be to dispel any doubt raised by the retraction, that the confession may be untrue, and the maker may have falsely implicated himself, or it may be to rebut the presumption applicable to an accomplice that he is likely to falsely implicate other persons. The point of contrast between 'general corroboration' and 'corroboration in material particulars' seems to be that the latter expression requires independent evidence which, in some way, reasonably connects or tends to connect the accused with the crime.[58] In *Madi Ganga* v. *State of Orissa*[59], it was held that general corroboration of a confession is sufficient to sustain conviction.[60]

The standard of corroboration required for a retracted confession of somewhat different from the standard of corroboration required for the evidence of an accomplice.[61] In *Subramania Goundan* v. *State of Madras,*[62] the court pointed out the distinction in the requirement regarding corroboration of retracted confession and the evidence of an accomplice in the following terms:—"Though under Section 133 of the Act a conviction is not illegal merely because it proceeds on the uncorroborated testimony of witnesses, illustration (b) to Section 114 lays down that a court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. It is absolutely necessary that what he has deposed must be corroborated in material particulars. Contrasting this with the statement of a person making a confession who stands on a better footing, one need only find out, when there is a retraction, whether the earlier statement, which was the result of remorse, repentance and contribution, was voluntary and true, or not, and it is with that object that corroboration is sought for. The standards of corroboration in the two are quite different. In the case of the person confessing, who has resiled from his statement, general corroboration is sufficient, while an accomplice's evidence should be corroborated in material particulars. In addition, the court must feel that the reasons given for the retraction in the case of a confession are untrue.[63]

The corroboration may be obtained from the facts and circumstances discovered before the confession is made.[64]

When the retracted confession is found to be untrue in many parts and uncorroborated in material particulars, it is not sufficient for a conviction.[65]

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52. *State of U.P.* v. *Boota Singh,* AIR 1978 SC 1770; *Pangambam Kalanjoy Singh* v. *State of Manipur,* AIR 1956 SC 9; *Bharat* v. *State of U.P.,* (1971) 3 SCC 950.
53. *Nathuram V. Godse* v. *Emperor,* ILR (1956) Punj 499 (FB).
54. *Uda alias Suda* v. *State of Rajasthan,* 2001 Cr LJ NOC 28 (Raj) : (2001) 1 Raj Cri C 723.
55. *Bandhan Sao* v. *State,* 1960 BLJR 268 : ILR 39 Pat 361; *Ahmad Kunju* v. *State,* ILR (1971) 2 Ker 30.
56. *Laloo* v. *State,* AIR 1953 Raj 214; *Baboo Ram* v. *State,* 1996 Cr LJ 483 (para 12) (All).
57. *Abdul Samad* v. *State,* AIR 1959 Ker 46; *Hemraj Devilal* v. *State of Ajmr,* AIR 1954 SC 462; *Balbir Singh* v. *State of Punjab,* AIR 1957 SC 216; *Subramania Goundan* v. *State of Madras,* AIR 1958 SC 66; *Nandalal More* v. *State,* (1965) 1 Cr LJ 393 (Punj); *Arjoon* v. *State,* (1963) 2 Cr LJ 234 (Ori); *Kunjan Vasu* v. *State of Kerala,* (1963) 2 Cr LJ 458 (Ker); *Mohinder Singh* v. *State of Rajasthan,* (1963) 1 Cr LJ 229.
58. In re : *Tadipamula Sathyanarayana,* AIR 1959 AP 419.
59. AIR 1981 SC 1165.
60. 1978 SCJ 248.
61. *Kurungalanga Luxman* v. *State,* (1964) 1 Cr LJ 464; *Subramania Goundan* v. *State of Madras,* AIR 1958 SC 66.
62. AIR 1958 SC 66.
63. *Mohinder Singh* v. *State of Rajasthan,* (1963) 1 Cr LJ 229.
64. *State* v. *Ramachandra Bhoi,* AIR 1965 Ori 175.
65. *Arjuna Lal Misra* v. *State,* AIR 1953 SC 411.

Where the confession was retracted, though it cannot be used against a co-accused, it can be used to a limited extent against the maker, as corroborating the evidence of a witness against him.[66]

Where retraction was made after nearly five years on the ground that confession was made as a result of torture by the customs authorities but there was no satisfactory explanation for belated retraction, retraction was held to be not genuine.[67]

Where *corpus delicti* is not traceable, the proof of murder depends on the retracted confession, and where the court is satisfied about the improbability of the manner of murder, it is not safe to base a conviction on such confession.[68]

Where accused Nos. 5 and 6 were acquitted of the charge of conspiracy under Section 302, read with Section 120-B of the Penal Code, and accused No. 5, was not charged under Section 302, IPC, read with Section 34, IPC, for the offence of murder for which accused Nos. 1, 6 and 7 were tried, it was held that the retracted confession of accused No. 5 cannot be relied upon against accused No. 6 in view of the fact that accused No. 6 who had been tried along with accused No. 5 was acquitted of the charge of conspiracy to commit murder; and accused No. 5 was not charged for the offence of murder under Section 302 read with Section 34.[69]

In *Arjun Lal Mishra* v. *State*[70], the High Court, in revision, upheld B's conviction, but acquitted A, after recording its findings. The conclusion of B's guilt rested solely on his retracted confession, which was not corroborated in material particulars and was devoid of truth in many substantial particulars, according to the Supreme Court. The Supreme Court observed that the conviction of B, based solely on the retracted confession, was opposed to law and could not be allowed to stand, as the High Court did not advert to the substantial truth of the story as narrated by the accused, but rested their view on a line of reasoning which was entirely at variance with the confession.

A conviction can be based on a retracted confession, if the confession was voluntary and true. The fact that the maker retracted from the confession during the examination of the accused under Section 313, Cr. P.C., and that the Magistrate who recorded it was not examined, is immaterial.[71]

A retracted confession could be made use of to indicate *prima facie* involvement of other accused.[72]

When the Court considers taking into consideration a retracted confession of a co-accused against a non-confessing accused under Section 30 of this Act, the proper way is first to marshal the evidence against the accused, excluding the confession altogether from consideration, and then to see whether, if it is believed, a conviction can safely be based on it. If it is acceptable of belief independently of the confession then, of course, it is not necessary to call the confession in aid. But cases may arise where a Judge is not prepared to act on other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession, and use it to lend assurance to other evidence and thus fortify himself in believing what, without the aid of the confession, he would not be prepared to accept. Thus it can not be made the foundation of the conviction but can only be used in support of the other evidence.[73]

The Court has to determine, in the first instance, whether a retracted confession is voluntary or has been improperly induced. If, upon weighing all the circumstances, the prisoner's denial and the probabilities, it appears to the judge that the confession has been improperly induced no matter however, true it may be, he is bound to exclude it.[74]

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66. *Paramhansa* v. *State*, AIR 1964 Ori 144.
67. *Sule Kareem* v. *Asstt. Collector of Customs (R&I)*, 1998 Cr LJ 3052, (para 13-A) (Bom).
68. *Ram Chandra* v. *State of U.P.*, AIR 1957 SC 381; *Birey Singh* v. *State*, AIR 1953 All 785.
69. *Vinayak* v. *State of Maharashtra*, AIR 1984 SC 1793.
70. AIR 1953 SC 411.
71. *Phatik Chandra Gogai* v. *State of Assam*, 1988 Cr LJ 24. **Also see** *Valiyaveetil Ashraf* v. *State*, 1994 Cr LJ 555 (para 26).
72. *Mohan Wahi* v. *State*, 1982 Cr LJ 2040 (Del).
73. *Mohinder Singh* v. *State of Rajasthan*, (1963) 1 Cr LJ 229; **referring to** *Kashmira Singh* v. *State of M.P.*, AIR 1952 SC 159; *Nathu* v. *State of U.P.*, AIR 1956 SC 56; *Ramparkash* v. *State of Punjab*, AIR 1959 SC 1.
74. In re : *Tadipamula Sathanarayana*, AIR 1959 AP 419.

Where an extra-judicial confession is the sheet anchor of the prosecution, and the accused has denied having made it, the court must see whether there is reliable and unimpeachable evidence in proof of the making of the confession.[75]

A true and voluntary statement cannot be rejected merely because the accused retracted from it at the trial.[76]

A retracted confession of an accused can be taken into consideration along with other evidence for convicting a co-accused.[77]

As the confession is required to be clear, specific and unambiguous, its retraction should also not be ambiguous, vague or imaginary. The person alleging retraction of confession or his earlier inculpatory statement must satisfy the Court that he had withdrawn from that statement at the earliest possible time and such withdrawal from the statement cannot be pleaded to be presumed on imaginary grounds.[78]

16. EXTRA-JUDICIAL CONFESSION

Extra-judicial confession must be addressed to somebody and not the way one goes on shouting in the street that he/she had killed someone and the confession before the assembly of villagers called solely for confronting accused as to whether he had killed a certain person, does not amount to confession/extra-judicial confession.[79] Where the prosecution witness, assuming that the accused had committed patricide, asked him the cause of killing his father whereat he replied that he did it because he used to quarrel, by no stretch of imagination this can be said to be an extra-judicial confession made by the accused.[80] Where the extra-judicial confession did not disclose the name of the victim, it was held that it was an infirm statement and conviction cannot be based on such confession.[81] Where extra-judicial confession was said to be made to the first informer but it found no place in the F.I.R., rejection of the extra-judicial confession was held to be proper.[82]

Where a woman jumped in the well along with her children and, on being rescued, made a voluntary statement to the persons gathered there, it was held such statement is admissible in evidence and can be relied on.[83] Where the witnesses in evidence gave the substance and not the actual words of the extra-judicial confession made to them, it was held that the slight departure by the witness from the statement in the F.I.R. is insignificant and the evidence can be accepted by the court.[84] Where the witness deposed about the extra-judicial confession and he was quite disinterested and independent, and bore no animus against the accused, there could be no justification for disbelieving that evidence when it was corroborated by the evidence regarding recovery of the dead body and ornaments of the deceased at the instance of the accused.[85] Where there was not a suggestion given to the witness to whom extra-judicial confession was made that there was no confession as claimed and it was corroborated by medical evidence, it was held to be reliable.[86]

Regarding extra-judicial confession the evidentiary value depends on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to

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75. *Jogu Yadaiah* v. *State of A.P.*, (1980) 1 AP LJ 313 (DB); *Abdul Hye* v. *State of Assam*, (1983) Cr LJ (NOC) 93 (Gau). Inconsistent, uncorroborated retracted extra-judicial confession, *Chhittar* v. *State of Rajasthan*, 1994 Cr LJ 245 (para 3) : AIR 1994 SC 214.
76. *State of Orissa* v. *Bhuben Chirgun*, 1981 Cr LJ 1461 (Ori).
77. *Shrishail Nageshi Pare* v. *State of Maharashtra*, AIR 1985 SC 866.
78. *Taj Mohammad Khan* v. *State of Karnataka*, 1998 Cr LJ 2312 (para 15A) (Kant).
79. *Jadumani Khanda* v. *State*, 1993 Cr LJ 2701 (paras 6 and 7) (Ori).
80. *S.V. Chalke* v. *State of Maharashtra*, 1993 Cr LJ 3364 (para 7) (Bom).
81. *Akanman Bora* v. *State of Assam*, 1988 Cr LJ 573 (Gau). **Also see** *Giddu* v. *State of West Bengal*, 1998 Cr LJ 1798 (paras 9, 10, 11 and 12) (Cal).
82. *Udiya* v. *State of Rajasthan*, 1997 Cr LJ 516 (Raj).
83. *Basanti* v. *State*, 1959 Cr LJ 415 (Ori).
84. *Inderdas* v. *State of Rajasthan*, 1985 Cr LJ 1416 (Raj).
85. *Buty* v. *State of Orissa*, 1982 Cr LJ 938.
86. *Rangadhar Barik* v. *State*, 1996 Cr LJ 5 (paras 6 and 7) (Ori).

such a confession.[87] Where the witness, before whom the alleged extra-judicial confession was made, did not disclose it to the police or any body else for five days and he suspected that the accused had illicit relations with his wife, it was highly improbable that the accused made confessional statement to him.[88] The conduct of a witness to whom the confession was made, in keeping silent all the time before he swore to an affidavit reflects adversely on his credibility.[89] Where the witness to whom extra-judicial confession was alleged to have been made behaved unnaturally in neither identifying the dead body nor informing the police or the relatives of the deceased regarding the involvement of the accused in the alleged offence and gave inconsistent version as to the substance of the confessional statement, it was held to be unreliable[90] but the extra-judicial confession made by the accused to his sister-in-law when she, seeing him with a gun, asked as to what had happened, was held to be natural and was relied upon and her failure to inform the police immediately was held to be immaterial as she was a rustic woman.[91] However, the extra-judicial confession allegedly made to a relative, a social worker who, though was with the police for two days, lodged a complaint with them after three days, was held to be surrounded by suspicious circumstances.[92]

Where a witness stated that the accused disclosed to him that he killed the victim, but when he tried to phone the police the accused ran away, it was held that the accused would be the last person to make such a voluntary statement to a stranger when his intentions were to run away and no reliance can be placed on such witness.[93] Where a witness deposed for the first time in the police station that the accused made an extra-judicial confession that he committed a mistake in killing his brother and the witness who was a stranger to the accused, never mentioned the extra-judicial confession to any one else, though he met a number of persons on the date of occurrence, it was held that it was unsafe to rely on the evidence of extra-judicial confession, more so when no motive was either alleged or proved against the accused in killing his brother.[94] Where two witnesses mentioned about the making of extra-judicial confession to them by the accused and where there was absence of cordial relationship between the accused and one of the witnesses and the witnesses did not inform the investigation officer about the extra-judicial confession, it was held that as there was no evidence as to the witnesses being in the confidence of the accused, their evidence as to the making of confession cannot be relied on.[95] In the evidence there were verbal differences as to what the accused told the witnesses in his confession, and the accused had no previous association with the witnesses so as to repose confidence in them; it was held that the court would be justified in rejecting the alleged extra-judicial confession.[96] Where the testimony of the witnesses did not incriminate the accused, besides there were other discrepancies in evidence, he was entitled to acquittal.[97]

If the court believes the witness before whom the confession is made and it is satisfied that the confession was voluntary, a conviction can safely be founded on such evidence alone.[98] In proving the extra-judicial confession, the evidence must not lack plausibility but must inspire confidence in the court

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87. *Narayan Singh* v. *State of M.P.*, AIR 1985 SC 1678; *Abdul Munim Khan* v. *State of Hyderabad*, AIR 1953 Hyd 145; *Heramba Brahma* v. *State of Assam*, AIR 1982 SC 1595 (Confession to an undertrial in jail awaiting trial for dacoity not accepted). **Also see** *Kavita* v. *State of T.N.*, AIR 1998 SC 2473 : 1998 Cr LJ 3624.
88. *Dwarkadas Gehanmal* v. *State of Gujarat*, (1999) 1 SCC 57.
89. *Dharambir* v. *State*, 1982 Cr LJ (NOC) 4 (Del). **See also** *State of H.P.* v. *Diwana*, 1995 Cr LJ 3002 (para 21) (HP); *Kailash* v. *State of Rajasthan*, 1995 Cr LJ 3111 (para 8) (Raj).
90. *Virendra Kumar Yadav* v. *State*, 1996 Cr LJ 231 (Del).
91. *S.G. Gundegowda* v. *State*, 1996 Cr LJ 852 (para 33) (Kant).
92. *Balvinder Singh* v. *State of Punjab*, 1996 Cr LJ 883 (para 10) (SC) : AIR 1996 SC 607.
93. *Jagan Nath* v. *State of H.P.*, 1982 Cr LJ 2289 (HP). **Also see** *Mylsami alias Thoppan* v. *State*, 1994 Cr LJ NOC 76 (Mad). Witnesses strangers and deposing parrot like, unreliable, *Pradipta Kumar Mohanty* v. *State of Orissa*, 1996 Cr LJ 375 (para 4) (Ori); *State of Punjab* v. *Gurdeep Singh*, 1999 Cr LJ 4597 (para 26) (SC) : AIR 1999 SC 3724; confession to not a closely acquainted person and not a helpful person, *Sandeep* v. *State of Haryana*, 2001 Cr LJ 1456 (para 10) (SC) : AIR 2001 SC 1103.
94. *Lakhan Pal* v. *State of M.P.*, AIR 1979 SC 1620.
95. *Harihar Paik* v. *State*, 1985 Cr LJ 432 (Ori). **See also** *Kheraj Ram* v. *State of Rajasthan*, 1995 Cr LJ 3113 (para 9) (Raj).
96. *State* v. *Aru Pradhan*, 1985 Cr LJ 161 (Ori). **See also** *Niranjan Lal* v. *State of Haryana*, 1995 Cr LJ 248 (para 12) (P&H), **relying on** *Heramba Brahma* v. *State of Assam*, AIR 1982 SC 1593 : 1983 Cr LJ 149.
97. *Kanka alias Ouyen Ho* v. *State of Orissa*, 2001 Cr LJ NOC 63 (Ori) : (2000) 19 OCR 417; **See also** *Pratap Dehury* v. *State of Orissa*, 2001 Cr LJ NOC 78 (Ori) : (2000) 18 OCR 633.
98. *State of Rajasthan* v. *Mangilal*, 1981 Cr LJ 852 (Raj); *Laxmijani* v. *State*, 1986 Cr LJ 513.

before it is accepted.[1] Where the extra-judicial confession was suspicious, improbable and uncorroborated, the accused were held entitled to acquittal.[2]

Where a witness deposed to the substance and not the actual words of the confession, it can be accepted by a court[3] but where to neither of the two, it is not acceptable.[4] Evidence of oral confessions had to be received with great caution, but when there is nothing in the cross-examination of the witnesses to show that they had any motive for implicating the accused and when they deposed to the actual words uttered by the accused, there is no reason to discard the statements of the witnesses.[5] The exact words of an extra-judicial confession need not be proved in every case. It would be sufficient if the substance of those words spoken to by the accused is proved.[6] However, it was held that the exact words uttered by the accused, while giving the extra-judicial confession, should be proved and it is not safe to rely upon the impressions gathered by the witness from such confessions. Mere general statement that the prisoner confessed is insufficient.[7] If the exact words of the accused were not recorded, it is not safe to rely on such confessions.[8] If the witnesses do not depose to the exact words spoken by the accused while making the extra-judicial confession, such evidence is unworthy of credit.[9] Where the extra-judicial confession was the outcome of the consumption of liquor by both the witness and accused and the witness failed to reproduce the confession in the exact words of the accused or in even the words as nearly as possible, it was excluded from the purview of consideration.[10]

Antecedent recoveries cannot in any way be used to corroborate or to test the truth or otherwise of a confessional statement.[11]

Where there was an extra-judicial confession before a doctor, it was held in the absence of any corroboration by any witness, that the accused was entitled to benefit of doubt.[12]

If a confession is not hit by sections. 24, 25, 26 and 27 of the Evidence Act, and also falls outside the scope of Section 164 Cr. P.C., it would not only be admissible in evidence but, it could be good enough, if believed, to sustain a conviction on any charge.[13] The prosecution witness, who was interrogated by the police on the next of the occurrence, stated the extra-judicial confession made to him by the accused but it was recorded under Section 164 Cr.P.C., after a month. It could not be rejected as a belated version.[14]

Where the accused gave the confessional statement that she gave four axe blows on the head of her deceased husband and the dead body was buried in the house and, later, the dead body was recovered in a decomposed state, and no injuries on the body were visible because the body was highly decomposed, it was held that the confessional statement could not be rejected on the ground that only simple injury was mentioned in the postmortem report, and that she was liable to be convicted.[15]

The evidence of extra-judicial confession, in the very nature of things, is a weak piece of evidence. If the evidence adduced in respect of it lacks plausibility and does not inspire confidence in the court, it

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1. *Moti Gouduni* v. *State*, 1982 Cr LJ 2342 (Ori).
2. *Surinder Kumar* v. *State of Punjab*, AIR 1999 SC 215 : 1999 Cr LJ 267, at p. 268.
3. *Inderdas* v. *State of Rajasthan*, 1985 Cr LJ 1416 (Raj).
4. *Ghasiram Lakra* v. *State of Orissa*, 1997 Cr LJ 939 (para 7) (Ori).
5. *Raghuvir Singh* v. *State*, AIR 1955 MB 43.
6. *Krishnandan Prasad Varma* v. *State*, AIR 1958 Pat 166; *Mulk Raj* v. *State of U.P.*, AIR 1959 SC 902; *State of Orissa* v. *Machindra Majhi*, AIR 1964 Ori 100.
7. *Public Prosecutor* v. *Pasala Venkata Reddy*, AIR 1945 Mad 202; *Sultan* v. *Emperor*, AIR 1934 Sind 119; *Des Raj* v. *Emperor*, AIR 1928 Lah 858; *Mehar Singh* v. *State*, (1961) 63 Punj LR 742.
8. *Sohar Singh* v. *State of Bihar*, AIR 1966 Pat 448.
9. *Bhanwar Singh* v. *State*, 1988 Cr LJ 1054 (Raj); *Arjun Sahu* v. *State of Orissa*, 1988 Cr LJ 1086 (Ori).
10. *C.K. Reveendran* v. *State of Kerala*, 2000 Cr LJ 497 (para 4) (SC) : AIR 2000 SC 369.
11. *Abdul Salam* v. *State*, AIR 1954 J&K 1.
12. *Aklu Baraik* v. *State of Assam*, 1983 Cr LJ 1578 (Gau); *State of Orissa* v. *Adikanda Swain*, 1987 Cr LJ 603 (Ori).
13. *Nika Ram* v. *State*, 1972 Cr LJ 204 (HP); *Dhuleswar Behera* v. *State*, 1982 Cr LJ 2346 (Ori).
14. *State of A.P.* v. *Shaik Mazhar*, 2001 Cr LJ 3287 (para 17) (SC) : AIR 2001 SC 2427.
15. *Manguli Devi* v. *State of Orissa*, AIR 1989 SC 483. **Contra :** *Arumugham* v. *State*, 1994 Cr LJ 520 (Mad).

cannot be acted upon.[16] Where the prosecution was based on the testimony of a child eye-witness and there were circumstances raising serious doubts of the child claiming to be an eye witness and also destroying veracity of evidence regarding alleged confession the Supreme Court held acquittal inspite of the alleged confession was proper.[17] Any attempt of the investigating agency to introduce a false story about the removal of the ornaments of the deceased and their recovery from the accused would affect the credibility of the offence regarding the extra-judicial confession alleged to have been made by the accused.[18]

An extra-judicial confession made to one who is not a person in authority, and which is free from any suspicion as to its voluntary character and has also a ring of truth in it, is admissible against the accused and deserves to be acted upon.[19] It is a rule of prudence, particularly in cases of homicide and other grave offences, that it would not be safe to convict an accused person only on the evidence of an extra-judicial confession. The court would have to consider with great caution, whether it was natural for the accused person to have confided in and confessed to the person who is deposing to the confession. The relationship of that person with the accused is most material and vital. The court has to consider what has been confessed to, whether the same is consistent with the facts about the incident as deposed to by the witnesses, and whether the person deposing had any motive or other reason for falsely involving the accused person. If, after such careful scrutiny, the evidence of extra-judicial confession is regarded as acceptable and trustworthy, such evidence cannot be characterised as 'weak type evidence.[20] Where the accused allegedly confessed his guilt to a prosecution witness who was his childhood classmate and neighbour but not friendly or on visiting terms, probability of his making extra-judicial confession to such a witness could not be ruled out.[21] Where the extra-judicial confession was made before the father and brother of the deceased and their evidence was found to be trustworthy, it could not be discarded merely because they were relatives of the deceased.[22] Where extra-judicial confession was allegedly made to a close relative of the accused and his testimony was reliable and truthful and the delay of twenty days in recording his statement was explained by the Investigating Officer, conviction could be based on such extra-judicial confession.[23] Where an accused made two extra-judicial confessions, the first one to his brother-in-law, on the very night of the occurrence and the second one, to the neighbours immediately after his apprehension two days after the incident, it was held that, as the witnesses to whom the confessions were made were reliable and trustworthy having no animus against the accused, the two confessions were quite sufficient to warrant the conviction.[24]

Where the dead body of the victim was not traced, except for a human skeleton with skull and bones at the instance of the accused, there was evidence that the deceased was last seen in the company of the accused and there was recovery of a pair of slippers, a cycle, and some wearing apparel of the deceased at the instance of the accused, it was held that the extra-judicial confession was corroborated by the circumstances leading to the conclusion that the accused committed the murder.[25]

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16. *State of Punjab* v. *Bhajan Singh*, AIR 1975 SC 258 : 1975 Cr LJ 282, **followed in** *Sukhvinder Singh* v. *State of Punjab*, 1996 Cr LJ 632 (para 15) (P&H); *Jagta* v. *State of Haryana*, AIR 1974 SC 1545; *Ismail Ibrahim* v. *State*, 1975 Cr LJ 1335 (Gau). Weak piece of evidence, can be used for corroboration, *Chhinder Singh* v. *State of Rajasthan*, 1993 Cr LJ 1616 (para 12) (Raj).
17. *State of Delhi* v. *Vijay Pal*, AIR 1980 SC 1621.
18. *Jagta* v. *State of Haryana*, AIR 1974 SC 1545.
19. *Thimma* v. *State of Mysore*, AIR 1971 SC 1871; *State of U.P.* v. *M.K. Anthony*, AIR 1985 SC 48 (Confession of murder of wife and children to a close friend whose evidence found reliable), **followed in** *Riyasat* v. *State of U.P.*, 1993 Cr LJ 2834 (para 26) (All); *Darshan Lal* v. *State of J&K*, AIR 1975 SC 898; (Confession to uncle and cousin in an Inspector and commandant in BSF who was not person in authroity vis-a-vis the constable who made the confession was held admissible), **followed in** *Arjunan* v. *State*, 1993 Cr LJ 3113 (para 31) (Mad).
20. *Prabhakar Narayan* v. *State*, 1973 Cr LJ 246 Bom; *Thimma* v. *State of Mysore*, AIR 1971 SC 1871; *Ratan Goud* v. *State of Bihar*, AIR 1959 SC 18; *Ram Chandra* v. *State of U.P.*, AIR 1957 SC 381.
21. *State of Maharashtra* v. *Vilas Pandurang Patil*, 1999 Cr LJ 1062, 1067 (Bom).
22. *Bisi Chhuria* v. *State*, 1999 Cr LJ 1078, **following** *Kailash* v. *State of U.P.*, AIR 1997 SC 2835 (para 13).
23. *Ram Khilari* v. *State of Rajasthan*, AIR 1999 SC 1002 : 1999 Cr LJ 1450, 1451.
24. *Mathur Lohar* v. *State*, 1986 Cr LJ 877 (Cal). **See also** *Mayaram* v. *State of M.P.*, 1998 AIHC 368 (paras 14 and 16) (MP).
25. *Amar Layek* v. *State of West Bengal*, 1988 Cr LJ 1293 (Cal). **See also** *Balu Ram* v. *State of Rajasthan*, 1995 Cr LJ 3225 (para 9) : AIR 1995 SC 1943.

Where an extra-judicial confession was said to have been made, not immediately after the occurrence, but many days thereafter and, that too, to a person living about 80 to 90 miles away from the residence of the accused, it was held that such extra-judicial confessions could not be relied on, as the circumstances gave rise to suspicion about the truth of the confession.[26]

Extra-judicial confession made before a constable immediately after the occurrence and not in the course of investigation, is admissible in evidence.[27]

Extra-judicial confession made in front of the police is not admissible.[28]

Where an extra-judicial confession was made to chance witnesses immediately after the commission of the crime when asked why the accused were running away, it was held the testimony in respect of the confession could not be disbelieved merely because the witnesses were chance witnesses.[29] Where the accused stated that he was caught by the village people who were chasing the dacoits and was taken to the village on suspicion where he made a confession to the *Mukhia,* the inculpatory part of his statement about being caught and making confession could not be rejected merely because the exculpatory part of his statement that he was caught on suspicion was found to be false. General denial of his participation in the dacoity could not nullify the admission of independent facts.[30]

Where the evidence was that at the instance of the police, the doctor who was a witness questioned the accused and a confession was made and the accused was arrested later, it was held that the confession was hit by Section 26 and cannot be admissible.[31] The alleged extra-judicial confession, not put to the accused while examining him under Section 313 Cr.P.C., cannot be taken into consideration.[32] Where there was no material on record to prove the crime, the extra-judicial confession by the accused cannot be relied on and the conviction based on it would be illegal.[33]

Extra-judicial confessions are not usually considered with favour but it does not mean that when a confession has come out from a person who has no reason to give the statement falsely, and there are circumstances to support such a statement it should not be disbelieved.[34]

The value of the evidence in respect of an extra-judicial confession would be just like that of any other evidence, depending upon the varacity of the witnesses to whom it was made. An extra-judicial confession, if voluntary, can be relied upon by the court, along with other evidence, in convicting the accused; it is for the court, having regard to the credibility of the witness and his capacity to understand the language in which the accused made the confession, to accept the evidence or not.[35]

In the case of an extra-judicial confession it must pass the tests as to the reproduction of exact words, the reason or motive for the confession, and whether the person selected, is one in whom confidence is reposed by the accused.[36] Where there were no reasons to show as to why and how the accused reposed such a confidence in the *Sarpanch* as to confess their guilt before him, such a confession was held be improbable.[37]

Where the person charged with conspiracy made an extra-judicial confession, to a widow of another conspirator who was assisting her husband in making spears and other weapons, it was held that it was not acceptable.[38]

Conviction can be based upon the extra-judicial confession without corroboration. Prudence and caution however may require corroboration.[39] Law does not require that the evidence of an extra-judicial

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26. *Nirmalsingh* v. *State of H.P.*, 1987 Cr LJ 1644 (HP).
27. *Ramesh Kumar* v. *State of Rajasthan*, 1999 Cr LJ 871, at p. 876 (Raj).
28. *Dharani Pradhan* v. *State*, 1997 Cr LJ 2973 (Ori).
29. *Malsingh* v. *State of Rajasthan*, 1983 Cr LJ 1411 (Raj).
30. *State of Bihar* v. *Anirudh Thakur*, AIR 1998 SC 921.
31. *Md. Dwara Rawther Ismail* v. *State of Kerala*, 1982 Cr LJ 2102 (Ker).
32. *Vijay Kumar* v. *State*, 1996 Cr LJ 2429 (para 39) (Del). The Court referred to *Sharad Birdhichand Sarda* v. *State of Maharashtra*, AIR 1984 SC 1622 : 1984 Cr LJ 1738.
33. *Lachman Gouda* v. *State of Orissa*, 1982 Cr LJ 929 (Ori).
34. *Ram Singh* v. *State of U.P.*, AIR 1967 SC 152.
35. *Mulk Raj* v. *State of U.P.*, AIR 1959 SC 902.
36. (1985) 2 Cr LC 189 : (1985) 1 Ori LR 638.
37. *Jaspal Singh* v. *State of Punjab*, AIR 1997 SC 332 : 1997 Cr LJ 370.
38. *Kanan* v. *State of Kerala*, AIR 1979 SC 1127.
39. *Maghar Singh* v. *State of Punjab*, AIR 1975 SC 1320; *Shiv* v. *State of U.P.*, AIR 1954 SC 322; *Jagir Singh* v. *State (Delhi Admn.)*, AIR 1975 SC 1400.

confession should in all cases be corroborated. When it is proved by an independent witness like a responsible officer who bore no animus against the accused, it can be accepted. In the particular case before the Supreme Court, the extra-judicial confession was corroborated by the recovery of an empty cartridge from the place of occurrence and it was spoken to by a responsible officer.[40] Detailed particulars are not necessary, but some corroboration is required on the main particulars of the affairs while proving the extra-judicial confession. The evidence of the husband that the accused narrated the incident was held to be corroborative piece of evidence in the case.[41] If the statement of an approver about the confession of guilt made to him by the accused, is not corroborated in material particulars, conviction cannot be based on such statement of the approver.[42] Corroboration of the extra-judicial confession, in material particulars is necessary to base the conviction[43] but it can be accepted without corroboration if other evidence inspires confidence.[44] It can be acted upon without corroboration for the purpose of entering a conviction.[45] An extra-judicial confession, if satisfactorily proved to have been voluntarily made, may be the basis for a conviction even in the absence of corroboration[46] but it being a weak piece of evidence, the Court would normally expect sufficient and reliable corroboration to such type of evidence.[47]

Where extra-judicial confession was allegedly made by the accused to his father-in-law through two letters that he had killed his son but the handwriting in those two letters was found to be different from each other and the said letters were brought on record after considerable delay, the genuineness of those letters was doubtful and they could not form the basis of conviction.[48]

Where the accused allegedly surrendered and made extra-judicial confession to Village Administrative Officer who was far away and not to the police station which was nearer to the scene of occurrence, the alleged confession ought to be ignored.[49]

Where extra-judicial confession was made before a person holding a responsible post, evidence of the two witnesses to it was found to be reliable and trustworthy and corroborated, conviction of the accused was proper.[50]

17. EXTRA-JUDICIAL CONFESSION TO STOCK WITNESS

Where extra-judicial confession was made to a stock witness who was casually knowing the accused, it was held to be not acceptable.[51]

18. EVIDENTIARY VALUE OF CONFESSION

There is a clear distinction between the admissibility of an evidence and the weight to be attached to it. A confessional soliloquy is a direct piece of evidence. Before accepting such evidence, it must be established by cogent evidence what the exact words used by the accused were. Even if this is

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40. *Piara Singh* v. *State of Punjab*, A'R 1977 SC 2274. **Also see** *State of Maharashtra* v. *Vilas Pandurang Patil*, 1999 Cr LJ 1062, 1067 (Bom); *Jayeshkumar Parshottamdas Valand* v. *State of Gujarat*, 1998 Cr LJ 4260; *D.B. Valvi* v. *State of Maharashtra*, 1996 Cr LJ 174 (para 10) (Bom).
41. *State* v. *Tomeiren Maringni*, 1970 Cr LJ 549 (Manipur).
42. In re : *Athayee*, (1965) 2 Cr LJ 566 (Mad).
43. *Ratan Goud* v. *State of Bihar*, AIR 1959 SC 18; *Podyami Joga* v. *State of M.P.*, (1964) 1 Cr LJ 455 (MP); *Poolin Halder* v. *State*, 1996 Cr LJ 513 (para 18) (Cal).
44. *Haribhajan Kour* v. *State*, 2001 Cr LJ 2033 (para 31) (J&K).
45. *Lokeman Shah* v. *State of W.B.*, 2001 Cr LJ 2196 (para 13) (SC) : AIR 2001 SC 1760.
46. *Bisheshar Dhani Ram* v. *State*, (1963) 1 Cr LJ 645 (All).
47. *S.V. Chalke* v. *State of Maharashtra*, 1993 Cr LJ 3364 (para 7) (Bom); voluntary and corroborated extra-judicial confession, trustworthy and reliable, *Bagda Ram* v. *State of Rajasthan*, 1995 Cr LJ 2129 (paras 9 and 10) (Raj). **Contra :** uncorroborated and retracted extra-judicial confession, unreliable, *Munian* v. *State*, 1995 Cr LJ 2165 (paras 9-11) (Mad).
48. *Prasanta Kumar Sahu* v. *State*, 1999 Cr LJ 969, at pp. 971 and 972 (Ori).
49. *Ravirajan* v. *State*, 1998 Cr LJ 3086 (para 5) (Mad). **Also see** *Ballu* v. *State of Haryana*, 1997 SCC (Cri) 234.
50. *Jayeshkumar Parshottamdas Valand* v. *State of Gujarat*, 1998 Cr LJ 4260 (Guj). Extra-judicial confession to uncle. corroborated, conclusion drawn as to guilt of accused, *Balu Ram* v. *State of Rajasthan*, 1997 SCC (Cri) 836.
51. *Tarseem Kumar* v. *Delhi Administration*, 1995 Cr LJ 470 (para 18) : AIR 1994 SC 2585.

established, prudence and justice require that such evidence cannot be made the sole ground of conviction, but may be used only as a corroborative piece of evidence[52] but where the evidence of the witness before whom extra-judicial confession was made, was found to be discrepant, doubtful, vague and incomplete, it was held to be unreliable.[53] Where it was stated that the accused made a confession to the uncle of the deceased, it was held that it cannot be conceived that the accused would confess in view of the proximate relationship of the uncle with the deceased; and the evidence of the uncle is unworthy of belief.[54] Where the accused, one of the drivers of the truck of the deceased was alleged to have made a confession to one to whom he had no reason to make a confession, and in that statement the accused stated that certain persons had settled the dispute between the accused and his co-accused on the one hand and the deceased on the other, but they murdered the deceased because the deceased was still angry with them, it was held that such a statement cannot be relied on as the accused had no reason to make a confession to that witness.[55] Where the confessional statement showed that the accused stabbed the deceased in her belly and the doctor found the injury on the chest; it was held such confession did not appear to be true; and could not be relied on for convicting the accused.[56]

Where the court has disbelieved a witness, it would be wrong for the court to compare the confession of the accused with the deposition of the witness for knowing the genuineness or otherwise of the confession.[57]

Where there was an omission of a fact in a confession, it was held that it would be illogical to say that there an omission amounts to a contradiction.[58]

A confession can be made even during the trial and the evidence already recorded may be used to corroborate it[59] but confession during investigation is not admissible in evidence.[60]

For the purpose of this section it must be established that a confession is voluntary and also that it is true. As the first one is a *sine qua non,* if it is found that it is not voluntary, the second one would not arise. For the purpose of establishing its truth, it is necessary to examine the confession and compare it with the rest of the prosecution evidence and the probabilities of the case.[61]

The value of the evidence as to confession depends on the reliability of the witness who gives the evidence.[62] Where the prosecution witness admitted that the accused had confessed his guilt before him and his evidence was corroborated by another prosecution witness, the fact that the accused did not mention this confession before the Magistrate while making judicial confession, was not fatal for forming the basis of conviction[63]; but an involuntary and uncorroborated extra-judicial confession cannot form the basis of conviction.[64] Where confession is voluntary and no infraction or volition of any legally mandated substantive or procedural law is made out, conviction based on it is legal.[65]

Judicial confession would not become bad merely because the articles belonging to the victims were recovered prior to the making of the confession.[66]

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52. *Sahoo* v. *State of U.P.*, AIR 1966 SC 40.
53. *Kamlesh* v. *State of U.P.*, 1997 Cr LJ 3191 (para 16) (All).
54. *Kachhwa* v. *State of Rajasthan*, 1986 Cr LJ 306 (Raj).
55. *Balkar Singh* v. *State of U.P.*, 1990 Cr LJ 77 (All).
56. *Union Territory of Mizoram* v. *Vanlallawama alias Lallawma*, 1977 Cr LJ 1831 (Gau).
57. *Birey Singh* v. *State*, AIR 1953 All 785 : 1953 Cr LJ 1817 (All).
58. *Birey Singh* v. *State*, AIR 1953 All 785 : 1953 Cr LJ 1817 (All).
59. 1956 Raj LW 435.
60. *Balasubramaniam* v. *State*, 1994 Cr LJ NOC 423 (Mad).
61. *Sarwan Singh Rattan Singh* v. *State of Punjab*, AIR 1957 SC 637; *Shankaria* v. *State of Raj*, AIR 1978 SC 1248; *Roop Singh* v. *State of Rajasthan*, 1979 Raj LW 314 : 1980 Cr LJ (NOC), 138; *State of Orissa* v. *Dileshwar Bhoi*, 1979 Cr LJ (NOC) 262 ILR 1977 Cut 160; **See** *Kadraka Sitana* v. *State*, 1976 Cr LJ 414 (Ori); (3½ hours time for reflection given by magistrate held confession not admissible); In re : *Tadipamula Satyanarayana*, AIR 1959 AP 419; *Gendra Bhrahm* v. *State of Assam*, 1981 Cr LJ 430 (Gau); *State of Gujarat* v. *Subamiya Dosmohmed*, 1980 Cr LJ (NOC) 70 : 1979 Cri LR (Guj) 366; *Ratan Goud* v. *State of Bihar*, AIR 1959 SC 18; *Vali Isa Mahmad* v. *State*, AIR 1963 Guj 135; *Basanti* v. *State*, 1989 Cr LJ 415 (Ori); *Naresh Kumar* v. *State*, 1988 Cr LJ (NOC) 4; *Ujir Ali* v. *State*, 1988 Cr LJ (NOC) 50.
62. *Kanhu Majhi* v. *State*, 1998 Cr LJ 3729 (para 6) (Ori).
63. *Valiyaveetil Ashraf* v. *State*, 1994 Cr LJ 555 (para 19) (Ker).
64. *Lakshmi Kirsani* v. *State*, 2001 Cr LJ 2648 (para 9) (Ori).
65. *Farid Khan* v. *State of J.&K.*, 2000 Cr LJ 2680 (para 3) (J&K).
66. *State of T.N.* v. *Kutty*, 2001 Cr LJ 4168 (paras 12 and 14) (SC) : AIR 2001 SC 2778.

19. NECESSITY FOR CORROBORATION

The rule of prudence does not require that each and every circumstance mentioned in the confession, with regard to the participation of the accused person in the crime, must be separately and independently corroborated, nor is it essential that the corroboration must come from the facts and circumstances discovered after the confession was made. If the rule required that each and every circumstance mentioned in the confessional statement must be separately and independently corroborated, then the rule would be meaningless inasmuch as the independent evidence itself would afford sufficient basis for conviction; and it would be unnecessary to call the confession in aid.[67]

Where the circumstances such as recovery of bloodstained clothes or the ornaments of the deceased, and similar circumstances connecting the accused with the crime of murder are conspicuous by their absence, the subsequent conduct of the accused in making an attempt to commit suicide, for which the accused has offered plausible explanation, would not be sufficient corroboration of a confession by the accused.[68]

The extent and the nature of corroboration required, before a Court can act upon a confession will depend upon the circumstances of each case.[69]

The absence of details in the confession is not a reason to treat it as untrue, when there is nothing in the confession which is contrary to the oral evidence.[70]

Law does not presume that such confessions are untrue, but because of the danger of receiving such evidence, Judges thought it better to reject it for the due administration of justice. When hope or fear in respect of the confession were not in question, such statements were admitted as relevant, though with some reluctance and subject to strong warnings as to the weight to be attached to them.[71]

The corroboration must come from an independent source and connect with the crime; it is not enough to corroborate merely that a crime has been committed. The mere fact that the *accused had absconded would not be a sufficient corroboration,* regarding the participation of the accused in the crime, though it may be relevant under Section 8 of this Act showing his conduct.[72]

Where a BSF constable killed his wife and then told it to his uncle, a counsin of his wife and the commandant; where a woman held her husband in colloboration with her lover who stabbed him to death and then confessed to the *Sarpanch* and *Lambardar* of the village[73] and where a man, being unable to afford the medical treatment of his wife, killed her and her two children and then told the fact to a family friend who was trying to find money, in all these cases the Supreme Court upheld conviction solely on the basis of confessions.[74] In a murder case, the accused who was a sepoy in army, made an extra-judicial confession of his guilt in writing voluntarily to his senior officers who were not found to be inimical to him and at his instance head of the deceased was recovered from a well which was within his exclusive knowledge. It was held that variation between minor details in the statement of confession and in evidence did not affect the acceptability of the confession and it could be relied upon for conviction without corroboration.[75]

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67. *Balbir Singh* v. *State of Punjab,* AIR 1957 SC 216; *Hem Raj Devilal* v. *State of Ajmer,* AIR 1954 SC 462; *Noor Muhammed Abdul Samad* v. *State of Madras,* AIR 1959 Ker 46; *Subramania Goundan* v. *State,* AIR 1958 SC 66; *Maghar Singh* v. *State of Punjab,* AIR 1975 SC 1320; *Anneppa* v. *State,* 1978 Cr LJ 462 (Ker); *Chandraiahgari Anantharedd*i v. *State of A.P.,* 1996 Cr LJ 2109 (paras 15 and 19) (AP).
68. *Raghavan* v. *State of Kerala,* 1962 Ker LT 476. No corroboration, *Pokar Ram* v. *State of Rajasthan,* 1994 Cr LJ NOC 143 (Raj); *Naga Reddy* v. *State of A.P.,* 1994 Cr LJ 2545 (AP).
69. In re : *Vasamsetti Appa Rao,* AIR 1953 Mad 1004.
70. *Subramania Goundan* v. *State of Madras,* AIR 1958 SC 66.
71. *Reg* v. *Baldry,* 5 Cox CC 523; *Ibrahim* v. *Emperor,* AIR 1914 PC 155.
72. In re : *Arigachetta Chenniah,* ILR 1964 AP 780; **referring to** *Pakala Narayana Swamy* v. *Emperor,* AIR 1939 PC 47; *Palvinder Kaur* v. *State of Punjab,* AIR 1952 SC 354; *Sarwan Singh, Ratan Singh* v. *State of Punjab,* AIR 1957 SC 637; *Balbir Singh* v. *State of Punjab,* AIR 1957 SC 216; *Subramania Goundan* v. *State of Madras,* AIR 1958 SC 66.
73. *Maghar Singh* v. *State of Punjab,* AIR 1975 SC 1320; *Madi Ganga* v. *State of Orissa,* AIR 1981 SC 1165.
74. *State of U.P.* v. *M.K. Anthony,* AIR 1985 SC 48.
75. *Vinayak Shivajirao Pol* v. *State of Maharashtra,* AIR 1998 SC 1096 : 1998 Cr LJ 1558 (paras 12, 20, 21 and 22).

20. CONFESSION TO BE TAKEN AS A WHOLE

It is a well accepted rule regarding the use of confessions and admissions that these must be accepted as a whole, or rejected as a whole, and that the court is not competent to accept only the inculpatory part while rejecting the exculpatory part as inherently incredible. A statement that contains a self-exculpatory matter cannot amount to a confession, if the exculpatory matter includes some fact, which, if true, would negative the offence alleged to be confessed to. A confession must either admit in terms the offence or, at any rate, substantially all the facts that constitute the offence.[76]

However, where the exculpatory part of a confessional statement is not only improbable but is contradicted by other evidence, the Court can accept the inculpatory part and, piecing the same with the other evidence, convict the accused.[77] Thus, exculpatory part may be excluded where the evidence or record disproves it[78]; or where it is apparently false.[79] A packet delivered to the post office was opened in the presence of the Post Master by a subordinate who took out a ladies wrist watch and delivered it to the Post Master. The statement of the Post Master was that all this happened in his presence but that "it was done without his consent". The exculpatory portion of the statement was rejected.[80] While giving the confessional statement, the accused stated that the act was committed in self-defence, but that plea was not substantiated; it was held that the exculpatory part of the statement pleading the self-defence can be rejected and the other part can be relied on.[81]

Where an accused was charged for murder, kindnapping and extortion, and the Court has considered it unsafe to act upon the confession for a conviction in respect of murder, there is no reason why the confession insofar as it relates to the two offences of kidnapping and extortion should not be taken into consideration as against the accused, to lend assurance to the conclusion as far as those offences are concerned based on circumstantial evidence.[82]

Reading as a whole the judicial confession showed that the accused had admitted the full length of the role played by him alongwith others in the commission of the crime. It would be of no consequence that he did not say in so many words that he also inflicted one stab injury on the deceased.[83]

Confession to police officer not to be proved.

S. 25. No confession made to a police officer[84] shall be proved as against a person accused of any offence.

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76. *Palvinder Kaur* v. *State of Punjab*, (1953) SCR 94 : AIR 1952 SC 354, **followed in** *Kasim Babamiya Shaikh* v. *State of Maharashtra*, 1996 AIHC 18 (para 17); *Hanumant* v. *State of M.P.*, AIR 1952 SC 343; *Aghnoo Nagesia* v. *State of Bihar*, AIR 1966 SC 119; *Dohariya* v. *State*, AIR 1956 MB 23 : 1956 Cr LJ 70; *Mohammed Pasha* v. *State of Hyderabad*, AIR 1956 Hyd 180 : 1956 Cr L.J. 1320; Re : *Dangeti Satteya*, AIR 1957 AP 213 : 1957 Cr LJ 814; *Sant Ram* v. *State*, AIR 1953 HP 105 : 1953 Cr LJ 1665 (HP); Re : *Upputholla Sreenivasulu*, AIR 1958 AP 37 : 1958 Cr LJ 18; *Jagwant Singh* v. *State*, AIR 1966 Raj. 83 : 1966 Cr LJ 451; *Narbahadur Darjee* v. *State*, 1965 Assam 89 : (1965) 2 Cr LJ 614 (where no other evidence available to verify or check any part of the confession); *Budha Majhi* v. *State*, (1964) 2 Cr LJ 487 (Ori); *Charan Singh, Hukum Singh* v. *State*, 1961 All WR (sup) 67 : 63 Punj. LR 629; *Padmeswar Phukan* v. *State*, 1971 Cr LJ 1595 (Assam); *State of Orissa* v. *Rama Mudulı*, 1973 Cr LJ 1326 (Ori); (when it is stated that in exercise of his right of private defence it cannot be rejected); *Neelakantan Vasa* v. *State*, 1954 Tri/Co 282 : 1954 Cr LJ 658; *Ouseph* v. *State of Kerala*, ILR 1959 Ker 962; *Pikabewa* v. *R.* ILR 39 Cal 355; *Srinivasa* v. *R.* 1928 Mad 493; *R* v. *Chinnaya*, 1940 Mad. WN 169; *Abdul* v. *R.* 1940 All 46; (other portion cannot be rejected it would go against the prosecution story); *Balmakund* v. *R.* AIR 1931 All 1 (FB); *Jagmal* v. *R.* AIR 1948 All 211; *Chima Mahariya* v. *State*, 1969 Cr LJ 1291 (MP); *Jairam Ojha* v. *State*, 1968 Ori 97; *Lokeman Shah* v. *State of W.B.*, 2001 Cr LJ 2196 (para 12) (SC) : AIR 2001 SC 1760.

77. *Nishi Kant* v. *State of Bihar*, AIR 1969 SC 422; *Hira* v. *State*, AIR 1971 SC 44; *Bhagawan* v. *State of Haryana*, AIR 1976 SC 1797; *Kamala Shanker* v. *State of Gujarat*, (1963) 2, Cr LJ 611 : AIR 1963 Guj 312; *Budha Gouda* v. *State*, (1965) 2 Cr LJ 385 : 1965 Ori 170; *State* v. *Ramchandra Bhoi*, (1965) 2 Cr LJ 520 : 1965 Ori 175; *Bhima* v. *State*, 1956 Ori 177; *Parakinkar Chakma* v. *State of Tripura*, 1955 Cr LJ 1292 : 1955 Tripura 19; *Koh Jera Jodha* v. *State*, 1954 Cr LJ 1458 (Sau) : 1954 Sau 115; *Sultan alias Sullah* v. *Emperor*, 1945 Lah 91; *Rajesh Thakur* v. *State*, 1988 Cr LJ 1477 (Cal); *Kadraka Sitana* v. *State*, 1976 Cr LJ 414; *State* v. *Gouranga Sahu*, 1978 Cr LJ 276

78. ***Mohan Lal* v. *Ajit Singh*, AIR 1978 SC 1183; 1978 Cr LJ 1107.**

79. *Keshoram Bora* v. *State of Assam*, AIR 1978 SC 1096; 1978 Cr LJ 1089. **See also** *Jamuram* v. *State of Rajasthan*, 1995 Cr LJ 1333 (para 34) (Raj).

80. ***Bhagwan Singh* v. *State of Haryana*, AIR 1976 SC 1797.**

81. *Kadran Sitara* v. *State*, 1976 Cr LJ 414; *Nishikanta* v. *State of Bihar*, AIR 1969 SC 422.

82. ***Ram Chandra* v. *State of U.P.*, AIR 1957 SC 381.**

83. ***State of T.N.* v. *Kutty*, 2001 Cr LJ 4168 (SC) (para 17) : AIR 2001 SC 2778.**

84. Substituted by the Information Technology Act, 2000, S. 92, Sch. II (w.e.f. 17.10.2000).

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COMMENTS

1. PRINCIPLE AND SCOPE

Under this section, a confession made to a police officer is inadmissible in evidence except insofar as is provided by Section 27. The principle upon which the rejection of confession made by an accused to a police officer, or while in the custody of such officer (Section 26), is founded, is that a confession thus made or obtained is untrustworthy. The broad ground for not admitting confessions made to a police officer is to avoid the danger of admitting a false confession.[85]

In *Queen-Empress* v. *Babulal,* 6 All 509; in his dissent MAHMOOD J. observed: "The rules contained in Sections 25, 26 and 27 of the Evidence Act were not originally treated in British India as, strictly speaking, rules of evidence, but rather as rules governing the action of police officers, and as matters of criminal procedure. The Legislature had in view the malpractices of police officers in extorting confessions from accused persons in order to gain credit by securing convictions, and those malpractices went to the length of positive torture, the Legislature, in laying down such rules, regarded the evidence of police officers as untrustworthy, and the object of the rules was to put a stop to the extortion of confession, by taking away from the police officers the advantage of proving such extorted confession during the trial of accused persons."

Section 162 of the Criminal Procedure Code enacts that no statement made by any person to a police officer in the course of an investigation shall, if taken down in writing be signed by the person making it, nor shall such statement be used as evidence.

The object of this section and Section 26 is to prevent the practice of torture by the police for the purpose of extracting confessions from accused persons. Under this section no confession made to a police officer is admissible against the accused.

Any incriminating statement made by an accused to a police officer is inadmissible in evidence.[86]

In a very early case the Calcutta High Court held: "The reason why the law in Sections 25 and 26 zealously excludes a confession made by an accused, whilst in the custody of a police officer, unless it be made in the immediate presence of a magistrate, is that there is room for apprehension that a police officer, who is armed with large powers over accused persons, may unwillingly excite terror in their minds and extort false and involuntary confessions, and his duty to investigate criminal cases and to detect offenders and bring them to justice may make him feel tempted to obtain confessions from accused persons by threat, promise, or other improper influence.[87]

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85. *Queen-Empress* v. *Babu Lal,* (1884) 6 All 509, 532 (FB); In re : *Zahirabi,* AIR 1966 Mys 199. *Ibrahim Hussain* v. *State,* AIR 1969 Goa 68.
86. *Imperatrix* v. *Pandharinath,* (1881) 6 Bom 34; *Queen-Empress* v. *Nana,* (1889) 14 Bom 260 (FB); *Queen-Empress* v. *Mathews,* (1884) 10 Cal 1022; *Queen-Empress* v. *Javecharam,* (1894) 19 Bom 363; *Farid* v. *King-Emperor,* (1906) PR No. 16 of 1906 (Cr); *Queen-Empress* v. *Nga Thet,* (1900) 1 UBR (1897-1901) 156; *N. Natrajan* v. *State of T.N.,* 1996 Cr LJ 1007 (para 10) (Mad).
87. *R* v. *Bepin Behari,* 2 Cal WN 71, 74.

The Supreme Court has observed: "As a matter of fact, Sections 25, 26 and 27 differ widely from the English Law. Sections 25 and 26 have been enacted not because the law presumes the statement to be untrue, but, having regard to the tainted nature of the source of evidence, prohibits them from being received in evidence...."[88]

In the first report of the Indian Law Commissioners, it is stated: "The police in the province of Bengal are armed with very extensive powers. They are prohibited from inquiring into cases of a petty nature but complaints in cases of the more serious offences are usually laid before the police *darogh*, who is authorised to examine the complainant, to issue process of arrest, to summon witnesses, to examine the accused and to forward the case to the Magistrate, or submit a report of his proceedings, according as the evidence may, in his judgment, warrant the one or the other course...Then follow other provisions for preventing any species of compulsion, or maltreatment, with a view to extort a confession or procure information. But we are informed, and this information is corroborated by the evidence we have examined, that, in spite of this qualification as to the character of the confession, confessions are frequently extorted or fabricated.... We are persuaded that any provisions to correct the exercise of this power by the police will be futile; and we accordingly propose to remedy the evil, as far as possible, by the adoption of a rule prohibiting any examination whatever of an accused party by the police, the result of which is to constitute a written document."

In *Suman* v. *State of Tamil Nadu*[89] where a person was detained under the Tamil Nadu Prevention of Dangerous Activities of Bootleggers etc. (Act 14 of 1982), it was held that the confessional statement made by the detenu to the police officer can be considered by the detaining authority for making an order of detention. They observed that the proceedings before the detaining authority or the Advisory Board are not of a judicial or *quasi*-judicial character, nor are they of criminal or *quasi*-criminal character. Section 25 of the Evidence Act has no application to such proceeding nor is the analogy of that section applicable. It was, however, observed that the weight to be attached to the confession is the matter for the detaining authority.

2. OBJECT

The object of Section 25 is to ensure that the person accused of the offence would not be induced by threat, coercion or force to make a confessional statement and the officers also would make every effort to collect the evidence of the commission of the crime *de hors* the confession to be extracted from the accused while they are in the custody of the police.[90]

3. CONFESSION

A confession must either admit in terms the offence, or, at any rate substantially all the facts which constitute the offence. No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed to.[91]

An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, *e.g.*, an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused death.[92]

The accused can insist that the entire admission including the exclupatory part must be tendered in evidence.[93]

This section does not exclude all statements by an accused to the police but only confessions. There is a distinction between mere admission and confessions which are statements either directly admitting guilt or suggesting the inference of guilt. The general rule in the section is further subject to the exception which admits statements leading to discovery, whether they amount to confessions or not.

See also Commentary on Sections 17, 18 and 24.

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88. *Deoman* v. *State*, AIR 1960 SC 1125.
89. AIR 1986 Mad 318 (FB).
90. *State of Gujarat* v. *Anirudhsing*, AIR 1997 SC 2780 : 1997 Cr LJ 3397.
91. *A. Negesia* v. *Bihar State*, AIR 1966 SC 119.
92. *Pakala Narayana Swami* v. *The King Emperor*, (1939) 66 IA 66 at p. 81 : 41 Bom LR 428 : 18 Pat 234 : (1941) Ran 789n.
93. *A. Nagesia* v. *Bihar State*, AIR 1966 SC 119.

Communication to another is not a necessary ingredient of the concept of confession.[1]

The Supreme Court in *Aghnoo Nagesia* v. *Stateof Bihar*[2], held that a confession or admission is evidence against the maker of it unless its admissibility is excluded by some provision of law; that Section 25 does not exclude all statements by an accused to a police officer, but only confessions which are an admission in terms of the offence or at any rate substantially all the facts which constitute the offence. This section does not stand in the way of admitting the statement of an accused to a police officer, if such statement does not amount to a confession. Section 162, Cr PC, should be considered along with Section 25 of this Act while admitting any statement other than a confession, except as provided in Section 27 which provides that a statement leading to the discovery of a fact is admissible. Thus Section 25 protects the accused in respect of a confession made by him to a police officer, whereas Section 162, Cr PC, protects the accused if it is made during the course of investigation. The practice of introducing in evidence a whole confession to a police, under the guise of discovery of fact under Section 27, is deprecated by the Supreme Court in the above case.[3]

A confession to a police officer, whether in the course of investigation or otherwise, and a confession while in police custody, are inadmissible.[4] A confession made to the police in the course of investigating crime A, although it relates to another crime B, is equally inadmissible. The whole spirit of this section is to exclude confessions to the police, and the moment a statement is found to amount to a confession, it does not matter of what crime it is said to be a confession.[5] Where the accused made the confession while preparing the list of recovered articles and the confession was recorded in the recovery list, it was held that such confession, as was made to police, was inadmissible as it would cause irreparable prejudice to the accused.[6] Where a confession was recorded to the effect that the accused was present near the scene of offence, it was held that such confession is not sufficient to discharge the burden on the prosecution and shift it on to the accused and that confession made to a police officer cannot be accepted as substantive evidence to convict him.[7] A confession to a doctor who questioned the accused at the instance of the police officer was held to be inadmissible.[8] A confession to a police officer even in the presence of a Magistrate was held inadmissible.[9] The Privy Council has held that Section 25 covers a confession made to a police officer even before any investigation has started and is not confined to a confession in the course of an investigation.[10] An accused was charged with the offence of belonging to a gang of persons associated for the purpose of habitually committing dacoity. During the police enquiry he had made a statement to an Inspector of Police that a bundle of ammunition produced by him was given to him by two other accused who were charged with him as being members of the gang. It was held that, though that statement was self-exculpatory it was inadmissible in evidence under this section as it amounted to an admission of an incriminating circumstances.[11]

For Section 25 to apply, a statement by the accused must amount to a confession.[12]

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1. *Sahoo* v. *State of U.P.*, AIR 1966 SC 40.
2. AIR 1966 SC 119.
3. *Hanumant* v. *State of M.P.*, AIR 1952 SC 343; *Palvinder Kaur* v. *State of Punjab*, AIR 1952 SC 354; *Ram Lalwani* v. *State*, 1981 Cr LJ 97 (Del).
4. *Aghnoo* v. *State*, AIR 1966 SC 119; **followed in** *Khatri Hemraj* v. *State of Gujarat*, AIR 1972 SC 922; *Emperor* v. *Khwaja Nazir Ahmad*, AIR 1945 PC 18; *Naresh Ch. Nath* v. *State*, 1971 Cr LJ 407 : AIR 1971 Tripura 16; *Pershadi* v. *State*, AIR 1945 All 443 : 1955 Cr LJ 1125; (facts leading to discovery of clothe admissible); *Jasoda Haldar (Smt.)* v. *Sailendra Nath*, AIR 1957 Cal 372; *Banarsi Dass* v. *State of Punjab*, AIR 1981 Cr LJ 1235 (P&H); *Padan Pardhan* v. *State*, 1982 Cr LJ 534 (Ori); *Punja Mava* v. *State*, AIR 1965 Guj 5. **Also see** *Bullu Das* v. *State of Bihar*, (1998) 8 SCC 130.
5. *Seshapani*, **In re** : (1937) Mad 358, 361.
6. *Gunda* v. *State*, AIR 1954 All 127.
7. *Panlose* v. *State of Kerala*, 1990 Cr LJ 100 (Ker); **following** *State of Gujarat* v. *Raghunath Vamanrao Bixi*, AIR 1985 SC 1092.
8. *Mohammad Dwara Rowther Ismail* v. *State of Kerala*, 1982 Cr LJ 2102 (Ker).
9. *Alral* v. *State of MP*, AIR 1954 SC 15.
10. *Pakala Narayana Swami* v. *Emperor*, AIR 1939 PC 47.
11. *Emperor* v. *Haji Sher Mahomed*, ILR (1921) 46 Bom 958 : 25 Bom LR 214.
12. *State* v. *Memon Mohamud Hussain Ismail*, AIR 1959 Bom 534: 1959 Cr LJ 1419; *Sankaran Nair Chellappen Nair* v. *State of Kerala*, (1965) 2 Cr LJ 647 : AIR 1965 Ker 248; *Dal Singh* v. *Emperor*, AIR 1917 PC 25; *Faddi* v. *State of M.P.*, AIR 1964 SC 1850; *Sital Chandra* v. *State*, AIR 1956 Cal 82 : 1956 Cr LJ 509.

A confession contained in a letter written and signed by the accused and addressed to a police officer was held to be admissible as the letter was not written in presence of the police officer.[13] Where the accused admitted his guilt in his own handwriting before the Investigating Officer who himself supplied him with pen and paper, it was held to be voluntary and was not hit by Section 25.[14] Where the delinquent police constable made confession to the police while in police custody, the disciplinary authority can act upon such confession as rules of evidence do not apply to departmental inquiries.[15]

This section merely forbids the use of a confession made to a police officer and not statement of the accused.[16]

As the material words used in Section 25, of the Act, and Section 162, Cr PC. are the same and the intention of enacting the former is the same as that of the latter, there is no bar on the admissibility of a confessional statement of the accused unless it is shown that it was made to a police officer.[17]

Incriminating statements by the accused to a police officer were held to be not admissible as they are hit by Sections 25 and 26 of the Act.[18] To the extent that the Court made the observation that incriminating statements were not admissible under Section 25, it is submitted that the observation is not correct, the incriminating statement should be a confession of guilt. In that case the accused was said to have stated *inter alia* that axe with which the murder had been committed was in the house. The observation of the Supreme Court may however be justified on the ground that the statement was in effect a confession of guilt and not a mere incriminating statement. In *Kanda Padayachi* v. *State of T.N.*[19] it was explained that an admission of a fact, however, incriminating, but not by itself establishing the guilt of the accused does not amount to a confession. A statement by the accused while in custody of the police, to a doctor that the injury on his body was caused by the murdered person, might be an incriminating fact, but it is admissible and is not barred under Section 26.

P, accused of the murder of a girl, gave to a police officer a knife saying it was the weapon with which he committed the murder. He also said that he threw down the girl's anklets at the scene of the murder and would point them out. On the following day he accompanied the police officer to the place where the girl's body was found, and pointed out the anklets. It was held that such statements, being confessions made to a police officer, whereby no fact was discovered, could not be proved against P.[20] The accused, on his arrest, made a statement in the nature of a confession, which was reduced to writing by one of the Inspectors in whose custody he was, and subsequently signed and acknowledged by him in the presence of the Deputy Commissioner of Police at the police office, the Deputy Commissioner of Police receiving and attesting the statement in his capacity as Magistrate and Justice of the Peace. It was held that the confession was not admissible in evidence.[21] A confession made to a raiding party headed by the Assistant Collector of Customs, in the presence of intelligence officers, was held to be not admissible.[22]

Confessional statement of the co-accused before the customs officials can give rise only to strong suspicion but cannot take place of proof.[23]

4. FIRST INFORMATION REPORT

It was held in *Aghnoo's case*,[24] that where the accused gave the First Information to the police, the *fact of his giving* that information is admissible under Section 8. If it is a non-confessional one, it is

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13. *Sita Ram* v. *State of U.P.*, AIR 1966 SC 1906.
14. *Rajan Johnsonbhai Christy* v. *State of Gujarat*, 1997 Cr LJ 3702 (Guj).
15. *Kuldeep Singh* v. *State of Punjab*, AIR 1997 SC 79.
16. *Mahanta* v. *Het Ram*, 1954 Punj 27 : 1954 Cr LJ 155; *Devi Ram Patt Ram* v. *State*, AIR 1962 Punj 70 : (1962) 1 Cr LJ 186; *APK Ramaswamy Reddiar* v. *Padmanthan*, AIR 1966 Mad 392.
17. *Himat Singh Badhar Singh* v. *State*, AIR 1965 Guj 302 : (1965) 2 Cr LJ 753.
18. *Praboo* v. *State of U.P.*, AIR 1963 SC 1113.
19. AIR 1972 SC 66.
20. *Empress of India* v. *Pancham*, (1882) 4 All 198; *Emperor* v. *Hira Gobar*, (1919) 21 Bom LR 724.
21. *Queen* v. *Hurribole Chunder Ghose*, (1876) 1 Cal 207.
22. *J.A. Naidu* v. *State of Maharashtra*, AIR 1979 SC 1537.
23. *Ashok Kumar Singh* v. *Union of India*, 1999 Cr LJ 1962, 1966 (All).
24. AIR 1966 SC 119.

admissible under Section 21; but a confessional statement cannot be used against the accused under Section 25.[25]

In *Khatri & Hemraj* v. *State of Gujarat*[26] the Supreme Court made it clear that such confession can be used for *identifying the accused* as the maker of the report.[27]

Where the statement of the accused or a part of it amounts to a confession, and another part forms a non-confessional statement, *if they are seperable*, that part of the non-confessional statement can be taken as evidence forming the first information report.[28]

The above cases were overruled in *Aghnoo* v. *State*[29] holding: "We think that the severability test is misleading, and the entire confessional settlement is hit by Section 25; and save and except as provided by Section 27 and save and except the formal part identifying the accused as the maker of the report, no part of it could be tendered in evidence."

It was held that so much of the statement in the F.I.R., which amounts to a confession is not admissible. But the portions in the F.I.R. which do not relate to the crime, as, for instance, which are introductory or are a narration of motive or the opportunity for the crime or leading to the discovery of the fact under Section 27, would be relevant evidence in the case.[30]

But the Allahabad High Court held that narration of fact disclosing the motive for the crime is hit by this section.[31] But M.P. High Court has held that the part of the F.I.R. containing motive and relationship of the accused with the deceased, do not amount to confession. Hence it can be used as evidence.[32]

Where a driver lodged the first information regarding the death of a person hit by his vehicle, it was held that the statement that he had driven the lorry, would be a confession to a police officer, and would be inadmissible in evidence.[33] If the entire F.I.R., contains only a confession pure and simple, it is hit by Section 25; and no part of it is admissible.[34]

5. ACCUSED OF ANY OFFENCE

This expression covers a person accused of an offence at the trial, whether or not he was accused of the offence when he made the confession.[35]

Where a person, immediately after the murder, went to the police station, and lodged the first information report, and he was subsequently accused of the offence and tried for the offence, it was held that the report is not a confessional one but one containing admission of acts by the accused, and can be proved against him.[36]

See also Commentary under this head in Section 24.

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25. *Feddi* v. *State*, AIR 1964 SC 1850; *Nisar* v. *State*, AIR 1957 SC 366; *Dalsingh* v. *R*, AIR 1917 PC 25; **See also**, *R* v. *Harnam*, ILR 59 Bom 120; *Noor Mahamad* v. *R*, AIR 90 IC 148; *Mohammada* v. *R*, AIR 1948 Lah 19; *State* v. *Shiv*, AIR 1962 Raj 3; *Padan Pardhan* v. *State*, 1982 Cr LJ 534 (Ori); *Mandesan* v. *State of Kerala*, 1995 Cr LJ 61 (para 6) (Ker).
26. AIR 1972 SC 922.
27. **See also** In re : *Muthian Nadar*, 1971 Cr LJ 730 (Mad); *Bhuta* v. *State*, 1975 Raj. LW 479.
28. *Ram Singh* v. *State*, ILR (1952) 2 Raj 93; *Kartar Singh* v. *State*, AIR 1952 Pepsu 98; *Legal Remembrancer* v. *Lalit Mohan*, ILR (1922) 49 Cal 167; *Lachhuman* v. *State*, AIR 1964 Pat 210; *State of Rajasthan* v. *Shiv Singh*, AIR 1962 Raj 3.
29. AIR 1966 SC 119.
30. *Kartar Singh* v. *State*, AIR 1952 Pepsu 98 : 1952 Cr LJ 1090 (Pepsu); **following,** *Balkhan* v. *R*, AIR 1948 Lah 19; *Bharosa Ram Dayal* v. *Emperor*, AIR 1941 Nag 86; *Ram Beti* v. *State*, 1996 Cr LJ 1512 (para 8) (All).
31. *Ram Sajiwan* v. *State of U.P.*, AIR 1964 All 447; **following** *Harnam Kishan* v. *Emperor*, AIR 1935 Bom 26; *Pakala Narayana Swamy* v. *Emperor*, AIR 1939 PC 47; *Padan Pradhan* v. *State*, 1982 Cr LJ 534 (Ori); *State* v. *Balchand*, AIR 1960 Raj 101; *State of Rajasthan* v. *Shiva Singh*, AIR 1962 Raj 3; *Allahdia* v. *State*, 1959 All LJ 340. **Contra :** *Ram Beti* v. *State*, 1996 Cr LJ 1512 (para 8) (All).
32. *Sukka* v. *State of M.P.*, 1998 Cr LJ 3118 (para 3) (MP).
33. *Public Prosecutor* v. *Thulasingam*, (1964) 1 Cr LJ 241 (Mad).
34. *Badri* v. *State of U.P.*, 1973 Cr LJ 1478 (All); *State* v. *Mayadhar Rani*, (1971) 1 Cut LR 363 (Cri): 38 Cut LT 725.
A. Nagesia v. *State of Bihar*, AIR 1966 SC 119.
Faddi v. *State of M.P.*, AIR 1964 SC 1850; **relying on** *Dalsingh* v. *Emperor*, AIR 1917 PC 25.

6. CONFESSION IN THE PRESENCE OF A POLICE OFFICER

When police were present, it was held that confession could not be deemed to be voluntary.[37] Confession made before a police officer is inadmissible[38] and does not become admissible merely because he is dead.[39] Where the accused was found along with the police, prior to his making a statement under Section 164, Cr PC, and he was in the company of the police while he produced incriminating articles, it was held that it could not be held that the accused was free from police influence and so it was not voluntary.[40] Where a police officer who was present and did not prevent others from offering inducement, it was held that such confession was hit by this section.[41]

7. CONFESSION UNDER TADAA

Under Terrorist and Disruptive Activities Act, confession recorded by a police officer who is not below the rank of superintendent of police is admissible in evidence, if the same has been made voluntarily and is truthful.[42]

The Supreme Court[43] laid down the following guidelines so as to ensure that the confession obtained in the pre-indictment interrogation by a police officer not lower in rank than a Superintendent of Police is not tainted with any vice but is in strict conformity of the well-recognised and accepted aesthetic principles and fundamental fairness :

(1) The confession should be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him.

(2) The person from whom a confession has been recorded under Section 15(1) of the TADA Act should be produced before the Chief Metropolitan Magistrate or the Chief Judicial Magistrate to whom the confession is required to be sent under Rule 15(5) along with the original statement of confession, written or recorded on mechanical device without unreasonable delay.

(3) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate should scrupulously record the statement, if any, made by the accused so produced and get his signature or in case of any complaint of torture, the person should be directed to be produced for medical examination before a Medical Officer not lower in rank than of an Assistant Civil Surgeon.

(4) Notwithstanding anything contained in Cr.P.C. no Police Officer below the rank of an Asstt. Commissioner of Police in the Metropolitan cities and elsewhere of a Deputy Superintendent of Police or a Police Officer of equivalent rank, should investigate any offence punishable under TADA Act.

(5) The Police Officer, if he is seeking the custody of any person for pre-indictment or pre-trial interrogation from the judicial custody, must file an affidavit sworn by him explaining the reason not only for such custody but also for the delay, if any, in seeking the police custody.

(6) In case the person taken for interrogation, on receipt of the statutory warning that he is not bound to make a confession and that, if he does so, the said statement may be used against him as evidence, asserts his right to silence, the Police Officer must respect his right of assertion without making any compulsion to give a statement of disclosure.

The Central Govt. may take note of these guidelines and incorporate them by appropriate amendments in the Act and the Rules.

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37. *Para Kinkar* v. *State of Tripura*, AIR 1955 Tripura 19.
38. *Anant Kumar* v. *State of M.P.*, 1993 Cr LJ 1499 (paras 3 and 6) (MP); *M. Yellappa* v. *State of Karnataka*, 1993 Cr LJ 388 (para 12) (Kant).
39. *Amarsingh* v. *State of M.P.*, 1996 Cr LJ 1582 (para 15) (MP).
40. *Medu Sekh* v. *State*, 1972 Cr LJ 362 (Assam); *Hari Ram* v. *State*, 1972 Cr LJ 961 (J&K); *State* v. *Hukam Chand*, ILR (1974) 1 Del 419.
41. *Punja Mava* v. *State of Gujarat*, AIR 1965 Guj 5 : (1965) 1 Cr LJ 30.
42. *Sahib Singh* v. *State of Haryana*, AIR 1997 SC 3247 : 1997 Cr LJ 3956. **Also see** *State of Gujarat* v. *Mohd. Atik*, AIR 1998 SC 1686 : 1998 Cr LJ 2251; *Gurdeep Singh* v. *State (Delhi Admn.)*, 1999 Cr LJ 4573 (paras 26 and 27) (SC) : AIR 1999 SC 3646; *Lal Singh* v. *State of Gujarat*, 2001 Cr LJ 978 (paras 23 and 24) (SC) : AIR 2001 SC 746.
43. *Kartar Singh* v. *State of Punjab*, 1994 Cr LJ 3139 (paras 268, 269, 270 and 375) (SC).

Plea of inadmissibility of the confessional statement for non-following of the guidelines given in *Kartar Singh's* case was not accepted in view of the recording the said statement prior to the said decision.[44]

8. CONFESSION MADE TO PRIVATE INDIVIDUALS IN THE PRESENCE OF POLICE OFFICERS

Where the *Panchanama* was prepared by the police on the day the murder was committed and it was signed not only by the *panchas* but also purported to have been signed by the accused, it was held that the *panchanama* was a complete confession of the crime from the beginning to the end and it was highly irregular; as the provisions of the Evidence Act and of the Criminal Procedure Code had not been observed, it can not be admissible in evidence.[45]

An extra-judicial confession made to several witnesses including a village *choukidar* was held admissible, because the accused was neither in the custody of the *choukidar* nor was it made to *choukidar*, or under the influence of the *choukidar*. *Choukidar* being a police officer.[46]

9. POLICE OFFICER

This term should not be read in a strict technical sense but according to its more comprehensive and popular meaning. It applies to every police officer and is not restricted to officers in a regular police force.[47]

The Supreme Court observed that: "The test for determining whether a person is a 'police officer' for the purpose of Section 25 of the Evidence Act would be whether the powers of a police officer which are conferred on him or which are exercisable by him because he is deemed to be an officer-in-charge of a police station, establish a direct or substantial relationship with the prohibition enacted by Section 25, that is, the recording of a confession. In other words, the test would be whether the powers are such as would tend to facilitate the obtaining by him of a confession from a suspect or a delinquent. If they do, then it is unnecessary to consider the dominant purpose for which he is appointed or the question as to what other powers he enjoys. These questions may perhaps be relevant for consideration where the powers of a police officer conferred upon him are of a very limited character and are not by themselves sufficient to facilitate the obtaining by him of a confession."[48] It was held that Inspector and Sub-Inspector of Excise are police officers.

Where an officer was invested with powers of officer-in-charge of a police station but did not have the power to submit a report under Section 153, Cr. P.C. It was held that the officer was not a police officer within the meaning of Section 25 of the Act.[49] A senior reserve police officer appointed under the State Reserve Police Force Act, though is a police officer under the Bombay Police Act but he is officer-in-charge of a police station only for the purpose of maintaining law and order and tranquility in the society and power of investigation envisaged in Chapter XII, Cr.P.C. have not been invested with him. Section 25 would not get attracted in regard to the confession made to him.[50]

In *Amin Shariff* v. *Emperor*[51] it was held: "It is true that it has nowhere been defined what minimum aggregation of functions will constitute a person a police officer within the meaning of Section 25 of the Act; but the more comprehensive and popular significations of term 'police officer' such as it was in 1861, is not difficult to appreciate from what was said by the Legislature in the Police Act (V of 1861). Powers and duties of police officers under Act V of 1861 or under Act XXV of 1861 or under any other statute, or the different powers which different grades of police officers have under any particular enactment, are mere matters of details as a worked out in order to enable the entire body, taken as a whole to carry out the two essential duties entrusted to them, namely, the prevention and detection of

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44. *Lal Singh* v. *State of Gujarat*, 2001 Cr LJ 978 (para 23) (SC) : AIR 2001 SC 746.
45. *Narayan Rao* v. *State of A.P.*, AIR 1957 SC 737.
46. *Sridevi* v. *State*, 1974 Cr LJ 126; *Mihir Adhikary* v. *State*, 1983 Cr LJ 1559.
47. *Queen* v. *Hurribole Chuder Ghose*, (1876) 1 Cal 207, 215; *Maung Wun* v. *Queen-Empress*, (1893) PJ LB 22.
48. *Rajaram* v. *State of Bihar*, AIR 1964 SC 828.
49. *Raj Kumar Kanwal* v. *Union of India*, 1991 SC 45.
50. *State of Gujarat* v. *Anirudhsing*, AIR 1997 SC 2780 : 1997 Cr LJ 3397, **distinguishing** *Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569 at 719 : 1994 Cr LJ 3139 at pp. 3234 and 3235.
51. AIR 1934 Cal 580 : 61 Cal 607 (FB).

crimes. These two features of the duties which the police have to discharge and especially that of detection of offenders which involves the duty of holding investigations, have always been regarded as making them out for special treatment insofar as confession made to them are concerned.[52]

The Madras High Court in Someshwer H. Shelat, In re.: 1946 Mad 430; held that when an officer was empowered to investigate all offences punishable under an Act and to conduct such investigation, with powers, duties, privileges and liabilities of an officer-in-charge of a police station under the Criminal Procedure Code when investigating a cognizable offence, he would be a police officer within the meaning of this section.[53]

The Powers of an officer-in-charge of a police station are dealt with under Chapter XIV of the Cr. P.C. That Chapter deals with investigation into offences after registering a crime, recording statements of the persons questioned by him, make searches, seize or recover articles connected with an offence, arrest the accused persons in cognizable offences even without obtaining a warrant of arrest from the magistrate, granting bail in non-cognizable cases, sending the accused before a magistrate for remand, and filing a report before a magistrate for purpose of trial of the accused. He can also prevent the commission of offences and detect cases besides exercising the general duty of maintenance of law and order. In the case of persons specially empowered under the Cr. P.C., they may not be burdened with the maintenance of law and order.

It was held by the Gujarat High Court, that the words "Police Officer" are used in Sections 25, 26 and in the proviso to Section 27; they must have the same wide meaning in all those sections, and must cover a person who is authorised to exercise the powers of a police officer; and would not necessarily mean a person who is in-charge of the police station, or who is empowered to make an investigation.[54]

10. WHO ARE POLICE OFFICERS

The following officers are held as: "Police Officers" within the meaning of Section 25.

Excise Officer (Under the Bihar and Orissa Act)[55].—A Central Excise Officer who has the powers of a police officer for investigation but not the power to frame a charge-sheet under Section 173 of the Code of Criminal Procedure is not a police officer for the purpose of this section.[56] Under the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Goondas, Immoral Traffic Offenders, and Slum Grabbers Act, a person who is authorised to detain a person was held to be a police officer. (Act of 1982).[57] Under Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, confession made by the detenu to a police officer constituted a relevant material for subjective satisfaction of the authorities, though the weight to be given it is for the authority to decide.[58]

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52. **See also** *Queen* v. *Hurribole Chunder Ghose*, ILR (1876) 1 Cal 207; *Nanoo* v. *R*, ILR 51 Bom 78 (FB).
53. **See also** *Public Prosecutor* v. *Parmashivam*, AIR 1953 Mad 917; (both the cases deal with an officer of Commercial Tax Department).
54. *Punja Maya* v. *State*, AIR 1965 Guj 5; wherein it was held that the observations in *Ghunnai* v. *R*, AIR 1934 All 132; are obiter and it **dissented from** the view expressed in *Maharni* v. *R*, AIR 1948 All 7.
55. *Raja Ram* v. *State of Bihar*, AIR 1964 SC 828; *Abdul Rashid* v. *State of Bihar*, 2001 Cr LJ 3290 (para 1) (SC) : AIR 2001 SC 2422, **reversing** the decision of Patna High Court; *Rajendra Kumar* v. *State*, AIR 1966 All 42; *Public Prosecutor* v. *A. Annappa*, AIR 1969 AP 278; *Ahmad Noor Khan* v. *State*, AIR 1972 Gau 7; (Assam Opium Prohibition Act), *Public Prosecutor* v. *Paramasivam*, AIR 1953 Mad 917; (Under Opium Act Section 20A, officer is empowered with powers of a officer-in-charge of a police station); *Om Prakash* v. *State*, AIR 1951 Punj 387; (Ward rationing officer analogus to that of an excise officer); *Nanoo* v. *R*, ILR 51 Bom 78 (FB) **overruling**, *Pereera* v. *Emperor*, (1926) 28 Bom LR 674; *Ram Karan Singh* v. *R*, ILR 1935 Nag 13; *R* v. *Dinshaw*, AIR 1929 Bom 70; *Ibrahim* v. *R*, AIR 1931 Cal 10 : 58 Cal 1260; **dissenting from** *Foorg* v. *Emperor*, AIR 46 Cal 411; *Amin Sharuff* v. *R*, AIR 1934 Cal 580 (FB) : ILR 61 Cal 607; *Bachoo* v. *R*, AIR 1938 Sind 1 (FB); *Emperor* v. *Dinshaw Driver*, 31 Bom LR 49.
56. *Badku Joti* v. *State of Mysore*, AIR 1966 SC 1746; **See**, however, *Rajendra Kumar* v. *State*, AIR 1966 All 42; *Laxman Padma Bhagat* v. *State*, AIR 1965 Bom 195 : (1965) 2 Cr LJ 616; *Public Prosecutor* v. *Annapa*, AIR 1969 AP 278; *State* v. *Budhram*, AIR 1969 Raj 48.
57. *Duraiswamy Mudaliar* v. *Govt. of T.N.*, 1985 Cr LJ 1115; **overruled** on a different point in *Suman* v. *State*, AIR 1986 M 318
58. *Suman* v. *State of Tamil Nadu*, 1986 Mad 318 (FB) **overruling** *Duraiswamy Mudaliar* v. *State*, 1985 Cr LJ 1115 (Mad).

A special officer of the Commercial Tax Department empowered by the principal Government to exercise powers conferred on him by Section 12(3) of the Madras Hoarding and Profiteering Prevention Ordinance to investigate all offences under the Ordinance with all powers, duties, privileges and liabilities of an officer-in-charge of a police station under the Cr. P.C. when investigating a cognizable offence, was held to be a police officer within the meaning of this section.[59]

An officer appointed under the Bombay Sales Tax Act.[60]

Security Officer of H.E.C.[61]

Officers of J.K. Rifles.[62]

Officers under Orissa Home Guard Act (1961).[63]

Police Constable Guarding the Treasury.[64]

Police Patel.[65] **See Contra.**[66]

Gram Rakshi.[67]

Village Administrative Officer.[68]

11. WHO ARE NOT POLICE OFFICERS

In the undermentioned cases, it was held that the concerned officers were "not Police Officers".

IPS Officer working on an administrative post and not authorised or empowered to conduct investigation.[69]

Officers of Railway Protection Force or under the Railway Property (Unlawful Possession) Act of 1966.[70]

Member of the defence party under Assam Village Defence Organisation Act, 1966.[71]

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59. In re : *Someshwar H. Shelat,* AIR 1946 Mad 430; *Public Prosecutor* v. *Paramasivam,* AIR 1953 Mad 917.
60. *State* v. *Kaikhushroo Merwan Irani,* (1958) (IX) STC 681.
61. *Ram Lakhan Pandey* v. *State of Bihar,* 1969 BLJR 707.
62. *Lalkawnga* v. *Union Territory of Mizoram,* 1984 Cr LJ (NOC) 78.
63. *State of Orissa* v. *Duguba Tubod,* 1978 Cr LJ 1566.
64. *Ramachandra Singh* v. *State,* 1978 Cr LJ (NOC) 55 : (1977) 56 Pat 528.
65. *Empress* v. *Rama Birappa,* (1878) 3 Bom 12; *Queen-Empress* v. *Bhima,* (1892) 17 Bom 485; *Amar Singh* v. *State of Gujrat,* 1980 Cr LJ (NOC) 84; (Under Bombay Police Act); *Vistari Narayan Shebe* v. *State of Mah.,* 1978 Cr LJ 891 (Bom), (Maharashtra Village Police Act); *State of Mysore* v. *Ramaji Ramappa Malagi,* (1972) 2 Mys. LJ 6 (Under Mysore Police Act); *Alluri Ramayya* v. *State of M.P.,* 1987 Cr LJ 1172 (Bom); (though he is present in the crowd to whom confession is made it is admissible as the word "to" in Section 25 cannot be read as "in the presence of). Police Patil exercising powers as that of police officer in respect of investigation can be termed as police officer, *Vijaysing D. Thakar* v. *State of Gujarat,* 1996 Cr LJ 2932 (para 7) (Guj). **See also** *Ramsingh* v. *State of Maharashtra,* 1999 Cr LJ 3763 (para 19) (Bom).
66. In re : *Korella Larkhmiah,* ILR 1964 AP 905; *State* v. *Barkat Ram,* AIR 1962 SC 276; *R* v. *Samipapi,* 7 Mad 287; (Section 25 is not applicable to all officers whose duty is to detect and prevent the commission of offences); *Additional Public Prosecutor,* ILR 1962 AP 1230; *Vadithia Sevia.*
67. *Madan* v. *State,* 1977 Cr LJ (NOC) 132 : 43 Cut LT 512 (Orissa Gram Rakshi Act), held no longer a good law, *Khageswar Khatua* v. *State,* 1993 Cr LJ 2374 (para 8) (Ori); *State* v. *Shantilata,* 1978 Cr LJ (NOC) 267; *Dusasan Bhai* v. *State of Orissa,* 1981 Cr LJ 1452 : 52 Cut LT 126 (DB); *Boisakhu Kailor* v. *State,* 60 Cut LT 61; *Krup Sindu Mallir* v. *State,* 46 Cut LT 260.
68. *Annamalai* v. *State,* 1996 Cr LJ 535 (paras 14 and 15) (Mad).
69. *Seethamaniyan* v. *State of Kerala,* 1996 Cr LJ 3038 (para 12) (Ker).
70. *Balkishan A. Devidayal* v. *State of Maharashtra,* AIR 1981 SC 379 : 1980 Cr LJ 1424 : (1980) 4 SCC 600; *State of Gujarat* v. *Abdul Remhan Ismail,* 1972 Cr LJ 1101; *Darshanlal* v. *State,* AIR 1975 SC 898; *Balkishan* v. *State of Maharashtra,* 1975 Cr LJ 1891; *Ranjit Singh* v. *State of M.P.,* 1974 Cr LJ 719; *Badri Vishal* v. *State of M.P.,* 1973 MP LJ 82; *State of M.P.* v. *Chandan Singh,* 1980 Cr LJ 1024; *Sainik Kanaiyalal Kalumal* v. *State,* (1962) 3 Guj LR 739; *State of Orissa* v. *Kapildeo Singh,* 1983 Cr LJ (NOC) 188; *State Public Prosecutor* v. *Sankaran,* 1983 Cr LJ (NOC) 208 : 1983 Mad LW (Cri) 219; *State of Punjab* v. *Barkatram,* 1980 Cr LJ 24; *Hari Rachu* v. *State,* (1971) 73 Bom LR 891; **See also** *Badaku* v. *State,* AIR 1966 SC 1746; *Nanoo* v. *R,* AIR 1927 Bom 4; *Amin Shariff* v. *R,* AIR 1934 Cal 580; *Public Prosecutor* v. *Paramasivam,* AIR 1953 Mad 917; *State of Kerala* v. *Ramadasan,* 1989 Cr LJ (NOC) 110 (Ker); *Salim Mohamed Babul Miniyar* v. *State of Maharashtra,* 2001 Cr LJ 58 (para 10) (Bom); *Santosh Kumar Karmakar* v. *State of W.B.,* 2001 Cr LJ 3828 (para 8) (Cal).
71. *Akanman Bora* v. *State of Assam,* 1988 Cr LJ 573 (Gau); *Ramjan Ali* v. *State of Assam,* 1988 Cr LJ (NOC) 53.

Central Reserve Officer of Central Reserve Police Force.[72]

Constable of Rajasthan Armed Constabulary.[73]

Sub-Divisional Officer.[74]

Officer of the Security Force.[75]

(a) Officers of Customs.—It was held by the Supreme Court that the customs officer is primarily concerned with the checking of smuggling of goods and the due realisation of customs duties, and to determine the action to be taken in the interests of revenue of the country by way of confiscation of goods on which no duty has been paid, by imposing penalties and fine, and is conferred powers of search of persons or places, and of arrest, only for that purpose. The customs officer either under the Land Customs Act of 1924, or under the Sea Customs Act of 1878, is not a police officer; for the purpose of Section 25[76] and a confession recorded by Customs Officer is admissible in evidence.[77]

Inspector of Mines.[78] **See Contra.**[79]

Prohibition Officer.[80]

Food Inspector under Prevention of Food Adulteration Act.[81]

(b) Forest Officer.—As they are not empowered with powers of a officer-in-charge of a police station and are not competent to file a report under Section 173, Cr P.C.[82]

Officer under Norcotic Drugs Act.[83]

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72. *Jagjit Singh* v. *State*, AIR 1956 Kutch 1 : 1956 Cr LJ 217.
73. *Ramesh Kumar* v. *State of Rajasthan*, 1999 Cr LJ 871 at p. 874 (Raj).
74. *Haru* v. *State of MP*, 1980 Cr LJ 762 (MP); (though empowered to search and seize under Essential Commodities Act); *Srikant* v. *R*, AIR 1934 Par 256; *R* v. *Samipapi*, ILR 7 Mad 287.
75. *Darshan Lal* v. *State*, AIR 1975 SC 898; *Kapbuaia* v. *Union Territory of Mizoram*, 1984 Cr LJ (NOC) 189 (Gau).
76. *State of Punjab* v. *Barkatram*, AIR 1962 SC 276 : (1962) 3 SCR 338; **overruling** *Gopal Dass* v. *State*, AIR 1959 Punj 113; *Soni Vallabadas* v. *Assistant Collector*, AIR 1965 SC 481; S. *Fernandez* v. *State*, AIR 1953 Cal 219; *Percy Rustumji* v. *State*, AIR 1971 SC 1087; *Ramesh Chandra Mehta* v. *State of West Bengal*, AIR 1970 SC 940; *Hazari* v. *Union of India*, AIR 1973 SC 62; *Balkrishna* v. *State of West Bengal*, AIR 1974 SC 120; *Harbansingh* v. *State*, AIR 1972 SC 1224 : 1972 Cr LJ 759; *Asst. Collector Customs* v. *Tilak Raj*, AIR 1969 Del 301; *Asst. Controller of Customs* v. *Kedarnath*, ILR (1972) 1 Del 775; *Barkathali* v. *Director of Enforcement*, AIR 1981 Ker 81; *Dy. Collector C.B.O.* v. *P. Shyab Babu Patro*, 40 Cut LT 806; *Sevantilal* v. *State of Maharashtra*, AIR 1979 SC 705; *Illias* v. *Collector*, AIR 1970 SC 1065; *Issa Yacub* v. *State of Mysore*, AIR 1961 Mys 7 : (1961) 1 Cr LJ 106; (Under Foreign Exchange Regulation Act), *M.G. Venugoplan* v. *E.V. Govindan*, 1976 Cr LJ 165; *Fr. Mario Pires* v. *Director of Enforcement, New Delhi*, 1982 Cr LJ 461 (Goa); *Roshan Bebvi* v. *Joint Secretary*, T.N. 1984 Cr LJ 134 (Mad) (FB); In re : *Mayalavahanam*, ILR 1947 Mad 788; *State* v. *Papas Kumar Shome*, 1985 Cr LJ 871 (Ori); *Surjeet Singh Chhabra* v. *Union of India*, AIR 1997 SC 2560; *Supdt. of Customs & Central Excise, Nagercoil* v. *R. Sunder*, 1993 Cr LJ 956, at p. 963 (Mad); *Banshidhar Maharana* v. *State of Bihar*, 1993 Cr LJ 1310 (paras 15 and 16) (Pat).
77. *Convict Thalak Sher* v. *State of Punjab*, 1994 Cr LJ NOC 276 (P&H). **See also** *Arya Abhushan Bhandar* v. *Union of India*, 1999 AIHC 1302 (para 8) (All), the Court referred to *Percy Rustomji Basta* v. *The State of Maharashtra*, AIR 1971 SC 1087 : 1971 Cr LJ 933; *Balkrishna Naik* v. *State of M.P.*, 2000 Cr LJ 4797 (para 11) (MP); *Gulam Husain* v. *S. Reynolds, Suptd. of Customs, Marmgoa*, AIR 2001 SC 2930 (paras 4 and 15) : 2001 Cr LJ 4755.
78. *S. Fernandez of State*, (1983) 2 FAC 30 (Cal) (Under Dangerous Drugs Act of 1930).
79. *State* v. *B.L. Lohri*, AIR 1967 Pat 441; *Sachdeo agent of Eklehra Colliery* v. *State of M.P.*, 1974 MP LJ 64; **following** *Ramesh Chandra* v. *State*, AIR 1970 SC 940; *Illias* v. *Collector*, AIR 1970 SC 1065; *State of MP* v. *Mohammed Abdul Rahman*, 1973 Cr LJ 290 (MP).
80. In re : *Vadivel*, AIR 1952 Mad 299 : 1952 Cr LJ 640 (Mad); *Public Prosecutor* v. *Rangareddy*, AIR 1957 And Pra 81 : 1957 Cr LJ 623 (A.P.); In re : *Venkata Reddis*, AIR 1948 Mad 116; In re : *Vasam Seth*, AIR 1953 Mad 1004 : 1953 Cr LJ 1877; *Srinivasa* v. *State*, 1954 Mad WN 659.
81. *State of M.P.* v. *Mohammad Abdul Rahman*, 1973 Cr LJ 290 (MP); *State of Punjab* v. *Barkatram*, (1962) 1 Cr LJ 217 (SC); *Badaku* v. *State*, AIR 1966 SC 1746 : 1966 Cr LJ 1353 (SC); *Ramesh Chandra Mehta* v. *State of WB*, 1970 Cr LJ 863 (SC); *Illias* v. *Collector of Customs*, 1970 Cr LJ 998 (SC).
82. *Ramesh Chandra* v. *State of W.B.*, AIR 1970 SC 940; *E.C. Richard* v. *Forest Range Officer*, AIR 1958 Mad 31 : 1958 Cr LJ 52; *Kunhiraman* v. *Spl. Range Officer*, ILR 1959 Ker 660 : 1959 Kerala LT 667 : 1959 Mad LJ (Cri) 808; *Forest Range Officer* v. *Aboobacker*, 1989 Cr LJ 2038 (Ker); (Under Wild Life Protection Act); *Rema Naik* v. *State*, 1965 (1) Cr LJ 315 : AIR 1965 Ori 31; *Matia Patel* v. *State of Orissa*, 2001 Cr LJ 1897 (para 8) (Ori).
83. *Mangal Singh* v. *State*, 1989 Cr LJ 460 (Gu); *Union of India* v. *Altaf Husain*, 1998 Cr LJ 2782 (All); *Abdul Razak Alias Raju* v. *Sudip Kumar Dutta*, 1989 Cr LJ 2007 (Cal); *Kirpal Mohan Tirmani* v. *B.D. Mishra*, 1989 Cr LJ (NOC) 199; (Revenue Intelligence Officer under the Act); *R.N. Kaker* v. *Shabir Fidhusein*, 1990 Cr LJ 144 (Bom); *Nathubhai Babarbhai Patel* v. *State of Maharashtra*, 2001 Cr LJ 536 (para 61) (Bom).

Act—Enforcement Officer investigating the offence under Section 5(1)(aa) of the Foreign Exchange Regulation Act.[84]

Village Kotwal.[85]

Village Choukidar.[86]

Gram Rakhi.[87]

12. SECTION 25 PROHIBITS THE USE OF A CONFESSION AGAINST THE MAKER AND NOT IN HIS FAVOUR

Where the accused stated that he killed his wife on provocation, it was held that the facts relating to provocation can be used in his favour as this section only prohibits use of confession "against" an accused and does not prohibit its use in favour of an accused.[88] It was held by the Privy Council that a statement made to a police officer, confessing the offence, is inadmissible against co-accused but may be used in favour of the maker, as the prohibition under Section 25 is only regarding the use of the statement against the accused.[89] Even if such confession is wholly self-exculpatory; it cannot be used against the co-accused.[90]

This section does not preclude one accused person from proving a confession made to a police officer by another accused person tried jointly with him. Such a confession is not to be received or treated as evidence against the person making it, but simply as evidence on behalf of the other.[91]

A confession might be inadmissible under this section; yet, for other purposes, it would be admissible as an admission, under Section 18, against the person who made it in his character of one setting up an interest in property which is the subject of litigation or judicial enquiry and disposal.[92]

Confession by accused while in custody of police not to be proved against him.

S. 26. No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

***Explanation.*—In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882.**[93]

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84. *K T Subramanian* v. *Dy. Director of Enforcement Directorate, Madras,* 1987 Cr LJ 483 (Mad) : (1986) 99 Mad LW 754; **relying on** *Badaku* v. *State,* AIR 1966 SC 1746; *Abdul Rajak Haji Md* v. *Union of India,* 1986 Cr LJ 2018 (Punj); *Collector of Customs* v. *Koumal Bhirumal,* AIR 1967 Mad 263 : 1967 Cr LJ 1007.
85. *Rambhau Bhagwan Dhare* v. *State of Maharastra,* 1979 Mah LJ 603; *Srikanth* v. *R,* AIR 1934 Pat 256; *Nga Myin* v. *R,* AIR 1924 Rang 245; *State of MP* v. *Premlal,* 1987 Cr LJ 204.
86. **See Contra** *Mahto* v. *State of M.P.,* 1978 Cr LJ 1149 : 1978 MPLJ 599; *Devraj* v. *State of M.P.,* 1979 Cr LJ (NOC) 115 : (1878) MP LJ 802; *Queen-Empress* v. *Salemuddin Sheik,* ILR (1899) 26 Cal 569; *King-Emperor* v. *Pancham,* ILR (1933) 8 Luck 410; *Emperor* v. *Deokinandan,* (1937) All 85, (FB); *Budha Majhi,* (1962) Cut 366; In the Punjab a village chaukidar is held to be not a 'police officer' : *Khuda Baksh* v. *The Crown,* (1917) Pr. No. 42 of 1917 (Cr); in view Apex Court **decision in** *Raj Kumar Karwal* v. *Union of India,* 1991 Cr LJ 197 (*Supra*) that only a person conferred with power to investigate under Chap. XII, Cr.P.C. can be said a police officer, ***Village Chaukar*** has been held to be not a police officer in *Paro Chamar* v. *State of Bihar (FB),* 2000 Cr LJ 4787 (paras 16-20) (Pat), **overruling** *Emperor* v. *Mt. Jagia,* (1938) 39 Cr LJ 428 : AIR 1947 Pat 146 and *Punia Goalin* v. *Emperor,* (1947) 48 Cr LJ 412 : AIR 1947 Pat 146 and **dissenting from** *Deokinandan* v. *Emperor,* (1937) 38 Cr LJ 40 : AIR 1936 All 753 (FB); *Vistari Narayan Shebe* v. *State of Maharashtra,* 1978 Cr LJ 891 (Bom) and *Siddappa* v. *State of Karnataka,* 1991 Cr LJ 458 (Kant).
87. *Khageswar Khatua* v. *State,* 1993 Cr LJ 2374 (para 8) (Ori).
88. In re : *Thandavan,* 1973 Cr LJ 1041 (Mad); In re : *Rayappa Asari,* 1972 Cr LJ 1226 (Mad); *Lalkhan* v. *R,* AIR 1948 Lah 43; *Hasil* v. *R,* AIR 1942 Lah 37; In re : *Motti Thevar,* AIR 1952 Mad 586; *Hari Shankar* v. *State,* 1985 Cr LJ 1700 (Del).
89. *Waldi Muhammod* v. *The King,* AIR 1949 PC 103; *Usman Main* v. *State,* 1971 Cr LJ 747 (Pat); In re : *Mottai Thevan,* AIR 1952 Mad 586; In re : *Rayappa Asari,* 1972 Cr LJ 1226; *Lalkhan* v. *R,* AIR 1948 Lah 43.
90. *Dharma* v. *State,* AIR 1966 Raj 74 : 1966 Cr LJ 441.
91. *Imperatrix* v. *Pitamber Jina,* ILR (1877) 2 Bom 61.
92. *Queen-Empress* v. *Tribhovan Manekchand,* ILR (1884) 9 Bom 131.
93. See now the Code of Criminal Procedure, 1973 (2 of 1974).

SYNOPSIS

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COMMENTS

1. PRINCIPLE AND SCOPE

This section was adopted with some verbal alterations from the old Section 149, Cr PC of 1861, which was in the following terms:—"No confession or admission of guilt made by a person, whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be used as evidence as against such person."

Under this section no confession made by a person in custody, to any person other than a police officer, shall be admissible, unless made in the immediate presence of a Magistrate. Section 25 excludes confessions to police officers under any circumstances. This section excludes confessions to anyone else, while the person making it is in a position to be influenced by a police officer. The presence of the Magistrate secures the free and voluntary nature of the confession and the confessing person has an opportunity of making a statement uncontrolled by any fear of the police.[1]

Thus, this section is a further extension of the principle laid down in Section 25. Section 25 applies to all confessions made to police officers; this section applies to confessions made to persons other than police officers but made while in police custody.

Section 25 was intended as a full protection to the accused in its widest and most popular signification, by saying that no confession made to a police officer shall be proved as against a person accused of any offence. As the prohibition is absolute, it is submitted that a confession made to a police officer even in the presence of a magistrate would not be admissible. Section 26 will not apply to a case where the confession is made to a police officer.

The Supreme Court observed: "Under the Indian Evidence Act, the Miranda[2] exclusionary rule that custodial interrogations are inherently coercive, finds expression in Section 26, although the Indian provision confines it to confession which is a narrower concept than self-incrimination".[3]

In *Pakala Narayana Swamy* v. *The King Emperor*[4] the Privy Council observed that a confession "includes any statement made by (any) person whilst in custody of the police and appears to apply to such statements to whomsoever made, *e.g.*, to fellow prisoner, a doctor or a visitor; such statements are not covered by Section 162."[5]

2. CUSTODY

The word 'custody' is not defined in the Act. But it implies that there must be some limitation upon the liberty of the citizen, either directly or indirectly caused by police, which may include arrest, detention, surveillance or any restraint on his movement.[6] It does not necessarily mean custody after formal arrest; it is sufficient if there is some form of police surveillances, or restriction by the police on the movements of the person concerned.[7] Police custody extends to a case where the accused is deemed

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1. *Hiran Miya*, In the matter of (1877) 1 CLR 21.
2. (1966) 384 US 436.
3. *Nandini Satpathy* v. *P.L. Dani*, AIR 1978 SC 1025.
4. AIR 1939 PC 47 : 66 IA 66 (B).
5. **See also** *Mahabir* v. *State*, AIR 1972 SC 1331; *Nagesia* v. *State*, AIR 1966 SC 119.
6. *State of Bihar* v. *Madanlal Agarwalla*, AIR 1967 Pat 63; *Jairam Ojha* v. *State*, AIR 1968 Ori 97, In re : *Ramachandran*, 1960 Cr LJ 616; 1969 Mad 191; *Paramahansa* v. *State*, (1964) 1 Cr LJ 680 : AIR 1964 Ori 144, In re : *Mannem Edukondalu*, AIR 1957 AP 729, *Babbu* v. *State*, AIR 1954 All 633.
7. *Mahir Adhikary* v. *State*, 1983 Cr LJ 1559 (Cal); *Rodhal Mal* v. *Ramji Das*, AIR 1933 Lah 609; *Ahamad Kunju* v. *State*, ILR (1971) 2 Ker 30; *Akmat Ali* v. *State*, 1957 Tri 48 : 1957 Cr LJ 1457.

to have submitted to the custody of the police officer, by submitting to the interrogation and making statements about discovery and thereby ceases to be a free man.[8] The words "in custody" which are to be found in this and other sections of the Act include surveillance or restriction on the movements of the person concerned, which may be complete as, for instance, in the case of an arrested person, or may be partial.[9]

In considering whether an accused is in police custody when his confession is recorded, the crucial test is whether at the time when the accused makes the confession he is a free man or his movements are controlled by the police either by themselves or through some other agency employed by them, for the purpose of securing the confession. Even a temporary absence of policeman or a police officer would not terminate his custody and the accused shall be deemed to be in the custody of the police even in such circumstances.[10]

As soon as an accused or a suspected person comes into the hands of a police officer, he is, in the absence of a clear and unmistakable evidence to the contrary, no longer at liberty, and is, therefore, in custody within the meaning of this section and Section 27.[11] Where the evidence was that, at the instance of the police, the doctor who was a witness questioned the accused and a confession was made and the accused was arrested later, it was held that the confession was hit by Section 26, and could not be admissible.[12] The mere temporary absence of a policeman from the room in which the confession is recorded does not terminate his custody of the accused, if the policeman has taken effective steps to prevent his escape whether by locking the door of the room or by waiting outside[13], or by leaving him in the custody of another person.[14] Where a village policeman who had arrested the accused left him in charge of certain villagers and went to see the scene of occurrence and, during that interval, the accused confessed his guilt to those villagers, it was held that, notwithstanding the temporary absence of the policeman, the accused being still under police custody, the extra-judicial confession made before the villagers was not admissible in evidence.[15] When once the accused is arrested by the police officer and is in his custody, though temporarily left in charge of a private individual, it does not terminate the police custody. When a police constable took the accused for medical examination and when the accused confessed certain facts to the doctor and the doctor stated that police constables were outside the room, it was held that the confession was inadmissible as it is hit by Section 26 of the Act.[16] An English woman under arrest on a charge of murder was taken in a tonga, from the place where the alleged offence was committed, to the principal town of the district. An European friend drove with her in the tonga and a mounted policeman rode in front. In the course of the journey, the policeman left the tonga and went to a neighbouring village to procure a fresh horse, the tonga meanwhile proceeding slowly along the road for some miles without any escort. In the absence of the policeman, the accused made a communication to her friend with reference to the alleged offence. At the trial it was proposed to ask what the accused had said, on the ground that she was not then in custody, and that this section did not apply. It was held that, notwithstanding the temporary absence of the policeman, the accused was still in custody, and the question could not be allowed.[17]

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8. *Bakshia* v. *State*, AIR 1960 Bom 263; *Punja Mava* v. *State of Gujarath*, AIR 1965 Guj 5; *State* v. *Md. Hussain*, AIR 1959 Bom 534; *Maharani* v. *Emperor*, AIR 1948 All 7.
9. *Harbansingh* v. *State*, (1968) 71 Bom LR 599. **Also see** *Bibhachha Baitharu* v. *State of Orissa*, 1998 Cr LJ 1553 (para 7) (Ori).
10. *Ram Singh* v. *State*, 1959 All 518 : 1959 Cr LJ 940; (after giving confession he was again handed over to the police custody) *State* v. *Girosia Bachuba*, AIR 1954 Sau 39 : 1954 Cr LJ 561; *Punja Mava* v. *State of Gujarat*, 1965 Guj 5; *A.P. Kuttan Panicker* v. *State of Kerala*, (1963) 1 Cr LJ 669 (Ker); *Farman Shah* v. *State*, 1981 Cr LJ (NOC) 53; *State* v. *Thingnam Dhabalo Singh*, 1955 Cr LJ 139 : AIR 1955 Mani 1; *Vidyamati* v. *State*, AIR 1951 HP 82 : 1952 Cr LJ 33; *Emperor* v. *Panchkari Dutt*, AIR 1925 Cal 587; *Sivarajan* v. *State*, ILR 1959 Ker 319; *Mobemi Minji* v. *Union Territory of Arunachal Pradesh*, 1982 Cr LJ 39 (NOC).
11. *Maung Lay* v. *King-Emperor*, ILR (1923) 1 Ran 609; *King-Emperor* v. *Pancham*, ILR (1933) 8 Luck 410.
12. *Md. Dwara Rawther Ismail* v. *State of Kerala*, 1982 Cr LJ 2102.
13. *Queen-Empress* v. *Lakshmya*, 1896 Unre Cr C 855.
14. *King-Emperor* v. *Musammat Jagia*, ILR (1938) 17 Pat 369 : AIR 1938 Pat 308.
15. *King-Emperor* v. *Pancham*, ILR (1933) 8 Luck 410.
16. *Raghavan* v. *State*, 1962 Ker LJ 755 : 1964 MLJ (Cri) 29; **following** *Haroon* v. *State*, AIR 1932 Sind 149; *R* v. *Mst Jagia*, AIR 1938 Pat 308; *Mst. Hassan Pari* v. *The Emperor*, AIR 1941 Peshawar 22; *Ram Singh* v. *State*, AIR 1959 All 518.
17. *Empress* v. *Lester*, ILR (1895) 20 Bom 165.

The evidence of a police officer and of witnesses as to the pointing out of various places by the accused is really evidence of the confession of his guilt made by the accused while the latter is in the custody of the police officer and is, therefore, a statement inadmissible under Section 25 and this section.[18]

Where the accused was brought hand-cuffed to the police station and a statement was made by the accused to the police at the outpost police station, that he killed the deceased, it was held that the statement was inadmissible as it was made while in police custody.[19] An accused approaching a police officer and making a statement incriminating himself can be said to be in police custody; as custody means submission to custody by words, or action.[20] Where a little before the recovery of the articles, the police took the appellant into custody and interrogated him and then the appellant gave the axe with which the murder had been committed and also stated that his blood-stained clothes and *dhoti* were in his house and he would produce them, it was held that the statements by the appellant were incriminating statements made to a police officer and were hit by Section 26.[21] Though the accused was in judicial lock-up under the Magistrate's supervision, but with police guard, it was held that it was really a case of police custody.[22] Where an accused made a confession before his father-in-law, a police officer, who arrested him later, it was held that as the confession was while in custody of the police, it was hit by Section 26.[23] Where the accused was arrested by the police, and later he made a statement to the medical officer as to how he had sustained the injuries, it was held that it is inadmissible.[24] While the accused was in the lock-up of the Magistrate under trial, he was sent up by the Magistrate to a hospital for treatment. He was taken from the lock-up to the dispensary by two policemen, who waited outside on the verandah of the hospital. During his examination inside the dispensary by the doctor, the accused made a confession of his guilt to another patient who happened to be there within the hearing of the doctor. It was held that the confession was inadmissible, because the accused, who was in police custody up to his arrival at the hospital, remained in that custody even though the policemen were standing outside on the verandah.[25]

The full Bench of Kerala High Court held that a statement made by an accused to a doctor of a Govt. hospital, though incriminating, is not a confession hit by Section 26 and is therefore admissible.[26] Where the accused, whilst in police custody, made a statement before a doctor that the injury on his person was caused by the murdered person, as the statement does not amount to a confession, it is not barred under this section but can be relied upon as an admission, under Section 21, of the fact that he was in the deceased's room.[27]

3. POLICE OFFICER

This term was held to include police officers of former Indian States.[28]

A jailor is not a police-officer, and a confession made to him may be given in evidence.[29]

For other cases, see commentary under Section 25 under the head 'Police Officer'.

4. CONFESSIONS

A statement made to a police officer by an accused person, while in custody of the police, although intended to be made in self-exculpation and not as a confession, may nevertheless be an admission of an

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18. *Turab* v. *King-Emperor*, ILR (1934) 10 Luck 281 : AIR 1935 Oudh 1.
19. *Ramlal Lohar* v. *State of Assam*, 1981 Cr LJ 1734 (Gau).
20. *State of Bihar* v. *Madan Lal Agarwalla*, 1966 BL JR 133.
21. *Prabhoo* v. *State*, AIR 1963 SC 1113; *State* v. *Debnu*, AIR 1957 HP 52 : 1957 Cr LJ 1254; *Jogjit Singh* v. *State*, 1956 Cr LJ 217.
22. *Kirpa* v. *State*, AIR 1952 HP 68 : 1952 Cr LJ 1495.
23. *Amar Singh* v. *State*, 1980 Cr LJ (NOC) 84 : 1980 Cr LR 154 (Guj).
24. In re : *Diraviam*, 1985 Cr LJ (NOC) 63 : 1984 Mad LW 163 (Cri).
25. *Emperor* v. *Mallangowda*, (1917) 19 Bom LR 783, 42 Bom 1 : AIR 1917 Bom 130.
26. *State of Kerala* v. *Ammimi*, 1988 Cr LJ 107 (FB).
27. *Kanda Padayachi* v. *State of Tamil Nadu*, AIR 1972 SC 66.
28. *Queen-Empress* v. *Nagla Kala*, ILR (1896) 22 Bom 235.
29. *Queen-Empress* v. *Bhima*, ILR (1892) 17 Bom 485, *Queen-Empress* v. *Tatya*, ILR (1895) 20 Bom 795.

incriminating circumstances, and, if so, under Sections 25 and 26, it cannot be proved against the accused.[30] If a statement contains an admission of an offence, not only that admission but also every other admission of an incriminating fact contained in the statement is part of the confession.[31] If it is an admission of an incriminating circumstance it cannot be used in evidence either under Section 25 or this section.[32]

But if it does not amount directly or indirectly to an admission of any incriminating circumstance, it is admissible. Where, therefore, the accused was found carrying away a box at night, and when asked by a policeman about the ownership of the box, he stated that it belonged to him, it was held that the statement was admissible against him, in a trial for theft regarding the box.[33] It was held by the Supreme Court[34] that a statement made by an accused in police custody, to a doctor that the injuries on his person were caused by the murdered person amounts only to an admission of facts, though incriminating and its admissibility is not barred under this section.[35]

Where a person proceeded against under Section 109, Cr PC, (for keeping good behaviour) is not prosecuted for any offence, any statement made by him is not a confession; such statements are not covered either by 162, Cr PC or by Section 26 of this Act. There seems to be no other provision of law which renders such statements inadmissible in evidence on the ground that they were made to a police officer.[36]

For other cases see Commentary under Section 24 and 25.

(a) Confession under police restraint.—The prolonged custody, immediately preceding the making of the confession is sufficient unless it is properly explained, to stamp it as voluntary. Though various suggestions were made on behalf of the accused during the cross-examination of the inspector to show inducement, threat or promise of any nature and, they were denied, it would not relieve the prosecution from the duty of positively establishing that the confession was voluntary.[37]

There is a considerable difference between a confession recorded before an accused was placed in the police custody and the one recorded afterwards. In the former case, the contents of the confession may themselves be a reason for placing him in police custody e.g., for pointing out the places of recovering of the articles which he divulges in the confession. If, on the other hand, he is put in the police custody and returns with a readiness to confess, it is obvious that it has been the stimulant. In such circumstances, the magistrate has to give much longer time and take special caution before recording the confession.[38]

An extra-judicial confession was made to a doctor after the accused had been kept in the police station for 3, 4 days and at the instance of the police; it was held that the confession is hit by Section 26.[39]

Where a confession was made before the customs authorities, while the accused was in police custody, it was held that confession was not admissible in evidence. It was further held that though customs authorities have power of arrest under Section 104 of Customs Act, that does not mean that the police officer cannot exercise his power under Cr PC.[40]

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30. *Imperatrix* v. *Pandharinath*, (1881) 6 Bom 34; *Anant Kumar* v. *State of M.P.*, 1993 Cr LJ 1499 (paras 3 and 6) (MP); *Banshidhar Maharana* v. *State of Bihar*, 1993 Cr LJ 1310 (paras 15 and 16) (Pat).
31. *A. Nagesia* v. *Bihar State*, AIR 1966 SC 119.
32. *Queen-Empress* v. *Javecharam*, ILR (1894) 19 Bom 363; *Queen-Empress* v. *Jai Singh*, (1900) PR No. 12 of 1900 (Cr); *Hakiman* v. *King-Emperor*, (1905) PR No. 20 of 1905 (Cr); *Farid* v. *King-Emperor*, (1906) PR No. 16 of 1906 (Cr).
33. *Emperor* v. *Mahmed*, ILR (1903) 5 Bom LR 313; **distinguishing** *Imperatrix* v. *Pandarinath*, (1881) 6 Bom 34.
34. *Kanda Padayachi* v. *State of Tamil Nadu*, AIR 1972 SC 66.
35. *Emperor* v. *Mohamed*, (1903) 5 Bom LR 313; **distinguishing** *Imperatrix* v. *Pandharinath*, ILR (1881) 6 Bom 34.
36. *Rex* v. *Ram Dayal*, AIR 1950 All 134, 142.
37. *Nathu* v. *State of U.P.*, AIR 1956 SC 56.
38. *Kartar Singh* v. *State of V.P.*, AIR 1952 Vin Pra 42 : 1952 Cr LJ 986.
39. *Mohamad Dwara Rawther Ismail* v. *State of Kerala*, 1982 Cr LJ 2102 (Ker).
40. 1980 Cr LR (Guj) 252.

(b) Confession in the immediate presence of a Magistrate.—The word 'Magistrate' was held to include Magistrates of former Indian States.[41]

A confession made to a Magistrate while in the custody of the police is admissible.[42] A statement made on oath before a coroner is admissible in evidence.[43]

A confession made while in the custody of the police to an officer who is not a Magistrate, *e.g.*, a Portuguese Administrator[44], is not admissible in evidence. Confession made by the accused in police custody to a Magistrate in England or in a foreign country (*e.g.* French India), is admissible.[45]

This section contains the expression, "in the immediate presence of the Magistrate". The explanation says that the expression 'Magistrate' does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising a power of Magistrate under the Cr PC, 1882. So this contemplates that a headman of a village can be empowered with magisterial functions under this section.[46]

Under this section the main consideration is the presence of the Magistrate and the making of the confession in his presence.[47]

A statement of the accused charged with murder, identifying the body discovered as that of the deceased, in the presence of a Magistrate and police officials, does not amount to a confession of a crime and is outside the purview of Section 26. Further Section 26 is not applicable when the statement is made in the immediate presence of a Magistrate even though the person making it might be in police custody.[48]

A confession is admissible without proof when it is made before a Magistrate following the procedure under Section 164, Cr P C and can be looked into even when it goes in favour of the accused[49] but where the Magistrate failed to ask any question to the accused relating to his making the confession voluntarily, it could not be relied upon for conviction. Mere warning is not sufficient.[50] In *Nazir Ahmed* v. *Emperor*,[51] it was held that oral evidence by a magistrate of a confession made to him in the course of an investigation which was not recorded following the procedure under Section 164, Cr PC is not admissible and a conviction based on such confession has to be set aside.[52] The Supreme Court in *State of U.P.* v. *Singhara Singh*[53] held that where a Second Class Magistrate, not empowered to record confessions under Section 164, Cr PC, records the confession under that section, his oral evidence relating to the confession is not admissible.[54] Where a statement was given under police pressure and recorded by a magistrate under Section 164, Cr PC, it is inadmissible.[55]

Where the Magistrate followed the requisite formalities in recording the confession, the mere fact that the record does not show that he told the accused that he was a Magistrate, is immaterial, and the confession is admissible.[56]

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41. *Queen-Empress* v. *Nagla Kala*, ILR (1896) 22 Bom 235; *sup: Queen-Empress* v. *Sundar Singh*, (1890) 12 All 595; *Govinda* v. *King Emperor*, (1920) 17 NLR 113.
42. *Emperor* v. *Sidheshwar Nath*, (1933) 56 All 730, *R* v. *Moti*, AIR 1953 All 792 : 1953 Cr LJ 1829 (All).
43. *Emperor* v. *Ramnath*, ILR 50 Bom 111; *Emperor* v. *Md. Hasan*, 30 Bom LR 86 (1927).
44. *Emperor* v. *Mhabli*, (1924) 26 Bom LR 706.
45. *Panchanatham Pillai*, In re : (1929) 52 Mad 529.
46. *Panchanathan* v. *Emperor*, AIR 1929 Mad 487; *Emperor* v. *Hulasi*, AIR 1933 All 286.
47. *Jograj* v. *Emperor*, AIR 1930 Lah 534.
48. In re : *Chinnasami*, AIR 1960 Mad 462 : 1960 Cr LJ 1344; **See** *Chinnaswamy* v. *State of A.P.*, AIR 1962 SC 1788 on appeal.
49. *Harnath* v. *State*, AIR 1952 Ajmer 49.
50. *Maharaj Deen* v. *State*, 1996 Cr LJ 506 (paras 23, 25 and 26) (All).
51. 1936 PC 253 : 63 IA 372.
52. **See also** In re : *Dinanath Ganpat Rai*, AIR 1940 Nag 188; *Emperor* v. *Kommoju Brahman*, AIR 1940 Pat 163; *Bala Majhi* v. *State of Orissa*, AIR 1951 Ori 168 (FB).
53. AIR 1964 SC 358, *Tandra Ravi* v. *State of A.P.*, 2001 Cr LJ 4048 (para 23) (AP).
54. *Singhara Singh* v. *State of U.P.*, 1961 All LJ 617; (magistrate not specially empowered), *Basdeo* v. *State*, 1965 All LJ 77, *Basdeo* v. *State*, 1967 Cr LJ 1104
55. *State* v. *Suram Singh*, 1976 Cr LJ 96 (J&K)
56. *Paramahamsa* v. *State*, AIR 1964 Ori 144.

Where a confession was recorded by a specially empowered Taluk Magistrate and it was corroborated, it was held that mere availability of a judicial magistrate for recording the confession would not, by itself, be sufficient to discard the evidence of the *Taluk* Magistrate. As the confession did not suffer from any infirmities, it was voluntary.[57]

The question has often arisen in the courts as to whether a confession which was not recorded by a magistrate under Section 164, Cr.P.C. would be admissible under this section as a confession made "in the immediate presence of a magistrate". In *Zwinglee Ariel* v. *State of M P*.[58] the Supreme Court held that the alleged statements, made by the accused in that case in the immediate presence of the Magistrate would not be admissible in evidence, as they were not recorded by the magistrate in the manner prescribed by Section 164, Cr.P.C. Purporting to follow this decision it was held in re.: *Thothan*[59] that a confession recorded by a magistrate empowered to record a confession without conforming to the provision of Section 164 or Section 364, Cr PC is inadmissible in evidence. The Judges went further and held that no confession recorded by a magistrate of any rank is admissible unless it conforms to the provisions of Section 164, Cr.P.C. They came to that conclusion notwithstanding the view expressed in In re : *Ramaswami Reddiar* v. *State*,[60] where it was held that a confession before a magistrate holding an inquest but not empowered to record confessions under Section 164, Cr PC is admissible. It is submitted that the above extreme view taken in In re.: *Thothan*,[61] is not correct. In considering the question of admissibility of a confession made before a magistrate, it is important to note the distinction between various cases of such confession.

Section 26 deals with a confession made by a person in the custody of the police "in the immediate presence of a magistrate". It is to be noted that the expression used is "in the immediate presence of a magistrate" and not "to a magistrate". For instance a confession may be made to a police officer or any other person in the presence of a magistrate and not made to the magistrate. If it is made to a police officer, it would come within Section 25 and will be totally inadmissible even though it is made in the presence of a magistrate and Section 26 would not apply. If it is made to any other person Section 26 would apply and it would be admissible, if made, in the presence of the magistrate. In *Pakala Narayana Swamy* v. *King Emperor*,[62] the Privy Council observed that Section 26 would include any statement by a person while in the custody of a police and appears to apply to such statements to whomsoever made *e g* , to a fellow prisoner, a doctor or a visitor. Confessional statement may also be made to a Magistrate. If the magistrate of first class or of second class is empowered to record a confession under Section 164, Cr PC, then such a confession would be inadmissible, if it is not recorded in view of the decision in *Nazir Ahmad's* case[63]. The decision in *Ariel's case*[64] is also a case of a confession to a magistrate. In that case a trap was laid by the police to a person accepting bribe and the police took with them an Additional District Magistrate and a First Class Magistrate. Dealing with a confessional statements made on that occasion the Supreme Court observed: "If these alleged statements are to be regarded as confessions, they will be hit by Section 25 of the Evidence Act, for they were made to Pande, the police officer who was there. If they are sought to be brought in under Section 26 as confessions made in the immediate presence of a magistrate then also they will not be admissible in evidence, in that they were not recorded by the magistrate in the manner prescribed by Section 164, Cr PC". It is to be noted that in this case the magistrate was a First Class Magistrate who had a duty to record under Section 164, Cr PC. It is submitted therefore that the above observation of the Supreme Court with regard to the inadmissibility under Section 26 is to be confined to the cases of confession made before a magistrate who is under a duty to record statements under Section 164, Cr PC in the manner prescribed by that section. The above reasoning would equally apply to a case where the recording of the statement is not in accordance with Section 164, Cr PC as well as to a case where it is not recorded at all. Where the procedure under Section 164, Cr PC is not followed, the recording has to be ignored and the position would be as if there is no

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57. *Abdul Rehman* v. *State of Karnataka*, AIR 1979 SC 1924.
58. AIR 1954 SC 15.
59. AIR 1956 Mad 425.
60. AIR 1953 Mad 138.
61. AIR 1956 Mad 425; **See also** *Noor Mohamed* v. *State*, AIR 1959 Ker 46.
62. 1939 PC 47 : 66 IA at p. 80.
63. 63 I.A. 372 : 1936 253 (2).
64. AIR 1954 SC 15.

record and the confession would be inadmissible. *Zwinglee's* case has no application where the magistrate has no duty to record under Section 164, Cr PC, and therefore does not record the confession.

A distinction has to be made where there is a mere irregularity in procedure. In *State of U.P.* v. *Antonyhn*[65] it was held that where the signature was taken on the statement recorded under Section 164, Cr PC, the statement is not rendered inadmissible.

Yet another case which has to be considered is where a statement is made before a magistrate who is not empowered to record or though empowered, the confession made before him was in the circumstances which do not fall within Section 164, Cr PC. It is submitted that in those cases as there is no question of recording the statement under Section 164, Cr PC, the non-recording the statement or not following the procedure under Section 164, will not be of any consequence and the confession will be admissible under Section 26 as it is made in the presence of a magistrate.

In *Miral* v. *Emperor*,[66] it was stated: "It is to be observed that, if this ruling of the Privy Council[67], is to be kept, as clearly it should be kept, in effect, to cases of confessions recorded by Magistrates empowered to record confessions during the course of an investigation, the special provisions of Section 164, Cr PC, do not apply to confessions otherwise made; they would not apply, for instance, to a confession made by an accused person to Third Class Magistrate such as in *Noukar Mouledino* v. *Emperor*[68] nor to a Second Class Magistrate, not especially empowered to record confessions; nor also to a confession alleged to have been made, as in this case, to some one who is not a Magistrate (Sher Mohammad). The ruling of their Lordships and the provisions of Section 164 would also not apply to a statement of a confession for which special provision is made in Section 339(2), Cr PC. Such a statement referred to in sub-section (2) of Section 339, Cr PC, should in the nature of things, be a confessional statement, and if it was intended to make such a statement subject to the provisions of Section 164, Cr PC, we must assume the Legislature would have said so."

According to Section 20 of the Coroner's Act the Coroner shall be deemed to be a magistrate for the purpose of Section 26 of the Evidence Act. Therefore, it was held that where a Coroner records a confession made to him at an inquest, he has to follow the procedure under Section 164, Cr PC.[69]

The provisions in the Coroner's Act relating to the duty of the magistrate at the inquest are the same as those relating to the magistrate holding an inquest under Section 176(1), Cr PC, in the matter of recording confessions. The Madras High Court held that a confession recorded by the magistrate, who is not empowered to record a confession at the time of inquest, is admissible.[70]

A confession of a guilt to a Magistrate when he visit the jail and during the interview of the accused, is not inadmissible.[71]

Section 164, Cr PC does not make it obligatory on the part of the Magistrate to record in writing a confession made by the accused, while he is holding an investigation or a preliminary enquiry under Section 159, Cr PC and it can be proved by his oral evidence.[72]

In Criminal cases extra-judicial confessions can be proved against the accused. The only requirement under this section is that the confession is to be made in the immediate presence of a magistrate and it does not say that it should be recorded in writing. It is only if the confession is given to a magistrate during the course of the investigation, that the procedure under Section 164, Cr PC is to be strictly adhered to. And, if that procedure is not followed, it cannot be proved by the oral evidence of the magistrate. Thus, oral evidence can be allowed as regards the confession made to a magistrate, not during the course of investigation, but when the magistrate went and met the accused to trap him while committing the offence, or for some other purpose.[73]

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65. AIR 1985 SC 48.
66. AIR 1943 Sind 166.
67. AIR 1936 P.C. 253.
68. AIR 1937 Sind 212.
69. *Government of Bombay* v. *Dashrath Ramnivas*, AIR 1945 Bom 265 (FB).
70. *Ramaswamy* v. *State*, AIR 1943 Mad 138.
71. *Rayalugadu* v. *R.*, 1931 Mad WN 723.
72. *Tangedupalli* v. *R*, AIR 1922 Mad 40.
73. *Chhutkannoo* v. *Rex*, AIR 1949 Oudh 84; In re : *Nain Mohamed*, AIR 1960 Mad 138; In re : *Natesan*, AIR 1960 Mad 443; In re : *Ramachandran*, AIR 1960 Mad 191; *Arunachala* v. *R*, AIR 1932 Mad 500; *Miral* v. *Emperor*, AIR 1943 Sind 166.

Where a confession was made to a Magistrate who followed the procedure under Section 164, Cr PC, it is not necessary in all cases to examine the Magistrate.[74]

A confession recorded by a magistrate under Section 164, Cr PC, after the police had completed investigation and submitted a charge but before the magesterial enquiry has commenced, is admissible in evidence.[75]

Where the magistrate did not follow the precaution as required under Section 164, Cr PC before recording a confession such confession cannot be taken into consideration.[76]

5. EXTRA-JUDICIAL CONFESSION

These are made by the party elsewhere than before a Magistrate or in court. The law in regard to extra-judicial confessions may be stated thus: An extra-judicial confession, if voluntary, can be relied upon by the court, along with other evidence, in convicting the accused.[77] Where the confession was made before the witnesses while the accused was not anywhere near the precints of the police station, nor during the surveillance of the police, though long after it was recorded inside the police station, it was held that bar of Section 26 was not attracted.[78] Where there was difference of a.m. and p.m. in recording the time of extra-judicial confession, it was held to be not proper to jettison an otherwise sturdy piece of evidence of extra-judicial confession on the ground of such a rickety premise.[79] Extra-judicial confession made in police custody is hit by S. 26.[80]

Usually, and as a matter of caution, courts require some material corroboration to an extra-judicial confessional statement.[81]

Though it cannot be laid down, as an inflexible rule of law, that in no case will an extra-judicial confession afford the sole basis for conviction, in cases of homicide and such other similar grave offences, it would not be safe to convict a person on the confession alone unless corroborated by other evidence. This is a rule of prudence rather than of law. The nature and the quality of corroborative evidence must necessarily depend upon the facts of each case.

The extra-judicial confession of an accused cannot be taken into consideration in determining his guilt when it is not put to him in his examination under Section 313 of the Code of Criminal Procedure, 1973.

For other cases see Commentary in Section 24.

How much of information received from accused may be proved

S. 27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

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74. *Madi Ganga* v. *State of Orissa,* AIR 1981 SC 1165; *Bisipati Padhan* v. *State,* AIR 1969 Ori 289.
75. *B. Rajaram* v. *State,* AIR 1966 All 1927 **overruling;** *Bachchanlal* v. *State,* AIR 1957 All 184 : 1957 Cr LJ 344; *Ram Singh* v. *State,* AIR 1959 All 518 : 1959 Cr LJ 940; *State* v. *Ram Autar Chaudhary,* AIR 1955 All 138.
76. *Noor Uddin* v. *State,* 1965 All 40 : (1965) 1 Cr LJ 4; Re : *Thothan,* AIR 1956 Mad 425 : 1956 Cr LJ 1004; *Nazir Ahmed* v. *R,* AIR 1936 PC 253; *Shital Singh* v. *State,* 1975 Cr LJ 699 (All) (cannot even be treated as extra-judicial confession) In re : *Balan alias Balusami Mudali,* (1973) 2 Cr LJ 1311; (not even as an admission) 1972 Mad LJ (Cri) 543; (it should be recorded as far as possible in the first person itself) *State* v. *Surat Singh,* 1976 Cr LJ 96 (J&K).
77. *Mulk Raj* v. *State of U.P.,* AIR 1959 SC 902.
78. *State of A.P.* v. *Gangula Satya Murthy,* AIR 1997 SC 1588 (para 20) : 1997 Cr LJ 774 (SC), **reversing** Cri A No. 255 of 1994, decided on 4-11-1994 (AP).
79. *State of A.P.* v. *Gangula Satya Murthy,* AIR 1997 SC 1588 (para 13) : 1997 Cr LJ 774 (SC), **reversing** Cri A No. 255 of 1994, decided on 4-11-1994 (AP).
80. *M.V. Mahesh* v. *State of Karnataka,* 1996 Cr LJ 771 (para 23) (Kant).
81. *Ratan Goud* v. *State of Bihar,* AIR 1959 SC 18.

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COMMENTS

1. PRINCIPLE AND SCOPE

This section is founded on the principle that if the confession of the accused is supported by the discovery of a fact, the confession may be presumed to be true, and not to have been extracted. It comes into operation only:

(i) if and when certain facts are deposed to as discovered in consequence of information received from an accused person in police custody; and

(ii) if the information relates distinctly to the fact discovered.

The broad ground for not admitting confessions made to a police officer under inducement, threat or promise is the danger of admitting false confessions; but the necessity for the exclusion disappears in a case provided for by this section when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given.[1]

The object of this section is to admit evidence which is relevant to the matter under inquiry, namely, the guilt of the accused, and not to admit evidence which is not relevant to that matter. The discovery of a material object is of no relevancy to the question whether the accused is guilty of the offence charged against him, unless it is connected with the offence. It is, therefore, the connection of the thing discovered which renders its discovery a relevant fact. The connection between the offence and the thing discovered may be established by evidence other than the statement leading to the discovery but that does not exclude proof of the connection by the statement itself.[2]

The Privy Council held that this section, which is not artistically worded, provides an exception to the prohibition imposed by the *preceding section*, and enables certain statements made by a person in police custody to be proved.[3] The condition necessary to bring the section into operation is that the discovery of a fact, in consequence of information received from a person accused of any offence who is

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1. *Bulaqi* v. *The Crown*, ILR (1928) 9 Lah 671, 675.
2. *Pirgu Singh* v. *King Emperor*, (1946) 25 Pat 279; *Ramsingh*, (1952) Raj 93; *State of U.P.* v. *Rajnath*, 1983 Mad LJ 347 Cri.
3. *Pulukuri Kottaya* v. *R.*, AIR 1947 PC 67, 84 : 51 CWN 474 : 49 Bom LR 508 : 74 IA 65, **approved in** *State of Rajasthan* v. *Bhup Singh*, (1997) 10 SCC 675 : 1997 (Cri) 1032.

in the custody of a police officer, must be deposed to, and so much of the information as relates to the fact thereby discovered may be proved.[4]

SIR JOHN BEAUMONT, in *Polukuri Kottaya* v. *R*,[5] **overruling** In re.: *Athappa Goundan*,[6] observed: "The section seems to be based on the view that, if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence but clearly the extent of the information admissible must depend on the exact nature of the fact discovered, to which such information is required to relate. That ban (imposed by the two preceding sections) was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban on the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect".[7]

The principle underlying this section was taken from the amended Section 150, of the Criminal Procedure Code, under the Amended Act, 8 of 1869. When this Evidence Act was enacted in 1872, that Section 150, Cr PC, was transferred to the Evidence Act.

Under this section:

(a) there must be information;

(b) it does not matter whether the information amounts to confession or not;

(c) that person must be in the custody of a police officer;

(d) in consequence of the information a fact must be deposed to as discovered;

(e) in such a case so much of the information as relates distinctly to the fact thereby discovered may be proved.

Whether a person is in custody or outside, a confession made by him to a police officer or the making of which is procured by inducement, threat or promise, having reference to the charge against him and proceeding from a person in authority, is not provable against him in any proceeding in which he discharged with the commission of an offence. Where in persuance of the statement made by the accused on the specific question by the investigating officer stolen property was discovered, the said statement of the accused could not be said to be volunteered and was inadmissible in evidence.[8]

A confession made by a person whilst he is in the custody of a police officer, to a person other than a police officer, is not provable in a proceeding in which he is charged with the commission of an offence, unless it is made in the immediate presence of a Magistrate.

That part of the information given by a person, whilst in police custody, whether the information is confessional or otherwise, which distinctly relates to the fact thereby discovered but no more, is provable in a proceeding in which he is charged with the commission of an offence.

A statement, whether it amounts to a confession or not, made by a person when he is not in custody, to another person, such latter person not being a police officer, may be proved if it is otherwise relevant.

A statement made by a person to a police officer, in the course of an investigation of an offence under Ch. XIV of the Code of Criminal Procedure, cannot, except to the extent permitted by Section 27 of the Indian Evidence Act, be used for any purpose at any enquiry or trial of any offence under investigation at the time when the statement was made in which he is concerned as a person accused of an offence.[9]

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4. *Queen-Empress* v. *Babulal*, 6 Cal 509; *Reg* v. *Jora Hasji*, (1874) 11 Bom HCR 242; *Queen-Empress* v. *Nana*, ILR (1889) 14 Bom 260; *Queen-Empress* v. *Coomer Sahib*, ILR (1888) 12 Mad 153; *Abu Shikdar* v. *Queen-Empress*, ILR (1888) 11 Cal 635.
5. AIR 1947 PC 67.
6. AIR 1937 Mad 618.
7. This decision was followed in *Ramkishan* v. *State*, in AIR 1955 SC 104 : 1955 SCR 903; **See also** *Frabhadrappa* v. *State of Karnataka*, AIR 1983 SC 446; *R.* v. *Ganu*, ILR (1931) 56 Bom 172; *Legal Remembrancer* v. *Lalitmohan*, 49 Cal 167.
8. *Meghaji Godadji Thakore* v. *State of Gujarat*, 1993 Cr LJ 730 (Guj).
9. *State of U.P.* v. *Deoman Upadhyaya*, (1961) 1 SCR 14 at p. 23 : AIR 1960 SC 1125.

Statements of accused persons to the police admitting the commission of the crime cannot be allowed to go in evidence against them under the guise of admissible evidence falling within the scope of this section.[10]

Where the accused allegedly stated that the injuries sustained by him were caused due to dog-bite and the evidence showed that only one of those injuries was attributable to dog-bite, still the statement of the accused could not be used in evidence against him.[11]

2. CONSTITUTIONAL VALIDITY

Article 20(3) of the Constitution states: "No person accused of any offence shall be compelled to be a witness against himself."

The Supreme Court in *State of Bombay* v. *Kathi Kalu Oghad*,[12] held that statements admissible under Section 27 of the Evidence Act are not within the prohibition of Art. 20(3) unless compulsion has been used in obtaining the information. The mere fact that the accused was in custody at the time he made the confession did not make it a compelled statement though that fact coupled with others might establish that the statement was compelled. Dealing with the argument that Art. 20(3) only provides that an accused cannot be compelled *to be a witness* against himself, the Supreme Court observed that the expression "to be a witness" bears the wider meaning of "bearing testimony orally or writing in court or out of court by a person accused of an offence". It would therefore include a statement under Section 27. The decision of the Supreme Court has been treated as setting the law on the question.[13]

3. SECTION 27—ARTICLE 14 OF THE CONSTITUTION

In *State of U.P.* v. *Deoman Upadhyaya*,[14] the Supreme Court held that Section 27 does not violate Art. 14 of the Constitution. Dealing with the contention that it discriminates between confessions made by persons in custody of a police officer and persons not in custody, the Supreme Court held that the distinction made between the two classes of persons cannot be called arbitrary, artificial or evasive. Persons in custody, and persons not in custody, do not stand on the same footing nor require identical protection.[15]

4. WHEN ANY FACT IS DEPOSED TO AS DISCOVERED IN CONSEQUENCE OF INFORMATION RECEIVED

The 'fact' must be a 'relevant fact' (Section 5). The fact said to have been discovered in consequence of information received from a person accused of an offence, must be of a kind which such information really helps to bring to light and which it would be difficult to find out otherwise before it can be treated as of any substantial probative value.[16] The fact must be the consequence, and the information the cause of its discovery. The information and fact should be connected with each other as cause and effect. If any portion of the information does not satisfy this test, it should be excluded.[17]

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10. *Janomani Nadar* v. *State*, (1954) TC 1211; *Narpal Singh* v. *Haryana*, AIR 1977 SC 1066.
11. *Shivaji Ganu Naik* v. *State of Maharashtra*, 1999 Cr LJ 471, at p. 475 (Bom).
12. AIR 1961 SC 1808 : (1962) 3 SCR 10.
13. *Panda* v. *Union of India*, AIR 1963 Punj 198; *Ahmed Miyan* v. *State*, AIR 1963 Guj 159; *R.K. Dalmia* v. *Delhi Administration*, AIR 1962 SC 1821 : (1963) 1 SCR 253 at 381; *State of Gujarat* v. *Shyam Lal*, AIR 1963 Guj 178; *Collector of Customs* v. *Kotumal*, AIR 1967 Mad 263 (FB); **See also** *Dhoom Singh* v. *State*, AIR 1957 All 197; *Amin* v. *State*, AIR 1958 All 293; *Anam Swain* v. *State*, AIR 1954 Orissa 33; In re : *Madugula Iermian*, AIR 1957 AP 611 : ILR 1956 AP 173; *Jethiya* v. *State*, AIR 1955 Raj 14; In re : *Govinda Reddy*, AIR 1958 Mys 150 (DB).
14. AIR 1960 SC 1125 : (1961) 1 SCR 14.
15. **See also** In re : *Ramachandra*, AIR 1960 Mad 191.
16. *Nga Shwe Tat* v. *Queen-Empress*, (1897) 1 UBR (1897-1901) 152. Nexus of recovered articles with crime not established. *Dwarkadas Gehanmal* v. *State of Gujarat*, (1998) 1 SCC 57. **Also see** *Shambhu Dayal* v. *Subhash Chandra*, AIR 1998 SC 1732.
17. *Sukhan* v. *The Crown*, ILR (1929) 10 Lah 283, 293, (FB) : AIR 1929 Lah 344; *King-Emperor* v. *Ramanujam*, ILR (1934) 58 Mad 642, FB; *H.P. Administration* v. *Om Prakash*, AIR 1972 SC 975; *Fateh Singh Dahyabhai* v. *State*, (1973) 14 Guj LR 696; *Avtar Singh* v. *State of U.P.*, 1978 Cr LJ 324 (All); *State of Hyderabad* v. *Annantha Reddy*, AIR 1953 Hyd 133 : 1953 Cr LJ 746 Hyd; In re : *Murugan*, AIR 1958 Mad 451 : 1958 Cr LJ 1196 Mad. *Gopal* v. *State of Allahabad*, 1977 Cr LJ 358. Stolen articles recovered in persuance of the information given by accused.

It was observed: "It is fallacious to treat the "fact discovered" in this section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact".[18] Where the Sessions Judge did not accept the evidence of recovery as showing the connection of accused with the crime, on the ground that there was no evidence to show that the deceased was wearing the ear-rings at the time of the crime, by drawing a distinction between possession and knowledge of the articles, the Supreme Court held that the Sessions Judge was not justified in his conclusion and that the statement of the accused that he had buried the ear-rings was admissible in evidence as it connected the accused with the crime.[19] Where the weapon of offence was recovered on the basis of the statement made by the accused during investigation in another case, the said statement was held admissible in evidence.[20]

In *State of U.P.* v. *Deoman Upadhyaya*,[21] it was held that the information given by the accused was provable insofar as it distinctly related to the fact thereby discovered, and his statement that he had thrown the *Gandasa* in the tank was information which distinctly related to the fact thereby discovered, the *Gandasa*.[22]

In a burglary case the accused in police custody stated to the police that he would show the place where he had hidden the ornaments and that statement led to the discovery of the stolen ornaments. The Supreme Court held that Section 27 allows that part of the statement made by the accused to the police, whether it amounts to a confession or not, which relates distinctly to the facts thereby discovered to be proved; thus, even a confessional statement before the police, which distinctly relates to the discovery of a fact, may be proved under Section 27. In this case the statement was admissible as a whole. The words 'he had hidden them' had nothing to do with the past history of the crime, and were distinctly related to the actual discovery that took place by virtue that statement and would therefore not be inadmissible.[23] Where the police recovered the stolen property from a house on the pointing out of the accused, the fact that the said house belonged to his brother-in-law, would not absolve him from the incriminating evidence proved against him.[24] Recovery cannot be doubted simply because the sketch of the place of recovery was not prepared.[25]

The Supreme Court observed that the phrase 'distinctly' relates 'to the fact thereby discovered', and it is the linchpin of the provision, and it means "clearly, unmistakably, decidedly or indubitably."[26]

In *Prabhoo* v. *State of U.P.*,[27] the accused gave out, when interrogated by a police officer, that the axe with which the murder had been committed and his blood stained shirt and *dhoti* were in the house. The Supreme Court observed: "they were incriminating statements made to a police officer and were hit by Sections 25 and 26 of the Indian Evidence Act. The statement that the axe was one with which the murder had been committed was not a statement which led to any discovery within the meaning of Section 27 of the Evidence Act. Nor was the alleged statement of the appellant that the blood stained shirt and *dhoti* belonged to him, a statement which led to any discovery within the meaning of Section 27." It was therefore wrong to admit in evidence the alleged statement. The Supreme Court distinguished

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admissible, *Raju* v. *State of Rajasthan*, 1997 Cr LJ 4547 (Raj); no discovery, *Mangal Singh* v. *State*, 1996 AIHC 2390 (paras 7 and 10) (Del).

18. *Polukuri Kottaya* v. *King-Emperor*, AIR 1947 PC 67.
19. *Balbir Singh* v. *State of Punjab*, AIR 1957 SC 216; *Pershadi* v. *State of Uttar Pradesh*, AIR 1957 SC 211.
20. *State of Rajasthan* v. *Bhup Singh*, (1997) 10 SCC 675 : 1997 SCC (Cri) 1032. **Also see** *Subhash Chandra* v. *State of M.P.*, 1994 Cr LJ NOC 59 (MP).
21. 1960 SC 1125.
22. *Polukuri Kotayya* v. *Emperor*, AIR 1947 PC 67; *Paula Nayak* v. *State*, (1963) 1 Cr LJ 788 (Ori): AIR 1963 Ori 93; *Rongrao* v. *State*, AIR 1952 Bom 72; *Mohd. Sadiq* v. *State*, (1979) 81 Punj LR (D) 56; *Public Prosecutor* v. *India China Lingiah*, 1954 Cr LJ 583 : AIR 1954 Mad 433; *Fellix-Joannas* v. *State of Karnataka*, 1998 Cr LJ 2479 (para 8) (Kant).
23. *Chinnaswamy Reddy* v. *State of A.P.*, AIR 1962 SC 1788; *State* v. *Shanker Prasad*, 1952 All 776 : 1952 Cr LJ 1585; *State* v. *Kali*, 1952 Cr LJ 267 1951 HP 28; *Bhagirath s/o. Param v. State of M.P.*, 1959 MP 17 : 1959 Cr LJ 48; (the words 'I hid', 'I pledged', 'I sold', 'I gave', 'I have kept' are all admissible if they distinctly relate to the fact discovered). In re : *Sheikh Khader Sahib*, 51 Cr LJ 445 Mad : AIR 1950 Mad 108; *Gendra Brahma* v. *State of Assam*, 1971 Cr LJ 430 (Gau); *Bahoran* v. *State*, 1981 All LJ 991; *Karam Din* v. *Emperor*, AIR 1929 Lah 338.
24. *Pentapati Veerababu* v. *State of A.P.*, 1998 Cr LJ 2505 (para 8) (AP).
25. *Vishnu* v. *State (N.C.T. of Delhi)*, 2001 Cr LJ 4006 (para 43) (Del).
26. *Mohd. Inayatullah* v. *State of Maharashtra*, AIR 1976 SC 483.
27. AIR 1963 SC 1113 : 1963 (II) SCJ 165.

the decision in *State of UP* v. *Deoman Upadhyaya's* case[28] stating that the circumstancial chain in that case did not depend merely on the production of the *gandasa* but on other circumstances as well. The decision did not proceed merely on the production of a blood-stained weapon.

Information as to the past user, or the past history of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge; and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into this section something which is not there, and admitting in evidence a confession barred by Section 26. Except in cases in which the possession or concealment of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in the manner allowed by law.[29]

Following this Privy Council case the Bombay High Court has held in a Full Bench case that before this section can come into play, there must be a fact discovered and the fact must be discovered in consequence of some information received from an accused person. The section lays down a further qualification that the whole of the statement made by the accused in consequence of which the fact is discovered is not admissible. Only so much of the statement is admissible as relates distinctly to the fact discovered. Therefore, once a relevant fact is discovered by reason of a statement made by the accused to a police officer, the Court must scrutinize the statement in order to find out which portion of that statement bears a distinct relationship to the discovery of the fact. Any relationship to the fact is not sufficient. The relationship must be distinct; it must be unmistakable and unequivocal. When a statement made by an accused person while in custody of a police officer is tendered in evidence under this section on the ground that an article which is concealed and the accused's knowledge of its whereabouts are discovered in consequence of the statement, the words included in the statement with regard to the authorship of the concealment, *e.g.*, "I have concealed", "I have hidden", or "I have kept", are admissible in evidence under this section.[30] It was held that only the portion of the confessional statement made to the *panch* witnesses that "the accused produced stick from his house" was admissible and the Court deprecated the irregularities committed by the Sessions Judge in the recording of inadmissible evidence.[31]

Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, weapon or ornaments, said to be connected with the crime, of which the informant is accused. The proviso to Section 26, added by this section, should not be held to nullify the substance of the section.

Where the eye-witnesses categorically stated that the accused-appellant had not given any knife blow on the deceased, mere alleged recovery of a knife at the instance of the accused cannot make him perpetrator of the crime.[32]

In *Queen-Empress* v. *Babulal*[33], it was held that under Section 27, information includes statements which falls short of confession, as well as statement which amount to confession.

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28. (1961) 11 SCJ 334 : 1961 (I) SCR 14.
29. *Pulukuri Kottaya* v. *Emperor*, (1946) 49 Bom LR 508: 74 IA 65. **See also** *Udai Bhan* v. *State of U.P.*, AIR 1962 SC 1116 and *Prabhoo* v. *State of U.P.*, AIR 1963 SC 1113. *Joseph*, ILR (1951) TC 417; *Kuruvilla Joseph*, ILR 1951 417.
30. *State* v. *Rama Shidarpa*, (1951) 54 Bom LR 316 : (1952) Bom 662 (FB), **overruling** *State* v. *Rangrao Devaru* (1951) 53 Bom LR 834.
31. *Bashapaka Laxmaiah v.State of A.P.*, 2001 Cr LJ 4066 (para 17) (AP).
32. *Deva* v. *State of Rajasthan*, AIR 1999 SC 214 : 1999 Cr LJ 265, at p. 266.
33. ILR (1884) 6 All 509.

In *Sukhan* v. *Emperor*[34], it was held that the word "statement" is interchangeable with the word 'information'. Mere pointing out a place or a house by the accused cannot amount to information, much less a statement, incriminating or otherwise, admissible under Section 27.[35]

Information is actually the content or substance of a statement, and it may be the same in several statements which may substantially be repetitions. The discovery, for the purpose of Section 27, should be the direct consequence of this or that information. So, where the information is the same, it is immaterial if the statement is repeated.[36]

Where the accused led the police party to a tank and pointed out the place by throwing brickbats, it was held that a statement can also be one by gestures and so is admissible.[37]

This section refers to information, whether received by a police officer or by other person, there being nothing in the language of the section to justify any distinction in respect of the person to whom the information is given.[38]

If it is taken for granted that there is guarantee of truth regarding the information in consequence of which a fact is discovered, there is no reason why it should not also be presumed that such information was voluntarily given, unless it is proved to the contrary that it was obtained by some sort of compulsion.[39]

It was held by the Privy Council that where the statement of the accused leading to the discovery of a fact, is capable of two interpretations, the one which is favourable to the accused as to be adopted.[40]

In *State of U.P.* v. *Deoman Upadhyaya*,[41] HIDAYATULLAH, J., suggested that it would be admissible to follow the English practice of cautioning of a prisoner in custody by the police officer before the accused makes any statement under Section 27 to the effect that, whatever statement is given by the accused may be used against him. His Lordship made a reference to the rules framed by the King's Bench Division in England for the guidance of the police officers. Even in recent years in *R.* v. *Buchan*,[42] it was stated that under the former and also the revised Judges Rules, it was and is permissible to question under caution a person in custody about offences other than those with which a person is charged. Such rules may not have the force of law or are not mandatory, as the court still has discretion to admit the evidence.[43]

Though cautioning of the accused by the police officer prior to giving the statement may cause some handicap in the investigation, it would be a healthy practice to be adopted by the police, because under Section 25 no statement or confession to the police officer is admissible, and Section 27 provides that only so much of the information as relates distinctly to the fact thereby discovered may be proved.

5. SIGNATURE OR THUMB IMPRESSION OF ACCUSED ON DISCLOSURE STATEMENT

The absence of signature or thumb impression of the accused on the disclosure statement recorded under Section 27 detracts materially from the authenticity and the reliability of the disclosure statement.[44] The provisions of Section 27 do not require that a voluntary statement must be signed by its maker or that the thumb impression must be affixed to it.[45]

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34. AIR 1929 Lah 344.
35. *Dhaman Hiranand* v. *Emperor*, AIR 1937 Sindh 251; *Emperor* v. *Shiv Putraya Basligaya*, AIR 1930 Bom 244.
36. *Basanth Kumar* v. *Collector of Land Customs*, (1961) 1 Cr LJ 237 : AIR 1961 Cal 86.
37. ***Kaju* v. *State***, 1985 Cr LJ 367.
38. ***Queen-Empress* v. *Babu Lal***, ILR (1884) 6 All 509, 511 (FB).
39. ***Jethiya* v. *State***, AIR 1955 Raj 147.
40. *Pulukuri Kottaih* v. *Emperor*, AIR 1947 PC 67; *Pohalya Mothya Valri* v. *State of Maharashtra*, AIR 1979 SC 1949; ***Jogen Fangso* v. *State of Assam***, 1981 Cr LJ (NOC) 226 (Gau).
41. AIR 1960 SC 1125.
42. (1964) 1 All ER 502.
43. *R* v. *Smith*, (1961) 3 All ER 972.
44. *Jackaran Singh* v. *State of Punjab*, 1995 AIR SCW 3485 : 1995 Cr LJ 3992 (para 8) : AIR 1995 SC 2345 (paras 6 and 8), **distinguished in** *K.M. Ibrahim* v. *State of Karnataka*, 2000 Cr LJ 197 (para 19) (Kant). **Also see** *Fellix-Joannas* v. *State of Karnataka*, 1998 Cr LJ 2479 (para 10) (Kant); *Jaskaran Singh* v. *State of Punjab*, 1997 SCC (Cri) 651. **Contra :** *Bhakua Kampa* v. *State of Orissa*, 1996 Cr LJ 350 (para 17) (Ori).
45. *K.M. Ibrahim* v. *State of Karnataka*, 2000 Cr LJ 197 (para 19) (Kant), **distinguishing** *Jackaran Singh* v. *State of Punjab*, 1999 Cr LJ 3992 (para 8) : AIR 1995 SC 2345 : 1995 AIR SCW 3485.

6. SIGNATURE OF ACCUSED IN SEIZURE MEMO

The Investigating Officer is not obliged to obtain the signature of an accused in any statement attributed to him while preparing the seizure memo for the recovery of any article covered by Section 27 of the Evidence Act. But, if any signature has been obtained by him, there is nothing wrong or illegal about it. Hence, it could not be said that the signatures of the accused in seizure memo would vitiate the evidence regarding the recovery.[46]

7. INFORMATION RECEIVED ON PHONE

Information received on phone by the police officer, conveyed in all probabilities by the accused and it being non-confessional, was held to be admissible in evidence as the law is now well-settled that even before his arrest, if any information is given by the accused leading to discovery, it shall be presumed that the accused was constructively in police custody. In the instant case dead bodies were discovered on such information which (discovery) also was held to be admissible.[47]

8. INDEPENDENT WITNESSES

Where the disclosure statement of the accused was proved by the testimony of a natural witness, a brother of the deceased present during investigation when he made the statement, the fact that no independent witnesses were associated with the recoveries, was held to be not sufficient to create doubt in the prosecution version.[48]

9. FACT DISCOVERED—DISCOVERY OF A WITNESS

According to one view, the expression 'any fact' includes discovery of a witness consequent upon the statement given by the accused. That discovery of a witness must relate to the crime or the act of the accused.[49] According to the dissenting opinion in that case, the fact means a concrete or material fact.[50]

In re.: *Hanumantha Rao*,[51] the majority view was followed by KRISHNARAO J., and the dissenting opinion was followed by UMAMAHESHWRAM J. The minority view is in accordance with the Privy Council in *Polukuri Kotayya* v. *Emperor*,[52] where it was held that the word 'fact' refers to a material and concrete fact. SIR JOHN BEAUMONT observed: "Normally, the section is brought into operation when a person in police custody produced from some place of concealment some object, such as a dead body, a weapon or ornaments, said to be connected with the crime of which the informant is accused."

The matter is now concluded by the decision of the Supreme Court where it was held that the testimony of a witness that the accused had pointed out a particular witness is not admissible under Section 27, as it did not lead to the discovery of a fact which is necessarily a material object.[53] Statements made by an accused to police officers, pointing out the places where the offence was committed by others or where he concealed himself thereafter, and the houses to which he went for assistance, whether regarded as information leading to discovery, or as statements made by him as part of his defence, are admissible in evidence as admissions.[54]

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46. *State of Rajasthan* v. *Teja Ram*, 1999 Cr LJ 2588 (paras 20-30) (SC) : AIR 1999 SC 1776.
47. *State of Rajasthan* v. *Vinod Malhotra*, 1997 Cr LJ 1488 (paras 25 and 26) (Raj).
48. *Sanjay* v. *State (N.C.T. of Delhi)*, 2001 Cr LJ 1231 (para 30) (SC) : AIR 2001 SC 979. **See also** *Kishore Kumar* v. *State of Kerala*, 2001 Cr LJ 2137 (para 8) (Ker); *State Govt. of N.C.T. of Delhi* v. *Sunil*, 2001 Cr LJ 504 : 2000 AIR SCW 4398; *Prabhudaya Harijan* v. *State of Orissa*, 2001 Cr LJ 2987 (paras 18 and 19) (Ori).
49. *Emperor* v. *Ramanuja*, AIR 1935 Mad 528, (according to the majority of the Special Bench).
50. The majority view was **followed** in *Rammurthy* v. *Emperor*, AIR 1941 Mad 290, In re : *Rami Reddi*, AIR 1941 Mad 238, *Public Prosecutor* v. *Indla China Lingiah*, AIR 1954 Mad 433.
51. AIR 1957 AP 456.
52. AIR 1947 PC 67.
53. *H.P. Admn* v. *Omprakash*, AIR 1972 SC 975. In re : *Karunakaran*, 1975 Cr LJ 798 (Mad).
54. *Emperor* v. *Kangal Mali*, ILR (1905) 41 Cal 601; *Lalji Dusadh* v. *King-Emperor*, (1927) 6 Pat 747 : AIR 1928 Pat 162, *Sonaram Mahton* v. *King-Emperor*, (1930) 10 Pat 153 : AIR 1931 Pat 145.

10. DISCLOSURE STATEMENT—ADMISSIBILITY

The disclosure statement recorded during investigation is admissible and the same need not be recorded on a separate paper along with the signature of the accused.[55]

11. INADMISSIBLE STATEMENTS AND DISCOVERY

Whether a confession is admissible or inadmissible, any fact, the knowledge of which has been obtained through it, may still be proved by the prosecution.[56]

The rules regarding confessions and admissions have no application to the discovery of material evidence which has itself probative value.[57]

Thus, where articles connected with an offence are found in consequences of an inadmissible statement, the finding of the articles may be proved, although the making of the statement may not be.[58]

Where the accused was neither an accused of the offence nor was under arrest at the time of making the statement, such statement and recovery in persuance thereof was not admissible in evidence.[59] In a murder case blood-stained clothes were recovered on the statement of the accused but blood-stains were not proved to be of human being. It was held that mere discovery does not relate the accused with offence.[60] Recoveries allegedly made persuant to the involuntary disclosure statements of accused are inadmissible.[61] The statement regarding the fact which was not in the exclusive knowledge of the accused and was self-evident to the police was held to be not admissible.[62]

12. NO STATEMENT

Where there was no statement on the part of the accused, recoveries were held to be useless.[63]

Though the accused did not give information as to the exact place where the incriminating article was placed, still if he leads to the shop of a named person, it is admissible, as the recovery of the article could be effected from a place in that shop.[64]

While in the custody of the police, if the accused produces the object connected with the crime from some place of concealment, Section 27 applies.[65]

Mere pointing of the accused to the police to the place where the dead body of his wife was hidden cannot be treated as statement under this section.[66] Where the accused took out the axe, the weapon of offence, from the wall of the thatched roof and handed it over to the investigating officer, it was held that recovery of the axe alone, or the statement to that effect in absence of information furnished by the accused to the police while in custody would not be admissible under Section 27.[67]

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55. *Bhakua Kampa* v. *State of Orissa*, 1996 Cr LJ 350 (para 17) (Ori).
56. *R.* v. *Warickshall*, (1783) 1 Leach 263; *R.* v. *Griffin*, (1809) Russ & Ry 151; **See also** *Kuruma* v. *R*, (1955) AC 197 : (1955) 1 All ER 236, (PC); *King* v. *R*, (1969) 1 AC 304 : (1968) 2 All ER 610 PC; *Cf. R.* v. *Jones*, (1809) Russ & Ry 152; *R.* v. *Jenkins*, (1822) Russ & Ry 492, CCR.
57. **See** *R* v. *Sadler*, (1970) 2 All ER 12 at 19 : (1970) 1 WLR 416 at 425 (CA).
58. *R.* v. *Lockhart*, (1785) 2 East PC 658; *R* v. *Gould*, (1840) 9 C&P 364.
59. *Sarabjit Singh* v. *State of Punjab*, 1998 Cr LJ 2231 (para 5) (P&H), **relying on** *Pall* v. *State of Punjab*, 1996 (2) RCC 643. **See also** *Karam Singh* v. *State of U.P.*, 1994 Cr LJ 3446 (para 13) (All).
60. *Ganga Singh* v. *State of U.P.*, 1998 Cr LJ 3362 (para 14) (All).
61. *Chuni Lal* v. *State of H.P.*, 1995 Cr LJ 1393 (HP). **See also** *Bhagat Bahadur* v. *State*, 1996 Cr LJ 2201 (para 44) (Del).
62. *Vijay Kumar* v. *State*, 1996 Cr LJ 2429 (para 42) (Del).
63. *Bahadul* v. *Orissa*, 1979 Cr LJ 1075 : AIR 1979 SC 1262, (recovery by itself cannot sustain conviction); *State of Punjab* v. *Gurnam Singh*, AIR 1984 SC 1799; *Bhimappa Jinnappa Naganur* v. *State of Karnataka*, 1994 Cr LJ 1801 (para 8) (SC) : AIR 1993 SC 1469; *M.S. Sheshappa* v. *State of Karnataka*, 1994 Cr LJ 3372 (para 26) (Kant).
64. *State of M.P.* v. *Murarilal*, 1973 Cr LJ 1559.
65. *H.P. Administration* v. *Omprakash*, AIR 1972 SC 975.
66. *Ravindran* v. *State of Kerala*, 1999 Cr LJ 2364 (para 14) (Ker).
67. *Sakal Deep* v. *U.P. State*, 1993 Cr LJ 551 (para 21) (All).

13. STATEMENT TO BE RECORDED

Any statement of the accused to a police officer, leading to the discovery of the fact, must be recorded by the police officer as proof of such statement, and for its admissibility in evidence under Section 27.[68]

In the absence of any statement of accused on record placed before the court, it was held that it could not be said that the statement led to the discovery of the fact.[69] When there was no recorded statement, giving information leading to the discovery of fact, Section 27 is not attracted, but his act leading to the discovery can be taken as evidence of conduct under Section 8.[70]

The police officer, while giving evidence, should reproduce the contents of the statements made by the accused leading to the discovery of a fact under Section 27. He can refresh his memory under Section 160 of the Act. Before attracting the provisions of Section 160 of the Act, he should normally affirm on oath that he does not recollect the fact mentioned in the document. But mere omission to say that will not make the document inadmissible, provided the witness swears that the facts are correctly recorded in the document itself. This applies even to a police officer.[71]

Where on the basis of the disclosure statement made by the accused, incriminating articles belonging to the deceased were found and seized, disclosure statement can be said to be true and also worthy of credence and non-recording of the disclosure statement and non-examination of public witnesses, as regards the said recovery, would be of no consequence.[72] It is not required by law that the disclosure statement should be recorded in the presence of *panchas*. The statement of the accused leading to discovery is sufficient.[73]

14. INFORMATION MUST BE RECEIVED FROM A PERSON ACCUSED OF AN OFFENCE

Under this section, the person who is making the statement must be a person accused of any offence.

When a statement was made by a person who is a stranger or a prosecution witness, it is not admissible in evidence inspite of the fact that it led to the discovery of a fact.[74] Where a witness deposes as to what the accused purported to have stated before the police it cannot be taken as tantamount to the information of the accused leading to the discovery.[75]

The Supreme Court has held that the expression "accused of any offence" is descriptive of the person against whom evidence, relating to information alleged to be given by him, is made provable by this section. It does not predicate a formal accusation against him at the time of making the statement which is sought to be proved.[76]

The Patna High Court has held that the statement must be of a person who was then an accused. If, at the time when the confession was made, the person making it was not an accused person, the statement would not be admissible. This decision may not be good law after the decision of the Supreme Court in *Deomani case supra*.[77]

The Bombay High Court has dissented from this view and has held that the words "information received from a person accused of any offence" cannot be read to mean that he must be an accused when he gives the information, but would include a person if he became subsequently an accused person, at the time when that statement is sought to be received in evidence against him. Where a person goes to a

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68. *Phusu Koini* v. *State of Assam*, 1986 Cr LJ 1057 (Gau).
69. *Subhas Bhattacharyya* v. *State*, 1985 Cr LJ 1807 (Cal); *Sambhu Bora* v. *State of Assam*, 1987 Cr LJ 1027 (Gau).
70. *Mayachar Sha* v. *State*, 1987 Cr LJ 1948 (Ori); *Amarlayek* v. *State of West Bengal*, 1988 Cr LJ 1293 (Cal); *Bejoy Mondal* v. *State of W B.*, 1984 Cr LJ 518 (Cal).
71. *Dharma* v. *State*, AIR 1966 Raj 74, **following** In re : *Kalli Seetha Rami Reddi*, AIR 1939 Mad 766; *Bhagirath* v. *State*, AIR 1959 MP 17; *Public Prosecutor* v. *Venkatrama Naidu*, AIR 1943 Mad 542.
72. *S.C. Bahri* v. *State of Bihar*, 1994 Cr LJ 3271 (paras 71 and 72) : AIR 1994 SC 2420.
73. *Manohar Amrut Satpudke* v. *State of Maharashtra*, 2001 Cr LJ 4355 (paras 16 and 17) (Bom).
74. *Devi Ram* v. *State*, AIR 1962 Punj 70.
75. *Findal* v. *State*, AIR 1954 HP 11.
76. *State of U.P.* v. *Deoman*, AIR 1960 SC 1125.
77. *Deonandan Dusadh* v. *King-Emperor*, ILR (1928) 7 Pat 411; *Jalla* v. *Emperor*, AIR 1931 Lah 278; *Chetu* v. *Emperor*, AIR 1948 Lah 69; *Devi Ram* v. *State*, AIR 1962 Punj 70; In re : *Malladi Ramaiah*, AIR 1956 AP 56.

police officer and makes a statement which shows that an offence has been committed by him, he accuses himself and though he is formally not arrested, since he is not free to move wherever he likes after disclosure of the information to the police, he must be deemed to be in custody of the police within this section.[78]

In *Md. Dastagiri* v. *State*,[79] also, it was held that it is not necessary that when a statement is made by a person he should be an accused, that it is enough, if he is an accused person when it is sought to be proved in court.

In view of the decision of the Supreme Court in the *State of U.P.* v. *Deoman Upadhyaya*,[80] the view of the Bombay High Court and of the Madras High Court represents the correct view.

The Supreme Court, in *Pohalya Motya Valvi* v. *State of Maharashtra*,[81] held that, where two persons were charged for murder, and the information given by one of them led to the discovery of the weapon of offence, it was capable of two interpretations: (1) he was the person who concealed the weapon, (2) he had the knowledge of the place where it was hidden. Hence, the accused could not be convicted for murder on the basis of such information. A joint statement made by two accused persons leading to discovery is not *per se* inadmissible in evidence but it is a very weak piece of evidence on which reliance can be placed by the prosecution.[82]

15. THE PERSON MUST BE IN THE CUSTODY OF A POLICE OFFICER

This section does not apply to information given to the police by an accused person who was not in custody at the time it was given.[83]

The submission of a person to the custody of a police officer, within the terms of Section 46(1) of the Criminal Procedure Code, is 'custody' within the meaning of this section.[84]

In *State of U.P.* v. *Deoman*,[85] it was held that when a person not in custody approaches the police and gives them statements, he may be deemed to have surrendered himself to the police and may be deemed to be in the 'custody of the police' within the meaning of Section 27, in view of Section 46(1), Cr P.C.[86]

The word 'custody' in this section does not mean physical custody by arrest.[87]

As soon as an accused or suspected person comes into the hands of a police officer, he is, in the absence of clear evidence to the contrary, no longer at liberty, and is therefore in custody within the meaning of Sections 26 and 27.[88] In the case of more suspects, who have not been formally charged with

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78. *Memon Mohmed*, (1958) 61 Bom LR 715; *Bakshia Mukunda* v. *State of Bombay*, (1959) 62 Bom LR 80 : AIR 1960 Bom 263; **see also** In re : *Sreenivasulu*, AIR 1958 AP 37; *Amin* v. *State*, AIR 1958 All 293.
79. AIR 1960 SC 756.
80. AIR 1960 SC 1125.
81. AIR 1979 SC 1949.
82. *Meghaji Godadji Thakore* v. *State of Gujarat*, 1993 Cr LJ 730 (para 18) (Guj).
83. *Kha Hlaw* v. *King-Emperor*, (1907) 4 LBR 116; *King-Emperor* v. *Nga Aung Ba*, (1916) 2 UBR (1914-1916) 114; *Eapakuntla Chinna Kashi Reddy* v. *State of Hyderabad*, (1954) Hyd 209. **Also see** *Manoranjan Singh* v. *State of Delhi*, (1998) 3 SCC 523 : 1998 SCC (Cri) 848.
84. *Legal Remembrancer* v. *Lalit Mohan Singh Roy*, (1921) 9 Cal 167 : AIR 1922 Cal 342.
85. AIR 1960 SC 1125.
86. *Santhoki* v. *Emperor*, AIR 1933 Pat 149 (SB); *Bharosa* v. *Emperor*, AIR 1941 Nag 86; *Umed* v. *State of MP*, 1979 Cr LJ (NOC) 18 : ILR 1979 MP 535; *Viran Wali* v. *State*, AIR 1961 J&K 11; *Kanhiya* v. *State of Rajasthan*, 1976 Cr LJ 1652 (Raj); (arrested 30 Mts. after the statement); *State* v. *Mohd. Husain*, AIR 1959 Bom 534; In re : *Bandi Murugulu*, AIR 1963 AP 87 : (1963) 1 Cr LJ 142; *Punja Mava* v. *State*, AIR 1965 Guj 5; *State of Assam* v. *Upendranath Raj Khowa*, 1975 Cr LJ 354 (Gau); *Chhoteylal* v. *State of U.P.*, AIR 1954 All 687; *Amin* v. *State*, AIR 1958 All 293; *Onkar* v. *State of MP*, 1974 Cr LJ 1200; In re : *Man Singh* AIR 1959 MP 267.
87. *State* v. *Madanlal*, AIR 1967 Pat 63; *Chhotelal* v. *State of M.P.*, AIR 1954 All 687; In re : *Krishna Pillai*, ILR 1960 Mad 1082 : (1960) 1 MLJ 307; *Kanhiya* v. *State of Rajasthan*, 1976 Cr LJ 1652 (Raj); *Bakshia* v. *State*, AIR 1960 Bom 263; *Gurdial Singh* v. *Emperor*, AIR 1932 Lah 609; *Jamubia Partap* v. *Emperor*, AIR 1936 Nag 200.
88. *Mussammat Aishan Bibi* v. *The Crown*, (1933) 15 Lah 310; *Mis. M.F. Rego* v. *Emperor*, AIR 1936 Nag 136; *Mt. JJanunia Partap Lohar* v. *Emperor*, AIR 1936 Nag 200.

any offence or arrested under any section of the Criminal Procedure Code, their presence with the police officer under some restraint amounts to 'custody'.[89]

'Custody' connotes some idea of restraint on the movements of a person whether by word or action and does not necessarily mean custody after formal restraint.[90] Even indirect control over the movements of suspects by the police would amount to 'police custody'.[91] An accused is in police custody within the meaning of the section when he is under surveillance of the police and cannot break away from the company of the police or get away. A formal arrest is not necessary.[92] For the purpose of this section, the word 'custody' does not necessarily mean detention or confinement. Submission to custody, by any action or words, is also custody within the meaning of this section.[93] A person who makes a statement to a police officer voluntarily, confessing that he had committed an act which the penal law regards as an offence, submits himself to the custody of the said officer within the meaning of this section.[94]

The Madras High Court has held that the spirit of the language employed in Section 27 of the Evidence Act, appears to imply that where a person submits himself to the custody of a police officer, with the consciousness that, temporarily at least, he is in such custody or under such control, whether formally authorised or not, the information given by him to such officer, leading to the discovery of a relevant fact is within the scope of the section; it is not proper to limit further the meaning of the expression, by imposing condition as to the time of arrest and the existence or absence of a formal magisterial order authorising police custody or interrogation.[95]

This section does not require that the person must be in the custody of the police officer investigating the offence to which the information relates. Whoever may be the police officer who has custody of the accused, if the information leads to the discovery of a relevant fact, that information is clearly admissible under Section 27.[96]

It is not necessary that the police officer should be present while making the statement. Even temporary absence of a police officer would not terminate the custody when the statement was made.[97]

The Court cannot remand a person to police custody to enable the police to secure recovery under Section 27.[98]

Where there was material discrepancy in the evidence of the eye-witness and the investigating officer regarding the time when the police took the accused in custody, the evidence of the investigating officer regarding recovery of weapons at the instance of the accused could not be relied upon.[99]

For other cases regarding the meaning and scope of custody see commentary under Section 26.

16. POLICE OFFICER

See commentary under Section 25.

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89. *Allah Ditta* v. *The Crown*, ILR (1937) 18 Lah 106 : AIR 1937 Lah 620.
90. *Hakam* v. *The Crown*, (1940) 21 Lah 242 : AIR 1940 Lah 129.
91. *Paramhansa* v. *State*, AIR 1964 Ori 144.
92. *Chhoteylal* v. *State of U.P.*, AIR 1954 All 687; *Umed* v. *State of M.P.*, 1979 Cr LJ (NOC) 18 : ILR 1979 MP 535; In re : *Mannem Edukondalu*, AIR 1957 AP 729; *Anammed* v. *Kunju*, ILR (1971) 2 Ker 30; *Maharani* v. *Emperor*, AIR 1948 All 7; *Gurdial Singh* v. *Emperor*, AIR 1932 Lah 609; *Onkar* v. *State of MP*, 1974 Cr LJ 1200 (MP); *S* v. *Mohd Husain*, AIR 1959 Bom 534; *Paramhansa* v. *State of Orissa*, AIR 1964 Ori 144 : (1961) 1 Cr LJ 780
93. In re : *Man Singh*, AIR 1959 MP 267; *Santokhi* v. *Emperor*, AIR 1933 Pat 149 (SB); *Bharosa* v. *State*, AIR 1941 Nag 86; *Legal Remembrancer* v. *Lalit Mohan Singh Roy*, ILR (1921) 49 Cal 167 : AIR 1922 Cal 342; *Jalla* v. *Emperor*, AIR 1931 Lah 278; *Maung Lay* v. *Emperor*, AIR 1924 Rang 173.
94. *Mirsa Singh*, (1935) Patiala 711.
95. In re : *Ramachandran*, AIR 1960 Mad 191; *Rambabu Jadav* v. *Emperor*, AIR 1938 Pat 60; In re : *Kambala Kalikamurthi*, 1936 MWN (Cri) 159; (accused was in hospital in judicial custody. Police examined him with the permission of the Magistrate.
96. *State of Mysore* v. *Rangaiah*, 1966 Cr LJ 848 : (1965) 2 Mys LJ 158.
97. *Ram Singh* v. *State*, AIR 1959 All 518; *Emperor* v. *Mst Jagia*, AIR 1938 Pat 308; *Ram Bharose* v. *Emperor*, AIR 1944 Nag 105.
98. *T.N. Jayadeish Devidas* v. *State of Kerala*, 1980 Cr LJ 906.
99. *Rammi* v. *State of M.P.*, 1999 Cr LJ 4561 (paras 16-19) (SC) : AIR 1999 SC 3544.

17. EVIDENTIARY VALUE

Recoveries provide important support to the version of the eye-witnesses.[1] Where the eye-witness received injuries and the weapon was recovered at the instance of the accused, the Supreme Court held that the conviction on such evidence was proper.[2]

Recovery of the dead body on the information given by the accused, only raised strong suspicion against the accused.[3]

When the recoveries were made at the instance of the accused, and the memos were attested by police officers and independent search witnesses, and when police officers were alone examined to prove the search, and other independent search witnesses were not examined, it was held that it would not introduce any serious infirmity in the evidence furnished by the recoveries, which at best are only a corroborative piece of evidence.[4] Where there was no suggestion to any of the material witnesses that the disclosure statements were involuntary or the accused made different statements at different stages of interrogation, the place of recovery was not an open place, there was no delay in recovery and no material to show that the incriminating articles were planted at the place of recovery, the disclosure statements were held to be reliable and admissible in evidence[5] but where the Investigating Officer made no efforts to join any independent witness at the time of the alleged recovery, evidence of recovery became suspicious.[6]

Where the statement of the accused accompanying the discovery, is woefully vague to identify the authorship of concealment, the fact of pointing out of the weapon by the accused may at best prove the accused's knowledge as to where the weapon was kept, and by itself cannot prove that he wielded it in committing the offence.[7] Where the Investigating Officer did not state as to what were the information given by the accused, the alleged voluntary statements of the accused could not be taken to be substantive evidence.[8] Where the dead body of the deceased was recovered in persuance of the statement of the accused but the circumstances showed that he had come to know of the place where the dead body was buried from the co-prisoners in the lock-up and he had not stated that he had buried the said dead body, he could not be connected with the offence.[9]

Recovery of a weapon is only a corroborative piece of evidence, and if it is not proved that the weapon was stained with human blood, the evidence of eye-witnesses of reliable character does not stand condemned.[10] The discovery of the weapon with which the accused is alleged to have struck his wife, on the information given by the accused, is a circumstance as incriminating the accused; the absence of blood stains on the weapon does make the discovery inadmissible, as the corroborative piece of evidence relating to blood stains falls to be considered by the court.[11]

Where the knife, not containing blood stains, was recovered at the instance of the accused, but it was not shown to the doctor conducting the postmortem, it was held that no weight could be attached to the recovery, as there was no guarantee that the said knife was used in the offence.[12] Where there was no

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1. *Bhagwan Dass* v. *State of Rajasthan*, AIR 1974 SC 1699.
2. *Bhagwan Dass* v. *State of Rajasthan*, AIR 1974 SC 1699 : 1974 Cr LJ 1168.
3. *Bakshish Singh* v. *State of Punjab*, AIR 1971 SC 2016 : 1971 Cr LJ 1452.
4. *Mst. Dalbir Kaur* v. *Punjab*, AIR 1977 SC 472. **Also see** *Mylsami alias Thoppan* v. *State*, 1994 Cr LJ NOC 76 (Mad); *Mylsami alias Thoppan* v. *State*, 1994 Cr LJ NOC 76 (Mad); absence of independent witness not a ground to discard seizure evidence, *State Govt. of N.C.T. of Delhi* v. *Sunil*, 2001 Cr LJ 504 (paras 19, 21 and 22) (SC), **reversing** 1998 Cr LJ 4233 (Del).
5. *Anuj* v. *State of H.P.*, 2000 Cr LJ 1103 (paras 42 and 43) (HP).
6. *Satish Kumar* v. *State*, 1996 Cr LJ 265 (para 33) (Del). **See also** *Islam Molla* v. *State of W.B.*, 1996 Cr LJ 724 (paras 11 and 12) (Cal).
7. *Dudhnath Pandey* v. *State of U.P.*, AIR 1981 SC 911. **See also** *Slim Babamiya Sutar* v. *State of Maharashtra*, 2000 Cr LJ 2696 (paras 13 and 14) (Bom).
8. *M. Abbas* v. *State of Karnataka*, 1996 Cr LJ 317 (paras 7 and 8) (Kant). **See also** *N. Rajendra Prasad* v. *State of Karnataka*, 1996 Cr LJ 257 (para 16) (Kant).
9. *Prem Prakash Mundra* v. *State of Rajasthan*, AIR 1998 SC 1189. Mere recovery of crime articles persuant to retracted confession in absence of any attempt to conceal them not sufficient to connect accused with offence, *Varghese* v. *State of Kerala*, 1998 SCC (Cri) 890.
10. *Shriram* v. *State*, 1973 Cr LJ 1443 (Raj).
11. *Public Prosecutor* v. *Uppana Muthyalu*, (1961) 1 An WR 406.
12. *Bholanath* v. *State of Delhi*, 1986 Cr LJ 1409 (Delhi).

proof that the seized blood-stained clothes and knife were sealed and remained untampered with till being sent to the chemical analyst, the evidence of recovery was liable to be rejected.[13] Where the blood and hairs of the deceased or injured person were not sent for comparison with the blood stains found on the sword the weapon of the crime and the hairs recovered, the recoveries will not connect the accused with crime.[14]

Where the facts disclosed that the accused was subjected to third degree methods prior to the discovery of the dead body, the discovery becomes worthless.[15]

Where the disclosure statement was made to the interrogating officer, in the presence of disinterested witness, and such officer could not be examined for some reason or other, such statement is admissible when the witnesses were examined, as nowhere has it been laid down that it is obligatory to examine the officer who had interrogated in order to prove the disclosure statement.[16]

Where something (gun in this case) has been discovered from the custody of a person, he must be produced as a witness. His evidence is necessary in this case to substantiate the allegation that the accused borrowed his gun. If not there is no legal evidence to connect the accused with the recovery.[17] It is, however, not necessary to examine the witnesses in whose presence recoveries are effected[18] but when the witnesses turn hostile, the recovery at the instance of the accused is not acceptable.[19]

Mere recovery of certain incriminating articles at the instance of the accused cannot form the basis of conviction.[20] Mere recovery of a blood-stained knife persuant to the statement of the accused after fifteen days of the incident and a few simple injuries found on his person would only raise a strong suspicion and not a conclusive inference of the guilt of the accused.[21] Where a pistol was recovered at the instance of the accused and the opinion of the ballistic expert was that the bullet recovered from the body of the deceased could have been fired from the said pistol, it was held that this circumstance should be taken into consideration while considering the legal implication of the evidence relating to the recovery of the pistol.[22]

18. SECTION 27 & SECTIONS 7, 8, 9 OF THE EVIDENCE ACT

Statements made under Section 27, though not admissible under the section, may be admissible under Sections 7, 8 or 9 of the Act. Where a statement made while in custody of the police and recorded in a *Panchanama*, indicated that the articles were hidden in a certain place, and it led to the discovery of the same, it was held that it was admissible under Section 27 and was also an admission under Section 8, as it was indicative of the conduct of the accused.[23]

When the police officer asked the accused whether he knew of a certain dacoity, the accused took the officer to a grain-bin and produced the ornament; it was held that even if the statement was not covered by Section 27, the conduct of the accused was covered by Sections 7, 8 & 9 of the Act.[24]

A conjoint and harmonious reading has to be given to Sections 8 and 27 and the conduct of an accused becomes admissible in evidence as far as it leads to the discovery of a distinct fact and not directly incriminating evidence.[25] Where the recovery was made on the place being shown by the

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13. *Ashraf Husain Shah* v. *State of Maharashtra*, 1996 Cr LJ 3147 (para 8) (Bom), **relying on** *Deoraj Deju Suvarna* v. *State of Maharashtra*, 1994 Cr LJ 3602; articles recovered not immediately sealed, no evidentiary value. *Tulshiram Bhanudas Kambale* v. *State of Maharashtra*, 2000 Cr LJ 1566 (para 8) (Bom), **following** *State of Maharashtra* v. *Prabhu Barku Gade*, 1995 Cr LJ 1432 (para 12) (Bom); *Amarjit Singh* v. *State of Punjab*, (1993) 4 Cur Cri R 486 : 1992 Cr LJ 3858 and *State* v. *Motia*, AIR 1955 Raj 82 : 1955 Cr LJ 835.
14. *Ram Karan* v. *State of Rajasthan*, 1996 Cr LJ 3521 (para 32) (Raj).
15. *Dhoom Singh* v. *State*, 1957 Cr LJ 431 : AIR 1957 All 197. **See also** *D.D. Suvarna* v. *State of Maharashtra*, 1994 Cr LJ 3602 (para 24) (Bom), **relying on** *Shankar Raju Banglorkar* v. *State of Goa*, 1992 Cr LJ 3034.
16. *Chani* v. *State of Punjab*, (1965) 2 Cr LJ 699 (Punj).
17. *State of U.P.* v. *Jageshwar*, AIR 1983 SC 349.
18. *Dalbir Kaur* v. *Punjab*, AIR 1974 SC 472.
19. *Pallepu Venkati* v. *State of A.P.*, 1996 Cr LJ 1458 (para 3) (AP).
20. *Rambilas* v. *State of M.P.*, 1997 SCC (Cri) 1222.
21. *Mohd. Aman* v. *State of Rajasthan*, AIR 1997 SC 2960 (para 9) : 1997 Cr LJ 3567.
22. *State of Rajasthan* v. *Bhup Singh*, (1997) 10 SCC 675 : 1997 SCC (Cri) 1032.
23. *Sada Shiva Daulat* v. *State*, 1950 MB 104.
24. *Jag Narih* v. *State*, 1965 All LJ 344.
25. *Yog Raj* v. *Romal Singh*, 1997 Cr LJ 1958 (para 7) (J&K).

accused, without any statement, it was held that Section 27 was not attracted, but his act on showing the place was evidence of conduct under Section 8.[26] The production of the alleged weapon of offence by the accused himself has to be proved by the contents the seizure memo which fact cannot be proved by the inhibition contained in Section 27 of the Evidence Act.[27]

19. TO WHAT EXTENT THE INFORMATION IS ADMISSIBLE

Such information as relates distinctly to the fact discovered is admissible. It is the first statement alone of the accused to whomsoever it was made, that leads to the discovery of the fact, which is admissible. A later statement of the accused, even if it is repeated by the accused, is not legally admissible, and so no corroboration is required for the later statement of the accused.[28] Where words spoken by the accused do not implicate him with the commission of crime but refer only to the nature of property hidden by them, they are admissible.[29]

The Supreme Court has held that the information would consist of a statement made by the accused to the police officer and the police officer is precluded from proving the information or part thereof unless it comes within the four corners of the section.[30]

When a statement relating to the discovery of certain incriminating articles, hidden at a particular place, made while in custody, includes a statement by the accused with regard to the authorship of the concealment, as for example, 'I have concealed', or 'I have hidden', then the statement of the accused as regards concealment is admissible under Section 27.

The Bombay High Court has observed: "It is not all statements connected with the production or finding of property which are admissible; those only which lead immediately to the discovery of property, and so far as they do lead to such discovery, are properly admissible. Whatever be the nature of the fact discovered, that fact must, in all cases, be itself relevant to the case, and the connection between it and the statement must have been such that the statement constituted the information through which the discovery was made, in order to render the statement admissible. Other statements connected with the one thus made evidence, and so immediately, but not necessarily or directly, connected with the fact discovered, are not to be admitted, as this would rather be an evasion than a fulfilment of the law, which is designed to guard the prisoners, accused of offences against unfair practices on the part of the police.

For instance, a man says: 'You will find a stick at such and such place. I killed Rama with it'. A police-man, in such a case, may be allowed to say that he went to the place indicated, and found the stick; but any statement as to the confession of murder would be inadmissible. If, instead of 'you will find', the prisoner has said, 'I placed a sword or knife in such a spot', when it was found, that, too, though it involves an admission of a particular act on the prisoner's part, is admissible, because it is the information which has directly led to the discovery, and is thus distinctly and independently of any other statement connected with it. But if, besides this, the prisoner has said what induced him to put the knife or sword where it has been found, that part of his statement, as it has not furthered, much less caused, the discovery, is not admissible."[31]

A statement to the police by the accused in custody saying;. "I put a bomb in R's office; I will show it to you" which puts the police in motion and results in finding out the bomb at the place indicated, is admissible in evidence under this section.[32]

The accused was charged, under Section 411 of the Penal Code, with dishonestly receiving stolen property. In the course of the police investigation, the accused was asked by the police where the property was. He replied that he had kept it, and would show it. He said he had buried the property in the fields. He then took the police to the spot where the property was concealed, and, with his own hands,

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26. *Mayachar Shah* v. *State*, 1987 Cr LJ 1948 (Ori); *Amar Layek* v. *State of West Bengal*, 1988 Cr LJ 1293 (Cal); *Bijoy Mondal* v. *State of W. Bengal*, 1984 Cr LJ 518 (Cal)(DB).
27. *Yog Raj* v. *Romal Singh*, 1997 Cr LJ 1958 (para 7) (J&K).
28. *Aher Raja Khima* v. *State of Saurashtra*, AIR 1956 SC 217; In re : *Subba Rao*, AIR 1949 Mad 710; *Noor Muhammed Abdul Samed* v. *State*, 1959 Ker 46.
29. *Sanjay* v. *State (N.C.T. of Delhi)*, 2001 Cr LJ 1231 (para 27) (SC) : AIR 2001 SC 979.
30. *Ramkishan Mithanlal* v. *State of Bombay*, (1954) 57 Bom LR 600, (1955) SCR 903.
31. *Reg.* v. *Jora Hasji*, (1874) 11 BHCR 242, 244, 245; *Queen-Empress* v. *Nana*, ILR (1889) 14 Bom 260; (FB); *Emperor* v. *Shivputraya*, (1930) 32 Bom LR 574.
32. *Emperor* v. *Namdeo Kaikadi*, (1944) 46 Bom LR 546.

disinterred the earthen pot in which the property was kept. He made a second statement, when pointing out the spot, to the effect that he had buried the property there. It was held that the above statements were clearly in the nature of a confession, as they suggested the inference that the accused committed the crime, and, even if not intended by the accused to be a confession of guilt, they were an admission of a criminating circumstance and would form a very important part of the evidence against the accused, as showing that he had not come by the property honestly, and, therefore, properly within the rule of exclusion in regard to confessions made by a person in the custody of the police; but the accused's statement, that he had buried the property in the fields, was admissible in evidence under this section, as it set the police in motion and led to the discovery of the property.[33]

Where the accused gives information to the police in a form which divides such information into several parts, the part admissible under this section can be easily separated. But, where the accused gives his information in the form of a compound statement, the Judge must, before he records it as evidence or leaves it to the jury, divide the sentence into what are really its component parts and only admit that part which has led to the discovery of the particular fact.[34] Under this section, it is only that part which distinctly relates to the discovery, which is admissible; but if any part of the statement distinctly relates to the discovery it will be admissible wholly and the court cannot say that it will excise one part of the statement because it is of a confessional nature. The section makes that part of the statement which is distinctly related to the discovery admissible as a whole, whether it be in the nature of a confession or not.[35]

Where, after certain clothes were taken out of a pond on the information given by the accused, he made another statement that he had removed them from the person of the deceased and thrown them into the pond, it was held that the latter statement did not come within the purview of Section 27 and so was not admissible.[36] Where, after the recovery of blood stained *paijama* and *banian*, of the accused kept concealed by the accused, the accused made a statement that they were his clothes, it was held that the statement that those articles belonged to the accused was not admissible in evidence.[37]

Where the accused states to the police, "I will produce the share which I received in such and such a dacoity" the statement is divisible into the following parts:

(1) an admission that there was a dacoity;

(2) an admission that the accused took part in it;

(3) an admission that he got part of the property, and

(4) a statement as to where the property is.

The first three parts are not admissible in evidence, having regard to Section 25, but the fourth part is admissible under this section.[38]

Where the accused stated to the police, that the throat of the deceased was cut with a knife, and the knife was at a particular spot in the kitchen, and the police found the knife at the place indicated, it was held that the first part of the statement, which was the incriminating part, and which did not directly lead to the discovery of the knife, should be excluded under this section but the second part of the statement should be admitted.[39] During the police investigation into a case of dacoity, the accused said in the presence of the Sub-Inspector of Police and *panchas*: "About three months ago, I had gone along with some others and, after breaking open the Alnawar Bank had stolen the amount therefrom and I will produce the amount that is with me now at my house at Mugatkhan Hubli of the Alnawar Bank Dacoity." After saying so, he took the police and the *panchas* to his house and produced Rs. 40 in currency notes. A question having arisen, how much of the above statement was admissible in evidence at the trial of the

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33. *Queen-Empress* v. *Nana*, (1889) 14 Bom 269 (FB). Confession related distinctly to discovery is admissible. *N Rajan* v. *State*, 1994 Cr LJ 322 (para 18) (Ker). Statement must precede discovery. *Bhuribai* v. *State of M.P.*, 1994 Cr LJ NOC 263 (MP).

34. *State of U.P.* v. *Deoman*, AIR 1960 SC 1125.

35. *Chinnaswamy* v. *State of A.P.*, AIR 1962 SC 1788. *State of Himachal Pradesh* v. *Jeet Singh*, AIR 1999 SC 1293 (para 28) : 1999 Cr LJ 2025 (even inculpatory statements admissible), **followed in** *Masang Kisku* v. *State of Orissa*, 2001 Cr LJ 1633, (para 11) (Ori).

36. *Jaggar Singh* v. *Crown*, AIR 1952 Pepsu 23.

37. *Jamil Ahmad* v. *State*, (1965) 67 Punj LR 1010, **relying on**, *Prabhoom* v. *State*, AIR 1963 SC 1113.

38. *Emperor* v. *Ganu Chandra Kashid*, (1931) 34 Bom LR 303 : 56 Bom 172 : AIR 1932 Bom 286.

39. *Emperor* v. *Salve*, (1933) 36 Bom LR 384.

accused for dacoity, it was held that the only portion of the statement that was admissible in evidence under this section was "I will produce the amount".[40] Where a suspect in the custody of police makes a statement that he committed murder and removed ornaments which he produces later, the first part of the statement does not fall under this section because it is not a statement required to lead up to the production of the property.[41] Where one of the accused made a statement in the presence of the *panchas* that he and his brothers buried the dead body and he would point out the place and later the dead body was recovered from his field, it was held that the statement in so far as he involved himself, would be admissible, and the other part involving his brothers would not be admissible.[42]

The accused were charged with the theft of some *jawar* (a kind of grain). During the police investigation, they admitted that they had taken the grain and concealed it in a jar, which they forthwith produced. The identity of the *jawar* recovered with that stolen was not proved to the satisfaction of the trying Magistrate, except by those admissions, and upon those admissions they were convicted of theft. It was held that, as the accused themselves produced the *jawar*, it was by their own act, and not from any information given by them, that the discovery took place and this section, therefore, did not apply; and though the fact of the production of the property might be proved, the accompanying confession made to the police was inadmissible in evidence.[43]

The Calcutta High Court has also held that this section is not intended to let in the confession generally, but only such particular part of it as set the person, to whom it was made, in motion, and led to his ascertaining the fact or facts of which he gives evidence.[44]

When the statements made by an accused, whilst in police custody, consist of severable parts, some of which constitute a general confession of guilt, some are imputations of guilt on the accomplices, and some lead to the discovery, such statements, in their entirety, are not admissible under this section.[45] *A* was tried for the murder of *B*, whose dead body was recovered from a well. *B* was wearing certain ornaments but they were not found on his body. A made a statement to the police—"I had removed the ornaments, had pushed the boy into the well and had pledged them with *X*" The ornaments were recovered from *X*. It was held that the statement that the accused had pledged the ornaments with *X* was admissible, but that the rest of the incriminating statements could not be received in evidence.[46] In another case the statement of the accused was: "I had removed the *karas* and pushed the boy into the well and had pledged the *karas* with Allahdin". Five Judges of the Lahore High Court held that the only portion "that he had pledged the *karas* with Allahdin" was admissible.[47] A police officer can depose that the accused went to him and stated that he was lying on the bed wounded, that the sword was also on the bed and the padlock was on the window sill, but the statement that he had severely hacked his wife was not admissible.[48]

The Patna and the Nagpur High Courts have taken the same view.[49]

The Allahabad High Court has held that so much of the information given by the accused to the police-officer, whether amounting to a confession or not, as related distinctly to the facts thereby discovered, might be proved.[50] The accused gave information to the police to the effect that they had stolen a cow and a calf and sold them to a particular person at a particular place. As a result of this information, the cow and calf were discovered. It was held that only the statement that the accused had

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40. *Emperor* v. *Mareppa Ningappa*, (1946) 48 Bom LR 542.
41. *Emperor* v. *Bhika Gober*, AIR 1943 Bom 458 : (1943) 45 Bom LR 884 : (1944) Bom 25.
42. *Mathurdhana* v. *State*, AIR 1956 Bom 393; *State* v. *Santappa Mother Kasawwa Metri*, AIR 1956 Bom 217 : 1956 Cr LJ 487 ("he had hidden the pistol").
43. *Queen Empress* v. *Kamalia*, ILR (1886) 10 Bom 595.
44. *Adu Shikdar* v. *Queen-Empress*, ILR (1885) 11 Cal 635; *Amiruddin Ahmed* v. *Emperor*, ILR 45 Cal 557; *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Bhajoo*, (1929) 57 Cal 1062; *Naresh Chandra Das* v. *Emperor*, (1942) 1 Cal 436 : AIR 1942 Cal 593.
45. *Satish Chandra Seal* v. *Emperor*, (1944) 2 Cal 76 : AIR 1945 Cal 137.
46. *Sukhan* v. *The Crown*, ILR (1929) 10 Lah 283 (FB).
47. *Sukhan* v. *Emperor*, AIR 1929 Lah 344 (SB) : 1930 Cr LJ 414.
48. *Legal Remembrancer* v. *Lalit Mohan Singh Roy*, ILR (1921) 49 Cal 167 : AIR 1922 Cal 342.
49. *Lalji Dusadh* v. *King-Emperor*, ILR (1927) 6 Pat 747 : AIR 1928 Pat 162; *Sonaram Mahton* v. *King-Emperor*, ILR (1930) 10 Pat 153 : AIR 1931 Pat 145; *Bharosa v Crown*, ILR (1940) Nag 679 : AIR 1941 Nag 86.
50. *Nathu* v. *State*, AIR 1959 All 467.

sold the cow and calf to a certain person could be proved under this section but not the statement that the accused had stolen them.[51]

The digging out and handing over to the police by the accused person, of certain articles from particular spots to which he took the police and witnesses, without the accused person saying anything, does not amount to a "statement", and, therefore, is not admissible in evidence but it is an "act" or "conduct", which is admissible in evidence under Section 8.[52]

Where the accused in the custody of a police officer said to him: "I have buried a gun at such and such a place", it was held that not only the fact of the discovery of the gun but also the statement of the accused that he had buried the gun at that place was admissible in evidence.[53]

In a case where a prosecution witness, while referring to the information given by the accused leading to the recovery of a rifle, also stated that the accused had told him, in the presence of the investigating officer that the accused would point out the rifle, the Mysore High Court held that the latter part of the information amounted to confession and was inadmissible in evidence.[54]

The former Chief Court of Oudh at Lucknow had held that this section must be construed strictly, and only so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered can be proved under it. The section is not intended to let in a confession generally.[55] Under Section 27, only so much of the information as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded.[56] Where the accused stated that he had killed his brother and that he removed the body and buried it in a field, it was held that the first portion that he killed his brother was inadmissible and the latter part that he removed the dead body and buried it in the *Kuvawal* field was admissible, as the recovery was affected on that information.[57]

In all these cases the exact words of the accused, giving out the information which leads to the discovery, are important, because such portion of the information only is provable under Section 27, against the accused. To give an example, if the accused says that he had kept the ornament inside the bush, it spells out his possession of the object that may be recovered. If, on the other hand, the accused says the object was kept or would be found inside the bush, it would only show that he got the knowledge somehow about the place where the object could be found. The latter type of case would come within the decision in *Triambuk* v. *State of M.P.*[58]. What is required under Section 27, and is provable is only such of the information that leads to the discovery of the object. In this view, it is very important for the officer to record the information given by the accused, as far as possible, in the same words spoken to by the accused. It should also be recorded in the first person and should not be paraphrased.[59]

The information which leads to discovery, distinctly of the fact concerned with the case, is admissible though the accused led the police party and pointed out the place. But where the weapon was recovered from accused No. 1 under a seizure memo in which it was recited that the accused No. 1 made a statement that he would show the weapon with which he assaulted the deceased, it was held by the Supreme Court, that the first part in the seizure memo would be inadmissible, because the fact that the accused No. 1, assaulted the deceased was not discovered in pursuance of the information given by accused No. 1; it would be a confessional statement to the police which would be hit by Section 25 of the Act. There must be evidence to connect the weapon with the crime.[60] Where the accused first made a statement that he took the corpse to the bed of the dried up nullah and then took the police to that place, where they found blood stains on the sand, and he made a statement to the effect that the body of the deceased was kept, whereupon the body was found buried, it was held that the first information given by

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51. *Queen-Empress* v. *Babu Lal*, ILR (1884) 6 All 509, (FB); *B.B. Singh* v. *King-Emperor*, ILR (1944) 21 Luck 56.
52. *Emperor* v. *Nanua*, ILR (1941) All 280 : AIR 1941 All 145.
53. *Emperor* v. *Chokhey*, (1937) All 710 : AIR 1937 All 497.
54. *Shankar Rao* v. *State*, AIR 1958 Mysore 1.
55. *B.B. Singh* v. *King-Emperor*, ILR (1944) 21 Luck 56.
56. *Mohd Sadiq* v. *State*, (1979) 81 PLRD 1 (DB).
57. *Punjamava* v. *State of Gujarat*, AIR 1965 Guj; *Parimal Banerjee* v. *State*, 1986 Cr LJ 220 (Cal) (DB).
58. AIR 1954 SC 39.
59. In re : *Athappa Goundan*, 1937 Mad 618 (FB); In re : *Channa Reddy*, AIR 1940 Mad 710. In re : *Ramamurthy*, AIR 1941 Mad 290; *Naresh Chandra Das* v. *Emperor*, AIR 1942 Cal 593, *Mangal Singh* v. *Emperor*, AIR 1948 Nag 78.
60. *Babboo* v. *State of M.P.*, AIR 1979 SC 1042; *D.P. Misal* v. *State of Maharashtra*, 1987 Cr LJ 1512 (Bom).

the accused leading to the discovery of blood-stains and some leaves at a particular spot would be admissible, and the latter statement that he kept the body there was not admissible.[61]

The Madras High Court has put a wider construction and held that the whole of the statement which leads to the discovery of a stolen article is admissible and it should not be cut up so as to confine it only to the actual words which the accused may use to express the fact that he had hidden the properties.[62] If it is the accused's statement that connects the fact discovered with the offence and makes it relevant, then, even though the statement amounts to a confession of the offence, it must be admitted because it is that which had led directly to the discovery of the fact.[63]

In a limited class of cases where the gist of the offence is possession, words such as 'I hid', 'pledged', 'I sold', 'I gave', or 'I have kept' are admissible on the ground that the words are distinctly related to the fact discovered, though in some circumstances they may amount to a confession.[64]

Where the accused stated: "I gave the dynamo and the light to V (accused No. 2).....I got back from V the dynamo light.....and the dynamo stolen from my next house, and sold them to the proprietor of the Soda Factory near the Pillayar Temple etc.," It was held that the portion "I gave the dynamo and light to V", was not admissible since the requirements of Section 27 were not satisfied; that the previous history of the dynamo spoken to by accused No. 1, namely, that he got it back from V, or that at an earlier of point of time he stole it from the next house would be inadmissible, as those statements were not relevant for the discovery; and that the only portion 'I sold the dynamo to the proprietor of the Soda Factory near Pillayar Temple, etc., was admissible as that information led to the discovery of the fact, namely, the dynamo.[65]

Any statement by the accused, offering to point out the weapon of offence, excluding the incriminating portion which would be hit by Section 25, is admissible under Section 27.[66]

In a case where the accused lodged the first information report, stating that he murdered his wife due to her bad character, and it was in the nature of a confession it was held that part of it was not admissible and that the second part, leading to the discovery of the body and bloodstained cloths was held admissible.[67] In[68] it was held that the statement relating to the handling over of the key as well as the as box, was held admissible, as that portion distinctly related to the fact discovered, and the other portion that he opened the shop with the key was held inadmissible.

This section is based on the doctrine of confirmation by subsequent facts. That doctrine is that where, in consequence of a confession otherwise inadmissible, search is made and facts are discovered which confirm it in material points, then such discovery is a guarantee that the confession made was true. But what is important to note is that only that portion of the information can be proved which relates distinctly or strictly to the facts discovered.....The expression 'distinctly' means 'clearly', or 'positively'. It therefore follows that where the accused makes a compound statement, it would be the duty of the court to divide it into its component parts and only admit that part which had distinctly led to the discovery of the particular fact, and reject the rest. The view that the entire statement accompanying the discovery was admissible, even though it contained an acknowledgement of guilt, or other incriminatory statements, can no longer be sustained as correct after the pronouncement of the Privy Council.[69]

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61. *Kalu Khan* v. *State*, AIR 1957 Ori 102 : 1957 Cr LJ 530.
62. *Sogainmuthu Padayachi* v. *King-Emperor*, ILR (1925) 50 Mad 274.
63. *Athappa Goundan* v. *Emperor*, AIR (1937) Mad 695, (FB).
64. *Public Prosecutor* v. *Indla China Lingiah*, AIR 1954 Mad 433 : 55 Cr LJ 583; *Rama* v. *State*, 1952 Bom 299 (FB); *Rangrao Dnyanu Nikam* v. *State*, AIR 1952 Bom 72, ("I have kept that bomb in the eastern wall of a dung pit in a cattle shed of my friend, and I will take it out and give you," was held to be admissible). *Chunilal* v. *Union of India*, AIR 1964 HP 27 : (1964) 2 Cr LJ 293, (I buried their copper linings in the forest), *Chinnaswamy Reddy* v. *State of A.P.*, AIR 1962 SC 1788, (he had hidden the ornament at a place).
65. In re : *Vellingiri*, AIR 1950 Mad 613 : 1951 Cr LJ 1531.
66. *Polukuru Kottaya* v. *Emperor*, AIR 1947 PC 67; *Proboo* v. *State*, AIR 1963 SC 1113, 1972 All WR 192, *Dipu* v. *State of Calcutta*, 1977 Cr LJ 1508 (Cal).
67. *Gopal* v. *State*, 1977 Cr LJ 358, **see also** *Kunnumal Mohammed* v. *State of Kerala*, AIR 1963 Ker 54.
68. AIR 1962 SC 116.
69. *Polukuri Kottaya* v. *Emperor*, AIR 1947 PC 67; **see also** *Dharma* v. *State*, AIR 1966 Raj 74; *Jasoda Haldar (Smt.)* v. *Sailendra Nath* AIR 1957 Cal 372.

Where, though the interrogation by the police took two hours, it was done in the presence of many persons, it was held that it cannot be held that the disclosure was not voluntary. As the fact discovered was the place from which various articles were produced by the accused and as the information given by the accused related to that important fact, it was clearly admissible under Section 27 of the Evidence Act.

Where the confessional statement does not lead to any discovery of incriminating articles, such part of the statement will not be covered by Section 27 and the other part is not admissible, as it is hit by Section 25.[70] The accused, after his arrest and after recovery of stolen property from him, showed a place from where he had stolen the property. It was held that it amounts to a confession without leading to any new discovery of a fact, and, therefore, not admissible.[71]

Discovery is not the same thing as disclosure; where there has been no discovery in consequence of the information given by the accused, such information cannot be proved against the accused.[72]

20. PLACE OF DISCOVERY

The accused, who gave the information leading to the discovery of fact, need not be in exclusive possession of the place where from the recovery was made.[73] Where the information was that the accused concealed the knife in the compound of another, and it was recovered, it added to the weight of inference against the accused.[74]

In order that a 'discovery' may come under the provisions of this section, the place from which the incriminating article was recovered must be a place of concealment, which would be difficult or impossible for the police to discover without some assistance from the accused.[75]

The discovery of a pistol at the instance of the accused, from a place which was a public thoroughfare was held to be not relevant.[76] Recovery of the wearing apparel of the deceased from a public place a burrow pit near the place of murder more than three weeks after the occurrence was held to be irrelevant.[77] The Supreme Court held that, where a weapon was merely taken out by the accused from beneath his cot and handed over to police, without any statement, as it was a place which was also accessible to all, the *factum* of recovery was barred under Section 27.[78]

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70. *Hari Shanker* v. *State*, 1985 Cr LJ 1700 (Del).
71. *State* v. *Prakash Singh*, AIR 1956 Punj 224 : 1956 Cr LJ 1347.
72. *Prabhoo* v. *State*, AIR 1963 SC 1113; *Sattiah S/o Kisthiah* v. *Govt*, AIR 1951 Hyd 45; *Naresh Ch. Nath* v. *State*, AIR 1971 Tripura 16 : 1971 Cr LJ 407; *Ramlal Lohar* v. *State of Assam*, 1981 Cr LJ 1734 (Gau); *Trilochan Joshi* v. *Union of India*, 1983 Cr LJ (NOC) 109 (Delhi); *Harishankar* v. *State*, 1985 Cr LJ 1700 (Del); *Amin Chand* v. *State*, 1987 Cr LJ 1034 (Delhi); *Mahabir* v. *State*, AIR 1972 SC 1331.
73. *State* v. *Amar Singh*, ILR (1961) 11 Raj 154; *Sadashiv Bajrang Sutar* v. *State of Maharashtra*, 1982 Cr LJ 2056 (Bom); *Kunjan Nadar* v. *State*, 1990 Cr LJ (NOC) 6 (Ker); *Ladoo* v. *State*, 1984 (26) Delhi. LT 254.
74. *Kunjan Nadar* v. *State*, 1990 Cr LJ (NOC) 6 (Ker); dead body exhumed at instance of accused, *Vasudevan* v. *State*, 1993 Cr LJ 3151 (para 8) (Ker).
75. *Sadhu Singh* v. *State*, AIR 1967 Punj 14; *Amin* v. *State*, AIR 1958 All 293.
76. *Dudh Nath Pandey* v. *U.P.*, AIR 1981 SC 911. **Also see** *Jaysing* v. *State of Maharashtra*, 1999 Cr LJ 1687, 1691 (Bom) and *Trimbak* v. *State of Madhya Pradesh*, AIR 1954 SC 239 : 1954 Cr LJ 335 (para 4). **Also see** *S.P. Sohatre v State of Maharashtra*, 1997 Cr LJ 454 (Bom); *Sarabjit Singh* v. *State of Punjab*, 1998 Cr LJ 2231, (P&H). *Surinder Kumar alias Raju* v. *State of Punjab*, 1994 Cr LJ NOC 20 (P&H); *Jai Singh* v. *State of Rajasthan*, 1994 Cr LJ 1689 (Raj). **See also** *Ganpat Kisan* v. *State of Maharashtra*, 1995 Cr LJ 792 (para 10) (Bom), **following** *Trimbak* v. *The State of Madhya Pradesh*, AIR 1954 SC 39 : 1954 Cr LJ 335.
77. *Abdul Sattar* v. *U.T., Chandigarh*, AIR 1986 SC 1438; *Sudhir Chandra Das* v. *State* 1970 Tripura 8 : 1971 Cr LJ 86, *Osan* v. *State of Punjab*, 1978 Punj LR 106 (open place); *Jag Narih* v. *State*, 1965 All LJ 344; *Ramdas* v. *State*, (1962) 2 Andh LT 115; *Mst. Viran Wali* v. *State*, (1961) 1 Cr LJ 258 : 1AIR 961 JK 11; *State of Kerala* v. *Joseph*, (1963) 2 Cr LJ 454 (open place like a quarry), *Kolimala Bija* v. *State of Kutch*, AIR 1954 Kutch 22 : 1954 Cr LJ 801; (it shows only knowledge of the accused place) 1964 MP 30 : In re : *Kalu Singh Moti Singh*, AIR 1964 MP 30 : (1964) 1 Cr LJ 198 (open field); *Shoba Param Kachi* v. *State of MP*, 1959 MP 125 : 1959 Cr LJ 476; *Mst. Bhagan* v. *State of Pepsu*, 1955 Cr LJ 537; *Abdul Haqua Ali* v. *State*, 1983 Cr LJ (NOC) 122; *Mayachar* v. *State of Orissa*, 1987 Cr LJ 1948, (recovery may be relevant under Section 8); *Abdul Sattar* v. *Union Territory*, 1985 SCR (Cri) 395 : AIR 1986 SC 1438. *Kalu* v. *State*, 1974 Cr LJ 839 (J&K) ; *Puran Lal* v. *State of U.P.*, 1997 Cr LJ 3813 (All), *Dharni Pradhan* v. *State* 1997 Cr LJ 2973 (Ori); discovery from open place, *S.T. Chalke* v. *State of Maharashtra*, 1993 Cr LJ 3364 (para 8) (Bom).
78. *Bahadul* v. *State of Orissa*, AIR 1979 SC 1262 : 1979 Cr LJ 1075. **See also** *Krishan Mohar Singh Dugal* v. *State of Goa*, AIR 1999 SC 3842 (para 2) : 2000 Cr LJ 18 (SC).

It is true that exclusive possession cannot be brought home to an accused, if properties are discovered in open places equally accessible to members of the public, as a result of the information given by him. But the fact, that it was on that particular person's information and his pointing out that the incriminating article was discovered and recovered, would lead to the presumption that he was the person who had secreted it there.[79] It is a fallacious notion that, when recovery of any incriminating article is made from a place which is open or accessible to others it will vitiate the evidence. The crucial question is not whether the place is accessible to others or not but whether it is ordinarily visible to others or not. If it is not, then it is immaterial that the place of concealment is accessible to others.[80] If the property was found to be so hidden away that no ordinary members of the public could know of its existence then the statement leading to its discovery would be admissible.[81]

The accused made statements to the effect: "If I am taken to G (the name of a place), I shall get the four silk *sarees*.....If I am taken to my native place I shall get one gold ring, etc." Discoveries were accordingly made at both the places. They were identified by the ladies as belonging to the family. The question was, as the articles were the subject of open sale in the market, whether they could be said to be connected with the crime. The court said: "It is a matter of common knowledge that ladies have an uncanny sense of identifying their own belongings, particularly articles of personal use in the family. That apart, the description of the silk *sarees* in question shows that they were expensive sarees with distinctive designs."[82]

21. LEADS TO DISCOVERY

STRAIGHT, J., drew a distinction between a discovery by the act of the party and one from his information. Where the accused, while giving the knife to the police, stated that he had thrown away certain jewels on the deceased at the scene of offence and he would show them the next morning and later he pointed out the jewels, it was held that as the statements had been made to a police officer, they were inadmissible, as the recovery was made by his own act and it was not from any information given by him that the discovery took place.[83]

However, the Bombay High Court, in *Queen-Empress* v. *Nana*,[84] held that, had it not been for the information given by the accused, the property would not have been discovered; that the information set the police in motion, the immediate consequence being that the police asked the accused to show them the spot and accompanied him there, with a view to the discovery of the property, and it was the natural consequence of the information the police had received from the accused; and it is so connected with the final result, namely, the discovery of the property, as a *causa causans*.[85]

If, in consequence of the disclosure statement of the accused, recovery of guns was effected from a place which could not be known to others, such a statement is admissible.[86] Where the disclosure statement of the accused that the dead body of the deceased child was carried on a motorcycle upto a particular spot led to the recovery of a broken piece of glass from the said spot which was found to be the part of the tail lamp of the motorcycle of the co-accused, allegedly used for the said purpose, the information supplied by the accused would be admissible in evidence.[87]

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79. In re : *Murugan Alias Thannasi*, AIR 1958 Mad 451 : 1958 Cr LJ 1196.
80. *State of Himachal Pradesh* v. *Jeet Singh*, AIR 1999 SC 1293 (para 26) : 1999 Cr LJ 2025.
81. In re : *Murugan*, AIR 1958 Mad 451; *Public Prosecutor, v Pakkiriswami*, AIR 1929 Mad 846; *Ram Autar* v. *Emperor*, AIR 1925 All 478; *Amrit Sonar* v. *Emperor*, AIR 1919 Pat 330; *Sohan Singh* v. *Emperor*, AIR 1930 Lah 91; *Mangalya Ragho* v. *Emperor*, Nag 54.
82. *Earabhadrappa* v. *State of Karnataka*, AIR 1983 SC 446
83. *Queen-Empress* v. *Pancham*, ILR (1882) 4 All 198.
84. ILR (1889) 14 Bom 260.(F.B.) of 5 Judges.
85. **See also** *Ganuchandra* v. *Emperor*, AIR 1932 Bom 286; *Rama Shidappa* v. *State*, AIR 1952 Bom 299; *Manjunathaiya* v. *Emperor*, AIR 1914 Mad 61; In re : *Sogianuthu Padayachi*, AIR 1926 Mad 638; *Deputy Legal Remembrancer* v. *Chenanashya*, 2 Cal WN 257; *Isher Singh* v. *Emperor*, AIR 1916 Lah 228; *Karam Din* v. *Emperor*, AIR 1929 Lah 338; *Nawab Din* v. *Emperor*, AIR 1933 Lah 516; *State* v. *Mohindera Singh*, AIR 1953 Pun 81; *State* v. *Lehna Singh*, AIR 1953 Pun 101; *A.P. Kuttan Panicker* v. *State of Kerala*, (1963) 1 Cr LJ 669 (Ker).
86. *Narpal Singh* v. *State of Haryana*, AIR 1977 SC 1066; recovery of skeleton of wife of accused at his instance. *Shambu Gowala* v. *State of W.B.*, 2000 Cr LJ 1602 (para 15) (Cal).
87. *State of Maharashtra* v. *Damu Gopinath Shinde*, 2000 Cr LJ 2301 (paras 36, 37-39) (SC) : AIR 2000 SC 1691.

The person who received information from the accused, and the person who effected the recovery on such information need not be same. It would be sufficient if the information leads to the discovery of the fact.[1] The information given by the accused is admissible provided it leads to the discovery of relevant facts, even if the actual recovery is made by the accused himself in pursuance of that information[2] but admissibility alone would not render the evidence, pertaining to the above information, reliable. The Court would have to see whether or not it was voluntarily stated by the accused.[3] The information given by the accused must lead to discovery of the fact directly; but, discovery of incriminating articles made after making search from place to place, is not attracted by Section 27.[4] Where, at the instance of the witnesses, the accused was arrested and a weapon stained with blood of the blood group of the deceased was recovered, on the information given by the accused, and when the witnesses later did not associate themselves with the recovery, it was held that this did not vitiate the prosecution evidence.[5] Where the evidence was that the victim was last seen with the accused and, on his information, the victim's muffler was recovered from the accused, it was held that the recovery was the most incriminating fact against the accused.[6] Where the complainant indicated the place where the stolen articles could be found, and they were recovered in pursuance of a portion of the statement of the accused made in the presence of independent witnesses who attested the recovery memo, it was held that the fact that the complainant gave an indication did not render the recovery outside the purview of Section 27.[7] Where the victims of brutal assault were found lying on the spot where the accused gave discovery and other accused were found standing, the discovery implicates him in the incident as the person participating in the crime along with others.[8] Recovery on the information given by the accused himself is admissible in evidence under this section.[9] Deposit of recovered arms and ammunition as a result of raid on terrorists at police headquarter because of its large quantity for the purpose of safety, would not vitiate the recovery [10] When the discovery under Section 27 is as regards the authorship of concealment and not of guns and daggers used in a crime, conduct and concealment are incriminating circumstances and their discovery becomes relevant and admissible under Section 27.[11] The disclosure statement could also mean that the accused had knowledge of concealment of the articles recovered and not that he had himself concealed the same and was in their conscious possession.[12]

When the evidence against the accused mainly consists of a confessional statement made when he was arrested in connection with another case, still it cannot be said that the discovery was not in consequence of the information given by the accused. In that case the statement revealed that the revolver was presented to the accused by a named communist and that he had concealed it in the ground near his father-in-law's house, the revolver was recovered on his taking the police to his father-in-law's house. It was held that the description of the revolver given by him indicated that the accused got possession of it and his statement was admissible.[13]

Where incriminating articles were recovered after a gap of 10 to 12 days after the disclosure statement and they were not recovered earlier though the particular place/house was searched twice, the recoveries do not inspire confidence.[14] Where the accused brought the articles from inside his house and handed them over to the Investigating Officer and the witnesses, there being no convincing evidence that the articles were in the exclusive possession of the accused and in absence of any site plan, it was no recovery under Section 27.[15] Where there was no evidence to show that the shots were fired from the

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1. *M.C. Sekharan* v. *State of Kerala*, 1980 Cr LJ 31 (Ker).
2. *Ram Richhapal* v. *State*, AIR 1954 Punj 97; *State* v. *W. Lehna Singh*, AIR 1953 Punj 101 : 1953 Cr LJ 697 (Punj).
3. *Rammi* v. *State of M.P.*, 1999 Cr LJ 4561 (para 12) (SC) : AIR 1999 SC 3544.
4. *Sakri Janiani* v. *State*, 1985 59 Cut LT 391.
5. *Ishwar Singh* v. *State (Delhi Admn.)*, 1986 Cr LJ 1625.
6. *Krishna Santra* v. *State*, 1986 Cr LJ 2077 (Cal).
7. 1985 Mad LJ (Cri) 410.
8. *Prem* v. *State of Maharashtra*, 1993 Cr LJ 1608 (para 11) (Bom). **Also see** *Turuku Budha Karkaria* v. *State*, 1994 Cr LJ 552 (para 8) (Ori); *Manji* v. *State of Rajasthan*, 1996 Cr LJ 788 (para 5) (Raj).
9. *Aravindakshan Nair* v. *State of Kerala*, 2001 Cr LJ 431 (para 6) (Ker).
10. *Lal Singh* v. *State of Gujarat*, 2001 Cr LJ 978 (paras 23 and 24) (SC) : AIR 2001 SC 746.
11. *State of U.P.* v. *Jageshwar*, AIR 1983 SC 349.
12. *R.B. Killedar* v. *State of Maharashtra*, 1995 Cr LJ 2632 (para 4) (SC).
13. *Public Prosecutor* v. *Nagabhushanam* AIR 1943 Mad 661; *Sankar Lal* v. *State*, ILR 1962 Cut 542 : 27 Cut LT 159.
14. *Kheraj Ram* v. *State of Rajasthan*, 1995 Cr LJ 3113 (para 10) (Raj).
15. *Maharaj Deen* v. *State*, 1996 Cr LJ 506 (para 30) (All) Poisonous substance not shown to be in personal custody or possession of accused, other recoveries not proved, conviction set aside. *M.V. Mahesh* v. *State of Karnataka*, 1996

pistols recovered, the recovery was inconsequential.[16] Where the alleged recovery of the crime weapon and cartridges on the basis of the alleged disclosure statement of the accused was unreliable, the accused was entitled to benefit of doubt.[17]

Where on one of the weapons recovered the serologist detected the presence of human blood but on the other he failed to detect any blood due to disintegration of serum, it does not mean that there had been no human blood on the other weapon.[18]

"Missing link" to the chain of circumstances.—Where at the instance of the accused a brass pitcher used for collecting the blood of the children was recovered from his house and same was found to have blood sticking on the outer side whose origin the chemical analyst could not determine as it was disintegrated by that time, it was for the accused to explain how the blood came to be there but he denied the seizure itself. It was held that such a denial was sufficient to provide a "missing link" to the chain of circumstances.[19]

22. STATEMENT NOT LEADING TO DISCOVERY OF FACT

The statement of the accused that he threw the knife, the weapon of offence in the river, has to be disregarded when it did not lead to any discovery of fact.[20] Pointing out by the accused to the vendor from whom he had purchased the knife, the weapon of the offence, cannot come under Section 27 as a witness cannot be said to be discovered if nothing is to be found or recovered from him as a consequence of the information furnished by the accused.[21] In a case of murder, mere recovery of sticks without any marks of bloods cannot constitute incriminating evidence against the accused. It is a common knowledge that in every household in villages sticks are found.[22] Where the accused himself had produced the weapon of offence and this fact was sought to be proved by the contents of the seizure memo in question which could not be proved being barred by Section 27, order refusing to exhibit the said seizure memo was proper.[23]

Where the confessional statement does not lead to any discovery of incriminating articles, such part of the statement will not be covered by Section 27 and the other part is not admissible as it is hit by Section 25.[24] The statement of the accused that he threw the knife, the weapon of offence, in the river has to be disregarded when it did not lead to any discovery of fact.[25]

23. STATEMENT SUBSEQUENT TO DISCOVERY

Where the fact has already been discovered, any statement relating to its discovery would not be admissible in evidence.[26] Mere discovery, on the information given by the accused, is of no legal consequence, if it is not preceded by the informative statement on the part of the accused.[27] Where stolen articles were discovered prior to the arrest of the accused, the subsequent statement of the accused with

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Cr LJ 771 (paras 22 and 23) (Kant). **See also** *Sukhvinder Singh* v. *State of Punjab*, 1996 Cr LJ 632 (paras 15 and 16) (P&H).

16. *Bhani Ram* v. *State of Rajasthan*, 1995 Cr LJ 3165 (para 19) (Raj).
17. *Jackaran Singh* v. *State of Punjab*, AIR 1995 SC 2345 (paras 6 and 8).
18. *State of Rajasthan* v. *Teja Ram*, 1999 Cr LJ 2588 (paras 24, 25 and 27) (SC) : AIR 1999 SC 1776.
19. *State of Maharashtra* v. *Damu Gopinath Shinde*, 2000 Cr LJ 2301 (para 34) (SC) : AIR 2000 SC 1691. The Court **referred to** *State of Maharashtra* v. *Suresh*, 2000 (1) SCC 471.
20. *State* v. *Zilla Singh*, 1973 Cr LJ 1384; *Harishanker* v. *State*, 1985 Cr LJ 1700 (Delhi); *Aminchand* v. *State*, 1987 Cr LJ 1034 (Delhi); *Rakma* v. *State of Rajasthan*, 1994 Cr LJ NOC 69 (Raj), **following** 1956 Cr LJ 421 (SC).
21. *Mohan* v. *State*, 1997 Cr LJ 22 (Mad), **relying on** *Himachal Pradesh Administration* v. *Shri Om Prakash*, 1972 Mad LJ (Cri) 404 : 1972 Cr LJ 606 (SC) : AIR 1972 SC 975. **Also see** *Joseph* v. *State of Kerala*, 1997 Cr LJ 4289 (Ker). **Also see** *Chet Ram* v. *State*, 1997 Cr LJ 1029 (Del).
22. *Narayan Kanu Datavale* v. *State of Maharashtra*, 1997 Cr LJ 1788 (Bom).
23. *Yog Raj* v. *Romal Singh*, 1997 Cr LJ 1958 (J&K).
24. *Harishankar* v. *State*, 1985 Cr LJ 1700 (Del).
25. *State* v. *Zilla Singh*, 1973 Cr LJ 1384; *Sankar Lal Aggarvalla* v. *State*, 1979 Chand Cri Cases 170 (Punj); *Harishankar* v. *State*, 1985 Cr LJ 1700 (Delhi); *Aminchand* v. *State*, 1987 Cr LJ 1034 (Delhi).
26. *Vijender* v. *State of Delhi*, (1997) 6 SCC 171 : 1997 SCC (Cri) 857.
27. *Devidas* v. *State of Maharashtra*, 1982 Cr LJ 2189 (Bom); *State* v. *Bairagi Charan Mohanty*, 1972 (38) Cut LT 754; *Maharaj Deen* v. *State*, 1996 Cr LJ 506 (para 29) (All).

regard to concealment of stolen articles was held inadmissible.[28] Where, after certain clothes were taken out of a pond on the information given by the accused, he made another statement that he had removed them from the person of the deceased and thrown them into the pond, it was held that the latter statement did not come within the purview of Section 27, and so was not admissible.[29] No statement relating to a relevant fact is admissible under the section if it is made after the discovery of that fact, or if it does not relate distinctly to the fact discovered.[30]

Where, after the recovery of blood-stained *paijama* and *banian* of the accused, which had been concealed by the accused, the accused made a statement that they were his clothes, it was held that the statement that those articles belonged to the accused was not admissible in evidence[31] but where the daughter of the deceased stated that after the recovery of the property from the accused persons, she identified the articles and found them to be belonging to her mother and they were stolen on the day of her murder, it could not be said that the recovery of articles had preceded the making of the disclosure statements.[32] Where, before the accused led the police to the place of murder, for the purpose of discovery of the deadbody, the son of the deceased, found the deadbody before the arrival of the police, it was held that the discovery of the deadbody was not in consequence of the information given by the accused.[33]

The accused, after his arrest and after recovery of stolen property from him showed a place from where he had stolen the property. It was held that it amounted to a confession, without leading to any new discovery of a fact, and therefore, not admissible.[34]

Where recovery of vehicle was made two days after disclosure statement and the police in whose jurisdiction the recovery was made, was also not informed, the recovery was held to be doubtful.[35] Recovery of a wrist watch in persuance of the disclosure made by the accused, there being no mention of any wrist watch missing in the F.I.R., can be given no importance.[36] Where two knives were recovered persuant to the disclosure of the accused of murder of which one had no blood and the other had disintegrated blood and the witness to the recovery was interested in prosecution, the recovery was of no significance.[37]

24. STATEMENT IN THE CASE OF A NUMBER OF ACCUSED

In this section the expression "from a person accused of any offence" has been used. It has given rise to conflicting judicial opinions in regard to the question of admissibility, when there is a joint statement given by several accused leading to the discovery of the fact. One view is that, as the use of the word 'person' is singular, and it has been given significance and designedly used, one cannot consider a joint statement of a number of persons and such statements cannot be said to be an information given by any particular accused out of the several accused.[38]

The evidence that one accused, along with all others, gave information leading to recovery of robbed articles, and the evidence of the receiver of the stolen property that accused 1 to 3 sold him the ring, and that accused 1 to 3 asked him to produce the ring when they came with the police party, do not present

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28. *Queen* v. *Kamal Fukir*, 17 WR (Cri) 50; *R.* v. *Jora Hasji*, 11 Bom HCR 242; *Narisanto* v. *Emperor*, AIR 1945 Pat 161.
29. *Jaggar Singh* v. *Crown*, AIR 1952 Pepsu 23.
30. Re : *Motilal*, ILR (1959) 38 Pat 151 : AIR 1959 Pat 54.
31. *Jamil Ahmad* v. *State*, (1965) 67 Punj LR 1010 **relying on;** *Prabhoo* v. *State*, AIR 1963 SC 1113.
32. *Sanjay* v. *State (N.C.T. of Delhi)*, 2001 Cr LJ 1231 (para 31) (SC) : AIR 2001 SC 979.
33. *Ramlal Lohar* v. *State of Assam*, 1981 Cr LJ 1734 (Gau); *Trilochan Joshi* v. *Union of India*, 1983 Cr LJ (NOC) 109 (Delhi); *Suresh Kumar* v. *State of Rajasthan*, 1995 Cr LJ 1853 (para 15) (Raj).
34. *State* v. *Parkash Singh*, AIR 1956 Punj 224 : 1956 Cr LJ 1347.
35. *Niranjan Lal* v. *State of Haryana*, 1995 Cr LJ 248 (para 14) (P&H).
36. *Niranjan Lal* v. *State of Haryana*, 1995 Cr LJ 248 (para 15) (P&H).
37. *Niranjan Lal* v. *State of Haryana*, 1995 Cr LJ 248 (para 16) (P&H).
38. *Puttu* v. *Emperor*, AIR 1945 Oudh 235; *Ramsingh* v. *Emperor*, AIR 1916 Lah 433 (2); *Faqira* v. *Emperor*, AIR 1929 Lah 665; *Kudaon* v. *Emperor*, AIR 1925 Nag 407; *Bhudha* v. *Emperor*, AIR 1922 Lah 315; *Poshaki* v. *State*, AIR 1953 All 526; *Narayan* v. *State*, AIR 1953 Hyder 161; In re : *Sheik Mahboob*, AIR 1942 Mad 532; *Urlav Namasudara* v. *Emperor*, AIR 1932 Cal 297; *Kolimala Bijal* v. *State*, AIR 1954 Kutch 22; *Emperor* v. *Shiv Putraya*, AIR 1930 Bom 244; *Oudh Ram* v. *State*, 1982 Cr LJ 1656 (Del); *Kanura Yanadi Changaiah* v. *State of A.P.*, 1985 Cr LJ 1822 (AP); *Prem Bahadur* v. *State*, 1978 Cr LJ 945 (Sikkim); *Dhakeswari* v. *Commissioner of Income Tax*, AIR 1955 SC 154 : 1955 Cr LJ 196 (SC); *Babu* v. *State of Allahabad*, 1972 Cr LJ 815 (All).

any incriminating material against the accused. It is obligatory upon the investigating officer to state and record who gave the information, when he is dealing with more than one accused, what words were used by him so that a recovery pursuant to the information received may be connected to the person giving the information so as to provide incriminating evidence against that person.[39]

In *Ramsingh* v. *Emperor*,[40] it was stated that the information which was given first by one of the accused is to be taken in evidence, if it leads to the discovery of the fact. That was followed in *Rangayya* v. *R.*,[41] In re.: *Kallameedi*.[42]

The decision in *Puttu* v. *Emperor*,[43]; was dissented from by the Allahabad High Court in *Nathu* v. *State*,[44] **relying on** *Naresh Chandra* v. *Emperor*,[45] and *State of M.P.* v. *Chhotelal Mohanlal*,[46] and it was observed. "It is easily conceivable that two or more persons simultaneously or jointly furnish an information and, as a result of that information, a common discovery is made; such a case will, if either of the conditions is satisfied be covered by the section. Each case will, however, have to be judged on its own facts, but the underlying principle seems to be that the information should be such as cannot be said to be already in the possession of the police, that the discovery is made in consequence of that information, and further that the discovery is not rediscovery of something already discovered."

In *Naresh Chandra Das* v. *Emperor*,[47] it was held: "When a fact is once discovered, in consequence of information received from some source, any further information subsequently received from any other source cannot be said to be the information whereby the fact is discovered. But, the mere plurality of information received before discovery shall not necessarily take any of these information out of the section. In a suitable case, it is possible to ascribe to more than one accused the information which leads to the discovery."[48]

The other view was stated in an early case, *Queen* v. *Rama Churn Chug*,[49] as follows:—"It can hardly have been the intention of the Legislature that, when a fact is discovered in consequence of information received from one of several persons charged with an offence, and when others give like information, that fact should be treated as discovered from the information of them all..... It should be deposed that a particular fact has been discovered from the information of A and B, and this will let in, under Section 27, only so much of the information as relates distinctly to the fact thereby discovered."

In *Sulleman* v. *Emperas*,[50] it was held that if two persons give information leading to the discovery of fact, so much of the statement of each accused as relates distinctly to the fact discovered may be proved.

In a later case the Calcutta High Court held that where joint statements of the accused, had not been recorded by the investigating officer, but it transpired that the accused persons made some statements jointly and, on the basis of their statements, dead bodies were recovered which were satisfactorily identified, such evidence would be admissible under Section 27[51]. Where stolen property was recovered from different parts of the residence of the accused on the information of three co-accused, it was held to be nothing unnatural or improbable on the part of the accused in keeping their share of the stolen articles concealed in the residence of one of the accused.[52]

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39. *Md Abdul Hafeez* v. *State of A.P.*, AIR 1983 SC 367; **See also** *Lachhman Singh* v. *State*, AIR 1952 SC 167.
40. AIR 1916 Lah 433.
41. 1932 Mad WN 113.
42. AIR 1940 Mad 710.
43. AIR 1945 Oudh 235.
44. 1958 All 467.
45. AIR 1942 Cal 593.
46. AIR 1951 Nag 71.
47. AIR 1942 Cal 593.
48. **See also** *Rangayya* v. *Emperor*, 1931 Mad WN 113; *Abdul Kadhar* v. *Emperor*, AIR 1946 Cal 452; *Gurubaru* v. *R.*, AIR 1949 Ori 67 : 1949(1) Cut 207.
49. (1875) 24 WR (Cri) 36.
50. (1916) 17 Cr LJ 506.
51. *Lall alias Chiranjib Bhowmik* v. *State*, (1982) 86 Cal WN 479.
52. *Brij Mohan* v. *State of Rajasthan*, 1994 Cr LJ 922 (para 11) : AIR 1994 SC 739.

The third view was expressed in *Queen Empress* v. *Babulal*[53] STRAIGHT J. observed: "In detailing statements of this kind, which are alleged to have led to discovery, it is of the essence of things that what each prisoner said should be precisely and separately stated. If the evidence was not clear upon this point, and the witness refused to be more explicit, the Judge should have paid no attention to it." This view was similarly expressed in *Allabaksh* v. *Emperor*.[54]

The Supreme Court, in *Lachhaman Singh* v. *State*,[55] did not express any clear opinion regarding the question but simply observed as follows: "But, as to what should be the rule when there is clear and unimpeachable evidence as to independent and authentic statements of the nature referred to in Section 27, Evidence Act, having been made by several persons, 'either simultaneously or otherwise', all that we wish to say is that, as at present advised, we are inclined to think that some of the cases relied upon by the learned counsel for the appellants have perhaps gone further than is warranted by the language in Section 27, and it may be that on a suitable occasion, in future, those cases may have to be reviewed."

The above observation spells out that, in case of simultaneous information given by several accused, the information given by a particular accused would be admissible, if it is followed up by the police being taken to the actual spot from where the fact was discovered. The following decisions are on the same lines.[56]

In another case, *Ramkishan Mithanlal* v. *State of Bombay*,[57] the Supreme Court observed: "The question that really arose for the consideration of the court there was whether the joint statement attributed to the accused 1 and 2 in that case was admissible, without specifying what statement was made by a particular accused, which led to the discovery of the relevant fact, and it was rightly held that a joint statement by more than one accused was not contemplated by Section 27, and evidence of Mistry, the police officer, in that behalf should therefore have been excluded."

In *Motilal* v. *State*,[58] it was held that it would be correct to lay down, as a rule of prudence, that the investigating officer should record the statements of the accused persons in precise language as far as possible, one accused after the other, and if it is so done, it can be judged by the court which part of the information led to the discovery of a fact in respect of a particular accused as deposed before it, and whether the evidence is believable and if so against whom. It was further held that because one accused accidentally happens to be the first person to give a statement, it cannot be taken that such statement is the information in consequence of which the discovery may be said to have been made, and that the other statements should not be excluded on the ground that they did not lead to the discovery.

In Section 13 of the General Clauses Act, it is stated that in all Central Acts and Regulations, unless there is anything repugnant in the subject or context, the words in the singular shall include the plural and *vice versa*. If that be the position even different statements of different accused, it is submitted, can be taken into account. If such statements of each of the accused are precisely and separately recorded, to the extent possible, in the words spoken to by the accused (as pointed out in *Queen Empress* v. *Babulal*,[59] and it would be possible for the court to appreciate to what extent of the statement of one accused can be taken as leading to the discovery of a particular fact. And the different statements of different accused, made in some cases, leading to the discovery of different facts in a given case, can be considered.

In a Madras case, WADSWORTH J. observed: "It seems to us improper to treat as individual statements of two different persons, a composite statement of this kind, which appears to have been made up of information gathered from the two persons, it being impossible to say how much of the statement was made by one of them and how much was made by the other."[60]

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53. ILR (1884) 6 All 509 (FB).
54. 92 PLR 1902.
55. AIR 1952 SC 167.
56. *State of M.P.* v. *Chhotelal*, AIR 1955 Nag 71; *Ramchand* v. *State*, AIR 1956 MB 256; *Ranchhod* v. *State*, AIR 1956 MB 104.
57. AIR 1955 SC 104.
58. AIR 1959 Pat 54.
59. 6 All 509.
60. In re : *Peria Guruswami*, AIR 1941 Mad 765 : ILR 1942 Mad 77.

But the Kerala High Court held that if the different statements are all of the same pattern, and refer to the same articles, and the accused have taken the police officer to point out the articles which were hidden by them, those statements would constitute one composite statement about the same article which did not serve to fasten the individual guilt, as there was no knowing on whose information the material facts were discovered.[61] Where the alleged recovery of the clothes of the deceased was made at the instance of both the accused jointly and it could not be said as to which of the accused produced which article and recovery of the ring and wrist watch of the deceased was not preceded any disclosure statement of the accused, the said recoveries were held to be inadmissible in evidence under Section 27.[62]

Where two or three persons jointly made statements leading to the discovery, the fact that their statements appear in case diary in a certain order, is no guarantee that they were made in that order.[63]

Where it was alleged that the recovery of stolen articles was made on the basis of the statement of one of the accused petitioner from the house of a witness who stated that such a statement had been made by the three accused persons including the petitioner which made it doubtful and identification of the accused in the Court was also doubtful, it was held that the statement of the petitioner was not sufficient to uphold conviction of the accused persons.[64]

25. POLICE ALREADY KNOW

Conduct of the accused in first telling the police and then taking them to the place where the weapon of offence was hidden and it is recovered, it amounts to information directly leading to the discovery of the fact, though police already knew the place where it could be found.[65]

The police must not have any prior information before the discovery of the fact at the instance of the accused. It is only if they derive the information from the accused as to the object to be recovered that Section 27 would be attracted.[66]

If the police had already known where the object was hidden, such discovery is inadmissible.[67] A fact already discovered from other sources cannot be discovered afresh, even if relevant information is extracted from the accused.[68]

In a later case, the Supreme Court, in *Karan Singh* v. *State of U.P.*[69], held that, where the accused first told the police that he would show the knife and then took them to the place where it had been hidden, his statement leading to the discovery of the blood-stained knife was not inadmissible on the ground that the police already knew the place where the knife could be found.[70]

26. DELAY

The Supreme Court in *State of U.P.* v. *Wazir Chand*,[71] held that where there was a long delay between the fatal attack and the arrest of certain accused, following the recovery of certain articles belonging to the deceased, and it was also not clear from the memo of recovery that the articles were recovered on the information given by the accused and the accused was not charged for retaining stolen

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61. *Karuppa Valayan* v. *State of Kerala*, AIR 1960 Ker 238.
62. *Chander Pal* v. *State*, 1999 Cr LJ 135 (para 8) (Del). The Court referred to *Bhagat Bahadur* v. *State*, 1996 Cr LJ 2201 : 1996 (1) AD (Del) 59.
63. *Nathu* v. *State*, AIR 1958 All 467.
64. *Trilochan Harijan* v. *State of Orissa*, 1998 Cr LJ 1887 (para 6) (Ori).
65. *Karan Singh* v. *State of U.P.*, AIR 1973 SC 1385; *Proboo* v. *State*, AIR 1963 SC 1113; *State* v. *Kathikalu*, AIR 1961 SC 1808.
66. *Jaffer Husain* v. *State*, (1969) 2 SCWR 550 : AIR 1970 SC 1934.
67. *Aher Raja Khima* v. *State of Saurashtra*, AIR 1956 SC 217; *Nathu* v. *State*, AIR 1958 All 467; *Krishan Mohar Singh Dugal* v. *State of Goa*, AIR 1999 SC 3842 (para 2).
68. *Thimma* v. *State of Mysore*, AIR 1971 SC 1871; *Hemraj Derilal* v. *State of Ajmer*, AIR 1954 SC 462; In re : *Gunadla*, 1959 Cr LJ 947 : AIR 1959 AP 387; *M. Karuararan* v. *State of Kerala*, ILR 1960 Ker 1202; *Noor Md.* v. *State*, AIR 1959 Ker 46 : 1959 Cr LJ 187; In re : *Chenna Reddi*, AIR 1940 Mad 710; *Gomtu* v. *State of Himachal Pradesh*, 1972 Cr LJ 687 (HP).
69. AIR 1973 SC 1385.
70. *Chamanlal* v. *State of J & K*, 1976 Cr LJ 1310 (J&K).
71. AIR 1978 SC 315.

property, the recovery could not be relied upon as suggesting participation of the accused in the fatal attack; that this would be so even if recovery was believed to be at the instance of the accused in question.

Where the recovery of weapon of offence was at the instance of the accused, nine days after his arrest, it was held that the delay was not material.[72] The delay of more than two months for the accused to make up his mind to give information to the police cannot possibly afford a valid reason for rejecting the information upon which ornaments of a peculiar nature were recovered.[73]

Where the accused stated that he threw the deadbody in a canal, and the police could not recover it immediately but sent a telegraphic message to the people supervising the canal and the deadbody was found a few days later, it was held that such statement was admissible.[74] Where articles were recovered on the basis of the statement of the accused, the said circumstances positively inculpating the accused could not be rejected merely because of the belated interrogation of the accused by the Investigating Officer.[75]

Where recovery took place twenty three days after the statement, the informant being still not charged, and was ultimately charged only as an abettor, the Supreme Court upheld the exclusion of the evidence.[76]

27. WHETHER SECTION 27 IS A PROVISO TO SECTIONS 24, 25 AND 26

The question has often arisen whether Section 27 is a proviso to all the preceding Sections 24, 25 and 26, or to Sections 25 and 26, or to Section 26 only. On a literal reading of Section 27 which starts with the expression "provided that" it would appear that it is a proviso only to the immediately preceding section *i.e.* Section 26. Section 24 deals with confessions generally and under this section a confession which is not voluntary is not admissible. Section 25 deals with a confession made to a police officer. Such a confession is absolutely inadmissible whether it is voluntary or not. Section 26 deals with a confession whilst he is in police custody. Such a confession is also inadmissible unless it is made in the immediate presence of a magistrate. If Section 27 is considered only as a proviso to Section 26 and not to Sections 24 and 25 it would follow that an involuntary confession or a confession to a police officer would be inadmissible even though it leads to a discovery of a fact, Whereas if the confession is made while in the custody of a police officer but not to a police officer Section 27 would apply if the conditions laid down in that section are satisfied.[77] The Privy Council observed at page 80, "Section 27 seems to be intended to be a proviso to Section 26."[78] In *Polukuri Kottaiah* v. *Emperor*[79] also the Privy Council observed at page 76 "Section 27 which is not artistically worded provides an exception to the prohibition imposed by the previous section and enables certain statements made by a person in police custody are to be proved. See also discussion in 1976 ASIL pages 234, 235".

However in *Ramakishan* v. *State of Bombay*[80] the Supreme Court observed at page 923 "Section 27 is an exception to the rules enacted in Sections 25 and 26 of the Act." The same view was expressed in *Chinnaswamy Reddy* v. *State of A.P.*[81], where it is stated that Section 27 is an exception to Sections 25 and 26 and even a confessional statement before the police which distinctly relates to the discovery of a fact may be proved under Section 27. The decision in *Delhi Administration* v. *Balkrishan*[82] is also to the

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72. *Baldeo Singh* v. *State*, 1982 Cr LJ 1087; *State of Maharashtra* v. *Vithal Pandurang Bhagat*, 1985 Cr LJ 664 (36 days delay as accused was hospitalised). **Contra :** unexplained delay of five days, evidence weakened, *Ahmad* v. *State of Maharashtra*, 1994 Cr LJ 274 (para 10) (Bom).
73. 1973 W.L.N. 934 (Raj).
74. *Harbhajan Singh* v. *State*, (1956) 58 Punj LR 541.
75. *State of U.P.* v. *Babu Ram*, 2000 Cr LJ 2457 (para 18) (SC) : AIR 2000 SC 1735, **reversing** Cri A Nos. 498, 506 of 1993 and Ref. No. 3 of 1993, dt. 23-4-1994 (All).
76. *Chandran* v. *State of Madras*, AIR 1978 SC 1574.
77. *Pakala Narayana Swamy* v. *Emperor*, 66 IA 66 : 1939 PC 47 : 66 IA 66.
78. *Emperor* v. *Babulal*, 6 All 509, (**dissenting** opinion of MAHMOOD J., *Supt and Remembrancer* v. *Bhajoo*, 34 Cal WN 106 : ILR 57 Cal 1062; *Deviram* v. *State*, AIR 1962 Punj 70; *Jasoda Haldar (Smt.)* v. *Sailendranath Samantha*, 1957 Cr LJ 707 : AIR 1957 Cal 372; *Nagin Soma* v. *State of Gujarat*, (1966) 7 Guj LR 601.
79. 74 IA 65
80. 1955 (1) SCR 903 : AIR 1955 SC 104.
81. AIR 1962 SC 1788 at 1793.
82. AIR 1972 SC 3 at p. 6.

same effect. *In Mohd. Inayatullah* v. *State of Maharashtra*,[83] the Supreme Court observed at p. 485 "the expression "provided that" together with the phrase "whether it amounts to a confession or not" shows that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies to any extent Section 24 also".

In *State of U.P.* v. *Deoman Upadhyaya*[84] the Supreme Court observed at page 337 that Section 27 is founded on the principle that even though confession whilst in the custody of a police officer is tainted and inadmissible it may be presumed to be untainted and provable if the information leads to the discovery of a fact insofar as it relates to the fact thereby discovered and that Section 27 is a proviso to Section 26. However while setting out the material propositions emerging from an analysis of Sections 24 to 27 and Section 162, Cr PC, they observed in clause (*e*) "a statement made by a person to a police officer..... cannot except to the extent permitted by Section 27 of the Indian Evidence Act be used for any purpose". It would therefore appear that even though in the earlier part the Supreme Court stated that Section 27 is a proviso to Section 26, the above observation would indicate that they regarded Section 27 as a proviso to Section 25 also. HIDAYATULLAH J., in his judgment at p. 357 took the view that Section 27 has to be rightly held to be an exception to Sections 24 to 26 and not only to Section 26.

From a review of the above decisions of the Supreme Court, the preponderance of opinion in that court appears to be that Section 27 is an exception to both Sections 25 and 26 and not merely Section 26. It is true that in *Pakala Narayanaswamy*[85] and in *Polukuri Kottaiah*,[86] the observations of the Privy Council are to the effect that Section 27 is a proviso to Section 26. But they were not dealing with the question whether Section 27 is an exception to Section 25. The decisions of the Supreme Court holding that Section 27 is an exception to Sections 25 and 26 also cannot be said to be inconsistent with the above decisions of the Privy Council. However it is submitted that the view expressed by HIDAYATULLAH in *Deoman Upadhyya's* case[87] that Section 27 is an exception also to Section 24 would lead to considerable injustice. In that view even a confession which is not voluntary and which has been caused by inducement, threat or promise would be admissible provided it leads to the discovery of a fact, thus defeating the very purpose of preventing confessions extorted by the police being inadmissible. It is submitted that the view expressed in the undermentioned cases in which it was held that Section 27 qualifies Sections 24 to 26 should not be accepted.[88] If, however, Section 27 is interpreted as being an exception to Sections 25 and 26 only, any confession made in the custody of a police or to a police officer, if involuntary, would be inadmissible under Section 27 even though it leads to discovery. In other words Section 27 and Section 24 have to be read together. It is interesting to note that even in the early case of *Durloy* v. *R*[89] JUSTICE RANKIN pointed out the absurdity of holding that Section 27 is an exception to Section 26 only and not to Section 25, though he observed that it was for the Legislature to take the matter in hand. It is submitted that there is no necessity for the Legislature to intervene if as stated above, Section 27 is considered as an exception to Section 25 and 26 but should be read along with Section 24. The same result can be arrived at by taking the view that a person who goes to the police officer and voluntarily makes a statement to him can be said to be in the custody of a "police officer".

See for such cases commentary on the expression 'Police officer' in Section 26.

Confession made after removal of impression caused by inducement, threat or promise, relevant.

S. 28. If such a confession as is referred to in Section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant.

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83. AIR 1976 SC 483.
84. AIR 1960 SC 1125 : (1961) 2 SCJ 334 : 1960 Cr LJ 1504.
85. AIR 1939 PC 47.
86. 74 IA 65.
87. AIR 1960 SC 1125.
88. *Murri* v. *R.*, 31 All 529 (FB) : AIR 1918 Cal 88; *Amiruddin* v. *R.*, 45 Cal 557; *Durlay* v. *R.*, AIR 1932 Cal 297 : 59 Cal 1040; *Adhik* v. *R.*, AIR 1942 Pat 156; *R* v. *Christian*, 1947 Pat 152; *Madhura* v. *R.*, AIR 1946 Pat 210; *Gaya Prasad* v. *State*, AIR 1957 All 459.
89. ILR 59 Cal 1040 : AIR 1932 Cal 297.

COMMENTS

1. PRINCIPLE

This section makes it possible for a confession to be relevant provided such confession is made after the impression caused by any inducement, threat or promise has been fully removed. Thus this section forms an exception to Section 24. The proper position of this section therefore should have been immediately after Section 24.[90]

Under this section in order to treat a confession hit by Section 24, as relevant, the court, from the facts and circumstances of each case, has to come to a definite conclusion that the impression caused in the mind of the accused to make a confession by inducement, threat or promise, has been totally removed. The burden is on the prosecution to satisfy the court by clear evidence, that the impression caused by any such inducement, threat or promise has been fully removed from the mind of the accused.

In STEPHEN'S DIGEST (7th Edn., Art-22, p-31) it is observed, "A confession is deemed to be voluntary, if (in the opinion of the judge) it is shown to have been made after the complete removal of the impression produced by any inducement, threat, or promise which would otherwise render it involuntary."

WIGMORE (3rd Edn., Section 853, 854 & 855) observed as follows: "Was the inducement brought to an end?—Here five questions may arise:

(1) Must it be shown clearly that an improper inducement once offered, was brought to an end?

(2) Are there any situations in which this showing will be regarded as impossible, and thus the inducement, once made, vitiates any future confession of that person?

(3) Can the same person who has offered the inducement possibly put an end to it so as to make admissible a confession afterwards made to himself?

(4) Are confessions made subsequently, but to a person different from the one offering the inducement, to be treated as not made under the inducement, or must it be shown to have been negatived by the second person?

(5) What suffices, in general to end inducement?

(1) The first of these questions has always been answered affirmatively; the general principle is universally conceded that the subsequent ending of an improper inducement must be shown, *i.e.*, it is assumed to have continued until the contrary is shown.

(2) There is nothing permanently irrevocable in an improper inducement; whether it has been brought to an end is, as all concede, always open to inquiry.

(3) Yet, it seems never to have been decided specifically whether the same person may put an end to an inducement of his own creating. There is no reason why he cannot.

(4) There is no principle, no reason for assuming that a promise or a threat made by one person will be treated by the accused as equally to be attributed to some other person who has had no share in the other's conduct and shows no power or inclination to corroborate his promise or threat. Nevertheless, the inducement may, on the facts prove to be in effect the second person's as much as the first one's. It should thus be a question to be determined in each case; no general rule can be laid down.

(5) The circumstances which make it clear that the inducement had been entirely negatived must of course vary with the facts of each case. It is, in the words of an English Judge, "merely a question of degree". It is impossible to lay down a general rule, and it is useless to employ individual rulings as precedents.

PHIPSON (13th Edn., P-435, Para 22-26) observes: "If the impression produced by the promise or threat is clearly proved to have been removed, *e.g.*, by lapse[91], by an intervening caution given by some

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90. *R.* v. *Babulal*, ILR 6 All 509.
91. *R.* v. *Smith*, (1959) 2 QB 35 : 43 Cr App R 121.

person of superior but not of an equal[1], or inferior, authority to the person holding out the inducement – a confession subsequently made will be admissible[2]. Conversely, if the effect of a caution has worn off, the confession may be rejected.[3]

The effect of a promise is perhaps harder to dissipate than that of a threat.[4]

In HALSBURY'S LAWS OF ENGLAND 4th Edn., Vol 11, p. 234, para 412 it is stated: "A statement otherwise admissible may not be received if it is influenced by an inducement made to obtain a previous statement; thus, if the threat or promise under which the first statement was made, still persists when the second is made, the second statement will be inadmissible. Only where the time which elapses between the making of the two statements, the circumstances and the giving of any caution are such that it can be said that the original threat or inducement has been dissipated will the second statement be admitted as being voluntary.[5]

The expression "any such inducement, threat or promise, which in the opinion of the court has been *fully removed*, is very significant while considering the question by the court. In *Bhagirath* v. *State of M.P.*[6], it was observed: "The word 'fully' in Section 28 is significant: it means 'thoroughly', 'completely', 'entirely', so as not to leave any trace of the impression created by torture or fear; for, confession forced from the mind by the flattery of hope or by torture or fear comes in so questionable a shape that no credit can be given to it. A free and voluntary confession is presumed to flow from the strongest sense of guilt and therefore, it is admitted as proof of the crime."

In determining whether an inducement has ceased to operate, the nature of such inducement, the time and circumstances under which it was made, the situation of the person making it, will be taken into consideration by the court. The Madhya Pradesh High Court has held that, where once the existence of threat, assault, bearing or improper inducement, has been established, there is a presumption of its continuance, and the prosecution has to prove that the impression caused by the original inducement, beating, assault or threat was fully removed, when the prisoner made the confession.[7]

Where the accused confessed before the *panchayat* before his arrest, and was taken into custody by the villagers till the next day when police arrived, and later he was produced before a Magistrate who recorded the confession on the fourth day of the offence, it was held that the improper influence of the police had continued and so the confession was inadmissible.[8]

The influence would continue in the mind of the accused for some time, and even the warning given by the Magistrate may not have any effect immediately.[9]

In considering the question whether the impression caused by inducement, threat or promise was fully removed, the court has to see, in all cases, whether the time allowed for reflection was sufficient or not. Unless the court is satisfied that such impression was fully removed he cannot treat such confession as relevant.[10]

Where the accused was in police custody for 12 days, and confession was given after beating and threats by the police, it was held that though he was given time for reflection after such beating, it would not lessen the effect of the influence which had been brought to bear on him.[11]

In a case where a travelling auditor found defalcation by a booking-clerk and told the clerk that it would be better to pay the money back than go to jail, and thereby obtained a letter of confession before the traffic manager, it was held that it would be impossible to hold that the impression had been removed in the short interval between the conversation at the prisoner's house and the signing of the receipt for the mis-appropriated amount.[12]

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1. *R.* v. *Doherty*, (No. 1) 13 Cox 23; (No. 2) 13 Cox 24).
2. *R.* v. *Richards*, (1832) 5 C&P 318; *R.* v. *Bate*, (1871) 11 Cox 686; *Cf. R.* v. *Rue*, 13 Cox 209.
3. *R.* v. *Knight*, 20 Cox 711.
4. *R.* v. *Williams*, 1968 52 Cr App Report 439.
5. *R.* v. *Smith*, (1959) 2 QB 35 : (1959) 2 All ER 193 C-MAC; *R.* v. *Richards*, (1832) 5 C&P 318; *R.* v. *Howes*, (1834) 6 C&P 404; **See also** *Sparks* v. *R.*, (1964) AC 964 : (1964) 1 All ER 727 (PC); *R.* v. *Lingate* (1815), PHILLIPPS AND ARNOLD ON EVIDENCE (10th Edn.) 414; *R.* v. *Rosier* (1821), PHILLIPPS AND ARNOLD ON EVIDENCE (10th Edition) 414; *R.* v. *Clewes*, (1830) 4 C&P 221.
6. AIR 1959 MP 17.
7. *Shobha Param* v. *State of M.P.*, AIR 1959 MP 125.
8. *Emperor* v. *Ganesh*, ILR 50 Cal 127.
9. *R.* v. *Kashinath Dinakar*, 8 Bom HCR 126.
10. *Vali Isa Mahmed* v. *State*, AIR 1963 Guj 135.
11. *Naran Tulsidas* v. *Kutch Government*, AIR 1951 Kutch 27; *Shoba Param* v. *State*, AIR 1954 MP 125.
12. *R.* v. *Navroji*, 9 Bom HCR 358.

Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc.

S. 29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

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8. *Section 29 & Section 164, Cr.P.C.* ... 368
9. *Section 164(3) Cr.P.C* ... 369
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COMMENTS

1. PRINCIPLE

Under this section, if confession is otherwise relevant, it does not become irrelevant merely because of certain circumstances referred to in the section. Under Section 24, if the confession is caused by any inducement, threat or promise relating to the charge and proceeds from a person in authority, it would not be relevant. So if there is no such threat, or promise or inducement, it would become relevant. Under Section 25, confession to a police officer is not admissible. If it is not made to a police officer but is made to any other person, it would become relevant. Under Section 26, though the confession is made while in police custody, if it is made in the immediate presence of the magistrate, it would be relevant. Under this section a relevant confession does not become irrelevant merely because it was made under:

(1) a promise of secrecy, or
(2) in consequence of a deception or artifice practised on the accused, or
(3) when he was drunk, or
(4) because it was elicited in answer to a question, or
(5) because no warning was given that he was not bound to say anything and that whatever he might say would be used as evidence against him.

This section applies to criminal cases and is to be read along with Section 24.

"If such confession is otherwise relevant".—These words indicate that before the provision of this section can be invoked, it must appear that the confession in question is admissible under the preceding sections of the Act. If for any of the reasons mentioned in Ss. 24, 26 and 28, the confession is inadmissible, then there is no question of applying the provisions of Section 29 at all. Section 29, therefore, assumes that there is no bar to the admissibility of the confession in question arising from any of the said earlier provisions and it then proceeds to invalidate or negative other possible objections or bars that may be raised against its admissibility.[13]

2. STATEMENT MADE UNDER PROMISE OF SECRECY

A was in custody on a charge of murder. B, a fellow-prisoner, said to him: "I wish you would tell me how you murdered the boy-pray split." A replied: "Will you be upon your oath not to mention what I tell you?" B went upon his oath that he would not tell. A then made a statement. It was held that this was not such an inducement to confess as would render the statement inadmissible.[14] A witness stated that an

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13. *Rangappa Hanumappa*, (1954) 56 Bom LR 115 : AIR 1954 Bom 385.
14. *Rex* v. *Shaw*, (1834) 6 C&P 372.

accused, charged with felony, asked the witness whether he had better confess, and the witness replied that he had better not confess, but that the accused might say what he had to say to him, for it should go no further. The accused made a statement. It was held that it was receivable in evidence at the trial.[15]

The accused made their confession of guilt to a company officer of their regiment, who stated to the accused that he had already obtained information from another person and promised secrecy if they told the truth. It was held that the Company Officer was not shown to be a person in authority in relation to any proceedings that were to be taken against the accused; and that the alleged deception and inducement were covered by the provisions of this section.[16]

3. STATEMENT MADE UNDER DECEPTION

The accused asked the turnkey of the gaol in which he was locked to put a letter into the post for him, and after his promising to do so, the accused gave a letter addressed to his father, and the turnkey, instead of putting it into the post, transmitted it to the prosecutor. It was held that the letter was admissible in evidence against the accused notwithstanding the manner in which it was obtained.[17] When confession was obtained from the accused, after he was informed that his brother-in-law gave out that the accused was guilty, it was held admissible though the representation might amount to deception which is covered by Section 29.[18]

4. STATEMENT OVERHEARD

In *Sahoo* v. *State of U.P.*,[19] the Supreme Court held that a confessional soliloquy, heard by another, is a direct piece of evidence but it can only be used for purpose of corroboration.

Where the police overheard, by means of making a hole in the prison wall, the accused making a confession to a co-prisoner, it was held that the confession was admissible.[20] In a case where the prisoner made a statement in one room without noticing the presence of police in another room. Who overheard the same, it was held to be admissible.[21] The statement of the prisoner was held to be admissible when it was overheard while the prisoner was muttering something to himself, or saying something to his wife or to some person in confidence.[22]

5. STATEMENT MADE IN SLEEP

Statements made by a person in sleep are not receivable in evidence.

BEST, however, quotes a case from MR. ARBUTHNOT'S Reports of Criminal Cases in the Court of *Foujdaree Adalut* of Mad p. 61; which is as follows: "Five prisoners, D, N, V, T, and C, were tried in 1834 for the wilful murder of one P. The deceased had been found murdered and much mutilated, the head lying on an ant-hill away from the rest of the body. Suspicion fell on one W, with whom he was on bad terms. W's answers, when questioned on the subject, not being satisfactory, he was kept under surveillance, in the house of a neighbour, and in the course of the following night was heard to talk in his expressions to escape him: "D, catch hold of the hands, N cut off the head. T, C and V, catch hold of his legs, come, we may go home after we have deposited the head on the top of an ant-hill." These words having been next morning reported to the authorities. W was taken into custody and taxed with the murder, which he at once confessed, criminating the prisoners, whose names had been mentioned by him in his sleep, and who on being apprehended, likewise confessed their guilt. The prisoners were convicted chiefly on their own confession and left for execution." (11th Edn., p. 514).

6. STATEMENT WHEN DRUNK

A statement made by an accused when he is drunk is receivable in evidence. If a police officer gives an accused liquor in the hope of his saying something and he makes any statement, that statement is not rendered inadmissible in evidence.[23]

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15. *Rex* v. *Thomas*, (1836) 7 C&P 345.
16. *Emperor* v. *Mohammed Buksh*, (1906) 8 Bom LR 507.
17. *Rex* v. *Derrington*, (1826) 2 C&P 418.
18. *Queen* v. *Ramchuran*, 20 WR Cri 33.
19. AIR 1966 SC 40.
20. *R.* v. *Boughton*, 70 JP Rep 508, **referred** in PHIPSON'S EVIDENCE 4th Edn., p. 252.
21. *R.* v. *Sageena*, 7 WR Cr 56.
22. *R.* v. *Simons*, (1834) 6 C&P 540, PHIPSON 13th Edition, 15-35; 19-07; 22-46; Vol. II, HALSBURY 415, 472.
23. *Rex* v. *Spilsbury*, (1836) 7 C&P 187.

7. STATEMENT MADE WITHOUT HAVING BEEN WARNED

In view of S. 29, if the confession is otherwise relevant, it does not become irrelevant merely because the accused was not warned that he was not bound to make such confession and that evidence of it might be given against him.[24]

8. SECTION 29 & SECTION 164 Cr.P.C.

The question has repeatedly arisen whether in a case where the provisions in Section 164, Cr.P.C., were not complied with in recording a confession of an accused, the confession would still not become irrelevant u/s. 29, if such confession was otherwise relevant.

Section 164 of the Criminal Procedure Code provides the formalities to be undergone by Magistrates in recording confessions. It says, among other things, that the Magistrate shall explain to the person making the confession that he is not bound to make it. But this section says that a confession does not become irrelevant because the accused was not warned that he was not bound to make it. The Bombay High Court has held that the Criminal Procedure Code "is a special enactment applying only to certain statements made in the particular circumstances contemplated by Section 164". It cannot override the general provisions of this section except where these circumstances bring the section into operation.[25]

In *Nazir Ahmed* v. *King Emperor*[26] the Privy Council had to deal with a confession before a Magistrate who did not follow the procedure prescribed in Section 164, Cr.P.C. and did not record the confession but gave oral evidence about the confession. The Privy Council held that the oral evidence was inadmissible and in the absence of other convincing evidence the conviction must be set aside.

There is an exhaustive discussion of the question by JUSTICE GAJENDRAGADKAR in *Rangappa Hanumappa* v. *State*,[27] in paragraphs 13 to 16 of the said decision, elaborate reasons are given for the conclusion that Section 164 cannot override the plain words of Section 29. The rules which govern the question of admissibility of evidence are laid down by the Evidence Act and, by these rules alone, the question of admissibility must be determined. The mere fact that the procedure prescribed by Section 164(3), Cr.P.C., in regard to giving a warning to the accused, has not been complied with in recording the confession, would not by itself necessarily make the said confession inadmissible. The learned Judges agreed with the same view expressed In re.: *Karum Thambi*[28], and of JUSTICE BEMETT, JUSTICE RAY in *Emperor* v. *Jamuna Singh*[29]; *Vellamoonji Goundal* v. *Emperor*[30]; *Emperor* v. *Nanua*[31]. Dealing with the decision of the Privy Council in *Nazeer Ahmad* v. *King Emperor*[32], they distinguished that case on the ground that the Privy Council did not consider the effect of Section 29 of the Evidence Act. The learned Judges, however, added: "We must, however, hasten to add that, when we hold that the irregularity of procedure in recording the confessions does not necessarily make them invalid, we do not minimise the importance of strictly complying with the provisions of Section 164(3). These provisions have been deliberately and—if we may say so, with respect— wisely made by the Legislature in order to afford a safeguard, in the interest of the accused. This court has, on several occasions, emphasised the importance of strictly adhering to these requirements. We have always held that the act of recording a confession is a very solemn act and the learned Magistrate who records the confession must never allow an element of casualness to creep into the recording of a confession. It is the duty of the recording Magistrate to satisfy himself that it is honestly and voluntarily and is not the result of any coercion, inducement or threat practised on the accused.

It is also his solemn duty to caution him that he is not bound to make a confession and to warn him that if he makes a confession it would be used against him. All that we are holding is that, however important it may be to follow this procedure, its non-observance with regard to giving a warning to the

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24. *State of Mizoram* v. *Sri Lalrinawma*, 2000 Cr LJ 2358 (para 5) (Gau).
25. *Emperor* v. *Ramnath Mahabir*, (1925) 28 Bom LR 111, 114 : 50 Bom 111 : AIR 1926 Bom 151.
26. AIR 1936 PC 253 : 63 IA 372.
27. AIR 1954 Bom 385.
28. AIR 1950 Mad 579.
29. AIR 1947 Pat 305.
30. AIR 1932 Mad 431.
31. AIR 1941 All 145.
32. AIR 1936 PC 253.

accused has no direct effect on the admissibility of the confession itself. However, it is not at all unlikely that if the irregularity appears to the court to introduce an element of doubt as to whether the confession was voluntary, the court would not hesitate to reject the confession as being inadmissible, on the ground that it is not voluntary. If, in this case, we had felt the slightest doubt about the voluntary character of the confessions made by the accused, we would ourselves have held that they are not admissible on that ground."

This question is now settled by the Supreme Court in *Dagdu* v. *State of Maharashtra*[33]; wherein it was observed: "the failure to comply with Section 164(3), Cr.P.C. or with High Court circulars will not render the confessions inadmissible in evidence. Relevancy and admissibility of evidence have to be determined in accordance with the provisions of the Evidence Act. Section 29 of the Act lays down that, if a confession is otherwise relevant, it does not become irrelevant merely because, *inter alia*, the accused was not warned that he was not bound to make it, and evidence of it might be given against him. If, therefore, a confession does not violate any one of the conditions operative under Sections 24 to 28 of the Evidence Act, it will be admissible in evidence. But, as in respect of any other admissible evidence, oral or documentary, so in the case of confessional statements, which are otherwise admissible, the court has still to consider whether they can be accepted as true. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the Court may refuse to act upon the confession, even if it is admissible in evidence. That shows how important it is for the Magistrate who records the confession to satisfy himself, by appropriate questioning of the confessing accused, that the confession is true and voluntary. A strict and faithful compliance with Section 164 of the Code and with the instructions issued by the High Court affords, in a large measure, the guarantee that the confession is voluntary. The failure to observe the safeguards prescribed therein are in practice calculated to impair the evidentiary value of the confessional statements."[34]

Decisions taking the contrary view are no longer good law[35], in view of the above decision of the Supreme Court.

9. SECTION 164(3) Cr. P.C.

In Sections 164, Cr.P.C., Cl. (3) of Sections 164 was introduced by the Amending Act 18/1923. It lays down that a magistrate, before recording a confession, shall warn the person making it, that he is not bound to make a confession and that if he does so it may be used in evidence against him. Section 29 of the Evidence Act, however, was there from the beginning of the Act, 1872. It has to be noted that, at the time of Amending Act of 1923, the Legislature must have been fully aware of the clear and unambiguous words used in this Section 29, which were inconsistent with the spirit of the provisions they were introducing by the Amending Act. The provisions of the Evidence Act deal with the relevancy and admissibility of oral and documentary evidence, whereas the Criminal Procedure Code deals with the procedural matters in the criminal cases. If the Legislature wanted the strict adherance to the provisions under Section 164, it would have made a suitable amendment in Section 29 of this Act.[36]

10. SECTION 29, SECTION 25 AND SECTION 26

When the confession would not be admissible as hit by Section 25, this Section 29 does not apply. Similarly confession would not be admissible if hit by Section 26, and this section will not apply.[37]

The important point for its admissibility, whether it is a Judicial or extra-judicial confession is that it should be otherwise relevant, *i.e.*, it should be proved to be voluntary and true.[38]

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33. AIR 1977 SC 1579.
34. *Public Prosecutor* v. *Mitta Venkatamma*, AIR 1932 Mad 748; *Ram Singh* v. *State*, ILR (1952) 2 Raj 93; *Jolish Roy* v *State*, 1982 Cr LJ 269 (Ori).
35. *Sardar Miya* v. *R.*, AIR 1937 Nag 257; *Dhula* v. *State*, AIR 1957 Raj 141.
36. *Emperor* v. *Ramnath*, AIR 1926 Bom 151; **See also** *Bala Majhi* v. *State*, AIR 1951 Ori 168 (FB); *State* v. *Mitu*, 1977 Cr LJ 1018 (Ori); *Emperor* v. *Jamuna Singh*, AIR 1947 Pat 30; *Vellamoonji Goundan* v. *Emperor*, AIR 1932 Mad 431.
37. In re : *Mannem Edukowdalu*, AIR 1957 AP 729; *Public Prosecutor* v. *Mitta Venkatamma*, AIR 1932 Mad 748; *Ram Singh* v. *State*, ILR (1952) 2 Raj 93; *Jotish Roy* v. *State of Orissa*, 1982 Cr LJ 269 (Ori)(DB).
38. *Subrata* v. *Dipti*, AIR 1974 Cal 61 (SB).

Consideration of proved confession affecting person making it and others jointly under trial for same offence.

S. 30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

***Explanation.*—"Offence", as used in this section, includes the abetment of, or attempt to commit, the offence.**

ILLUSTRATIONS

(a) *A* and *B* are jointly tried for the murder of *C*. It is proved that *A* said—"*B* and *I* murdered *C*". The Court may consider the effect of this confession as against *B*.

(b) *A* is on his trial for the murder of *C*. There is evidence to show that *C* was murdered by *A* and *B*, and that *B* said—"*A* and *I* murdered *C*".

This statement may not be taken into consideration by the Court against *A*, as *B* is not being jointly tried.

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COMMENTS

1. PRINCIPLE

The object of this section is that where an accused person unreservedly confesses his own guilt, and at the same time implicates another person who is jointly tried with him for the same offence, his confession may be taken into consideration against such other person as well as against himself, because the admission of his own guilt operates as a sort of sanction, which, to some extent, takes the place of the sanction of an oath and so affords some guarantee that the whole statement is a true one.[1] When a person admits his guilt to the fullest extent, and exposes himself to the pains and penalties provided therefor, there is a guarantee for his truth.[2] But this is a very weak guarantee. For a confession may be true so far as its maker is concerned, but may be false and conducted through malice so far as it affects others.

The Privy Council had held that this section applies to confessions, and not to statements which do not admit the guilt of the confessing party. The section seems to be based on the view that an admission by an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself. But a confession of a co-accused is obviously evidence of a very weak type. It does not come within the definition of "evidence" contained in Section 3. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of these infirmities.[3]

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1. *Queen Empress* v. *Jagrup*, ILR (1885) 7 All 646, 648.
2. *Empress* v. *Daji Narsu*, (1882) 6 Bom 288, 291.
3. *Bhuboni Sahu* v. *King*, (1949) 51 Bom LR 955 : 76 IA 147 : AIR 1949 PC 257, **followed in** *Kashmira Singh* v. *State of M.P.*, AIR 1952 SC 159 : 1952 SCR 526; *Haricharan Kurmi* v. *State of Bihar*, AIR 1964 SC 1184; *Chinna Gowda* v. *State of Mysore*, (1963) 2 SCR 517, 528, 529.

The Privy Council observed: "Section 30, however, provides that the court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act, but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence."

It was further stated that this section applies only to confessions and not to statements which do not admit the guilt of the confessing party.

In *Kashmira Singh* v. *State of M.P.*,[4] the Supreme Court observed: "The proper way to approach a case of this kind is, first to marshall the evidence against the accused, excluding the confession altogether from consideration, and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course, it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what, without the aid of the confession, he would not be prepared to accept."[5]

Where more persons than one are jointly tried for the same offence, the confession made by one of them, if admissible in evidence at all, should be taken into consideration against all the accused, and not against the person alone who made it[6]. This section is an exception to the rule that the confession of one person is entirely inadmissible against another. The policy of the law in allowing a confession by one accused to be considered against another who is being jointly tried for the same offence, seems to rest on the recognition of the palpable fact that such a confession cannot fail to make an impression on the Judge's mind, which it was therefore better to control within limits than to ignore altogether.[7]

One of the conditions under the section is that the confession must implicate the author substantially to the same extent as the other accused person against whom it is sought to be taken into consideration. But, on reading the confession as a whole, if it appears that he was really trying to throw the main blame on the other accused, such a confession cannot be used against the other accused. Where there is difference between the confessions of the two accused, such confessional statements cannot be condemned out of hand or *in limine* as untrue, where some of the differences are immaterial and some others are due to desire of the accused to throw the blame on the other, and the rest of the part stand clearly resolved by other evidence in the case.[8]

2. SCOPE

STRAIGHT J. observed: "The test, which Section 30, Evidence Act, intended should be applied to a statement of one prisoner, proposed to be used in evidence as against another, is to see whether it is sufficient by itself to justify the conviction of the person making it of the offence for which he is being jointly tried with the other person or persons against whom it is tendered. In fact, to use a popular and well understood phrase, the confessing prisoner must tar himself and the person or persons he implicates with one and the same brush".[9]

The policy of the law in allowing a confession by one prisoner to be considered against another who is being jointly tried for the same offence, seems to rest on the recognition of the palpable fact that such a confession cannot fail to make an impression on the Judge's mind, which it was, therefore, better to control within limits than to ignore altogether.

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4. AIR 1952 SC 159 : 1952 SCR 526.
5. **See also** *Haricharan Kurmi* v. *State of Bihar*, AIR 1964 SC 1184 (6).
6. *Empress* v. *Rama Birappa*, (1878) 3 Bom 12.
7. *Gaganmull*, In re : (1924) 20 LW 202, 205 : AIR 1924 Mad 805.
8. *Balbir Singh* v. *State of Punjab*, AIR 1957 SC 216; *Rama Naik* v. *State*, AIR 1965 Ori 31; *Kuruchiyan Kunhanan* v. *State of Kerala*, 1974 Ker LT 328; *Netarpal Jhuna Mal* v. *State*, (1964) 2 Cr LJ 335 : 1964 Punj 397; *Munshi Mahesha* v. *State*, (1962) 2 Cr LJ 580; *Achuta Kan* v. *Maheshwar Rai*, (1963) 5 Ori JD 65; *Chhote Lal* v. *State of M.P.*, 1978 Cr LJ 1559 (MP); *State* v. *Manindranath*, AIR 1960 Cal 183; *State* v. *Debendara Tiria*, (1972) 38 Cut LT 1187; *Dildar Ahmad* v. *State*, 1978 Cr LJ (NOC) 8 (Del); *Baldeo Goala* v. *State of Assam*, 1977 Cr LJ 1516 (Gau); *Atta Mohammad* v. *State*, AIR 1952 J&K 36 : 1952 Cr LJ 1579; *Ram Chandra Sahu* v. *State*, (1963) 1 Cr LJ 377; *Malla Mahmadoo* v. *State*, AIR 1952 J&K 49 : 1953 Cr LJ 150.
9. *Empress of India* v. *Ganraj*, 1879 ILR 2 All 444.

In *Emperor* v. *Ashootosh Chuckerbutty*,[10] it was held that the Legislature did wisely in recognising and taking under its control the impression thus unavoidable, which might actually do more harm if unrecognised.

This section only means that, where there is evidence against the co-accused sufficient, if believed, to support his conviction then, the kind of confession described in Section 30 may be thrown into the scale as an additional reason for believing that evidence; that is, only if there is substantive evidence against the accused and there is lingering doubt, then the confession of co-accused may be taken into consideration to clear the doubt if any.[11]

WEST J., in *Emperor* v. *Daji Narsu and Govinda Nath*,[12] held that the logic behind incorporating such a provision cannot be ignored as "when a person admits guilt to the fullest extent and exposes himself to the pain and penalties provided for the guilt, there is a guarantee for his truth." The object of the rule is a safeguard for sincerity and for information.[13]

This section was not in the Evidence Act 2 of 1855, nor in the Criminal Procedure Code of 1861.

For the application of this section, the following conditions have to be fulfilled. (1) The statement of the accused must amount to a confession. (2) There must be more than one accused in the trial which would be a joint trial of the accused. (3) They must be tried for the same offence. Here itself it may be noted that the explanation given under the section states that the 'offence' as used in the section includes the abetment of, or attempt to commit, the offence. It means different accused should not be tried for different offences in one trial. (4) The confession must affect the maker himself substantially to the same extent as the other accused. (5) That confession has to be duly proved.

Even if the above conditions are fulfilled it is not obligatory on the part of the Court to take such confession into consideration against the other accused, as it is specifically stated in the section that the Court *may take* into consideration, such confession, etc.

3. APPLICABILITY

As Section 30 does not, in terms, apply to criminal trials in the tribal areas, it will not be in consonance with the principles of natural justice to rely upon the confession of a co-accused in trials in such areas in the absence of the application of Section 30.[14]

This section is applicable to Sea Customs Act offences in view of Section 171A, of that Act[15].

It was held by the Rajasthan High Court that where the accused made a confession while he was examined under Section 342, Cr.P.C. (Old), (313 Cr. P.C. new) this section does not apply to such a confession.[16]

Where one of the accused pleaded guilty in a *warrant case* and was convicted, it was held that as the accused was on joint trial, the prosecution can rely on his statement under this section for framing charge against others.[17]

Where the confession was to the effect that he alone killed the victim by assaulting him with a *gangia*, it was held that this section is not applicable as the confession did not involve others in killing the victim.[18]

Nor is the section applicable, when an accused did not make a statement incriminating himself with the other accused with whom he was tried jointly.[19] Statement of co-accused in another case is not legal evidence against the other accused.[20]

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10. ILR (1878) 4 Cal 483 (FB).
11. *Gopinathan* v. *State of Kerala*, (1963) 2 Cr LJ 92.
12. ILR (1883) 6 Bom 223.
13. *Queen* v. *Noormuhammad*, 8 Bom 223.
14. *Harendra Mohan Choudhary* v. *State*, ILR (1958) 10 Assam 195.
15. *Haroon Haji Abdullah* v. *State*, AIR 1968 SC 832.
16. 1966 RLW 460.
17. *Hari Chand* v. *State*, ILR (1974) 2 Delhi 706.
18. *Dhuleswar Behera* v. *State*, 1982 Cr LJ 2346 Ori.
19. 1978 Cr LJ 1559.
20. *Narayanaswamy* v. *State of Maharashtra*, AIR 1968 SC 609.

The disclosure statement of the accused while in police custody leading to discovery cannot be used against the co-accused[21] but the statement made before the custom official, he being not a police officer, is a material piece of evidence and can be used as substantive evidence[22] but the A.P. High Court has held that the confessional statement of the co-accused recorded under S. 108 of the Customs Act, though admissible in evidence, cannot be used as substantive evidence as contemplated under S. 30 of the Evidence Act.[23] Where the accused son only made extra-judicial confession that his mother had given him poison to be mixed in the flour for preparing '*chapatis*' for his father and there was no substantive and reliable evidence to bring the charge of murder against the mother of the accused, his mother was acquitted.[24]

4. SECTION 27 AND SECTION 30

A confessional statement made under Section 27, also comes within the meaning of Section 30 and may be taken into consideration against the co-accused.[25]

Dealing with this section and Section 27, the Madras High Court held that "when a confession of one of the accused is the immediate cause of recovery of some fact relevant against such other person, the confession can be used. But when it is not the immediate cause for the discovery, it cannot be used against other persons who are tried jointly for the same offence.[26]

5. SECTION SHOULD BE CONSTRUED STRICTLY

In *Balbir Singh* v. *State of Punjab*[27], it was held that judicial opinion is uniform that this section must be very strictly construed; that unless the maker implicates himself substantially to the same extent as the other accused; the confession cannot go in evidence against the other accused.

This section introduces an exception to the general rule that a confession can be used against the maker of it. When a confession was made by one among other accused persons, affecting himself and also others to the same extent of culpability, care and caution has to be taken by the courts before using such confession against other accused. In *Babu Singh* v. *Emperor*[28], it was held that the weakness of the guarantee afforded by self-implication and the dangerous and exceptional character of the evidence require that this section would be construed very strictly; if the confession is retracted by the maker, then no reliance can be placed upon such retracted confession so far as the co-accused are concerned.

As this section introduces an entirely new and rather dangerous element in the conduct of criminal trials, it ought to be construed with strictness.[29] In *Periaswamy* v. *R.*[30], REILLY J., observed: "It is a very exceptional, indeed an extraordinary provision by which something which is not evidence may be used against an accused person at his trial. Such a provision must be used with the greatest caution and with care to make sure that we do not stretch it one line beyond its necessary intention.[31]

6. TRIED JOINTLY

There should be a joint trial of the accused. The joint trial should be legal. If from any cause the accused who made the confession cannot be legally tried with the accused against whom the confession is to be used, the court should not attach any value to the confession.

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21. *Kamal Kishore* v. *State*, 1997 Cr LJ 2106 (Del).
22. *Naresh J. Sukhwani* v. *Union of India*, AIR 1996 SC 522 (para 4).
23. *Vanamala Jagadeswaraiah* v. *Dy. Commr., C. & C.E., Hyderabad*, 2001 Cr LJ 1590 (para 21) (AP).
24. *Rajendra* v. *State of U.P.*, 1997 Cr LJ 2700 (All).
25. In re : *Athappa Goundan*, ILR 1937 Mad 695 (FB) : AIR 1937 Mad 618 (FB); In re : *Rami Reddy Pullannagari*, AIR 1941 Mad 238; *Sankappa Rai* v. *Emperor*, ILR Mad 127.
26. *Shankappa Rai* v. *Emperor*, 31 Mad 127.
27. AIR 1957 SC 216 : 1957 Cr LJ 481. **See also** *Rama Naik* v. *State*, AIR 1965 Ori 31 : (1965) 1 Cr LJ 315; *Netar Pal Jhuna Mal* v. *State of Punjab*, AIR 1964 Punj 397 : (1964) 2 Cr LJ 335.
28. AIR 1936 Oudh 156.
29. According to GLOVER, J., in *Queen Empress* v. *Jaffir Ali*, (1873) 19 WR Cr 57; In re : *Marudamuthu*, AIR 1931 Mad 820.
30. ILR 54 Mad 75.
31. In re : *Malayara Seethu*, AIR 1955 Mys 27; *Sanna Huduga* v. *Govt. of Mysore*, 13 Mys LJ 69.

This section pre-supposes more than one accused being in trial for the same offence. Where two persons were charged with murder the statement by one accused confessing the offence, can be taken into consideration against the other, if the two accused were being tried jointly for the same offence.[32] The Privy Council, in *Achhaylal Singh* v. *Emperor*,[33] held that where an accused gave a confessional statement and later died, such statement cannot be admitted under this section against the other accused.[34] But when such accused died during the trial, after his confession had been placed on record before the court; it was held that it can be used against the other accused.[35]

Where the accused who made confessional statement, was discharged and was not facing trial, his statement could not be used against the co-accused.[36] Where a joint trial started and later one of the accused absconded and his case was separated under Section 512 Cr.P.C., it was held that the confession of the accused who took the trial, cannot be used against the absconding accused and Section 30 is not applicable.[37] The statement of the co-accused recorded under Section 67 of N.D. & P.S. Act, 1985 cannot be used against another accused in a different trial.[38]

Where the accused pleads guilty at the trial and is convicted and sentenced, he cannot be said to be jointly tried with his co-accused who pleads not guilty. Similarly, if one of the accused pleads guilty but he is not convicted or sentenced till the conclusion of the trial of his co-accused, he cannot be treated as being jointly tried with his co-accused.[39] A contrary view was expressed saying that the trial cannot come to an end necessarily with the plea of guilty by one accused, unless the accused who pleaded has been convicted.[40] Sometimes evidence is taken in Sessions cases even after the accused pleads 'guilty' and the case is decided upon the whole of the evidence including the accused's plea. The Madras High Court is of the opinion that when such a procedure is adopted, the trial does not terminate with the plea of guilty, and therefore a confession by the person so pleading may be taken into consideration, as against any other person who is being jointly tried with him for the same offence. LORD WILLIAMS J., has observed: "The practice sometimes adopted in India where there is a joint trial, of refusing to accept the plea of guilty and proceeding to try the accused in order that his confession may be taken into consideration against his co-accused under Section 30 is illegal and an abuse of the process of the court ..... Where an accused person has pleaded guilty and the court is prepared to convict on that plea, it is contrary to the spirit of the law to postpone the conviction so that the person who had pleaded guilty may technically be said to be tried jointly for that same offence.[41] The trial in a Sessions Court begins only when the accused pleads not guilty and claims to be tried. Under Section 228, Criminal Procedure Code, if he pleads guilty the court cannot try him but has forthwith to convict him. To defer his conviction only to enable the court to use his confession under this section against his co-accused is wrong.[42] The same view was expressed in England. It was stated that the principle would not apply where a man pleads guilty becomes a witness in the case; in such a case, he should be sentenced then and there, so that there would not be any suspicion that his evidence is coloured by the fact that he hopes to get a lighter sentence.[43]

A distinction has been drawn by the Madras High Court between a trial before a Sessions Court, and one before a Magistrate. In the Sessions Court, the accused's plea of guilty is recorded under Section 228 at the outset of the trial. A prisoner who then pleads guilty and is convicted on the plea cannot be held to be tried jointly with a co-accused against whom the case proceeds under Section 230. Where, therefore, all the accused were jointly tried before a Magistrate, and some of them confessed to the crime and

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32. *Queen Empress* v. *Jagat Chandra Mali*, ILR (1894) 22 Cal 50.
33. AIR 1947 Pat 90.
34. *Dengo Kandero* v. *Emperor*, AIR 1938 Sind 94.
35. *Ram Saroop* v. *Emperor*, AIR 1937 Cal 39 **approved** in *Haroon* v. *State*, AIR 1968 SC 832. **Also see** *Peoples Union for Civil Liberties (Delhi)* v. *Central Bureau of Investigation*, 1997 Cr LJ 3242 (Del); *Naga Reddy* v. *State of A.P.*, 1994 Cr LJ 2545 (para 23) (AP).
36. *Suresh Budharmal Kalani* v. *State of Maharashtra*, AIR 1998 SC 3258 (para 6) : 1998 Cr LJ 4592.
37. *Asst. Collector of Customs* v. *Harbanslal*, 1980 Cr LJ 818; *Anant Dixit* v. *State*, 1984 Cr LJ 1126.
38. *Narcotic Control Bureau* v. *Gani Khan*, 1994 Cr LJ NOC 281 (Raj).
39. *Queen Empress* v. *Pahuji*, ILR (1894) 19 Bom 195.
40. *Queen Empress* v. *China Pavuchi*, ILR (1899) 23 Mad 151, **dissenting from** *Queen Empress* v. *Lakshmayya*, ILR (1899) 22 Mad 491.
41. *Md Yusuf* v. *R.*, 35 CWN 490 : AIR 1931 Cal 341; *R* v. *Kheoraj*, (1908) 30 All 540.
42. *Amdu Mian* v. *Govt.*, ILR (1937) Nag 315 (FB) at 322, 323 : AIR 1937 Nag 17.
43. *R* v. *Payne*, (1950) 1 All ER 102.

implicated their co-accused in a statement made under Section 313, Criminal Procedure Code, and after the evidence for the prosecution was closed pleaded guilty under Section 246, it was held that their statement was admissible in evidence against the other co-accused.[44]

The Nagpur High Court also held that in a warrant case, it is within the discretion of the court to defer the convictions of an accused after the plea was recorded, and his confession can be used against others. The Nagpur High Court has laid down that the cases in which it was held that the confession of a co-accused who pleaded guilty could not be used under this section were those of Sessions trials.[45]

Where a co-accused pleads guilty, and the court has accepted the plea and directed his removal from the dock, and the trial proceeds against the remaining accused alone, a confession by the former is not admissible against the latter.[46]

The appellant, who was charged under Section 411 of the Indian Penal Code with receiving stolen property, knowing it to be stolen, was tried at the same time with the thief, and one P who was charged with receiving stolen property from the same thief, the proceeds of the same theft, but different property. It was held that the appellant and P were not being tried jointly for the same offence but were tried together for distinct offences punishable under the same section, and, therefore, a confession made by P could not be lawfully considered against the appellant.[47]

Where eleven accused were put for trial in one case, ten of them pleaded guilty and they were convicted and sentenced on 22-1-1975. Later, after recording some evidence, as the case was triable as a warrant case, a charge was framed against the remaining sole accused, 17-9-1975. It was held that in a warrant case the trial begins after the charge is framed; that the trial against the other accused came to an end on their conviction on 22-1-1975, and therefore, they were no longer before the court, that, as against the sole 11th accused, Section 30 cannot be applied for relying on the confession of a co-accused.[48]

In warrant cases, though an accused pleads guilty to the charge, he need not be convicted and removed from the dock and he would be deemed to be jointly tried with the other accused.[49]

In warrant cases, it was held that the trial before the Sessions Court starts after the plea of the accused is recorded at the beginning of the trial.[50]

The expression "tried jointly" means "legally tried jointly" and it is not simply trying them as a matter of fact.[51]

For treating a joint trial as a legal joint trial, the accused must be a real one and it should not be an excuse for joinder of charges which otherwise cannot be joined.[52]

When the maker of the confession, while being tried jointly with others, absconds during the trial and his case was separated from others, it was held that such confession can be considered to lend assurance to the conclusion of guilt reached on other evidence against other accused.[53]

7. FOR THE SAME OFFENCE

One of the ingredients of this section is that the accused have to be tried in a joint trial for the same offence; according to the explanation the expression 'offence' includes its abetment and attempt. The expression 'same offence' means an offence coming under the same legal definition, *i.e.*, under the same section of law. Where two accused were charged with offences under Section 302 and 457, Penal Code, and the third accused was charged for an offence under Section 411, Penal Code, it was held that the confession of the third accused cannot be taken into consideration to determine the guilt of the first two

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44. *R* v. *Basi Reddi*, ILR (1913) 38 Mad 302; *Fakruddin* v. *Crown*, ILR (1924) 6 Lah 176.
45. *Amdumiyau* v. *R*, AIR 1937 Nag 172.
46. *Emperor* v. *Keramat Sardar*, ILR (1911) 38 Cal 446.
47. *Maya Sigh* v. *Empress*, 1886 PR No. 9 of 1886 (Cr).
48. *Swami* v. *State*, AIR 1952 Mad 379; *Md Yusuf* v. *R.*, 35 CW 490; (1980) Cr LR Guj 234 : AIR 1931 Cal 341.
49. *Ramakishan* v. *R.*, AIR 1928 Lah 880, In re : *Bati Reddy*, ILR 38 Mad 302.
50. In re : *Bati Reddy*, ILR 38 Mad 302 : AIR 1914 Mad 45; *Venkatachinna* v. *R.*, 43 Mad 511 (FB).
51. *Queen Empress* v. *Jagat Chandra Mali*, ILR (1894) 22 Cal 50.
52. *Sanyashi* v. *State*, AIR 1937 Cal 269.
53. *Ramashish Rai* v. *State of Bihar*, 1989 Cr LJ 836.

accused.[54] The appellant, who was charged under Section 411 of the Indian Penal Code with receiving stolen property, knowing it to be stolen, was tried at the same time with the thief, and one P who was charged with receiving stolen property from the same thief, the proceeds of the same theft, but different property. It was held that the appellant and P were not being tried jointly for the same offence but were tried together for distinct offences punishable under the same section, and, therefore, a confession made by P could not be lawfully considered against the appellant.[55]

House-breaking and theft, and receiving the property stolen at that theft, are distinct offences, and the confession of one co-accused cannot be taken into consideration as against the other.[56] Where one was charged for rape, and the other was charged for abduction of a girl, and they were tried jointly, it was held that the confession of the accused charged with rape cannot be taken against the other accused.[57]

This section would not be applicable for different offences by different persons, though it happens during the course of the same transaction.[58]

When two persons are accused of an offence under the same definition, and arising out of a single transaction, the confession of the one may be used against the other, though it inculpates himself through acts separable from those ascribed to his accomplice, and capable, therefore, of constituting a separate offence from that of the accomplice.[59] 'Confession' in this section means confession of the very offence for which the accused are being tried.[60] A and B were tried together under Section 239 of the Indian Penal Code on a charge of delivering to another counterfeit coins, knowing the same to be counterfeit at the time they became possessed of them. A confessed that he had got the coins from B and had passed them to several persons at his request. It was held that the confession of A was relevant against B.[61]

Section 234, Cr P.C. (old) refers to the offences of the same kind, which is defined in that section itself, as offences punishable with the same amount of punishment under the same section of the Indian Penal Code or any special or local Code. In *Kundan* v. *Emperor*[62]; it was held that the expression 'same offence' in Section 30, cannot be have the same meaning as the expression "offence of the same kind" referred to in Section 234 Cr.P.C. (old).

Decisions are not uniform on the question whether when persons are jointly tried for several offences, the confession of one of them with regard to one offence is admissible against others. One view is that Section 30 deals with a case where several persons are being tried jointly for the same offence. It does not deal with a case of joint trial for a number of offences as the expression "offence" is used in singular.

Where a person was charged along with two others for sodomy and murder and he confessed that all the three committed sodomy but the murder was committed by the other two, it was held that the confession against the other two was not admissible even as regards the offence of sodomy.[63] In the other line of cases it has been held that if a confession implicates the confessor and other accused in one of the offences only and does not implicate himself in the other offence, confession may be taken into consideration against the other accused so far as the former offence is concerned. In *Mian Khan* v. *Emperor*[64] where two accused were tried for robbery and murder, confessing each of them had taken part in the robbery but that only the other person committed murder, it was held that the confession was admissible against both on the charge of robbery but not on the charge of murder. In re.: *Manikya Padayachi*, 1921 Mad 490, where a trial for a major offence of murder included a trial for a minor

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54. *Bhagi* v. *R.*, 1950 HP 35; *Bhansali Balu* v. *State*, AIR 1951 Kutch 74; *Queen Empress* v. *Nur Mohammad*, ILR (1883) 8 Bom 223. **See also** 5 MLJ, Art. p. 225.
55. *Maya Sigh* v. *Empress*, 1886 PR No. 9 of 1886 (Cr).
56. *Nga Po Tok* v. *Emperor*, 158 (1912) UBR (1910-1913).
57. *Naresh* v. *R.*, AIR 1938 Cal 479.
58. *Gour* v. *R*, 32 CWN 1044.
59. *Empress* v. *Nur Muhammad*, ILR (1883) 8 Bom 223.
60. *Periasami Moopan*, In re : (1930) 54 Mad 75.
61. *Empress* v. *Nur Muhammed*, ILR (1883) 8 Bom 223.
62. AIR 1948 Sind 65.
63. *Md. Sabir* v. *R.* AIR 1950 All (1132). Similar view had been taken in *Periaswamy* v. *R.*, ILR 54 Mad 75 = AIR 1931 Mad 177, *Naresh* v. *R.* AIR 1938 Cal 479. In re : *Govindu*, 1937 Mad 321; In re : *Gangavva*, AIR 1946 Mad 124; *Tikaram* v. *R.*, AIR 1939 Nag 309; *Syed Hussain* v. *R.*, 1937 Mad WN (Cri) 1253.
64. AIR 1923 Lah 293.

offence of hurt, it was held that the confession of a minor offence would be admissible on the implied minor charge and perhaps on the major charge also. This decision was dissented from In re.: *Gangavva*. While something may be said in favour of the view that in such cases the confession would be binding on the other accused in respect of the minor offence, it is submitted that the view that it would be admissible in respect of the major charge also is not justified.[65]

8. CONFESSION MADE BY ONE OF SUCH PERSONS AFFECTING HIMSELF AND SOME OTHERS—SELF-EXCULPATORY STATEMENT—NOT ADMISSIBLE UNDER SECTION 30

Where the accused made a confession and when it was read as a whole, it appeared that he was really trying to throw the main blame against others and that he was an unwilling spectator of the crime committed by others, it was held that such confessions cannot be used against the other accused.[66]

The Bombay High Court has held that the section is not limited to a case where the confessing accused directly implicates another accused as well as himself, but covers also a case where the confession indirectly affects a co-accused.[67] The Madras High Court has differed on this point and has held that a confession which indirectly affects another accused not named in it, on some circumstantial grounds, cannot be used against him.[68]

Statements made by an accused which implicate his fellows, and exculpate himself, are not regarded as evidence.[69]

9. ATTEMPT TO COMMIT OR ABETMENT OF THE SAME OFFENCE [EXPLANATION]

This Explanation comes into play where the accused making the confession is charged with an offence and his co-accused with an attempt to commit, or abetment of, the same offence.

10. PROVED

According to the Madras and the Allahabad High Courts, the word 'proved' means proved before the case for the prosecution comes to an end *i.e.*, proved either in the course of the prosecution case or proved in some proceeding previous to the trial. Hence a confession made after the close of the prosecution case, when questions under Section 342 of the Code of Criminal Procedure are put to the accused, is not admissible under this section.[70]

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65. *Vide Jainand (Dr.)* v. *R.*, AIR 1949 All 291; *Emperor* v. *Sambhu*, AIR 1932 All 228.

66. *Balbeer Singh* v. *State of Punjab*, AIR 1957 SC 126 : 1957 Cr LJ 481; *Ram Naik* v. *State*, AIR 1965 Ori 31; *State* v. *Manindranath Das*, AIR 1960 Cal 183; *State* v. *Debendra Liria*, (1972) 38 Cut LT 1187; (he gave the blow only when co-accused threatened to kill him); (1977) 2 Raj Cri C 226; *Dildar Singh* v. *State*, 1978 Cr LJ (NOC) 8; *Baldeo* v. *State*, AIR 1972 SC 464; *State* v. *Mohanlal*, AIR 1958 Raj 338 : 1958 Cr LJ 1540 (R); In re : *Malayara Seethu*, AIR 1955 Mys 27; *Jainand* v. *R.*, AIR 1949 All 291 (R) : AIR 1952 J&K 36; *Atta Mohammad* v. *State*, 1952 Cr LJ 1579 (R); AIR 1950 HP 18; *Gopal* v. *Crown*, 51 Cr LJ 786; *Ummed Mal* v. *State of Rajasthan*, 1975 Cr LJ 923; *Pakala Narayana Swamy* v. *Emperor*, AIR 1939 PC 47 : *Kalu* v. *State*, 1974 Cr LJ 839 (J&K). **See also** *R.* v. *Ganraj*, ILR (1879) 2 All 444; *Gul Hassan* v. *King Emperor*, (1910) PR 24 of 1910 (Cri); *Balkrishna Naik v.State of M.P.*, 2000 Cr LJ 4797 (para 12) (MP).

67. *Emperor* v. *Shivabai*, (1926) 28 Bom LR 1013, 50 Bom 683.

68. *Periyaswami Moopan*, In re : ILR (1930) 54 Mad 75.

69. *Queen* v. *Keshub Bhoonia*, (1876) 25 WR (Cr) 8; *Ah Foong* v. *Emperor*, ILR (1918) 46 Cal 411 : AIR 1919 Cal 696; *Goboraya* v. *Emperor*, (1930) 26 NLR 229, (FB) : AIR 1930 Nag 242; *Mangal Singh* v. *Crown*, (1936) 17 Lah 547 : AIR 1937 Lah 127; *Suresh Budharmal Kalani* v. *State of Maharashtra*, AIR 1998 SC 3258 (para 10) : 1998 Cr LJ 4592; statement of exculpatory nature and also retracted subsequently, *Mothilal* v. *State*, 2001 Cr LJ 4341 (paras 13 and 16) (Kant).

70. *Marudamuthu Padayachi*, ILR 1931) 54 Mad 788 : AIR 1931 Mad 820; *Emperor* v. *Mahadeo Prasad*, ILR (1923) 45 All 323 : AIR 1923 All 322; Chief Court of Oudh had held likewise: *Kunwar Sen* v. *King-Emperor*, (1932) 8 Luck 286 : AIR 1923 Oudh 86; *Empress* v. *Ashootosh Chuckerbutty*, ILR 4 Cal 483 (FB); *Malla Mahmadoo* v. *State*, AIR 1952 JK 49 : 1953 Cr LJ 150; *Rajanikant Keshav Bhandari* v. *State*; AIR 1967 Goa 21; *C.B. Xavier Cochin* v. *Food Inspector, Mattancherry Muncipality, Mattancherry*, AIR 1968 Ker 66; *Shripal Gulab Singh Maina* v. *State of M.P.*, 1986 MPLJ 83 (DB): (1985) 1 Ori LR 609: 1966 RLW 460; *Public Prosecutor* v. *B. Rama Murti*, 1973 Cr LJ 1761 (AP).

The word 'confession' used in the section clearly means such a confession as is required to be proved at the trial as a part of prosecution evidence; it cannot therefore signify any matter which comes on the record at the end of the prosecution evidence.[71]

According to the Bombay High Court, a statement made by a co-accused in the course of a trial, in reply to questions under Section 313, Criminal Procedure Code, 1973 implicating an accused person, is admissible as evidence against the other accused.[72] Similarly, the Lahore High Court has held that a confession, at the close of the prosecution case by one of several accused persons, can be taken into consideration against the other accused, and that this section does not justify a distinction between a confession made by an accused person before the trial and in the course of the trial.[73] Where the statements of the co-accused implicating the other accused were duly proved by the concerned officials and were admissible in evidence, the other accused could be convicted on their basis.[74] Where the statement made by the accused to the police officer involving himself in the crime and also implicating a third person, could not be proved due to being in conflict with Sections 25 and 26, the occasion for utilising that statement against another person does not arise.[75]

11. THE COURT MAY TAKE INTO CONSIDERATION SUCH CONFESSION

The section provides that the court may take the confession into consideration and thereby make it evidence on which the court may act, but it does not say that the confession is tantamount to proof. There must clearly be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence. The confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction.[76]

This section allows a confession made by one of several persons to be taken into consideration as against such other persons as well as against the person making it. It does not permit the confession to be used in favour of some other of the co-accused persons.[77] There is nothing in the section to prevent a court from convicting after taking into consideration the confession of a co-accused. But the High Courts in India have laid down a rule of practice, which has all the reverence of law, that a conviction founded solely on the confession of a co-accused cannot be sustained. The term 'confession' is not restricted to an unretracted confession, as once a confession is proved, it may be taken into consideration. The confession of one co-accused cannot be said to be corroborated by the confession of the other co-accused. Obvious considerations of justice require that a court, before acting upon such statements, should insist upon independent corroboration from other evidence in the case in material particulars, particularly to indentity.[78] This is no technical rule but is one founded on long judicial experience. The court can only treat a confession as lending assurance to other evidence against a co-accused, and a conviction based on the confession of a co-accused alone is bad in law.[79] The Madras High Court has held that it has become a rule of practice, and it is now a rule of law that corroboration is required. One accomplice cannot corroborate another. There is no corresponding provision in English Law.[80]

Confessions of a co-accused can be "taken into consideration" against the other accused, but they are not technically evidence, falling within the definition given in Section 3 of the Act; and they cannot, therefore, alone form the basis of a conviction.[81] It is at best the evidence of an accomplice, and the court

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71. *Mt. Sumitra* v. *Emperor*, AIR 1940 Nag 287.
72. *Emperor* v. *Cooper*, ILR 54 Bom. 531.
73. *Dayal Singh* v. *Crown*, ILR (1934) 16 Lah 651; *Nawab* v. *Emperor*, AIR 1935 Lah 35.
74. *Bhana Khalpa Bhai Patel* v. *Asstt. Collector of Customs, Bulsar*, AIR 1998 SC 1487 (para 8).
75. *Anant Kumar* v. *State of M.P.*, 1993 Cr LJ 1499 (paras 3 and 6) (MP).
76. *Bhubani Sahu* v. *King*, 769 IA 147 : AIR 1949 PC 257.
77. *Bagga Singh* v. *Emperor*, (1888) PR No. 39/1898 Cr.
78. *Emperor* v. *Gangappa*, (1913) 15 Bom LR 975, ILR 38 Bom 156; *Padmanabha*, ILR 1959 Cut 581
79. *Emperor* v. *Lalit Mohan Chuckerbutty*, (1911) 38 Cal 559 (SB); *Kashimuddin* v. *Emperor*, (1934) 62 Cal 312; *Maung Mya* v. *King*, (1938) Ran 30; *Ah Phut* v. *King*, (1940) Ran 104; *Rajagopal* (1944) Mad 308, (FB); *Sharif* v. *Crown* (1943) 25 Lah 463
80. *Thyagaraja Bhagavatar*, In re : ILR (1946) M 271.
81. *Queen Empress* v. *Khandiabin Pandu*, ILR (1890) 15 Bom 66, 67; *Venkatasami* v. *Queen*, ILR (1883) 7 Mad 102; *Queen-Empress* v. *Nirmal Das*, ILR (1900) 22 All 445. See *Banna* v. *Empress*, (1880) PR No. 29 of 1880 (Cr); *Nga Po Mya* v. *Queen-Empress*, (1886) SJLB 388; *Nathi* v. *State of U.P.*, AIR 1956 SC 56 : 1956 Cr LJ 152; *Haroom Singh* v. *State*, AIR 1968 SC 832 : 1968 Cr LJ 1017; In re : *Athayee*, (1965) 2 Cr LJ 566; In re : *Mustafa Maracair*

may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars (Section 114, ill. (b)). Such evidence must be dealt with by the court in the same manner as any other evidence. The weight, however, to be attached to such evidence and the question, whether, taken by itself, it is sufficient in point of law to justify a conviction, is a question for the judge. Unsupported by other evidence, it, however, should be taken as evidence of the weakest possible kind, being simply a statement of a third person not made upon oath or affirmation. If such confession is corroborated by other evidence, it is immaterial whether, in proving the cases at the trial, the confession precedes the other evidence, or the evidence precedes the confession.[82] Such evidence, is not sufficient to support a conviction, even if corroborated by circumstantial evidence, unless the circumstances constituting the corroboration would, if believed to exist, themselves support a conviction.[83] But where the confession leads to the arrest and identification of the other accused, it stands confirmed and should be taken as a substantially true statement.[84]

The confession of a co-accused is on an even lower footing than the evidence of an accomplice and a conviction based on such a confession alone is bad in law. This section provides that such a confession is to be an element in the consideration of all the facts of the case, but it does not do away with the necessity for other evidence. It is the duty of the Judge, when there is no other evidence than the confession of a co-accused, to direct the jury accordingly and tell them to acquit the accused; and his omission to do so is a misdirection which will vitiate a conviction.[85] A confession intended to be used against a co-accused stands on a lower level than an accomplice's evidence because the latter is at least tested by cross-examination whilst the former is not. The confessions of co-accused are not evidence, but if there is other evidence on which a conviction can be based, they can be referred to as lending some assurance to the verdict. It is only when false implication is excluded after close scrutiny that confession of a co-accused can be used to lend assurance to other evidence.[86]

Where the judge is not prepared to act on other evidence as it stands, even though, if believed, it would be sufficient to sustain a conviction, he may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what, without the aid of the confession, he would not be prepared to accept.[87]

The Court can, under this section, only take the confession of one of the accused into consideration but it is not in itself substantive evidence.[88]

Though a confession cannot be made the foundation of conviction of the accused, it can be used in support of other evidence.[89] Such a confession cannot be used as substantive evidence. It has only

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AIR 1951 Mad 787 : 52 Cr LJ 514; In re : *Kodur Thimma Reddi*, AIR 1957 AP 758 : 1957 Cr LJ 1091; *Mohan Singh Balwant Singh* v. *State*, AIR 1965 Punj 291 : (1965) 2 Cr LJ 127; *Gendra Brahma* v. *State of Assam*, 1981 Cr LJ 430 (Gau).

82. *Empress* v. *Ashootosh Chuckerbutty*, (1878) 4 Cal 483, 490, 491, (FB); *Emperor* v. *Sabit Khan*, (1919) 21 Bom LR 448, 43 Bom 739; *Emperor* v. *Laxman Jairam*, (1936) 38 Bom LR 1122.
83. *Empress* v. *Ashootosh Chuckerbutty*, ILR 4 Cal 483, 491 (FB); *Sobaraya* v. *Emperor*, (1930) 26 NLR 229 (FB).
84. *Ishar Singh* v. *Crown*, ILR (1938) 20 Lah 67.
85. *Giddigadu* v. *Emperor*, (1909) 33 Mad 46; *Nga San Nyein* v. *King-Emperor*, (1917) 3 UBR (1917-20) 3; *Nga Po Kauk* v. *King-Emperor*, (1926) 4 Ran 45; *Emperor* v. *Kalwa*, (1926) 48 All 409; *Aung Hla* v. *King-Emperor*, (1931) 9 Ran 404; *King-Emperor* v. *Sadasibo Manjihi*, (1939) 18 Pat 82.
86. *Haroom Haji* v. *State of Maharashtra*, AIR 1968 SC 832; *Nathu* v. *State of U.P.*, AIR 1956 SC 56.
87. *Haricharan Kurmi* v. *State of Bihar*, AIR 1964 SC 1184 : (1964) 2 Cr LJ 344; *Baburao Bajirao Patil* v. *State of Maharashtra*, (1971) 3 SCC 432; *Budh Ram* v. *State of Haryana*, 1985 Cr LR 322 (Guj); *Zohaminghiana* v. *Government of Mizoram*, 1984 Cr LJ 1055 (Gau); *Indramohan Brahma* v. *State of Assam*; 1982 Cr LJ (NOC) 127 (Gau); *Sudhir Chandra Das* v. *State*, AIR 1971 Tri 8 : 1971 Cr LJ 86; *Md. Yunus* v. *Bihar*, 1977 Cr LJ 1243; *Netarpal Jhuna Mal* v. *State*, AIR 1964 Punj 397 : (1964) 2 Cr LJ 335; *Nandalal More* v. *State of Punjab*, (1965) 1 Cr LJ 393; *Dewan Chand* v. *State of Orissa*, AIR 1965 Ori 66 : (1965) 1 Cr LJ 458; *Budu Gouda* v. *State of Orissa*, AIR 1965 Ori 170 : (1965) 2 Cr LJ 385; *Bharatendranath Battacharya* v. *Commissioner of Income Tax, West Bengal*, AIR 1958 Cal 559; *Bhima Shaw* v. *State*, AIR 1956 Ori 177 : 1956 Cr LJ 1208; In re : *Malayra Seethu*, AIR 1955 Mys 27 : 1965 Cr LJ 372; *Pyli Jacob* v. *State*, 1953 Tri Co 466; *Bahoran* v. *State*, 1981 All LJ 991 : 1980 Cr LJ (Guj) 234.
88. *Haricharan Kurmi* v. *State of Bihar*, AIR 1964 SC 1184; *Ramachandra* v. *State of U.P.*, AIR 1957 SC 381; *State* v. *Shakar Sakharam Jadhav*, AIR 1957 Bom 226 : 1957 Cr LJ 1107; *Public Prosecutor* v. *Shaik Ibrahim*, AIR 1964 AP 548 : (1964) 2 Cr LJ 636; *Dewan Chand* v. *State*, AIR 1965 Ori 66 : (1965) 1 Cr LJ 458.
89. *Kashmira Singh* v. *State of M.P.*, AIR 1952 SC 159 : ILR (1977) 1 Cal 267; *Uttam Rajaram* v. *State of Maharashtra*, 1978 Cr LJ 935.

corroborative value.[90] Dissenting from its own earlier view in *Kalpnath Rai (Supra)*, the Supreme Court held that a voluntarily and validly made confession by an accused is admissible against the co-accused as substantive evidence.[91]

12. CORROBORATION

The confession of the co-accused should be used as a piece of corroborative evidence and not as a sole basis for conviction.[92]

A conviction can be based on the uncorroborated testimony of an accomplice. The testimony of an accomplice can be used to corroborate another, though it ought not be so used save in exceptional circumstance and for reasons disclosed.[93] Where the accused tried to bribe a Minister for a certain favour but he informed the Anti-Corruption Bureau and filed a complaint, here unlike other normal corruption cases, the complainant, could not be equated with the position of an accomplice and the accused could be convicted even on the uncorroborated testimony of the complainant.[94]

There is no rule of practice that there should be corroboration in every case, but the rule which requires corroboration is one of prudence; the nature and extent of such evidence must necessarily vary with the circumstances of each case; however, certain rules are to be followed:

(1) It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case should in itself be sufficient to sustain conviction.

(2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it, by confirming in some material particular the testimony of the complainant that the accused committed the crime.

(3) The corroboration must come from independent sources and thus, ordinarily, the testimony of one accomplice would not be sufficient to corroborate that of another.

(4) The corroboration need not be direct evidence that accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.[95]

The test is not that, if the confession itself is corroborated by other evidence in certain material particulars, it can supply the missing link and can be made the basis of conviction. The only assistance which can be taken from the confession of the co-accused is to support the other evidence produced against the accused. It may help in accepting or rejecting the testimony of other witnesses. But even if, on accepting the testimony of other witnesses, some link is missing in the chain of the circumstantial evidence against the accused, that link cannot be supplied by the confession.[96]

The mere recovery of a stolen property from the house of the accused would not by itself be a sufficient corroboration to the evidence of the approver to make the accused guilty of the offence of conspiracy and abetment of robbery.[97] Where the accused was convicted of house-breaking by night with intent to commit theft, and the only evidence against him was the confession of a co-accused and the fact that he pointed out the stolen property some months after the commission of the offence, it was held that the mere production of the stolen property by the accused was not a sufficient corroboration of the confession of the other accused.[98]

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90. *Kalpnath Rai* v. *State*, (1997) 8 SCC 732 : AIR 1998 SC 201, **dissented in** *State of T.N.* v. *Nalini*, 1999 Cr LJ 3124 : AIR 1999 SC 2640 wherein Apex Court held such confession as substantive evidence against co-accused.

91. *State of T.N.* v. *Nalini*, 1999 Cr LJ 3124 (paras 417, 418, 420 and 423) (SC) : AIR 1999 SC 2640.

92. *Mandagiri Keshava Rao* v. *State of A.P.*, 2001 Cr LJ 1360 (para 5) (AP).

93. *Kashmira Singh* v. *State of M.P.*, AIR 1952 SC 159; *Rameswar* v. *State of Rajasthan*, (1953) 3 SCR 377 : AIR 1952 SC 54; *Thanuvan Retnakaran* v. *State*, AIR 1955 Tri Co 87 : 1955 Cr LJ 847; In re : *Padmaraja*, AIR 1951 Mad 746 : 52 Cr LJ 595.

94. *C.R. Mehta* v. *State of Maharashtra*, 1993 Cr LJ 2863 (paras 13 and 30) (Bom).

95. 1959 Ker LR 871 : 1959 Ker LJ 834 **following** *Rameshwar* v. *State of Rajasthan*, AIR 1952 SC 54; *Sidheswar Ganguly* v. *State of West Bengal*, AIR 1958 SC 143.

96. *Harender Mohan Choudhary* v. *State*, ILR (1958) 10 Assam 195, **relying on** *Kashmira Singh* v. *State of M.P.*, AIR 1952 SC 159; *Thingam Sashikumar* v. *Manipur Administration*, (1963) 2 Cr LJ 562.

97. *Kilimanni Abu* v. *State of Kerala*, (1965) 2 Cr LJ 557 (Ker).

98. *Queen-Empress* v. *Doasjwa*, (1885) 10 Bom 23.

The Madras High Court in In re : *Leelaram Gaganmall*[1] observed: "Section 30 is a most unsatisfactory section and is a needless tampering with the wholesome rule of the English Law that a confession is only evidence against the person who makes it. The courts of India, in construing it, have laid down that a conviction of an accused based solely on the confession of another accused, cannot stand and there must be independent evidence entirely outside, if the confession before it can be used."

An extra-judicial confession made before a person who was subsequently made an approver cannot be relied upon as the approver is no better than an accomplice and therefore, his testimony or extra-judicial confession would need independent corroboration before it can be acted upon. The evidence of one approver cannot be corroborated by that of another approver. There must be independent corroboration.[2] The confession of one accused can be used as evidence to corroborate the confession of another accused, provided there is sufficient independent evidence of the confession to warrant a conviction.[3]

The corroboration that is required is not only in respect of the commission of the crime but also in respect of the participation of each of the accused in the commission of that crime.[4]

Where the confession of the co-accused is uncorroborated by any of the evidence, it cannot alone be sufficient to sustain a conviction, although it is not a rule of law but of prudence and practice which has acquired all the reverence of law. All the more it should be so in a case where the confessing accused does not implicate himself substantially and fully as he does his co-accused.[5]

13. RETRACTED CONFESSION

There can be no absolute rule that a retracted confession cannot be acted upon unless it is corroborated materially. But, as a matter of prudence and caution, which has sanctified itself into a rule of law, a retracted confession cannot be made solely the basis of conviction unless it is corroborated. It is not necessary that each and every circumstance mentioned in the confession, regarding the complicity of the accused, should be separately and independently corroborated, nor is it essential that the corroboration must come from the facts and circumstances discovered after the confession was made. It would be sufficient if the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession.[6] It has also been held that a voluntary and true confession made by an accused, though it was subsequently retracted by him, can be taken into consideration against a co-accused; but, as a matter of prudence and practice, the court should not act upon it to sustain a conviction of the co-accused witout full and strong corroboration in material particulars, both as to the crime and as to his connection with that crime. The amount of credibility to be attached to a retracted confession would depend upon the circumstances of each particular case.[7]

In *Periyaswami Moopan* v. *Emperor*, REILLY J., observed that "the provision goes no further than where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in Section 30 may be thrown into the scale as an additional reason for believing that evidence."[8]

A retracted confession must be looked upon with greater concern, unless the reasons given for having made the confession in the first instance (not for retraction as erroneously stated in some cases)

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1. AIR 1924 Mad 805.
2. *State* v. *Shankar Sakharam Jadhav*, 1957 Cr LJ 1107; *Premraj* v. *State of Rajasthan*, 1951 Mad 746 : 52 Cr LJ 595; *Krishnalal Naskar* v. *State*, 1982 Cr LJ 1305.
3. *Brahman Vajeram Raghuram* v. *State of Kutch, L.S.*, 1954 Cr LJ 793 : AIR 1954 Kutch 20; *Raju* v. *State of Mysore*, 1953 Cr LJ 1352 : AIR 1953 Bom 297; *Paru Murgesh Jaikrishna* v. *Collector of Customs*, 1988 Cr LJ 963 (Bom).
4. *Bhima Shaw* v. *State*, AIR 1956 Ori 177 : 1956 Cr LJ 1208; *Ram Prakash* v. *State of Punjab*, AIR 1959 SC 1: 1959 SCR 1219 : 1959 Cr LJ 90.
5. *State* v. *Mohanlal*, AIR 1958 Raj 338; In re : *Malayara Seethu*, AIR 1955 Mys 27; *Jainand* v. *Rex*, AIR 1949 All 291; *Ram Bharose* v. *Rex*, AIR 1949 All 132.
6. *Subramania Goundan* v. *State of Madras*, (1958) SCR 428 : AIR 1958 SC 66; *Pyare Lal* v. *State of Rajasthan*, AIR 1963 SC 1094; *Abdul Ghani* v. *State of U.P.*, AIR 1973 SC 264. But **see** *Puran* v. *State of Punjab, (I)*, AIR 1953 SC 459, at p. 462, where it is stated: "It is a settled rule of evidence that unless a retracted confession is corroborated in material particulars, it is not prudent to base a conviction in a criminal case on its strength alone".
7. *Ram Prakash* v. *State of Punjab*, 1959 SCR 1219 : 1959 Cr LJ 90 : 1931 Mad 977.
8. **See also** *Rattanlal* v. *State*, AIR 1955 Punj 110 : 1959 Cr LJ 737.

are on the face of them false. Once the confession is proved satisfactorily, any admission made therein must be satisfactorily withdrawn or the making of it explained as having proceeded from fear, duress, promise or the like from some one in authority.[9]

The Bombay High Court has laid down that a retracted confession, if proved to be voluntarily made, can be acted upon along with the other evidence in the case, and there is no rule of law that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars. The use to be made of such a confession is a matter of prudence rather than of law.[10] The retraction of a confession does not cancel the confession, but it puts the court on inquiry as to its value, its voluntary character and the probability of its being true. Hence, although, as a matter of law, corroboration is not necessary at all, as a general rule, a retracted confession requires corroboration of some kind; but the amount of corroboration which the Court will look for depends the on circumstances of each case.[11]

Thus the rule regarding a confession, which is subsequently retracted, are: (1) that a confession is not to be regarded as involuntary merely because it is retracted; (2) as against the maker of the confession the retracted confession may form the basis of a conviction if it is believed to be true and voluntarily made; (3) as against the co-accused, both prudence and caution require the Court not to rely on a retracted confession without independent corroborative evidence. The corroboration should not only confirm the general story of the alleged crime, but must also connect the accused with.[12]

The Allahabad High Court has held that it does not necessarily follow that, because a confession made by an accused person is subsequently retracted and there is little or no evidence on the record to support the confession, therefore the confession is to be rejected. The credibility of such a confession, is, in each case, a matter to be decided by the court according to the circumstances of each particular case, and if the court is of the opinion that such a confession is true, the court is bound to act, as far as the person making it is concerned, upon such belief.[13] It is unable to rely on and act upon a retracted confession unless, upon a consideration of the whole of the evidence in the case, the Court is in a position to come unhesitatingly to the conclusion that the confession was true. It is often very difficult, if not impossible, to come to such a conclusion, unless there is reliable independent evidence to corroborate, to a material extent and in material particulars, the statements contained in the withdrawn confessional statements. It seems, therefore, to be unsafe, in the majority of cases, to found a conviction on retracted confessions which are not corroborated by credible independent evidence.[14] A retracted confession may be taken into consideration, that is, used as evidence, not only as against the person making it, but as against persons tried jointly with the confessing accused for the same offence. As regards the person making it, a retracted confession may, even without any corroborative evidence, form the basis of a conviction. As regards the other co-accused, although corroborative evidence may be necessary, it is not necessary that such corroborative evidence should by itself be sufficient to support a conviction and a conviction based on the unsupported evidence afforded by the confession of a co-accused would not be unlawful.[15] The retracted confession of a co-accused can undoubtedly be used or taken into consideration under this section as against the other accused, but it, like the evidence of an approver, is not sufficient for conviction unless it is corroborated in material particulars. The evidence of an approver, coupled with the retracted confession of a co-accused, is not sufficient for conviction of an accused person if there is no other reliable evidence in corroboration as regards the identity of that accused person.[16]

The same is the view of the Madras High Court. It holds that it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by an accused cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to such a confession must depend upon the circumstances under which it was originally given and the

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9. *Haroon Haji* v. *State of Maharashtra*, AIR 1968 SC 832.
10. *Queen-Empress* v. *Gharya*, (1894) 19 Bom 728; *Queen-Empress* v. *Gangia*, ILR (1898) 23 Bom 316; *Queen-Empress* v. *Basvanta*, (1900) 2 Bom LR 761: ILR 25 Bom 168; *Emperor* v. *Bhagwandas Bisesar*, (1940) 42 Bom LR 938 : ILR 1941 Bom 27; *Emperor* v. *Bhimappa Saibanna*, (1945) 47 Bom LR 648.
11. *Emperor* v. *Krishna Babaji*, (1933) : 35 Bom LR 331.
12. *Emperor* v. *Bhagwan Das Bissesar*, (1940) 42 Bom LR 938 : ILR 1941 Bom 27 : AIR 1941 Bom 27.
13. *Queen-Empress* v. *Maiku Lal*, ILR (1897) 20 All 133; *Emperor* v. *Manohar*, (1946) All 111 : AIR 1946 All 15.
14. *Queen-Empress* v. *Mahabir*, (1895) 18 All 78, 81; *Queen-Empress* v. *Rangi*, ILR (1887) 10 Mad 295, 313.
15. *Emperor* v. *Kehri*, ILR (1907) 29 All 434; *Ataya* v. *Crown*, (1910) PR No. 5 of 1911 (Cr); *Nga Aung Thein* v. *Crown*, (1901) 1 LBR 133.
16. *Emperor* v. *Nazir*, ILR (1932) 55 All 91; *Emperor* v. *Shambhu*, ILR (1931) 54 All 350.

circumstances under which it was retracted, including the reasons given by the accused for this retraction.[17] If the reasons given by the accused person for having made a confession, which he subsequently withdraws, are, on the face of them, false, that confession may be acted upon as it stands, and without any further corroboration.[18] A retracted confession can be used under this section where the court is satisfied that the confession was made voluntarily in the first instance and that it is true.[19] A retracted confession is of little value against a co-accused and the fullest corroboration is necessary. But, when there is considerable circumstantial evidence as to the guilt of the co-accused, the court is entitled to use the confession to remove any doubts that might linger in the mind.[20]

The Calcutta High Court has ruled that it is not safe to convict an accused on his retracted confession standing by itself uncorroborated,[21] and that to place any reliance on a retracted confession against a co-accused would be most unsafe.[22] A retracted confession should carry practically no weight as against a person other than the maker; it is not made on oath, it is not tested by cross-examination, and its truth is denied by the maker itself, who has thus lied on one or other of the occasions. The very fullest corroboration would be necessary in such a case, for more than would be demanded for the sworn testimony of an accomplice on oath.[23]

The Patna High Court has ruled that a retracted confession is admissible in evidence but should have no weight attached to it unless it is corroborated in material particulars, or the tribunal comes to the conclusion that the statement as a whole is a truthful statement. In either of these cases the retracted statement must be given full weight and may be used against a co-accused.[24]

The former Nagpur High Court has held that, when it is possible to come to the conclusion that a retracted self-inculpatory confession cannot be otherwise than true, it may be taken into consideration in connection with evidence appearing in the case against the person making it, as also against another person therein implicated, though it should be used with caution.[25] Subsequently, it has held that a retracted confession, if believed to be true, may form the basis of a conviction, but, as a rule of caution, it is unsafe to base a conviction even of the maker on a retracted confession alone, without some independent corroboration. The confession must be corroborated in material particulars, so as to satisfy the court that the confession, even though retracted, may be acted upon.[26]

The former Chief Court of Oudh at Lucknow had held that the statement of an approver, or the retracted confession of an accused, cannot be made the basis of conviction unless it is corroborated sufficiently by material evidence against the co-accused.[27] But a court is at liberty to base a conviction on the retracted confession of an accused person if it thinks that the confession has a ring of truth about it.[28] Where the accused retracts his confession, no reliance can be placed upon such a retracted confession so far as the co-accused are concerned.[29]

The Assam High Court has held that, where there is a retracted confession, the corroboration required is on two points: (1) as to the *factum* of the crime; and (2) as to the identity of the person accused of the crime.[30]

The Rajasthan High Court has held that, in the absence of corroboration in material particulars, it is not safe to convict an accused on his retracted confession alone, unless, from the peculiar circumstances in which it was made, and judging from the reasons, alleged or apparent, of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been resiled from, is genuine.

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17. *Queen-Empress* v. *Raman*, ILR (1897) 21 Mad 83, 88.
18. *Kesava Pillai*, ILR (1929) 53 Mad 160; *Rajagopal* In re : (1944) Mad 308.
19. *Syamo Maha Patro*, In re : ILR (1932) 55 Mad 903 (FB).
20. *Munayya* In re : ILR (1938) Mad 348.
21. *Queen-Empress* v. *Jadub Das*, (1899) 27 Cal 295; *Kali Jeeban Bhattacharya* v. *Emperor*, ILR (1936) 63 Cal 1053.
22. *Emperor* v. *Lalit Mohan Chuckerbutty*, ILR (1911) 38 Cal 559 (SB).
23. *Yassin* v. *King Emperor*, ILR (1901) 28 Cal 689.
24. *Sheonarain Singh* v. *King-Emperor*, ILR (1928) 8 Pat 262; *Kunja Subudhi* v. *King-Emperor*, ILR (1928) 8 Pat 289; *King-Emperor* v. *Mangru Kisan*, ILR (1937) 16 Pat 612.
25. *Abdul Gafoor* v. *Crown*, ILR (1941) Nag 169; *Kashimuddin* v. *Emperor*, ILR (1934) 62 Cal 312, **dissented from**.
26. *Bhukin* v. *King-Emperor*, ILR (1948) Nag 147.
27. *King-Emperor* v. *Maqbu Ahmad Khan*, ILR (1931) 7 Luck 511.
28. *Imamuddin* v. *King-Emperor*, ILR (1934) 10 Luck 131; *Sheoratan* v. *King-Emperor*, ILR (1934) 10 Luck 150.
29. *Baboo Singh* v. *King-Emperor*, ILR (1935) 11 Luck 662; *Sheoratan* v. *King-Emperor*, ILR (1934) 10 Luck 150.
30. *Serajuddin* v. *State*, ILR (1952) 4 Ass 305; *State* v. *Bidhu Balmek Swapan*, ILR (1951) 3 Ass 415.

But it is not necessary that the confession must be corroborated by other evidence in every particular; it is sufficient if it is corroborated in material particulars.[31]

The Andhra High Court has held that, as a rule of prudence, a retracted confession should not be made the basis of a conviction unless it is substantially corroborated by independent evidence.[32]

It was held by the Kerala High Court that a retracted confession can form the basis of conviction if corroborated by a confession of one or the other of the accused and can be used against other accused when conspiracy on their part is proved.[33]

To sum up, the following important principles are to be observed before a court uses the confession of an accused and, particularly, a retracted confession:

(1) The provisions of the Evidence Act do not prevent the court from taking into consideration confession of an accused against his co-accused.

(2) A confession is not to be regarded as involuntary merely because it has been retracted, by the maker, at the trial.

(3) The confession must implicate the maker substantially and to the same extent as the other accused person against whom it is sought to be taken into consideration.

(4) If it appears, on a reading of the whole confession, to be exculpatory, it can not be used as a confession particularly against the other accused, even though it contains grave incriminating statements.

(5) Before using the retracted confession, it should be proved as voluntary and true.

(6) Though there is no rule of law requiring a retracted confession to be supported by corroboration on material particulars, as a matter of prudence and practice, the court would not ordinarily act upon it to convict a co-accused without the strongest and fullest corroboration on material particulars.[34]

(7) Such corroboration should not only relate to the *factum* of the crime but also as to the connection of the co-accused with the trial.

(8) It is only when the court is not in a position to come to a conclusion on the evidence adduced, that it can call such confession in aid to lend assurance to the other evidence.

(9) It shall not be used as the foundation of a conviction nor to support, as a corroborative piece of evidence, to the evidence of accomplices or approvers.

It has been held that though a retracted confession is admissible, it can only be used to support the other evidence of the witness, but can neither be made the foundation of a conviction nor to support the evidence of other accomplices or approvers.[35] Where the appellant was charged with murder, the Supreme Court held that it retracted judicial confession of another accused could not be used against the appellant as the appellant who was tried along with other accused had been acquitted by the High Court under the charge of conspiracy to murder and the other accused was not charged for the offence of murder. But they relied on the evidence of the approver and the retracted confession of the appellant which was corroborated by the recovery of a blood stained razor and medical evidence and held that there was sufficient evidence to prove the guilt of the appellant in respecting the charge for murder.[36]

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31. *Krishna*, (1951) 1 Raj 929; *Laloo*, (1952) Raj 602, 1956 Raj LW 435.

32. *Subbiah*, (1955) *Andhra* 633; ILR 1964 AP 905. **See also** *Netar Pal* v. *State*, 1964 Punj 39; *Chanchal Singh* v. *State*, ILR 1957 Cut 651.

33. ***State of Kerala*** **v.** ***Ammini***, 1988 Cr LJ 107 (FB).

34. *Budha Majhi* v. *State of Orissa*, (1964) 1 Cr LJ 487; *Netar Pal Jhuna Mal* v. *State*, (1964) 2 Cr LJ 335 : AIR 1964 Punj 397 (R); *Ramachandra Sahu* v. *State*, (1963) 1 Cr LJ 377, *M/s. Vali Mohomed Gulham Hussain Sonavela and Co* v. *C T A. Pillai, Addl. Collector of Customs*, (1961) 1 Cr LJ 229 : AIR 1961 Bom 48; *Rup Devi* v. *Himachal Pradesh*, 1955 Cr LJ 679 : AIR 1955 HP 15; *State of Maharashtra* v. *P K Pathak*, AIR 1980 SC 122 : 1980 Cr LJ 923; *Hamza* v. *State of Kerala*, 1978 Ker LT 963; *Jogendranath* v. *State of Assam*, 1977 Cr LJ 1309, *Barendra Kumar Singha* v. *State of Assam*, 1978 Cr LJ (NOC) 90 : 1970 Ker LT 110; *Thaba* v. *State*, (1967) 2 Cr LJ 1023.

35. ***Mahammad Hussain*** **v.** ***Dalip Singhji***, AIR 1970 SC 45.

36. ***Vinayak*** **v.** ***State of Maharashtra***, AIR 1984 SC 1793.

It is one thing to say that a confession of a co-accused can be used to corroborate other evidence, but it is entirely a different thing to say that other evidence can be used to corroborate the confession of the accused. The confession can only be used to help to satisfy a court that the other evidence is true.[37]

The court cannot start with the confession of a co-accused; it must begin with the other evidence in the prosecution and after it has formed its opinion as to its quality and effect, then only it can turn to the confession in order to reserve assurance to the conclusion of guilty which the judicial mind is about to reach on the said other evidence.[38] In the absence of sufficient evidence against the other accused to sustain their conviction, the confession of a co-accused cannot be taken into consideration.[39] A retracted confession cannot be used to fill up a gap in the prosecution evidence.[40]

The value to be attached to a confession will depend upon the facts of each case, more particularly on the fact whether the co-accused has an opportunity to rebut the same.[41]

If once the court is satisfied that a retracted confession was in fact made voluntarily and was trustworthy, it can be used not only against its maker but also against the co-accused.[42]

A retracted confession can be taken into consideration to indicate *prima facie* involvement of others.[43]

A retracted confession is a weak evidence, and so cannot be made the sole basis of conviction when there is no other satisfactory evidence.[44]

Where a confession is retracted long after the commencement of the trial, on the advice of the counsel, the delay is of no significance, provided it is voluntary and true.[45]

Admissions not conclusive proof, but may estop.

S. 31. Admissions are not conclusive proof of the matters admitted but they may operate as estoppels under the provisions hereinafter contained.

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COMMENTS

1. PRINCIPLE AND SCOPE

This section declares that admissions are not conclusive proof of the matters admitted, but that they may operate as estoppels. 'Admission' is defined in Section 17, *supra*, 'estoppel' in Section 115, *infra*. Unless admissions are contractual or unless they constitute an estoppel they are not conclusive[46], but are open to rebuttal or explanation. Admissions, whether written or oral, which do not operate by way of estoppel, constitute a kind of evidence, which may be rebutted, against their makers and those claiming under them, as between them and others. A party is not bound by his own representations, where they have not been acted upon by the opposite party. If treated as admission not acted upon, the party who

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37. *Gunadhar Das* v. *State*, AIR 1952 Cal 618 : 1952 Cr LJ 1343; *Bhuboni Sahu* v. *King*, AIR 1949 PC 257.
38. *State of Orissa* v. *Gouranga Sahu*, 1978 Cr LJ 276.
39. *Haricharan* v. *State*, AIR 1964 SC 1184 : (1964) 2 Cr LJ 344; In re : *Balan*, 1973 Cr LJ 1311 (SC).
40. *State of Rajasthan* v. *Chhuttmlal*, 1970 Cr LJ 1206 (Raj): 1970 SCC (Cri) 320; *Hamza* v. *State*, 1978 Ker LT 963; *Tej Singh* v. *State of Rajasthan*, 1979 Cr LJ (NOC) 52 (Ori).
41. *Jana* v. *Mohd. Akbar Alai*, 1976 Cr LJ 1947.
42. *Kuljeet Singh* v. *State*, ILR (1979) 2 Delhi 571.
43. *Mohan Wahi* v. *State*, 1982 Cr LJ 2040 (Del).
44. *Haroon Hari* v. *State*, AIR 1968 SC 832; *Md. Hussain* v. *Dalip Singhji*, AIR 1970 SC 45 : ILR (1977) 1 Cal 413; *Ananta Dixit* v. *State of Orissa*, 1984 Cr LJ 1126 (Ori).
45. *Ranjit Singh* v. *State of Himachal Pradesh*, AIR 1952 HP 81 : 1952 Cr LJ 1720 (HP).
46. *Dr. N. Ganesh* v. *Sucheta*, ILR 1969 Bom 1024.

made them may prove that they were not true or mistaken. A mere admission is conclusive only where it has been acted on by the party to whom it was made. An estoppel, *i.e.*, a representation acted on by the other party, by creating a substantive right, does oblige the estopped party to make good his representation, in other words, it is conclusive. The maker of the admission would be precluded from going back on it and speaking the truth on the principle of estoppel if the person to whom it is made has acted on its faith.[47]

Admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong. But they may raise an estoppel and shift the burden of proof on to the person making them or his representative in interest. Unless shown or explained to be wrong they are an effcatious proof of the facts admitted.[48] An admission is the best evidence that an opposite party can rely on and though not conclusive is decisive of the matter unless successfully withdrawn or proved erroneous.[49]

An admission shifts the onus on the party admitting on the principle that what a party himself admits may reasonably be presumed to be true. Admissions are not conclusive and unless they constitute estoppel. The maker is at liberty to prove that they are mistaken or untrue. Where an admission was made by a young Hindu widow lonely and dependent on the husband's relatives who were interested in foisting an adoption on her, the Supreme Court attached little weight to it.[50]

The rule of estoppel binds only the party and his successors in interest and not strangers. Where a plaintiff filed a suit regarding certain property that he was entitled by inheritance from his natural father and the defence was that that plaintiff is not an heir to his natural father as he had gone in adoption basing on certain admissions made by the plaintiff in certain documents to which defendant was not a party, it was held that there is no estoppel as the defendant was not a party to those documents and the plaintiff could prove that the statements are untrue.[51]

For the application of the doctrine of estoppel mainly three conditions have to be fulfilled, *firstly*, there must be a representation either oral or written by a person to another person. *Secondly*, the other person must have acted upon the said representation taking the admissions as true. *Thirdly*, he should suffer some prejudice by believing the representation or must have acted in detriment to his interest by reason of the representation.[52]

An estoppel differs from an admission, for it cannot generally be taken advantage of by strangers. It binds only parties and privies. An estoppel is generally said to be only a rule of evidence, for an action cannot be founded upon it. As a defence it has been held to have the effect of rule of substantive law.

What a party himself admits to be true, may reasonably be presumed to be true.[53]

The expression 'conclusive proof' is defined in Section 4, and when a fact is declared to be conclusive proof of another, a court cannot allow evidence to be given for the purpose of disproving the fact conclusively proved. All that this section provides is that an admission, unless it operates as an estoppel, is not conclusive. What a party himself admits to be true may reasonably be presumed to be so. The person against whom it is proved is at liberty to show that it was mistaken or untrue. An admission does not estop the party who makes it; he is still at liberty to disprove it by evidence so far as regards his

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47. *Narayan Neelakutti* v. *Krishnan Veki*, AIR 1955 TC 199; *Bhattacharjee* v. *Sentinel Assurance Co. Ltd*, AIR 1955 Cal 594.

48. *Avadh Kishore* v. *Ram Gopal*, AIR 1979 SC 861.

49. *Narayan* v. *Gopal*, AIR 1960 SC 100 : (1960) 1 SCR 773.

50. *Kishorilal* v. *Chaltibai*, AIR 1959 SC 504 : 1959 Supp (1) SCR 698. **See also** *Salah Bin Ahmed* v. *Abdullah Bin Ewaz Hamidan*, AIR 1956 Hyder 43; *Union of India* v. *Maqsood Ahmed*, AIR 1963 Bom 110; *Abadi* v. *Mumtazuddin*, 1934 All 662; *Dukharamnath* v. *C.C. Corporation Ltd.*, AIR 1940 Oudh 35; *Md. Sadiq Ali Khan* v. *Fakhr Jahan*, AIR 1932 PC 13; *Jamilunnissa* v. *Shukh Md. Zia*, AIR 1937 All 547; *Md. Moizuddin* v. *Nalini*, AIR 1937 Cal 284; *Dulana Moliko* v. *Bhagabat Biso*, AIR 1967 Ori 110; *Narayan* v. *Sucheta*, AIR 1970 Bom 312; *Income-tax Officer* v. *Shambhoo Dayal Omprakash and Company*, AIR 1968 All 203; *Ramaswami Iyer* v. *Subramania Pillai*, 1962 Ker LJ 929; *Narayan Neelakutty* v. *Krishnan Venkey*, AIR 1955 TC 199; *Bhattacharjee* v. *Sentinel Assurance Co. Ltd.*, AIR 1955 Cal 594 : ILR 1978 Bom 1454; *Manoharan Chetti* v. *Coommara Swamy Naidu*, AIR 1980 Mad 212 : ILR 1973 Cut 96 : (1975) 1 Cut WR 3.

51. *Chandrakumar* v. *Choudhuri Narpat*, 11 Cal WN 321; **See also** *Nagubai* v. *Shama Rao*, AIR 1956 SC 593; *Radhanath* v. *Krishna*, 40 Cal WN 722.

52. **See** commentaries on Sections 115 to 117 which deal with Estoppel.

53. *Pratap Kishore* v. *Gyamandranath*, AIR 1951 Ori 313; *Airva* v. *Vonkey*, AIR 1951 TC 209.

own interest. The rule that admissions are not conclusive is applicable to mistakes in respect of legal liability as well as to those in respect of fact.

A passport issued under Rule 31, of Indian Permit System Rules of 1949, might not be conclusive evidence but is *prima facie* evidence of the holder's nationality. A heavy onus lies on the petitioner to disprove the fact.[54] Admission by a person that he is the only son of S is not conclusive proof of the fact admitted.[55]

The maker of the admission can show that it is untrue or made under mistake of fact or underthreat, promise or inducement.[56]

The Privy Council observed: "It sometimes happens that persons make statements which serve their purpose or proceed upon ignorance of the true position; and it is not their statements but there relations with the estate, which should be taken into consideration in determining the issue."[57]

Admissions operating as estoppels are not the only kind of admissions that will either be relevant to or conclude the matter in issue. Two other kinds of admissions equally, if not more, effective, are:

(1) admissions contained in the pleadings in a case which would circumscribe the issues and avoid the necessity of proof, and

(2) admissions made by the parties to a suit on earlier occasions either in prior proceedings in a court of law, or in statements made out of court.

An admission by a party in his pleading can be considered against him. What a party in his pleading can be reasonably be presumed to be so unless the presumption is satisfactorily rebutted by other evidence.[58]

Admissions by a plaintiff in previous suit is binding on him in a later proceeding.[59]

Where in a suit by a son challenging the alienation by the father, of joint family property on the ground of absence of legal necessity, a statement was made by his elder brother B, in a previous suit admitting the genuineness of the sale deed, it was held that the admission of the elder brother was not binding as it was made in his individual capacity and prior to the power of attorney executed by the son in favour of his brother.[60] Where in a suit for declaration and rendition of account, the trial Court decreed the suit on the basis of unequivocal admissions made by the respondent in the written statement in the earlier proceedings but the appellate Court without pointing out any circumstance took the view that the admissions were made under constraint and compelling circumstances, it was held that the admissions in the written statement in the earlier proceedings, though not conclusive, in the absence of any reasonable and acceptable explanation, is a telling evidence heavily loaded against the respondent and the finding of the trial Court based on the evidence on issues was *in extenso* justified.[61]

2. ADMISSION IN CRIMINAL CASES

Where a compromise entered into in a previous criminal case (which was not legally possible to enter) in respect of the allegations constituting offences which were not compoundable no evidence having been recorded in that case, it was held that the contents of the compromise petition did not constitute an admission and did not operate as estoppel as the petition was wholly illegal and inadmissible.[62]

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54. *Yakub Molla* v. *Union of India,* (1958) 62 Cal WN 589.
55. *Bhaskar* v. *Rambha,* AIR 1974 Ori 74; *A.K. Basak* v. *Sailendra Nath Paul,* 69 Cal WN 593.
56. *Narayan* v. *Sucheta,* AIR 1970 Bom 312; *Income-tax Officer* v. *Shambudayal,* AIR 1968 All 203; *Ramaswami Iyer* v. *Subramonia Pillai,* 1962 Ker LJ 929; *Bhattacharjee* v. *Sentinel Assurance Co. Ltd.,* AIR 1955 Cal 594.
57. *Venkatapathiraju* v. *Venkatanarasimha,* AIR 1936 PC 264; *Harkishan* v. *Partap,* AIR 1938 PC 189.
58. *Jhunkaribahu alias Katrabali W/o. Laxmi Prasad* v. *Phoolchand,* AIR 1958 MP 261; *Jawaharbeg Umraobeg Musalman* v. *Abdul Aziz Bhondumiya Musalman,* AIR 1956 Nag 257; *Lal Singh Didar Singh* v. *Guru Granth Sahib,* AIR 1951 Pepsu 101.
59. *Shanti Sarup* v. *Radha Swami Satsams Sabha Dayal Bagh,* AIR 1969 All 248; *Roshanlal* v. *Union of India,* AIR 1968 Punj 51; *Mohammad Seraj* v. *Adibar Rehaman Shaikh,* AIR 1968 Cal 550; *Gulabbhai Vallabhbhai Desai* v. *H.A. Khan Collector of Daman,* AIR 1970 Goa 59 (In a writ proceeding).
60. *Dhani Ram* v. *Mangtu,* AIR 1953 Bilaspur 18.
61. *Sitaramcharya* v. *Gururajacharya,* AIR 1997 SC 806 : (1997) 2 SCC 548.
62. *Jagnarain* v. *Ram,* AIR 1979 All 71.

In a criminal proceeding between A and B, B admitted A's title to land in dispute and thereby caused A to give him some land. In a subsequent suit by A for declaration of title and possession of the land, it was held B was estopped from denying A's title thereto by his previous admission.[63]

3. ADMISSION MADE DURING THE CONDUCT OF THE SUIT

A plaintiff is not bound by an admission on a point of law, nor precluded from asserting the contrary in order to obtain the relief, to which, upon a true construction of the law, he may appear to be entitled. But, if the admission is duly proved and if the person against whom it is proved does not satisfy the court that it was mistaken or untrue, there is nothing in this Act, and there is no general principle or rule of law to prevent the court from deciding the case in accordance with it.[64]

4. ADMISSIONS CONTAINED IN A DOCUMENT

An admission contained in a registered deed of adoption formerly executed by a party with an endorsement showing that the executant was fully aware of the contents of the deed and was executed with due deliberation and full understanding is conclusive unless it is explained satisfactorily. The admission of an adoption in a deed amounts to an admission both of the fact and of the validity of the adoption and shifts the burden of proving the contrary to the party which made that admission.[65]

A recital as to delivery of possession by the donor in a gift deed is not conclusive and is rebuttable as to the *factum* of delivery of possession pursuant to the gift deed.[66]

Though a document containing an admission, is secured at a late stage it can still be used against its maker.[67]

Where a mortgagee admitted payment of money in the mortgage deed still it is open to the mortgagee to contend that the admission is not conclusive and some money had been paid towards a deed other than the mortgage deed in the suit.[68]

The provisions of this section are not restricted to admissions made at any particular time or place, but are wide enough to include admissions made in pleadings. Where an admission was made by the predecessor in title and the successor in interest confirmed it, he became bound by it.[69]

5. THE WHOLE OF THE ADMISSION SHOULD BE CONSIDERED

The law does not permit an admission to be truncated and taken piece-meal and it should be read as a whole or reject as a whole.[70]

BEST ON EVIDENCE (9th Edn., p. 568) stated that the law rejects what a man has stated on his own behalf, and admits what he has stated against himself, but where a document or statement is partly favourable and partly unfavourable to a party, the whole of it is admissible..... While the whole statement must be received the credit due to each part must be determined by the jury, who may believe the self-serving and disbelieve the self-harming portion of it, or *vice versa*. The above principle was approved by the Supreme Court.[71]

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63. *Mangal Das Chaudhury* v. *Bhageran Sao*, AIR 1953 Pat 318.
64. *Maung Mya* v. *Ma Tha Ya*, (1899) 2 UBR (1897-1901) 377; *Malgaonkar* v. *Jagmohan*, 1981 Cr LJ (NOC) 97; *Jetmull Bhojraj* v. *State of Bihar*, AIR 1967 Pat 287, **see** Section 17 for other cases.
65. *Bhola* v. *Man Matin*, AIR 1965 All 258; *Sooratha* v. *Kanaka*, AIR 1920 Mad 648; *Govinda* v. *Chimabai*, AIR 1968 Mys 309.
66. *Johara* v. *Suberia*, AIR 1964 Mad 373.
67. *Neminath Appayya* v. *Jambodrao*, AIR 1966 Mys 154.
68. *Soraisem Kamini Singh* v. *Chongtham Iboyaima Singh*, AIR 1954 Mani 11.
69. *Avadh Kishore Das* v. *Ram Gopal*, AIR 1979 SC 861.
70. *Hanumant* v. *State of M P.*, AIR 1952 SC 343; *Jasoda Haldar (Smt.)* v. *Sailendra Nath Samantha*, AIR 1957 Cal 372.
71. *Hanumant* v. *State of M P.*, AIR 1952 SC 343; *Palvinder Kaur* v. *State*, AIR 1952 SC 354; *Dadarao* v. *State*, AIR 1974 SC 388; *Mohd. Koya* v. *Muthu Koya*, AIR 1979 SC 154. (For a full discussion on admissions **see** commentary on Sections 17 to 23).

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES

Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant

S. 32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—

When it relates to cause of death,

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

or is made in course of business,

(2) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.

or against interest of maker;

(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

or gives opinion as to public right or custom, or matters of general interest,

(4) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter has arisen.

or relates to existence of relationship;

(5) When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

or is made in will or deed relating to family affairs;

(6) When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

or in document relating to transaction mentioned in Section 13, clause (*a*);

(7) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in Section 13, clause (*a*).

or is made by several persons and expresses feelings relevant to matter in question.

(8) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

ILLUSTRATIONS

(a) The question is, whether *A* was murdered by *B*; or

A dies of injuries received in a transaction in the course of which she was ravished. The question, is whether she was ravished by *B*; or

The question is, whether *A* was killed by *B* under such circumstances that a suit would lie against *B* by *A*'s widow.

Statements made by *A* as to the cause of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration are relevant facts.

(b) The question is as to the date of *A*'s birth.

An entry in the diary of a deceased surgeon regularly kept in the course of business, stating that on a given day he attended *A*'s mother and delivered her of a son, is a relevant fact.

(c) The question is, whether *A* was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that on a given day the solicitor attended *A* at a place mentioned, in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm, by which she was chartered to their correspondents in London, to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e) The question is, whether rent was paid to *A* for certain land.

A letter from *A*'s deceased agent to *A* saying that he had received the rent on *A*'s account and held it at *A*'s orders, is a relevant fact.

(f) The question is, whether *A* and *B* were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(g) The question is, whether *A*, a person who cannot be found, wrote a letter on a certain day.

The fact that a letter written by him is dated on that day is relevant.

(h) The question is, what was the cause of the wreck of a ship.

A protest made by the captain, whose attendance cannot be procured, is a relevant fact.

(i) The question is, whether a given road is a public way.

A statement by *A*, a deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market.

A statement of the price, made by a deceased banya in the ordinary course of his business, is a relevant fact.

(k) The question is, whether *A*, who is dead, was the father of *B*.

A statement by *A* that *B* was his son, is a relevant fact.

(l) The question is, what was the date of the birth of *A*.

A letter from *A*'s deceased father to a friend, announcing the birth of *A* on a given day, is a relevant fact.

(m) The question is, whether, and when, *A* and *B* were married.

An entry in a memorandum book by *C*, the deceased father of *B*, of his daughter's marriage with *A* on a given date, is a relevant fact.

(n) *A* sues *B* for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

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COMMENTS

1. PRINCIPLE

This and the following section are exceptions to the general rule that hearsay evidence is not admissible. Hearsay evidence is excluded on the ground that it is always desirable in the interest of justice to get the person, whose statement is relied upon, into court for his examination in the regular way, in order that many possible sources of inaccuracy and untrustworthiness can be best brought to light and exposed, if they exist, by the test of cross-examination. Section 60 lays down that oral evidence must be direct.

The phrase 'hearsay evidence' is not used in the Act; because it is inaccurate and vague. It is a fundamental rule of evidence under the English Common Law that hearsay evidence is inadmissible.[1]

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1. *Subramaniam* v. *Public Prosecutor*, (1956) 1 WLR 965, 970.

Uncertainty exists as to what evidence does and does not fall under hearsay rule.

In PHIPSON ON EVIDENCE, 15th Edn. (2000), pages 630-631, para 25-02, the following statements of STEPHEN, PHIPSON and CROSS relating to hearsay rule and 'hearsay' as defined in Civil Evidence Act, 1995 are given:

(a) STEPHEN[2] "A statement oral or written made otherwise than by a witness in giving evidence and a statement contained or recorded in any book, document or record whatever, proof of which is not admitted on other grounds, are deemed to be irrelevant for the purpose of proving the truth of the matter stated."

(b) PHIPSON[3] "Oral or written statements made by persons who are not parties and who are not called as witnesses are inadmissible to prove the truth of the matters stated."

Contrary to STEPHEN'S definition this formulation only excludes as hearsay statements by persons other than the parties and witnesses. Accordingly when a confession is related by someone rather than the maker it is not to be regarded as an exception to the hearsay rule. Equally, whether or not what witness *X* said to witness *Y* is inadmissible on some other ground it is not excluded in this definition by the hearsay rule. Modern authority is to the contrary.[4]

(c) CROSS "An assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible *as evidence of any fact asserted.*"[5]

(d) Civil Evidence Act, 1995, S. 2 (1)(a) : " 'Hearsay' means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated."

At page 635 (PHIPSON) it is stated: "Although the exact scope of the rule is a matter of controversy, it is clear that the effect of the rule is to prohibit certain oral and written statements of persons other than the witness who is giving evidence being related to the court as evidence of the truth of that which was asserted in the statement and notwithstanding the fact that no better evidence of the facts stated is to be obtained."[6]

In HALSBURY 4th Edn., Vol. 17, Page 39 it is stated: "Hearsay evidence in its legal sense is evidence given by a testifying witness of a statement made on some other occasion, when it is intended as evidence of the truth of what was asserted. It is essential to appreciate that evidence is only hearsay when tendered to prove the truth of the facts asserted, not when tendered simply to show that the statement was made. Hearsay may be first hand, when a witness says what he heard someone else say, or second hand (or even more distant) when he relates to what he was told that someone else said. It may be oral or documentary, of fact or of opinion."

The exceptions to the hearsay evidence have been directed by necessity. This rule excluding hearsay evidence is relaxed so far as the statements contained in Sections 32 and 33 are concerned. The general ground of admissibility of the evidence referred to in these sections is that no better evidence could be produced.

Before such evidence is let in, the court must arrive at a finding on evidence formally and regularly taken and recorded that one or other of the grounds specified in the section exists. The admission of such deposition in evidence without such finding is illegal.[7]

Sections 32 and 33 deal with different circumstances in which the evidence is relevant. Section 32 *inter alia* makes relevant the statements given by a deceased person as to the cause of his death or as to any circumstances of the transaction which resulted in his death, when the cause of death comes into

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2. *Digest of the Law of Evidence*, Art. 15.
3. 7th and subsequent editions.
4. *R* v. *McLean*, (1968) 52 Cr App R 80. Note, too, that evidence of recent complaint is not evidence of the truth of the facts stated in the complaint.
5. CROSS and TAPPER, *Evidence* (8th ed.), p. 564. This formulation is significantly different from that put forward in earlier editions: *cf.* 3rd ed., p. 387. In the 6th edition, this definition was the same except that it began with the words "a statement" instead of "an assertion". In the 5th edition the last word was "asserted" rather than "stated". These cumulative changes reflect changes in the law of "implied assertions".
6. See *Myers* v. *D.P.P.*, (1965) AC 1001, 1024.
7. *Satish Chandra Seal* v. *Emperor*, AIR 1945 Cal 137 : ILR (1944) 2 Cal 76.

question, whereas Section 33 makes evidence given by a witness relevant, when the witness is dead or cannot be found etc. Thus the two sections cover distinct fields. Under Section 33, evidence of a witness who is dead or not found can be admitted only if the adverse party in the first proceeding had the right to cross-examine. Under Section 32, the statement of the deceased would become relevant subject to one of the four conditions mentioned in the main section and further, it must come within one of the eight clauses mentioned in the section. Section 32 is not controlled by Section 33.[8]

Under this section, written or verbal statements of relevant facts made by a person:

(a) who is dead;

(b) who cannot be found;

(c) who has become incapable of giving evidence; or

(d) whose attendance cannot be procured without unreasonable delay or expense;

are relevant under the following circumstances:—

(1) When it relates to the cause of his death.

(2) When it is made in the course of business, such as an entry in books, or acknowledgement or the receipt of any property, or date of a document.

(3) When it is against the pecuniary or proprietary interest of the person making it, or when it would have exposed him to a criminal prosecution or to a suit for damages.

(4) When it gives opinion as to a public right or custom or matters of general interest and it was made before any controversy as to such right or custom had arisen.

(5) When it relates to the existence of any relationship between persons as to whose relationship the maker had special means of knowledge, and it was made before the question in dispute arose.

(6) When it relates to the existence of any relationship between persons deceased and is made in any will or deed or family pedigree, or upon any tombstone or family portrait, and was made before the question in dispute arose.

(7) When it is contained in any deed, will, or other document.

(8) When it is made by a number of persons and expresses feelings relevant to the matter in question.

Section 30 does not limit the operation of this section, but Section 118 does.

2. STATEMENTS WRITTEN OR VERBAL OF THE RELEVANT FACT—STATEMENT

The word 'statement' means that which is stated, though it is not defined in the Act.[9]

The element of communication to another person is not necessary before "something that is stated" can be treated as a statement.[10]

A dying declaration is not a statement which requires to be in writing. Oral evidence as to the statement made by the injured person who happens to die subsequently would prove the declaration. If the declaration is recorded, the record would be merely a note made by the witness and would not be substantive evidence.[11]

A statement made by the deceased, pointing out the person causing his death, at the identification parade held by the police, is admissible as his dying declaration.[12]

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8. *Shyamnand Das* v. *Ramakanta*, ILR (1904) 32 Cal 6; *Sulaiman* v. *King*, AIR 1941 Rang 301.
9. *Bhogilal Chunilal Pandya* v. *State of Bombay*, AIR 1959 SC 356.
10. *Shanti Devi* v. *State*, ILR (1979) 2 Del 183.
11. *Vallabh* v. *State*, (1962) 2 Cr LJ 540 (Guj).
12. *Emperor* v. *Mahadeo Dewoo*, (1945) 47 Bom LR 992.

3. VERBAL

'Verbal' means by words. It is not necessary that the words should be spoken. The words of another person may be adopted by a witness by a nod or a shake of the head.[13]

If the significance of the signs made by a deceased person in response to questions put to her shortly before her death is established satisfactorily to the mind of the court, then such questions, taken with her assent or dissent to them, clearly proved, constitute a verbal statement as to the cause of her death.[14]

In a trial upon a charge of murder, it appeared that the deceased, shortly before her death, was questioned by various persons as to the circumstances in which the injuries had been inflicted on her; that she was at that time unable to speak, but was conscious and able to make signs. Evidence was offered by the prosecution, and admitted by the Sessions Judge, to prove the questions put to the deceased, and the signs made by her in answer to such questions. It was held that the questions and the signs taken together right properly be regarded as 'verbal statements' made by the person as to the cause of her death, within the meaning of this section, and were, therefore, admissible in evidence under this section.[15] Where, on an enquiry as to what happened to him, the declarant, being unable to speak, indicated by gestures that his brothers had administered poison, his gestures amounted to verbal statements within Section 32 and were, therefore, admissible.[16]

The questions put to the injured person who is unable to speak and the signs made by him in reply, taken together, amount to "verbal statements" within the meaning of this section.[17]

Where a woman, whose throat had been cut, made, in answer to questions put to her by the Sub-Inspector, certain gestures, from which the latter inferred that she accused her husband of the assault, it was held that the gestures were admissible in evidence, but that the opinion of witnesses as to the meaning of the gestures was not admissible.[18] As the interpretation of the gesture is for the court alone to decide; the opinion of the witnesses as to the meaning of such gestures is not evidence. If the answers are given by gestures, the court should know what those gestures were. The interpretation of those answers by gestures would ultimately be a matter for the court and not for the investigating Sub-Inspector.[19]

The opinion of a doctor that in view of the injury caused, the person making the dying declaration could not speak is not conclusive of the ability to talk especially if it is at variance with the opinion of the doctor conducting the post mortem.[20]

Where the dying declaration is oral, the exact words stated by the deceased to the witnesses are of utmost importance. If the witnesses improve upon their statement by varying their versions, that evidence becomes unreliable, and the alleged dying declaration has to be eshewed.[21]

Where a person stated that the accused had caused her the injuries, though it appeared that her answer was not in response to any leading question, it was held such evidence amounted to a dying declaration and, though not reduced to writing, could not be rejected.[22] Even where a dying declaration made to the doctor has not been recorded in the form of questions and answers and in the words of the

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13. *Queen-Empress* v. *Abdullah*, ILR (1885) 7 All 385, 397 (FB).
14. *Queen-Empress* v. *Abdullah*, ILR (1885) 7 All 385 (FB); *Emperor* v. *Sadhu Charan Das*, AIR 1923 Cal 409 : (1921) 49 Cal 600; *Chandrika Ram Kahar* v. *King-Emperor*, AIR 1922 Pat 535 : (1922) 1 Pat 401; *Ranga* v. *Crown*, AIR 1924 Lah 581 : (1924) 5 Lah 305; *Emperor* v. *Motiram Raisingh*, AIR 1936 Bom 372 : (1936) 38 Bom LR 818 : (1937) Bom 68.
15. *Queen-Empress* v. *Abdullah*, ILR (1885) 7 All 385 (FB); *Chandrasekara* v. *King*, AIR 1937 Cal 220.
16. *Gajendrakar* v. *State of Orissa*, 1973 Cr LJ 1058 (Ori); *Alexander Perera Chandarasekara* v. *King*, AIR 1937 PC 24 : 38 Cr LJ 281 (PC); *Alexander Perera Chandarashekar* v. *King*, AIR 1937 PC 24 : 1956 Cr LJ 1240; *Vaghari Madhakana* v. *State*, AIR 1956 Sau 83; *Pandian K. Nadar* v. *State of Maharashtra*, 1993 Cr LJ 3883 (para 23) (Bom).
17. *Sudama* v. *King-Emperor*, AIR (1949) Nag 301.
18. *Chandrika Ram Kahar* v. *King-Emperor*, AIR 1922 Pat 535 : ILR (1922) 1 Pat 401; *Chandrasekara* v. *King*, AIR 1937 Cal 220 : 39 Bom LR 359.
19. *Shirinath Durgaprasad* v. *State*, AIR 1957 Bom 223.
20. *Sanappa Vamanappa* v. *State of Mysore*, AIR 1979 SC 1831.
21. *Kunnummal Mohammad* v. *State of Kerala*, AIR 1963 Ker 54; *Khushal Rao* v. *State of Bombay*, AIR 1958 SC 22; *Ramnath* v. *State of M P*, AIR 1953 SC 420.
22. *Sital Chandra* v. *State*, AIR 1956 Cal 82.

declarant, the dying declaration can be treated as oral testimony by the deceased as to the cause of his death and the circumstances of the transaction which resulted in his death, and thus becomes a relevant fact when the cause of death of the deceased is in question.[23]

When only two relatives were present when the deceased was attacked and the deceased shouted the names of the assailants, the evidence of the relatives cannot be discarded simply because that was not recorded and such statements can be taken as oral dying declarations.[24] In a case of murder the deceased made oral dying declaration to interested witnesses. The father of the deceased who lodged the F.I.R. after admitting him to hospital, mentioned about the dying declaration and also gave necessary details. There was no possibility of implication. The doctor did not categorically state in his evidence that the deceased was not in a fit condition to make dying declaration. The conviction on its basis was upheld.[25] Where the deceased made oral dying declaration to her father of which there was no other witness, the evidence of dying declaration of her father could not be discarded for non-examination of any witness in support.[26] The statement made by the deceased to her father 2-3 days prior to her death that she would not be allowed to leave her in-laws' house till the demand of scooter was met, would be admissible under Section 32(1).[27] Where the oral statement given by the deceased before death to the witness found place at the earliest in the *Fard Beyan* of that witness and it described the manner of assault, weapon and the persons assaulting and was corroborated by other evidence, the same could be used as dying declaration for corroborating other evidence.[28] Where the deceased, the victim of burning, gave wrong name of the father of the accused in her statement attached to FIR but on being confronted by the I.O. she made a clarificatory statement about the correct name of his father, such clarificatory statement, being intertwined the burning episode, fell within the ambit of Section 32(1).[29]

Where the deceased was sleeping when he was fired on his abdomen at night and was crying in agony, he could not have correctly identified the assailant and calling out the name of accused as assailant to his relatives could be a case of mistaken identity and such uncorroborated dying declaration could not be relied upon.[30] Where there were infirmities in the oral dying declaration regarding the state of the deceased to make the declaration, the witnesses to whom it was made disclosed it to the police after two days of the death of the deceased without giving any explanation for the delay and there was no corroboration.[31]

When the oral dying declaration was heard by more than one person, it was held that the witnesses need not repeat the same words, but they may state it in similar words.[32]

A dying declaration in the form of questions and answers and, so far as practicable in the words of the maker of the declaration, stands on a much higher footing.[33]

4. WRITTEN

The statement of a deceased person in a document, that a particular document is the copy of the original, is admissible under this section as a relevant fact and also as an admission under Section 21 of the Act.[34]

Letters written by the deceased wife disclosing circumstances under which she committed suicide are admissible under Section 32(1).[35]

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23. *Mamchand* v. *State*, ILR (1971) 2 Delhi 689.
24. *Anantamohanto* v. *State of Orissa*, AIR 1979 SC 1433.
25. *Vishram* v. *State of M.P.*, 1993 Cr LJ 304, at p. 306 (SC) : AIR 1993 SC 250, **affirming** the judgment of M.P. High Court.
26. *Lakhan Lal* v. *State*, 1995 Cr LJ 2699 (para 16) (Del).
27. *Mahesh Kumar* v. *State*, 2001 Cr LJ 4417 (para 28) (All).
28. *Qaiyum Mian* v. *State of Bihar*, 1993 Cr LJ 1756 (para 17) (Pat).
29. *Patel Hiralal Joitaram* v. *State of Gujarat*, AIR 2001 SC 2944 (para 31).
30. *Pyarelal* v. *State of M.P.*, 1994 Cr LJ 958 (para 10) (MP).
31. *Ramsai* v. *State of M.P.*, 1994 Cr LJ 138 (para 4) : AIR 1994 SC 464.
32. *Amba Shanker Dave* v. *State*, ILR (1971) 21 Raj 541.
33. *Khushal Rao* v. *State of Bombay*, AIR 1958 SC 22; *Nilamani Dehuri* v. *State*, ILR 1964 Cut 841.
34. *Seethaya* v. *Subramanya Somayajulu*, AIR 1929 PC 115.
35. *Ram Kumar* v. *State of M.P.*, 1998 Cr LJ 952 (para 12) (MP). **See also** *Mithailal* v. *State of Maharashtra*, 1993 Cr LJ 3580 (paras 14 and 16) (Bom).

5. LANGUAGE OF DYING DECLARATION

Dying declaration recorded in the language of the declarant acquires added strength and reliability.[36] Dying declaration would not vitiate merely because it was recorded in a different language than one in which narrated by the declarant.[37] Where the Spl. Magistrate asked the questions to the deceased in Sindhi and they were replied in Sindhi and then translated to a constable into Hindi who in turn recorded them in Marathi and the Magistrate disowned the endorsement that the declaration was explained to the maker in Hindi and not in Sindhi, conviction could not be based solely on such a dying declaration.[38] Where the dying declaration was given in Punjabi language but was recorded in Urdu, it was held that though Punjabi language was used in the Subordinate Courts, as the police used always record the statements in Urdu, the recording of the dying declaration in Urdu could not be a ground for saying that the statement did not correctly reproduce what was stated by the declarant.[39] Where the dying declaration made by the deceased in a local dialect was recorded in Hindi and not verbatim, but it contained a true and correct record of the statement of the declarant, it was held that it did not lose its evidentiary value.[40]

6. "STATEMENT OF A PERSON AS TO THE CAUSE OF HIS DEATH OR TO ANY CIRCUMSTANCES OF THE TRANSACTION WHICH RESULTED IN HIS DEATH" [SUB-SECTION (1)]

Section 32 is an exception to the rule of hearsay and makes admissible, the statement of a person who dies, whether the death is homicide or a suicide, provided the statement relates to the cause of death or deals with circumstances leading to the death.[41] Statement about anything which nexus with his death, is admissible as dying declaration as the words 'statements as to any of the circumstances of the transaction which resulted in his death' expands the scope of admissibility.[42]

(a) Who is Dead.—If the person making a dying declaration chances to live, his statement is inadmissible as a dying declaration under this section, but it might be relied on under the provisions of Section 157, to corroborate his testimony when examined[43] or is relevant and admissible as *res gestae* under Section 6 of the Evidence Act.[44] When the person making a dying declaration survives, the court cannot take note of the declaration.[45]

Where the police recorded a statement of the victim while he was being treated in the hospital, and that statement was treated as a first information report and later the declarant survived, then such statement could be useful only to corroborate or contradict the declarant's testimony in court. If the declarant dies, then that statement would become substantive evidence under Section 32(1), as a declaration as to the cause of the death or as part of his conduct, under Section 8.[46]

A statement of a person made in another proceedings is not admissible under Section 32, unless it is shown that the person is either dead or otherwise not available, as contemplated in Section 32. If that person is alive, he has to be examined in court to prove his statement, in which case it would be

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36. *Najjam Juroqui* v. *State*, 1992 Cr LJ 2574 (Cal).
37. *State of Rajasthan* v. *Bhup Singh*, (1997) 10 SCC 675 : 1997 SCC (Cri) 1032. **See also** *Ramesh* v. *State of Maharashtra*, 2001 Cr LJ 3780 (para 13) (Bom).
38. *Deepak Baliram Bajaj* v. *State of Maharashtra*, 1993 Cr LJ 3269 (paras 18-21) (Bom).
39. *Bakhshish Singh* v. *State of Punjab*, AIR 1957 SC 904.
40. *Kachhwa* v. *State of Rajasthan*, 1986 Cr LJ 306 (Raj).
41. *Sharad Budhichand Shardha* v. *State of Maharashtra*, AIR 1984 SC 1622; *P. Bikshapathi* v. *State of A.P.*, (1988) 2 An LT 946 : 1989 Cr LJ 1186; In re : *Venkata Subba Reddy*, AIR 1931 Mad 689 : ILR (1931) 54 Mad 93; *Rigo* v. *Emperor*, (1933) 29 NLR 251; *Kans Raj* v. *State of Punjab*, 2000 Cr LJ 2993 (para 11) (SC) : AIR 2000 SC 2324.
42. *Patel Hiralal Joitaram* v. *State of Gujarat*, AIR 2001 SC 2944 (para 28).
43. *Emperor* v. *Rama Sattu*, (1902) 4 Bom LR 434. **See also** *Ram Prasad* v. *State of Maharashtra*, 1999 Cr LJ 2889 (paras 15 and 17) (SC) : AIR 1999 SC 1969; *Heera Lal* v. *State of U.P.*, 2001 Cr LJ 2849 (para 28) (All).
44. *III Addl. Sessions Judge, Guntur* v. *G.V. Rao*, 1996 Cr LJ 703 (para 12) (AP).
45. *Moti Singh* v. *State of U.P.*, AIR 1964 SC 900 : (1964) 1 Cr LJ 727; *Tahsildar Singh* v. *State*, AIR 1958 All 255.
46. *Vallon Kochol* v. *State*, AIR 1956 Tra/Co 207; *Sunil Kumar* v. *State of M.P.*, AIR 1997 SC 940 : 1997 Cr LJ 1183.

admissible under Section 157 of the Evidence Act.[47] Where a person making a dying declaration was alive and he said nothing about his dying declaration in his statement under Section 313, Cr.P.C., the said dying declaration has got no value.[48] Where the declarant survives, the dying declaration was not admissible but it could be used to corroborate or contradict his subsequent version[49] and not as substantive evidence.[50] Where the maker of a dying declaration survives, it can be used, not as a piece of substantive piece of evidence, but only to corroborate or contradict him.[51]

Although a dying declaration is not substantive evidence, it can be relied upon to contradict the veracity of a witness.[52]

The statement of the deceased would be admissible if it is made with the apprehension of impending death. If the declarant survives, it is not admissible in evidence.[53]

Where the prosecution claimed that the injured was alive for three to four days but did not produce any medical evidence, it was held that the dying declaration could not sustain conviction.[54]

(b) As to the cause of death.—When the victim is not proved to have died as a result of the injuries received in the incident, his dying declaration cannot be said to be the statement as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death[55] and such a statement does not fall within the ambit of dying declaration within the meaning of Section 32 of the Evidence Act.[56]

Where the victim received a grievous injury to the intestines on 26-4-1976, and his statement about the assault was recorded by the Executive Magistrate, and subsequently he was discharged from the hospital, but later, because of some complications, the victim was admitted in the hospital and it was found that the injury had become dangerous, and finally he died on 5-7-1977, it was held that the statement of the victim amounted to a dying declaration as to the cause of his death.[57]

Where, in a dying declaration, a lady stated that she was burnt to death by her husband and even though she was dying her husband should not be tortured, it was held that the dying declaration was admissible as to the cause of her death, and it could not be converted into one exculpative of the husband.[58]

An information lodged by a person who died subsequently, relating to the cause of his death, is admissible in evidence under this clause[59] and cannot be discredited.[60]

The statement may be oral or written. It is relevant whatever may be the nature of the proceeding in which the cause of the death of the person who made the statement comes into question. If a complaint is made in writing by a person, expressing apprehension of death at the hands of a person and he dies sometime thereafter, is admissible in evidence under this clause, when the person whose conduct is the source of the apprehension is charged with the offence of murder of the person who made the complaint. The deceased had submitted a written complaint against her husband, to the Commissioner of Police, which stated that she was afraid she would be killed by her husband. It was held that the statement

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47. *Maqsoodan* v. *State of U.P.*, AIR 1983 SC 126; *Khardah & Co. Ltd.* v. *Their Workmen*, AIR 1964 SC 719; *Raj Bali Singh* v. *Deputy Director of Consolidation*, AIR 1972 All 291; *Pra Bhakarlal* v. *Shamlal Guiablal*, (1972) 1 Mys LJ 472; *Naresh Rai* v. *State of Bihar*, 1994 Cri LJ 978 (para 19) (Pat).
48. *Qaiyum Mian* v. *State of Bihar*, 1993 Cr LJ 1756 (para 18) (Pat).
49. *Phundi* v. *State of M.P.*, 1993 Cr LJ 1881 (para 2) (MP).
50. *Gentela Vijayavardhan Rao* v. *State of A.P.*, AIR 1996 SC 2791 (para 17), **reversing** Cri A No. 620 of 1995, Dt. 2-11-1995 (AP).
51. *Gunamdhi Sundara* v. *State of Orissa*, 1984 Cr LJ 1215 (Ori); *Siddu Daryav Valia* v. *State of M.P.*, 1978 MPLJ 820 : 1978 Cr LJ 255 (NOC).
52. *Nanakchand* v. *State of U.P.*, (1970) 1 SCC 368.
53. **In re** : *Mannem Edukondalu*, AIR 1957 AP 729.
54. *Jaspal Singh* v. *Kerala*, 1979 Cr LJ 1386.
55. *Motisingh* v. *State of U.P.*, AIR 1964 SC 900.
56. *Uppagala Sathish Kumar* v. *State of A.P.*, 1999 Cr LJ 3906 (para 10) (AP).
57. *Dasrath* v. *State*, 1985 All LJ 1358.
58. *Vasant Narayan Pawar* v. *State of Maharashtra*, AIR 1980 SC 1270.
59. *Emperor* v. *Mohammad Shaikh*, ILR (1942) 2 Cal 144. **Also see** *G.S. Walia* v. *State of Punjab*, 1998 Cr LJ 2524 (SC) : AIR 1998 SC 2857; *Veerawati* v. *The State*, 1994 Cr LJ NOC 294 (All).
60. *Muruganandam* v. *The State*, 1994 Cr LJ NOC 297 (Mad).

showing apprehension of death on account of the conduct of the husband was admissible under this clause.[61] Writings of the deceased in her diary about the cause of her suicide, have the evidentiary value that of a dying declaration.[62]

Omission, in a dying declaration, of the motive of the accused to kill the deceased does not affect its veracity, insofar as it relates to the cause of death.[63]

A statement made by a person, since deceased, as to the cause of the death of another, is inadmissible in evidence. The statement of one dead person is not a relevant fact with respect to the question about the death of another person.[64]

(c) Expectation of death.—A dying declaration need not have been made in expectation of death.[65]

English Law admits as dying declaration only such statements of material facts concerning the cause and circumstances of homicide, as are made by the victim under the fixed and solemn belief that his death is inevitable and near at hand. The solemnity of the occasion on which the statements are made is deemed to supply the sanction of oath. The approach of death is deemed to produce a state of mind in which the statements of the dying person are to be taken free from ordinary motive. The law in India does not make the admissibility of a dying declaration dependent upon the persons having a consciousness of the approach of death; even if the person did not apprehend that he would die, a statement made by him about the circumstances of his death would be admissible under Section 32 of the Evidence Act.[66]

The Law in England is stated by PHIPSON as follows in P. 867 of 15th Edn., (2000), Para 35-63: "The deceased must be proved, to the satisfaction of the judge, to have been, at the time of making the declaration, in actual danger of death, and to have abandoned all hope of recovery. These principles were set out in *R.* v. *Perry*,[67] where LORD ALVERSTONE, C.J., delivering the judgment of the Court of Criminal Appeal, said that the judge might have to consider whether "the death of the deceased was imminent at the time declaration was made, and to determine from the language used by the deceased, whether the statement was made at a time when the deceased had 'a settled hopeless expectation of death' "(meaning)" that the deceased had abandoned all hope of living." If these conditions occur, it is immaterial that he lingered for several days, or even weeks, or that he subsequently entertained hope of survival. There must be a "settled hopeless expectation of death",[68] and not qualified by any prospect of recovery, however slight, as well as a brief, not, indeed, in an instant or immediate death; but in an imminent and impending, as distinguished from a deferred, one.

The declarant's mental condition may be inferred from his own statements at the time and including those whose admissibility is in question, his conduct, as in taking leave of his friends, giving directions for his funeral, etc., the questions of medical or other attendants expressed to him; the serious nature of the injury received and other attendant circumstances.

Where liasion between the accused and the wife of the deceased is the alleged motive of murder, the statement of the deceased, as reproduced by the witness, to the effect that the accused had approached the deceased for the release of the latter's wife from marriage is admissible under Section 32(1), though

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61. *Allijan Munshi* v. *State*, AIR 1960 Bom 290 : (1959) 61 Bom LR 1620; *Mohinder Singh* v. *State of Punjab* 1971 Cr LJ 1764 (Punj).
62. *Ramesh Kumar* v. *State of Chhattisgarh*, 2001 Cr LJ 4724 (para 22) (SC).
63. *State of Rajasthan* v. *Jawan Singh*, 1971 Cr LJ 1656 (Raj); *Abdul Sattar* v. *State of Mysore*, AIR 1956 SC 168
64. *Ratan Gond* v. *State of Bihar*, AIR 1959 SC 18; *Emperor* v. *Kunwarpal Singh*, AIR 1948 All 122
65. *Tehansingh* v. *State of Punjab*, AIR 1979 SC 1347; *Rajindrakumar* v. *State*, AIR 1960 Punj 310; *Chinnavalayan* v. *State of Madras*, (1959) 1 Mad LJ 246; In re : *Kalusingh*, AIR 1964 MP 30; *Allijan* v. *State*, AIR 1960 Bom 290, *Tindan* v. *State*, AIR 1965 HP 11; *Emperor* v. *Akbarali*, AIR 1933 Bom 479; *R.* v. *Premananda*, AIR 1925 Cal 876; *Pakalanarayana Swamy* v. *Emperor*, AIR 1939 PC 47; *Enayakthan* v. *Emperor*, 1935 Lah; *State of Orissa* v. *Kaushlya Devi*, AIR 1965 Ori 38; *State of Bihar* v. *Suraj Deo Rai*, ILR (1972) 51 Pat 205; *Bharat* v. *State of Rajasthan*, 1981 Cr LJ 1474; *Dinkar Bandhu Desmukh* v. *State*, AIR 1970 Bom 438.
66. *State* v. *Kanchan Singh*, AIR 1954 All 153. **Also see** *Surjeet Kaur* v. *State of M.P.*, 1994 Cr LJ 1886 (para 9) (MP); *Sant Gopal* v. *State of U.P.*, 1995 Cr LJ 312, (para 35) (All); *Kishan Lal* v. *State of Rajasthan*, 1999 Cr LJ 4070 (para 18) (SC) : AIR 1999 SC 3062; *Kans Raj* v. *State of Punjab*, 2000 Cr LJ 2993 (para 10) (SC) : AIR 2000 SC 2324.
67. (1909) 2 KB 697.
68. PHIPSON ON EVIDENCE, p. 865, para 35-60, 15th Edn. (2000).

the statement was not made before the murder, and the deceased was not near his death when he made the statement, as Section 32(1), is not subject to these limitations.[69]

The section only requires that there must be a statement made by a person about the cause of his death, for its admissibility. And it need not disclose all the surrounding circumstances.[70]

But such details, which fall outside the ambit of this are not strictly within the permissible limits laid down by this sub-section and unless absolutely necessary to make a statement coherent or complete, should not be included in the statement.[71]

However, it was held in *Lukka* v. *State*[72] that, to exclude from the evidence, the statements made by the deceased person as to the incidents which occurred during the course of the transaction which resulted in his death, other than those relating to the cause of his death, would be to import a limitation to the words used in the section which their natural meaning does not warrant.

7. FITNESS OF THE DECLARANT

Where one dying declaration was recorded by the doctors when the capacity of the deceased to remember was not impaired and the same was corroborated by circumstantial and medical evidence and the other was recorded by the Magistrate when his memory was impaired and he could not tell the name of the accused, relying on the second dying declaration was held to be not proper.[73] Certificate from the doctor and particularly his endorsement that the patient is not only conscious but is in a fit condition to record dying declaration is a must, without which the dying declaration may be rendered heavily suspect[74] but where the dying declaration was recorded by the duty doctor when the deceased was in a serious condition and there was no chance of tutoring, the fitness certificate by the hospital incharge was not necessary.[75] Endorsement by the doctor regarding the fitness of the declarant to make statement on the application, instead of on the declaration, itself does not render the dying declaration suspicious in any manner.[76] Where the consciousness state and good mental condition of the declarant was certified by the doctor and he gave answers to questions in a coherent manner, its veracity could not be affected by the reason of certain infirmities in it.[77] Mere presence of hundred per cent burn injuries of second degree and third degree on the person of the deceased was held to be not sufficient to presume that the deceased was not physically and mentally fit to give statement.[78] Where two doctors examined the deceased proving her to be fit to make statement and she survived also for twelve days, her statement could not be rejected merely because of serious burn injuries on her person.[79] Where there was no medical evidence to indicate that the victim of assault was not in a position to make dying declaration and he survived for half an hour also after the assault and he knew the assailants, his giving the assailants' names to his family member at the first opportunity could be relied upon.[80]

Where the dying declaration was recorded by the Police Officer after obtaining fitness certificate from the doctor and endorsement was also obtained after recording the declaration, it could not be disbelieved merely on the ground that the Magistrate had not recorded it, more so when the same was corroborated by the doctor as well as the Magistrate.[81] Where the evidence of the doctor and the bed head ticket verified the fit condition of the patient, inability to get his sign or thumb impression was explained and there was no interpolation and the *fardbeyan* recorded earlier corroborated the same, merely non-inclusion of the names of certain accused persons would not vitiate the dying declaration.[82]

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69. *Findan* v. *State*, AIR 1954 HP 11.
70. *State* v. *Govinda Pillai*, AIR 1952 Tr/Co 449.
71. *Balhshish Singh* v. *State of Punjab*, AIR 1957 SC 904: 1958 SCR 409, 415.
72. AIR 1955 Tra & Co. 104.
73. *State of M.P.* v. *Nisar Ahmad*, 1997 Cr LJ 3055 (MP).
74. *Vithal Sadashiv Gaikwad* v. *State of Maharashtra*, 1994 Cr LJ 2035 (para 6) (Bom).
75. *State of Rajasthan* v. *Ganesh Das*, 1995 Cr LJ 25 (paras 16 and 17) (Raj).
76. *Harjit Kaur* v. *State of Punjab*, 1999 Cr LJ 4055 (para 5) (SC) : AIR 1999 SC 2571.
77. *Nawab Ali Jhinnu* v. *State of U.P.*, 1994 Cr LJ 2191 (para 7) : AIR 1994 SC 1607.
78. *Hans Raj* v. *State of Rajasthan*, 1995 Cr LJ 1004 (para 25) (Raj), **following** *Suresh* v. *State of M.P.*, 1981 Cr LJ 775 : AIR 1987 SC 860.
79. *Om Prakash* v. *State of Punjab*, AIR 1993 SC 138 (paras 7 and 8).
80. *Prakash* v. *State of M.P.*, AIR 1993 SC 65.
81. *Surinder Paul* v. *State of Punjab*, 1997 Cr LJ 1745 (P&H).
82. *Chandeshwar Singh* v. *State of Bihar*, 1999 Cr LJ 3085 (paras 13 and 16) (Pat).

Where a headconstable recorded the statement of a gunshot victim when he was in a fit condition for the purpose of registering a case and the victim died before the services of any Magistrate could be available for recording his dying declaration, it was held that the statement recorded by the headconstable could be relied upon as dying declaration.[83] Where the dying declaration was recorded by the Magistrate in the hospital in the presence of the doctor who certified as to the fitness of the deceased and the same was corroborated by the testimony of the witnesses, conviction of the accused could be made on the basis of such dying declaration.[84] Where the medical evidence showed that the deceased was in a position to speak for about 10-15 minutes of the assault on her, the view taken by the High Court regarding the deceased being not in a position to make dying declaration was not tenable.[85] Where the evidence showed that the declarant was in a fit condition to make statement and no attempt was made to cross-examine the doctor to show that she was not able to speak clearly, her declaration could not be faulted.[86] Where the doctors said that the deceased was in a fit state of mind, it could not be said that he was not in a fit state of mind merely because his general condition was poor or that the degree of burns was high.[87] Mere fact that the victim was seriously injured would not mean that he was unconscious and rule out the possibility of making a dying declaration.[88] Where the dying declaration was recorded by the Magistrate who had put substantial questions regarding the circumstances leading to her death and the answers given by her indicated that she was absolutely in a fit state of mind, mere omission to mention by the doctor that she was in a fit state of mind was immaterial.[89]

Where the doctor deposed that, when the deceased was admitted to hospital he was "not in speaking condition", recording of the alleged dying declaration was disbelieved.[90] The dying declaration recorded by the Police Constable in the presence of the doctor but without obtaining any certificate from him as to her capacity to make correct statement, was held to be wholly insufficient to base conviction[91] but where the doctor deposed that the police recorded that the statement of the deceased in his presence which the police affirmed, and she was in a fit condition to make statement, it was held to be truthful and inspired

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83. *Bhagirath* v. *State of Haryana*, 1997 Cr LJ 81 (SC) : AIR 1997 SC 234 (para 27). **Also see** *Jai Prakash* v. *State of Haryana*, 1999 Cr LJ 837, at p. 838 (SC) : AIR 1999 SC 3361 and *Paras Yadav* v. *State of Bihar*, AIR 1999 SC 644 : 1999 Cr LJ 1122, at pp. 8 and 9; *Babu Ram* v. *State of Punjab*, (1998) 9 SCC 495 : 1998 SCC (Cri) 1043.

84. *Nagulonchа Krishna* v. *State of A.P.*, 1997 Cr LJ 2834 (AP). Three dying declarations in a fit state of mind and properly recorded. *Navakoti Veera Raghavulu* v. *State of A.P.*, AIR 1997 SC 727 : 1997 Cr LJ 841.

85. *State of M.P.* v. *Dhirendra Kumar*, AIR 1997 SC 318, Criminal Appeal No. 210 of 1982 decided on 18-11-1982 (MP) **reversed. Contra : see** *State of Orissa* v. *Parasuram Naik*, AIR 1997 SC 3569 : 1997 Cr LJ 4404.

86. *Jai Prakash* v. *State of Haryana*, 1999 Cr LJ 837, at p. 838 (SC) : AIR 1999 SC 3361.

87. *Rameshkumar Moraji Marwadi* v. *State of Gujarat*, 1998 Cr LJ 2697 (para 16) (Guj). The Court referred to *Padmaben Shamalbhai Patel* v. *State of Gujarat*, (1991) 1 SCC 744 (para 10) (SC). 100% superfecial burn, patient fully conscious, veracity can't be doubtful, *Vithal Sadashiv Gaikwad* v. *State of Maharashtra*, 1994 Cr LJ 2035 (para 5) (Bom).

88. *Rokad Singh* v. *State of M.P.*, 1994 Cr LJ 494 (para 6) (MP). **Also see** *Bashir Shah* v. *State of Rajasthan*, 1994 Cr LJ 2526 (Raj); *Ram Narain* v. *State of Rajasthan*, 1994 Cr LJ 2513 (para 12) (Raj). **Contra :** Deceased suffering a number of injuries, inability to make dying declaration inferred, *Mohar Singh* v. *State of Rajasthan*, (1998) 8 SCC 654.

89. *Kodam Gangaram* v. *State of A.P.*, 1999 Cr LJ 2181 (paras 4 and 5) (AP). **See also** *Pandian K. Nadar* v. *State of Maharashtra*, 1993 Cr LJ 3883 (para 20) (Bom); *Koli Chunilal Savji* v. *State of Gujarat*, 1999 Cr LJ 4582 (paras 7 and 8) (SC) : AIR 1999 SC 3695. **Contra :** *Paparambaka Rosamma* v. *State of A.P.*, 1999 Cr LJ 4321 (para 8) (SC) : AIR 1999 SC 3455, **reversing** Cri A No. 662 of 1996, Dt. 6-3-1997 (AP).

90. *Swaminathan* v. *State*, 1993 Cr LJ 2379 (para 46) (Mad). **Also see** *Chehraji Chhagnaji Koli* v. *State of Gujarat*, 1998 Cr LJ 2573 (para 22) (Guj). Two dying declarations, no endorsement by the doctor about the fitness of deceased, can't be relied upon, *Kishori Das* v. *State of W.B.*, 1997 Cr LJ 315 (Cal). The Court referred to *Jagga Singh* v. *State of Punjab*, 1995 Cal Cr LJ (SC) 18 : AIR 1995 SC 135 and *Maniram v State of M.P.*, 1994 Cal Cri LR 118 : 1994 Cr LJ 946; *Irappa* v. *State of Karnataka*, 1998 Cr LJ 1806 (paras 8 and 10) (Kant); *Ram Singh* v. *State*, 1997 Cr LJ 372 (Del); *Sita Ram* v. *State of Rajasthan*, 1998 Cr LJ 287 (Raj); *Akbar Ashraf Khan* v. *State of Maharashtra*, 1995 Cr LJ 3575 (para 11) (Bom); *State of Bihar* v. *Satya Narayan Mishra*, 2000 Cr LJ 714 (para 16) (Pat); *State of U.P.* v. *Dambar*, 2000 Cr LJ 4690 (para 29) (All); *Dhanjibhai Pethabhai* v. *State of Gujarat*, 2001 Cr LJ 1587 (para 4) (Guj); *Arvind Singh* v. *State of Bihar*, 2001 Cr LJ 2556 (paras 18-20) (SC) : AIR 2001 SC 2124; possibility of tutoring also, *Gokul Singh* v. *State of M.P.*, 2000 Cr LJ 1283 (paras 12 and 13) (MP). Whether the deceased was in a medically fit condition to make dying declaration, doubtful, other discrepancies, not acceptable, *Ramesh Bhagwan Manjrekar* v. *State of Maharashtra*, 1997 Cr LJ 796 (Bom), conviction can't be based on such dying declaration, *State of Karnataka* v. *Shankar*, 2000 Cr LJ 1917 (para 1) (Kant). **Also see** *Rod Singh* v. *State of M.P.*, 1994 Cr LJ 1440 (MP); such evidence can't be used against accused, *Kodadi Srinivasa Lingam v State of A.P.*, 2001 Cr LJ 602 (para 21) (AP).

91. *State of Karnataka* v. *Aslam*, 2000 Cr LJ 1167 (paras 2 and 3) (Kant). **See also** *Laxmi* v. *Om Prakash*, 2001 Cr LJ 3302 (paras 22, 26 and 27) (SC) : AIR 2001 SC 2383.

confidence[1] and it was held to be truthful also where the doctor, certifying the mental state of the deceased when the police recorded the statement, was not examined where the deceased was found not only conscious but also fit to make statement.[2] Where the medical certificate only stated that the deceased was physically fit to make statement and did refer to her mental condition at the relevant time though she had been a mental patient, conviction could not be based solely on it.[3] Where neither the doctor was present when the statement was recorded nor did the Executive Magistrate recording it ascertain as to the mental condition of the patient to make statement, such a dying declaration did not inspire confidence.[4]

The certificate of the doctor as to the mental state of the declarant is not sufficient and the Magistrate himself must ascertain the declarant's mental state. In the instant case, the Magistrate failed to do so whereas the declarant was not giving coherent and consistent statements in response to his questions which also were not recorded. The dying declaration was held to be unreliable.[5] The dying declaration recorded by the Tahsildar without ascertaining from the doctor about the mental fitness of the deceased to make it and also not in question and answer form, was held to be unreliable.[6] It is not necessary that the Magistrate should put a formal direct question to the injured at the time of making the dying declaration as to the state of mind of the injured but prudence requires to take such a precaution. However, failure to do so is not fatal, moreso when the dying declaration was corroborated by medical evidence.[7]

Where 24 hours before recording the dying declaration, the declarant was certified to be unfit to make statement and evidence showed that her condition was worsening and the doctor, attesting the dying declaration did not certify that she was in a fit condition to make statement, such a document could not be relied upon.[8]

Mental and physical condition of the declarant has got to be proved by positive evidence. Mere producing a medical certificate is not sufficient. It should be substantiated by the doctor.[9]

8. "ANY CIRCUMSTANCES OF THE TRANSACTION WHICH RESULTED IN HIS DEATH"

In *Pakala Narayana Swamy* v. *Emperor*[10]; the Privy Council considered the meaning of the expression "Circumstances of the transaction" occurring in Section 32(1). LORD ATKIN observed: "Their Lordships are of opinion that the natural meaning of the word "cause" does not convey any of these limitations. The statement may be made before the cause of death had arisen or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction; general expressions indicating fear or suspicion, whether of a particular individual or otherwise, and not directly related to the occasion of the death, will not be admissible. But statements made by the deceased that he was proceeding to the spot, where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would, each of them, be circumstances of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. 'Circumstances of the transaction' is a phrase that no doubt conveys some limitations. It is not as broad as the analogous use in 'circumstantial evidence' which includes evidence of all relevant facts. It is, on the other hand, narrower than *res gestae*. Circumstances must have some proximate relation to the actual occurrence; though, as far instance, in a case of prolonged poisoning, they may be related to dates at a considerable distance from the date of the actual fatal dose. It will be observed that 'the circumstances' are of the transaction which resulted in the death of the declarant. It is not necessary that there should be a known transaction, other than that by which the death of the declarant has ultimately

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1. *Ramesh* v. *State of Maharashtra*, 2001 Cr LJ 3780 (para 16) (Bom).
2. *Shaikh Hamid Shaikh Mehtab* v. *The State of Maharashtra*, 2001 Cr LJ NOC 23 (Bom) : (2001) 5 Bom CR 391.
3. *Uka Ram* v. *State of Rajasthan*, 2001 Cr LJ 1821 (paras 10 and 11) (SC) : AIR 2001 SC 1814, **reversing** 1998 Cr LJ 725 (Raj).
4. *Ramesh* v. *State of Maharashtra*, 2001 Cr LJ 3780 (para 13) (Bom).
5. *Krishna Chandra* v. *State*, 1966 Cr LJ 1507 (paras 8, 12 and 16) (All). **See also** *Dilip* v. *State of Maharashtra*, 1996 Cr LJ 1911 (para 6) (Bom); *Laxmi* v. *Om Prakash*, 2001 Cr LJ 3302 (paras 1 and 28) (SC) : AIR 2001 SC 2383.
6. *Venkappa K. Chowdari* v. *State of Karnataka*, 1996 Cr LJ 15 (para 7) (Kant).
7. *Mandala Bhadraiah* v. *State of A.P.*, 1994 Cr LJ 1275 (para 7) (AP).
8. *Fatima Kom Mastansab Nadaf* v. *State of Kerala*, 1999 Cr LJ 1175, at p. 1177 (Kant).
9. *Adevappa Nagappa Anagolkar* v. *State of Kerala*, 1998 Cr LJ 584, at p. 586 (Kant).
10. 1939 PC 42 : 66 IA 66.

been caused, for the condition of the admissibility of the evidence is that, 'the cause of the declarant's death comes into question'. In the present case, the cause of the deceased's death comes into question. The transaction is one in which the deceased was murdered on 21st March or 22nd March, and his body was found in a trunk proved to be brought on behalf of the accused. The statement made by the deceased on 20th or 21st March that he was setting out to the place where the accused lived, and met a person, the wife of the accused, who lived in the accused's house, appears clearly to be a statement as to some of the circumstances of the transaction which resulted in his death. The statement was rightly admitted."[11]

The words "as to any of the circumstances of the transaction which resulted in his death", are wide enough to include the motive of the alleged crime. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be the circumstances of the transaction; general expressions indicating fear or suspicion, whether of a particular individual or otherwise, and not directly related to the occasion of the death, will not be admissible.[12]

The expression means only such facts or series of facts which have direct or organic relation to the death. The circumstances must have some proximate relation to the actual occurrence. Any statement made by the deceased long before the incident of murder will not be admissible.[13] Where the statement of the prosecutrix was recorded by the police 11 day after she was raped and she committed suicide after more than five and a half months, her statement, not being in the series of circumstances which resulted in her death, could not be treated as a dying declaration.[14] Where the injuries suffered by the deceased by the gunshot at the hands of the accused developed toxaemia which caused his death, it was held that the trial Court erred in holding that, as the death was not due the injuries caused by the accused, the dying declaration was inadmissible in evidence.[15]

There need not necessarily be a direct nexus between "circumstances" and "death". It is enough if the words spoken by the deceased refer to any circumstance which has connection with any of the transactions which ended up in the victim's death.[16]

Where the declaration of the deceased is also the evidence of his conduct, which supplies a very important circumstantial link in the chain of circumstances of the case, and the witnesses found it difficult to correctly reproduce the words which they heard the deceased uttering after he had been shot, all that they can be expected to say are the words very similar to the words of the deceased, and such witnesses can be relied on.[17]

Where the statement disclosed the circumstances under which the deceased was seriously injured, ultimately resulting in the death, it is admissible.[18]

Section 32 refers to two kinds of statements:—

(1) When the statement is made by a person as to the cause of his death; or

(2) When the statement is made by a person as to any of the circumstances of the transaction which resulted in his death.

The expression "any of the circumstances of the transaction which resulted in his death" is wider in scope than the expression "the cause of his death". The words "resulted in his death" do not mean "caused his death".[19]

Where the statement of the deceased was that while he was going to the accused to release his cow which the accused had confined, and that there was a quarrel during the course of which the deceased

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11. **See also** *Gokul Chandra* v. *State*, AIR 1950 Cal 306.
12. *State* v. *Ajit Singh*, ILR (1976) 2 Punj 362 : 1975 Punj LJ (Cri) 261; *Pakalanarayana Swamy* v. *Emperor*, 1939 PC 47; *Ratnakaran* v. *State*, AIR 1955 Tra & Co. 87; *Chinnavalayan* v. *State of Madras*, (1959) 1 MLJ 246; *Golaka Behari* v. *Emperor*, AIR 1938 Cal 51; *Emperor* v. *Faiz*, AIR 1916 Lah 106; *Ranjit Singh* v. *State of M.P.*, AIR 1952 HP 81; *Findan* v. *State*, AIR 1954 HP 11; *Shiv Kumar* v. *State of U.P.*, 1966 Cri App R (SC) 281.
13. *Omkar* v. *State of M.P.*, 1974 Cr LJ 1200; *Pakalanarayana Swamy* v. *Emperor*, AIR 1939 PC 47.
14. *Sudhakar* v. *State of Maharashtra*, 2000 Cr LJ 3490 (para 11) (SC) : AIR 2000 SC 2602.
15. *Bhagirath* v. *State of Haryana*, AIR 1997 SC 234 : 1997 Cr LJ 81.
16. *Rattan Singh* v. *State of H.P.*, AIR 1997 SC 768 (paras 13 and 15) : 1997 Cr LJ 833 (SC).
17. *Premnarayan* v. *State*, AIR 1957 All 177.
18. *Dukhidevi* v. *State*, AIR 1965 Ori 33.
19. *State* v. *Ramprasad Singh*, AIR 1953 Pat 354; *Chinnavalayan* v. *State of Madras*, (1959) 1 MLJ 246.

had sustained an injury from the accused resulting in his death, it was held to be admissible, as it related to the circumstances of the transaction which resulted in his death[20] but where there was possibility of the accused having fired in self-defence, the dying declaration, fixing him as the sole author of the fatal injury, would not be a corroborative factor for establishing the charge of murder against him.[21]

Where a house-wife died of drowning in a well, it was held that her father's evidence that she had told him earlier that she was subjected to cruelty by her husband and in-laws, was admissible under Section 32.[22] Where the alleged statement was made to the witnesses, some months prior to the murder, about the intention of the deceased to conceal a will and disinherit the accused, (but the statement was not made in the presence of the accused) and the prosecution wanted to rely on it for the motive aspect of the accused, it was held that, as the statement did not relate to the cause of the death or as to the circumstances resulting in his death, it was inadmissible.[23]

Where it was alleged that the accused had attempted to seduce a girl who had waited her mother to come back by night when her mother left for another village, as the accused had attempted to have sexual intercourse on a previous occasion, it was held that such statement of the girl was inadmissible as it did not relate the circumstances under which the girl met with her death.[24] Where the injury allegedly caused by the husband to his wife was not shown to have proximate connection with her death, the evidence of the relatives of the deceased-wife made on behalf of her dying declaration was held to be hearsay and not relevant under this section.[25]

When motive was tried to be inferred by the prosecution from the statement made by the deceased, it was held that such statement was not admissible, since general expressions indicating suspicion or fear, not directly related to the cause of death, are not admissible.[26]

The Bombay High Court has held that the wide words used in the clause show that it is intended to cover statements other than 'dying declarations'. The words 'as to any of the circumstances of the transaction which resulted in his death' cover also other statements made by a deceased person.[27]

A brief statement ("save me, a person has stabbed me") made to relatives half an hour before death, was followed by a detailed version in the presence of the medical officer; the Supreme Court attached value to the statement.[28]

Where, in a dying declaration, the deceased stated that the accused had assaulted him "on account of enmity caused by my acting as a wizard", it was held that the statement made by the deceased was a statement "as to the circumstances of the transaction which resulted in his death", so as to be admissible under this clause.[29]

9. PROXIMITY BETWEEN TIME OF STATEMENT AND DEATH

The problem of proximity was for the first time raised before the Supreme Court in *Sharad* v. *Maharashtra*[30]. A married woman had been writing to her parents and other relative about her critical condition at the hands of her in-laws. She lost her life some four months later. Her letters were sought to be proved as a dying declaration. The court held that the statements were not so remote in time as to lose their proximity with the cause of death. FAZAL ALI J. conducted a vast survey of authorities and stated the following propositions:

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20. *Sathischandra Saha* v. *State*, AIR 1954 Cal 379.
21. *Harish Kumar* v. *State of M.P.*, 1996 Cr LJ 3511 (para 20) (SC) : AIR 1996 SC 3433, **reversing** Cri A No. 533 of 1983, Dt. 25-8-1986 (MP).
22. *Balram Prasad Agrawal* v. *State of Bihar*, AIR 1997 SC 1830 : 1997 Cr LJ 1640.
23. *Venkatasubba Reddy* v. *Emperor*, AIR 1931 Mad 689.
24. *Venkata Gadu* v. *Emperor*, 1938 Mad Cr C 58.
25. *Imran Khan* v. *State of M.P.*, 1995 Cr LJ 17 (paras 20 and 22) (MP).
26. In re : *Baggam Appalanarasaiah*, AIR 1941 Mad 101; *Public Prosecutor* v. *Munigan*, AIR 1941 Mad 359.
27. *Shivabhai* v. *Emperor*, (1926) 50 Bom 683, 28 Bom LR 1013; *Autar Singh* v. *The Crown*, (1923) 4 Lah 451, which lays down that this clause covers only 'dying declarations', is not correctly decided, and is **dissented from** in *Inayat Khan* v. *The Crown*, (1934) 16 Lah 589; *Tahal Singh* v. *Punjab*, AIR 1979 SC 1347.
28. *Habib Usaman* v. *Gujarat*, AIR 1979 SC 1181; *Jayaraj* v. *Tamil Nadu*, AIR 1976 SC 1519.
29. *King-Emperor* v. *Somra Bhuian*, (1937) 16 Pat 593.
30. AIR 1984 SC 1622. **Also see** *Najjam Faraghi* v. *State of West Bengal*, AIR 1998 SC 682 (para 9) : 1998 Cr LJ 866.

1. A declaration will be relevant whether death is homicide or suicide, provided it relates to the cause of death or exhibits circumstances leading to death.

2. The test of proximity cannot be literally issued and practically reduced to a cut and dried formula of universal application. Distance of time would depend on or vary with the circumstances of each case. For example, where death is a logical consequence of a continuous drama long in process and in a way a finale to the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Where death takes place within a short time of the marriage, or the distance of time is not spread over more than three to four months, the statement may be admissible.

The Supreme Court held that there were two possibilities namely it may be a case of suicide or murder. The expression "cause of death" applies to both. Where there are two possibilities open, the accused is entitled to benefit of doubt and could not be convicted on the statement amounting to dying declaration.[31]

There must be some proximate relation to the occurrence, if a statement is to be admitted as a dying declaration. General expressions indicating fear or suspicion not directly to the occasion of death are not admissible.[32]

Statement soon after the incident in which a person received injuries was held admissible, where medical evidence showed that the injuries were at least contributory cause of his death.[33]

For a statement to be attracted under Section 32(1), it is not necessary that the death should have a nexus in terms of fixed time, with the statement, nor that the victim who made the statement should essentially be in apprehension of immediate death. The conditions are that the statement should relate to the circumstances surrounding the event which ultimately led to death. There should be nexus between the circumstances stated by the victim and his death. In the instant case, the victim made two dying declarations to independent persons and died three months after the incident of firing due to toxaemia, still the declarations were held to be admissible.[34]

In a decision of the Supreme Court JUSTICE MOHAN summed up the principles governing dying declaration as decided by the decisions of the Supreme Court as follows:[35]

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.[36]

(ii) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.[37]

(iii) The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration.[38]

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence.[39]

(v) Where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it is to be rejected.[40]

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31. **See** for a discussion of this case 1984 (20) ASIL pages 103 to 107.
32. *Shiv Kumar* v. *State of U.P.*, 1966 Cr App R (SC) 281.
33. *Jageshwar Singh* v. *State of Bihar*, 1968 Cr App R (SC) 73. **Also see** *Sooraj* v. *State*, 1994 Cr LJ 1155 (para 12) (Ker).
34. *Vijay Singh* v. *State of M.P.*, 2000 Cr LJ 650 (paras 19A and 20) (MP).
35. *Pamben* v. *State of Gujarat*, AIR 1992 SC 1817 : 1992 Cr LJ 2919 : (1992) 2 An WR (SC) 60 at pages 64 and 65. **Followed in** *Surjeet Kaur* v. *State of M.P.*, 1994 Cr LJ 1886 (para 7) (MP) and *Vithal Sadashiv Gaikwad* v. *State of Maharashtra*, 1994 Cr LJ 2035 (para 15) (Bom).
36. *Munnu Raja* v. *State of U.P.*, (1976) 2 SCR 764 : AIR 1976 SC 2199.
37. *State of U.P.* v. *Ram Sagar Yadav*, AIR 1985 SC 416; *Ramavati Devi* v. *State of Bihar*, AIR 1983 SC 164.
38. *Rama Chandra Reddy* v. *Public Prosecutor*, AIR 1976 SC 1994.
39. *Rasheed Beg* v. *State of Madhya Pradesh*, (1974) 4 SCC 264 : AIR 1974 SC 332.
40. *Kake Singh* v. *State of M.P.*, AIR 1982 SC 1021.

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction.[41]

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.[42]

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.[43]

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration has to look to the medical opinion. But where the eye-witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail.[44]

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon."[45]

The principle "*memo moriturus proesumitur mentiri*" (a dying person would not normally tell a lie) which governs the credibility of dying declaration, does require serious examination.[46]

10. DELAY IN RECORDING DYING DECLARATION

Where delay in recording the dying declaration was explained by the prosecution, it was admissible.[47] Where the dying declaration was recorded by the Magistrate five hours after the incident, it was held to be no inordinate delay and, as there was no possibility of tutoring, the dying declaration was to not vitiated.[48]

11. PROCEDURE OF RECORDING DYING DECLARATION

Where there was no certification by the scribe of the dying declaration that whatever he had scribed was the correct statement of the deceased, the doctor had made no certification that the deceased was in a fit state to give statement, no attempt was made to get the statement recorded by a Magistrate, it was not recorded in the language of the deceased, the manner of recording was also doubtful, it was recorded in violation of Police Rules and the senior doctor though present was not taken into confidence by the police before recording the statement, such a dying declaration could not be relied upon to sustain conviction.[49] Ordinarily, whenever an injured person is in precarious condition, the investigating officer should requisition the services of a Magistrate for recording the dying declaration. In fact, the investigating officers are naturally interested in the success of investigation and the practice of investigating officer himself recording a dying declaration during the course of investigation ought not to be encouraged.[50] Where the Magistrate took all the necessary precautions before recording the dying declaration and the same was corroborated with the evidence of the other prosecution witnesses, the fact that the deceased had sustained 90% burns was no ground to doubt her testimony.[51] Where the Magistrate, though obtained a certificate from the doctor as to the deceased being in a fit state of mind to make statement before and after recording her statement, asked her no question as to whether she was in a fit condition of mind to make statement, the statement so recorded could not be discarded merely for such failure.[52] On the other hand where the Spl. Executive Magistrate had satisfied himself that the

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41. *Ram Manorath* v. *State of U.P.*, 1981 SCC 581 (Cr).
42. *State of Maharashtra* v. *Krishnamurthi Laxmipati Naidu*, AIR 1981 SC 617.
43. *Surajdeo Oza* v. *State of Bihar*, AIR 1979 SC 1505.
44. *Nanahau Ram* v. *State*, AIR 1988 SC 912.
45. *State of U.P.* v. *Madan Mohan*, AIR 1989 SC 1519.
46. *Vithal Sadashiv Gaikwad* v. *State of Maharashtra*, 1994 Cr LJ 2035 (para 16) (Bom).
47. *G S Walia* v. *State of Punjab*, 1998 Cr LJ 2524 (para 10) (SC) : AIR 1998 SC 2857.
48. *Koli Chunilal Savji* v. *State of Gujarat*, 1999 Cr LJ 4582 (para 8) (SC) : AIR 1999 SC 3695.
49. *Rajendra Singh* v. *State of Rajasthan*, 1998 Cr LJ 2126. Dying declaration recorded in violation of Rajasthan Police Rules, unreliable, *Kalawati* v. *State of Rajasthan*, 1994 Cr LJ 691 (paras 26 and 27) (Raj). **Also see** *Bashir Shah* v. *State of Rajasthan*, 1994 Cr LJ 2526 (para 28) (Raj). Dying declaration not recorded as per Punjab Police Rules, uncorroborated, benfefit of doubt, *State of H.P.* v. *Rakesh Kumar*, 1999 Cr LJ 564, at p 575 (HP). **Contra** : *Raj Kumar* v. *State of Punjab*, 2000 Cr LJ 3218 (paras 22, 23 and 29) (P&H).
50. *Munnu Raja* v. *State of M.P.*, AIR 1976 SC 2199 : 1976 Cr LJ 1718.
51. *Kodam Gangaram* v. *State of A.P.*, 1999 Cr LJ 2181 (para 6) (AP). **See also** *Ramphal* v. *State of Rajasthan*, 2001 Cr LJ NOC 54 (Raj) : (2001) 1 Raj Cri C 55.
52. *G.R. Ghyare* v. *State of Maharashtra*, 1993 Cr LJ 3414 (para 7) (SC).

declarant was in a perfectly fit condition to make statement which was supported by the Police Officer, it was held to be not vitiated by interpolations or apparent inconsistencies and be relied upon inspite of the absence of the doctor's fitness certificate.[53] Where the dying declaration was recorded by the Magistrate but it was neither signed by deceased nor contained date and time of its recording and no explanation was given that the declarant was not in a position to sign, order of acquittal was held to be proper.[54] Only intimations about the injuries and the incident to the concerned Magistrate and the police without taking any required precautions cannot be treated as dying declarations.[55] Generally dying declaration ought to be recorded in question answer form but if it is not elaborate and consists of only a few sentences and is in the actual words of the maker, the mere fact that is not in question answer form cannot be a ground against its acceptability or reliability.[56] Dying declaration should preferably be in question and answer form, but the same is not laid down as a universal rule.[57]

12. PROOF OF DYING DECLARATION

A dying declaration may be written or oral. It may be proved by the evidence of a witness who heard it being made. It cannot be treated as a deposition unless made in the presence of the accused and before a Magistrate[58] but once the defence admits the document, no formal proof is necessary and it can be read in evidence for all purposes though its author is not examined before the Court.[59] It was held that the written record of a dying declaration, not taken down in the presence of the accused, is admissible when it is proved by a witness that the statements contained therein were, in his presence recorded by a Magistrate, and read over to the deceased who admitted their correctness.[60] Where each and every sentence of the maker was translated by the S.D.M., there was no need of dying declaration so recorded to recount it before its maker and ask for its correctness.[61]

Where the declarant mentioned the name of the accused in the presence of the doctor who gave him preliminary treatment and the doctor's evidence was found to be very clear and unshaken in any manner in the cross-examination, the dying declaration was held to be reliable.[62]

The dying declaration was considered to be unreliable where the declarant was resting while he was assaulted and the other deceased was at a distance of three furlongs from him, besides the witnesses to whom the dying declaration was alleged to have been made, categorically denied the same, it was held that no dying declaration was made.[63]

If original dying declaration is proved to have been lost, prosecution is entitled to give secondary evidence.[64]

When a dying declaration is recorded by a Magistrate, who is not a committing Magistrate, it must be proved by calling the Magistrate as a witness.[65] The writing cannot be admitted to prove the statement made. It may be used to refresh the witness' memory.[66] Where two interpretations of the statement recorded as a dying declaration were possible, the Supreme Court did not interfere with the meaning put by the High Court.[67] A dying declaration is not the proof of the truth of its contents but only of the fact

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53. *Pandian K. Nadar* v. *State of Maharashtra*, 1993 Cr LJ 3883 (para 19) (Bom).
54. *State of U.P.* v. *Shishupal Singh*, 1994 Cr LJ 617 : AIR 1994 SC 129. **Contra :** *Ajay Kumar* v. *State of M.P.*, 1994 Cr LJ NOC 238 (MP).
55. *Vakati Lavakishore* v. *State of A.P.*, 1997 Cr LJ 285 (AP).
56. *Ram Bihari Yadava* v. *State of Bihar*, AIR 1998 SC 1850 : 1998 Cr LJ 2515 (para 9).
57. *Rabi Chandra* v. *State of Orissa*, AIR 1980 SC 1738 : 1980 Cr LJ 1257. **Also see** *State of Rajasthan* v. *Bhup Singh*, (1997) 10 SCC 675 : 1997 SCC (Cri) 1032; *Syed Shaik Shavali* v. *State of A.P.*, 1994 Cr LJ NOC (AP) : (1993) 2 All Cri LR 301; *Surjeet Kaur* v. *State of M.P.*, 1994 Cr LJ 1886 (para 11) (MP).
58. In the matter of the petition of *Samiruddin*, (1881) 8 Cal 211; **followed in** *Saratchandra Kar* v. *Emperor*, (1924) 52 Cal 446; **See however**, *Abdul Jalil* v. *The Empress*, (1886) PR No. 13 of 1886 (Cr).
59. *Kodadi Srinivasa Lingam* v. *State of A.P.*, 2001 Cr LJ 602 (para 19) (AP).
60. *Emperor* v. *Balaram Das*, (1921) 49 Cal 358.
61. *Ram Dhar* v. *State*, 1997 Cr LJ 292 (Del).
62. *Nisar Ahmad Fajmohmed Kaji* v. *State of Gujarat*, (1998) 9 SCC 23 : 1998 SCC (Cri) 967.
63. *State of Karnataka* v. *Narayan Babu Sanadi*, AIR 1999 SC 848 (para 4) : 1999 Cr LJ 589.
64. *Aher Rama Gova* v. *State of Gujarat*, AIR 1979 SC 1567.
65. *Reg* v. *Fata Adaji*, (1874) 11 BHE 247, 248; contra. Karuppan Samban, (1915) 31 IC 359, 16 Cr LJ 759.
66. *Krishnama Naicken*, In re : (1930) 54 Mad 678.
67. *Vithal Somenath Kore* v. *Maharashtra*, AIR 1978 SC 519; *State of H.P.* v. *Wazir Ad.*, AIR 1978 SC 315.

stated.[68] If it is truthful it can be the sole basis of conviction.[69] When it is not properly proved, it cannot be used to corroborate other evidence.[70]

The statement made by a deceased person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, is admissible in evidence, notwithstanding the fact that there is no record of the questions put to the deceased and the answers given by the deceased in his own words to each of those questions. Whether that statement should be acted upon, whether that statement has evidential value, whether that statement is reliable, these are all considerations which do not go to the question of admissibility but to probative value.[71]

Where the only serious injury was in the abdomen not sufficient to make a person unconscious, a statement made within one hour of the assault was accepted as a dying declaration.[72]

The first information report is admissible as substantive evidence when the maker died before the matter came before the court.[73]

The first information report is recorded by a police officer who may also be the investigating officer. Since F.I.R. is not a confession, the police officer is not disqualified from giving evidence. Even so, the Supreme Court has pointed out that, as a matter of caution, the practice of dying declarations being recorded by the investigating officer himself should not be encouraged.[74] Where a declaration was recorded by the investigating officer alone without anybody's signature upon it and without specifying the time, the Supreme Court rejected it.[75]

No particular procedure has been prescribed by any provision of law, for recording such a declaration and it is also not necessary to give any warning before a dying declaration is recorded. Even a layman is competent to record a dying declaration and prove the same in the usual manner, like other facts and documents. When a Magistrate who is not specially empowered to record statements under Section 164 of the Code of Criminal Procedure, takes down a statement which subsequently turns out to be a dying declaration, there is nothing in law to prohibit the Magistrate from proving in the ordinary manner the statement made to him by the deceased person.[76]

A statement recorded by a doctor alone cannot be rejected particularly where the life was fast ebbing and there was no time to call a police officer or a Magistrate.[77]

Where the Magistrate stated that he had dictated the statement of the deceased to the Police Officer who denied the recording of the statement, it was held that the recording of the dying declaration was not proved.[78]

13. CORROBORATION

A conviction based upon an uncorroborated dying declaration is legal.[79]

There is neither any rule of law nor of prudence that a dying declaration requires to be corroborated by other evidence.[80] Where the dying declaration was true and reliable, corroboration was not necessary.[81]

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68. *Abhimanya Biswas* v. *Abdul,* AIR 1981 Cal 444.
69. *State of Assam* v. *M. Ahmed,* AIR 1983 SC 274.
70. *Banka Naiko* v. *Orissa,* AIR 1976 SC 2013.
71. *State* v. *Parsottam Bhikhabai,* (1957) 60 Bom LR 153 (FB).
72. *Suraj Deo* v. *State of Bihar,* AIR 1979 SC 1505.
73. *Lalaram,* (1953) MB 343.
74. *Dalip Singh* v. *Punjab,* AIR 1979 SC 1173; *Munna Raja* v. *M.P.,* AIR 1976 SC 2199; *Ramawati* v. *Bihar,* AIR 1983 SC 274; *K. Ramachandran* v. *Public Prosecutor,* AIR 1976 SC 1994.
75. *State (Delhi Admn.)* v. *Laxman Kumar,* AIR 1986 SC 250.
76. *State* v. *Ouseph,* (1955) TC 39.
77. *A.M.A. Rehman* v. *Gujarat,* AIR 1976 SC 1782.
78. *Gulam Hussain* v. *State of Delhi,* 2000 Cr LJ 3949 (para 10) (SC) : AIR 2000 SC 2480.
79. *Emperor* v. *Kunwarpal Singh,* (1948) All 122; *State* v. *Kanchan Singh,* (1955) 1 All 642; *Ulahannan* v. *State,* 1954 TC 1308; *Lumba* v. *State,* (1952) 2 Raj 298; *Kori* v. *State,* AIR 1960 Cal 50.
80. *Harbans Singh* v. *State of Punjab,* AIR 1962 SC 439; *Amba Shanker Dave* v. *State of Rajasthan,* ILR (1971) 21 Raj 541; *Tapinder Singh* v. *State of Punjab,* AIR 1970 SC 1566; *Tara Chand Sutar* v. *State of Maharashtra,* AIR 1962 SC 130 : 1962 (1) Cr LJ 196; *Gopa Ram* v. *State of Rajasthan,* 1996 Cr LJ 2987 (Raj).
81. *S.K. Katkar* v. *State of Maharashtra,* 1995 Cr LJ 3579 (para 15) (Bom). **See also** *Gopali Devi* v. *State (Govt. of N.C.T. of Delhi),* 2001 Cr LJ NOC 158 (Del) : (2001) 89 DLT 9.

Corroboration would not always be necessary if the dying declaration is complete in its accusation, and there is nothing to show that the maker of the statement had anything further to add. Where the dying declaration of the deceased, recorded at a police station, was a complete statement but, on account of the sudden collapse of the deceased, his thumb impression to the statement was taken only after his death, it was held that the declaration was admissible without corroboration.[82] Corroboration for dying declaration becomes necessary only when it suffers from any infirmity.[83]

The Supreme Court has held that

1. it could not be laid down as an absolute rule of law or even as a rule of prudence which has ripened into a rule of law, that a dying declaration cannot form the sole basis of conviction unless it is corroborated.
2. each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made.
3. it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence.
4. a dying declaration stands on the same footing as any other piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence.
5. a dying declaration recorded by a competent Magistrate in a proper manner in the form of questions and answers and in the words of the maker as far as practicable-stands on a much higher footing than a dying declaration which depends on oral testimony which may suffer from all the infirmities of human memory and character.
6. it order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, (*e.g.*), whether there was sufficient light if the crime was committed at night, whether the capacity of the man to remember the facts stated had not been impaired at the time of making the statement; that the statement has been consistent throughout if he had several opportunities of making dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.[84]

A dying declaration recorded by a Magistrate can be the foundation of conviction.[85]

While great solemnity and sanctity is attached to the words of a dying man, because a person on the verge of the death is not likely to tell lies or to concoct a case so as to implicate an innocent person, yet the court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination. The court must be satisfied that the deceased was in a fit state of mind to make the statement, after the deceased had a clear opportunity to observe and identify his assailants, and he was making the statement without any influence or rancour. Once the court is satisfied that the dying declaration is true and voluntary, it can be sufficient to found the conviction even without any further corroboration. In order to test the reliability of a dying declaration, the court has to keep in view the circumstances like the opportunity of the dying man for observation, *e.g.*, whether there was sufficient light, the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement by circumstances beyond his control; the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.[86]

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82. *Muniappan* v. *State of Madras*, AIR 1962 SC 1252.

83. *State of Maharashtra* v. *Mehtabi*, (1998) 8 SCC 618 : 1998 SCC (Cri) 1085.

84. *Khushal Rao* v. *State of Bombay*, (1958) SCR 552 : AIR 1958 SC 22. **Also see** *Baijnath* v. *State of U.P.*, 1997 Cr LJ 1691 (All), dying declaration cannot be placed in the same category as evidence of an accomplice or a confession.

85. *Hanumappa Bhimppa Huklannavar* v. *State of Mysore*, 1966 CAR 381; *Surinder Kumar* v. *State of Haryana*, AIR 1992 SC 2037. When there is no infirmity in recording it and it inspires confidence.

86. *K R Reddy* v. *Public Prosecutor*, AIR 1976 SC 1994; *Pretam Singh* v. *State of U.P.*, 1985 Cr LJ 10; *Kore* v. *State*, AIR 1960 Cal 509; *Sathyanarayan* v. *State*, 1977 Cr LJ 1626; 1975 Cr LJ 285 : *Siddaiah* v. *State of Karnataka*, ILR 1975 Kant 355; *Rajaram* v. *State of U.P.*, 1978 Cr LJ 196; *Sudhirkumar Shukla* v. *State*, 1990 Cr LJ 119, *Ramkumar* v. *State of Rajasthan*, AIR 1970 Raj 60; *Vinayaka Datta* v. *State*, AIR 1970 Goa 96; *Lumba* v. *State*, AIR 1952 Raj 155; *Sumer Singh* v. *State*, (1982) 2 Cr LJ 672; *Kumaran* v. *State*, 1958 Ker LT 1055, *Kunhooty* v. *State*, AIR 1960 Ker 120, *Kori* v. *State*, AIR 1960 Cal 509; In *Bagepalli Chengappa*, AIR 1958 AP 203; *State of Karnataka* v. *Bapu*

If the accused was not the real assailant, it is unlikely that a father would, in his dying moment, try falsely to implicate his own son; that this circumstance is a sufficient guarantee of the truth of the dying declaration made by the deceased; if the truthfulness of a dying declaration is accepted, it can always form the basis of the conviction of the accused.[87]

Although a dying declaration should be carefully scrutinised, if the court is satisfied that the dying declaration is true and is free from any effort to prompt the deceased to make a statement, and it is coherent and consistent, there is no legal impediment to founding the conviction on such a dying declaration even if there is no corroboration.[88]

The contrary view expressed in *Ramnath Madhoprasad* v. *State of M.P.*[89] must be taken not to have been accepted by the subsequent cases of the Supreme Court.[90]

This case is discussed at page 59 of 1985 (21) A.S.I.L. 59. The commentator points out that the test suggested by the Supreme Court can only be with respect to the question whether the deceased made the statement or whether it is a fabrication. He submits that with regard to the question whether the persons named as culprits in the declaration were really responsible for the death of the declarant, the court should always seek corroboration except in rare cases. He cites the following observations of SIR JAMES STEPHEN in his HISTORY OF CRIMINAL LAW.

In 1985 Annual Survey of Indian Law, pages: 59 & 60 it is observed: "In *State of U.P.* v. *Ram Sagar Yadav*[91], the Supreme Court pointed out a practical approach to the question of corroboration of a dying declaration. The primary effort of the court is to find out whether the dying declaration is true. If it is so no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clear or convincing that the court may, for its assurance, look for corroboration of the dying declaration."

It is submitted that with respect to dying declarations there are two questions, (i) whether the deceased really made the statement or it was a fabrication and (ii) whether the persons named in the dying declaration as the culprits really were responsible for the death of the declarant. The test suggested above is only with respect to the first question. As regards the second except in rare cases the court always looks for corroboration. It is well to remember the warning administered by SIR JAMES STEPHEN himself in his HISTORY OF CRIMINAL LAW (HISTORY OF CRIMINAL LAW IN ENGLAND, Vol. I).

> "The rule (regarding dying declarations) is in many ways remarkable. It has worked, I am informed, ill in India, into which it has been introduced with many other parts of the English law of evidence. I have heard that in the Punjab the effect of it is that a person mortally wounded frequently makes a statement bringing all his hereditary enemies on to the scene at the time of his receiving the wound, thus using his last opportunity to do them an injury. A remark made on the policy of the rule by a native of Madras shows how differently such matters are viewed in different parts of the world.

Pujari, ILR 1985 Kant 2257; *Nathu Singh* v. *State of U.P.*, 1985 All LJ 831; *Venkatakrishnaiah* v. *State*, (1985) 1 An WR 354; *State of Gujarat* v. *Bai Kokila Janakray*, (1984) 3 Crimes 26; *Kahnu Majhi* v. *State of Orissa*, (1984) 2 Crimes 137; *State of U.P.* v. *Ramsagar Yadav*, AIR 1985 SC 416; *Nilamani Bhahuru* v. *State*, ILR 1964 Cut 841; *Tirukanni Pampayya* v. *State of Mysore*, AIR 1965 SC 939.

87. *Vithal Somnath More* v. *State of Maharashtra*, AIR 1978 SC 519; *Jaswant Singh* v. *State (Delhi Adm.)*, AIR 1979 SC 190.

88. *Kusa* v. *State of Orissa*, AIR 1980 SC 559; *Munna Raja* v. *State of M.P.*, AIR 1976 SC 2199; *Baina Pali Enkana* v. *State*, (1975) 41 Cut LT 1371; *Manik Malakar* v. *State of Assam*, 1976 Cr LJ 1921; *Balkense* v. *State of Rajasthan*, 1976 Cr LJ 828; *Kushal Rao* v. *State of Bombay*, AIR 1958 SC 11; *Tarachand* v. *State*, AIR 1962 SC 130; *State of Rajasthan* v. *Mangilal*, 1981 Cr LJ 852; *Md. Axizeezuddin* v. *State of A.P.*, 1985 Cr LJ 336; *Asa Tharagil* v. *State of Kerala*, 1981 Cr LJ 1165; *State of Orissa* v. *Pitabasnaik*, 1982 Cr LJ 1163; *State of Assam* v. *Mafizuddin Ahamed*, AIR 1983 SC 274; *State of Punjab* v. *Savitridevi*, AIR 1983 Punj & Har 305 (FB); *Budhia Singh* v. *State*, 1983 Cr LJ 1020; *Thippaswamy* v. *State of Karnataka*, 1979 Cr LJ (NOC) 211 : 1980 Mad LJ (Cri) 301; *Lallubhai Devchand Shah* v. *State of Gujarat*, AIR 1972 SC 1776; In re : *Guruswamy*, ILR 1940 Mad 138 (FB); *Kursind* v. *The Crown*, ILR 1942 (23) Lah 619.

89. AIR 1953 SC 420.

90. ILR (1979) 2 Del 118 : *Ashok Kumar* v. *State*, 1979 Cr LJ 1477; ILR (1977) 2 Kant 1276 : *Bomma* v. *State of Karnataka*, 1979 Cr LJ (NOC) 229; *Thurukanni Pompaiah* v. *State of Mysore*, AIR 1965 SC 939; In re : *Narayana Swamy*, 1973 Cr LJ 1295; *Venkata Krishnaiah* v. *State*, (1985) 1 An WR 354; *State of U.P.* v. *Ramsagar Yadav*, AIR 1985 SC 416.

91. AIR 1985 SC 416. **Also see** *Kishan Bahadur* v. *State of A.P.*, 1994 Cr LJ 1418 (para 6) (AP); *Shanti Behal* v. *State (Delhi Admn.)*, 1994 Cr LJ 2043 (Del).

'Such evidence' he said, 'ought never to be admitted in any case': What motive for telling the truth can any man possibly have when he is at the point of death (Id. at 448-49)."

Where the deceased in his dying declaration, attributed all the injuries sustained by him to a particular weapon other than the one alleged to have been used by the accused, and there was no mention in it of any other weapon having been used by the accused, it was held that conviction could not be based solely on such dying declaration.[1]

Where there was clear discrepancy between the names of the accused mentioned in the dying declaration and those mentioned by the witnesses, it is unsafe to place complete trust on the dying declaration.[2] Dying declaration, not corroborated in material particulars by independent witnesses cannot be relied upon.[3]

The mere fact that the accused person named in the dying declaration is absconding cannot be taken as corroboration. A flaw in the dying declaration cannot be made up by seeking corroboration from the fact of absconding.[4]

14. RELEVANCY AND ADMISSIBILITY

A dying declaration made by a person who is dead as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which cause of his death comes in question, is relevant under Section 32 and is also admissible in evidence. Though dying declaration is indirect evidence being a specie of hearsay, yet it is an exception to the rule against admissibility of hearsay evidence. Indeed, it is substantive evidence and like any other substantive evidence requires no corroboration for forming basis of conviction of an accused. But then the question as to how much weight can be attached to a dying declaration is a question of fact and has to be determined on the facts of each case.[5] Where the dying declaration of the deceased with 100% burns was recorded by the Investigating Officer in the presence of the doctor and a witness in view of imminent likelihood of her death, when she was in good state of mind, the same, though uncorroborated and not recorded by a Magistrate, was held admissible and sufficient to base conviction.[6] Where the deceased stated in the dying declarations that the accused molested her and after such incident she immolated herself, the dying declaration was a relevant fact and was admissible in evidence. The "death" may be suicidal or homicidal.[7] Where the dying declaration was recorded by the Sub-Divisional Magistrate in the very words of the deceased, no interested person was present there and the Magistrate and the doctor deposed that the deceased was fully conscious and in a fit condition to speak which was certified by the doctor and the deceased affixed her thumb impression thereon, it being short, recorded straight forward and not in question-answer form and mere presence of her a few friends and relatives would not render it inadmissible.[8] Dying declaration would not be inadmissible merely because it was not recorded by the Magistrate.[9] The statements of the deceased regarding being subjected to cruelty and harassment and demand of dowry, made earlier by her to her father, real sister and to neighbours of her sister, were held to be admissible under Section 32.[10]

Where the dying declaration was recorded by a police official, the original of which was not found on the record and the official who recorded it was not examined, it was held to be inadmissible. Entry in case diary as to the said original dying declaration could not be taken as evidence.[11] Where the dying declaration stated that the accused had caused injuries to the deceased, the medical report stated that the

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1. *Md. Ekramul* v. *State of Bihar*, AIR 1973 SC 1395.
2. *Deorao* v. *State of Maharashtra*, (1968) 2 SCWR 94.
3. *Sagir Khan* v. *State of Rajasthan*, 1999 Cr LJ 1705, 1712 (Raj).
4. *Hanumappa* v. *State of Mysore*, 1966 Cr App R (SC) 381.
5. *Ram Bihari Yadava* v. *State of Bihar*, AIR 1998 SC 1850 : 1998 Cr LJ 2515 (para 6).
6. *Balbir Singh* v. *State*, 1994 Cr LJ 1079 (J&K).
7. *Deepak* v. *State of M.P.*, 1994 Cr LJ 767 (MP).
8. *Sant Gopal* v. *State of U.P.*, 1995 Cr LJ 312 (All).
9. *M.S. Satyanarayana* v. *State of A.P.*, 1995 Cr LJ 689 (para 17) (AP).
10. *Chandrawati* v. *State*, 1996 Cr LJ 975 (paras 44-46) (Del). The Court referred to *Sharad Birdhichand Sarda* v. *State of Maharashtra*, AIR 1984 SC 1622 : 1984 Cr LJ 1738 and *Wazirchand* v. *State of Haryana*, AIR 1989 SC 378 : 1989 Cr LJ 809.
11. *Ram Bihari Yadav* v. *State of Bihar*, AIR 1998 SC 1850 : 1998 Cr LJ 2515 (para 7)

cause of his death was non-healing of the wound on his thigh and there was no evidence regarding any thigh injury caused by the accused, the dying declaration was held to be inadmissible in evidence.[12]

15. WEIGHT TO BE ATTACHED

The maxim is : "A man will not meet his Maker with a lie in his mouth." A dying declaration made by the victim in a fit mental condition and on the verge of death has a special sanctity; at the solemn moment, a person is most unlikely to make an untrue statement, the shadow of impending death is itself the guarantee of the truth of his declaration as to the causes or circumstances leading to his death; a dying declaration is almost sacrosanct.[13]

In order to test the reliability of a dying declaration, the court has to keep in view the circumstances like the opportunity which a person on the point of death had for observation, whether his capacity to remember the facts stated by him, had not been impaired at the time he was making the statement, that the statement was made at the earliest opportunity, and was not the result of tutoring by interested parties. The dying declaration stands on the same footing as any other piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weight to be attached to evidence.[14]

It was however held in *State* v. *Motilal*[15] that a dying declaration cannot be contradicted by extraneous evidence of witnesses and it has to stand by itself or not at all. It is difficult to reconcile this decision with *Kushal Rao's* case and other decisions of the Supreme Court.

Where a dying declaration is amply corroborated, not only by the eye-witnesses but also by the circumstantial evidence and by the medical evidence regarding the situs of the injuries, the dying declaration is to be accepted.[16]

Where death of the deceased had occurred due to multiple injuries and he failed to explain the contusion found in the lower part of his chest in his dying declaration, it was held to be no ground to discredit it as the contusion was not of a serious nature.[17] Where in a murder case the sequence of injuries stated in the dying declaration was the same as that of the injury report, it could not be said that the dying declaration was prepared with the connivance of the doctor.[18]

Where there was no inconsistency in the evidence, regarding the oral dying declaration, conviction based on the dying declaration is unassailable[19] and the same will be the consequence of voluntary and

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12. *Laba Behera* v. *State of Orissa,* 1994 Cr LJ NOC 244 (Ori), **relying on** 1964 (1) Cr LJ 727 (SC).
13. *Arjun Kushwah* v. *State of M.P.,* 1999 Cr LJ 2538 (para 9) (MP). **See also** *Uka Ram* v. *State of Rajasthan,* 2001 Cr LJ 1821 (para 5) (SC) : AIR 2001 SC 1814.
14. *Kushal Rao* v. *State of Bombay,* AIR 1958 SC 22 : 1958 Cr LJ 106; **approving** the decision of the Full Bench of the Madras High Court rendered by SIR LIONEL LEACH C.J., In re : *Guruswamy Tewar,* AIR 1940 Mad 196 (FB). **Also see** *Kalawati* v. *State of Rajasthan,* 1994 Cr LJ 691 (paras 29 and 30) (Raj).
15. AIR 1968 All 83.
16. *Ghuphekan* v. *State of U.P.,* AIR 1972 SC 1172. Dying declaration corroborated, no fitness certificate and not being in question and answer form inconsequential, accepted as genuine and true, *Jai Prakash* v. *State of Haryana,* (1998) 7 SCC 284 : 1998 SCC (Cri) 1581; *Pradeep Kumar* v. *State of H.P.,* 2001 Cr LJ 1517 (paras 28, 29, 33 and 34) (HP), **distinguishing** *State of Gujarat* v. *Mohan Bhai Raghbhai Patel,* 1990 Cr LJ 1462 : AIR 1990 SC 1379.
17. *Baijnath* v. *State of U.P.,* 1997 Cr LJ 1691 (All). Dying declarations recorded by the Police Officer, Magistrate and Medical Officer consistent and corroborated with each other, no motive to implicate the accused-husband falsely, testimony of interested witness unnatural and unreliable, conviction on the basis of such dying declarations proper, *Prakash* v. *State of Rajasthan,* 1997 Cr LJ 668 (Raj), **distinguishing** *Mohar Singh* v. *State of Punjab,* 1981 Cr LJ 998 : AIR 1981 SC 1578 and *Chameli* v. *State of Rajasthan,* 1987 Raj Cri C 154. The Court referred to *Betal Singh* v. *State of M.P.,* (1996) 4 SCC 203 and *Charipalli Shankarrao* v. *Public Prosecutor, High Court of A.P.,* 1995 Supp (4) SCC 24 : AIR 1995 SC 777. Dying declarations consistent, conduct of accused prior and subsequent to occurrence unnatural, conviction proper, *Rajendra Kumar* v. *State of U.P.,* 1997 Cr LJ 1120 (All). **Also see** *Rawel Singh* v. *State,* 1997 Cr LJ 1195 (Del); *Kumbhar Dhirajlal Mohanlal* v. *State of Gujarat,* 1997 Cr LJ 769 (SC) : AIR 1997 SC 1531. Two dying declaration natural, consistent and reliable, corroborated by evidence of eye-witnesses and expert evidence, conviction proper, *Batto* v. *State,* 1997 Cr LJ 1201 (Del). Certain facts mentioned in F.I.R. lodged by informant omitted in dying declaration, no ground to discredit it, *Baijnath* v. *State of U.P.,* 1997 Cr LJ 1691 (All).
18. *Baijnath* v. *State of U.P.,* 1997 Cr LJ 1691 (All). Dying declaration corroborated by medical evidence and other evidence, admissible, absence of motive and non-examination of one witness immaterial, *Meharban* v. *State of M.P.,* 1997 Cr LJ 766 (SC) : AIR 1997 SC 1528 (para 7).
19. *Appu* v. *State of Kerala,* 1990 Cr LJ 36 (Ker).

consistent statements reduced in writing, corroborated by independent witness and presence of motive of the crime.[20]

A dying declaration cannot be ignored when crucial facts are found in it, merely on the ground that it does not include any statement as to how the accused had received the injuries. The crux of the whole matter is as to who had stabbed the deceased and why, and if the answer is found in the dying declaration, it has to be accepted.[21] Where the evidence of the eye-witnesses and other corroborative evidence established the guilt of the accused persons, the dying declaration could not be discarded merely because it had discrepancy as to the number of persons participating in the commission of crime.[22]

When the deponent, while making the dying declaration, was in severe bodily pain, his natural impulse would be to tell the Magistrate without wasting his breath on the details, as to who had stabbed him. The very brevity of the dying declaration in the circumstances of the case, far from being a suspicious circumstance, is an index of its being true and more so when the substratum of the dying declaration is fully consistent with the ocular account given by the witnesses.[23]

If the fact of the declaration is established, and it also gives the name of the assailant and the witnesses, its brevity does not matter.[24] Otherwise reliable dying declaration cannot be thrown merely because there was overwriting in it to make the originally written blurred names clear.[25] Where the dying declaration gave details of the role played by the accused and the presence of the prosecution witnesses, the same could not be discarded.[26]

Where a person gave a dying declaration a short time before his death while he was lying in a precarious condition shortly after the assault, such a dying declaration could not be discarded merely on the ground that it did not give a precise description of all the ingredients of the offence and of the manner in which the injuries were inflicted.[27] Great weight must naturally and necessarily be attached to a dying declaration recorded very shortly after the occurrence. Merely because some friends and relatives happened to be with the deceased before the statement was recorded, the statement cannot be thrown out as a tutored one.[28]

The mere fact that in a dying declaration a number of persons are named as culprits does not make it less credible. There is no distinction between a dying declaration in which one person is named and that in which a number of persons are named.[29]

It may be that in certain situations, the very wealth of the detail in a statement attributed to a dying man arouses suspicion; on the other hand, the circumstance that a statement contains a wealth of details cannot necessarily lead to the inference that the statement is a fabricated one.[30]

Where the names of the accused who had instigated the assault were clearly mentioned in the F.I.R., which was lodged within an hour of the occurrence, and the informant proved the dying declaration, it was held that non-mention of the name of the accused in the dying declaration would not entitle the accused to any benefit of doubt.[31] Where the injured witness consistently mentioned the names of accused persons in her earlier deposition as well as the dying declaration, the mere fact that she could not be confronted by the defence witness was no ground to discard it.[32]

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20. *Ramesh* v. *State of M.P.*, 1996 Cr LJ 2656 (paras 19-22) (MP).
21. *State of Maharashtra* v. *Krishnamurthy*, AIR 1981 SC 617.
22. *III Addl. Sessions Judge, Guntur* v. *G.V. Rao*, 1996 Cr LJ 703 (paras 11 and 12) (AP).
23. *Jayaraj* v. *State of Tamil Nadu*, AIR 1976 SC 1519.
24. *Surajdee Ojha* v. *Bihar*, AIR 1979 SC 1505; *Surat Singh* v. *Punjab*, AIR 1977 SC 705. (short statement, name of the witness mentioned); *Rabi Chandra* v. *Orissa*, AIR 1980 SC 1738; (should preferably in the form of questions and answers).
25. *Prayagsinha Bharatsinha* v. *State of Maharashtra*, 2001 Cr LJ 1327 (para 19) (Bom).
26. *Narayan Behara* v. *State of Orissa*, 1994 Cr LJ NOC 86 (Ori).
27. *Dalbir Singh* v. *State of Punjab*, AIR 1987 SC 1328.
28. *Habib Usaman* v. *State of Gujarat*, AIR 1979 SC 1181.
29. *Harbans Singh* v. *State of Punjab*, AIR 1962 SC 439 **overruling** AIR 1941 Lah 368.
30. *Tehalsingh* v. *State of Punjab*, AIR 1979 SC 1347.
31. *Tirathram* v. *State of U.P.*, AIR 1979 SC 1440.
32. *Ram Vilas* v. *State of M.P.*, 1993 Cr LJ 3251 (para 5) (SC).

The dying declaration recorded by a Magistrate can be the foundation of the guilt of the accused.[33] The otherwise reliable dying declaration made before the Magistrate could not be disbelieved on account of non-examination of the doctor on the crucial question of the fitness of the declarant or failure to put the leading questions to her with regard to the demand of dowry.[34]

Where it was stated in a dying declaration that she caught fire while preparing tea and was not burnt by her husband or in-laws, and it was recorded by a responsible judicial officer, and the deceased was not under any fear or pressure at the time of making the statement, acquittal of the husband and in-laws on the basis of the dying declaration was held to be proper[35]; but the statement that the victim's clothes caught fire while refilling kerosene in the stove is falsified by the fact that the absence of kerosene would put off the ignition of the stove.[36]

A dying declaration was recorded by the Magistrate in the hospital; though the certificate of fitness of the declarant was not obtained from the doctor and signature or thumb impression of the deceased was not taken, it was held that the declaration could be accepted.[37] When the dying declaration is recorded by a competent Magistrate in the form of questions and answers, as far as practicable in the words of the deceased person, it stands on a higher footing than dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character.[38]

There is no requirement of the law that the dying declaration must necessarily be made to a Magistrate. What evidentiary value or weight has to be attached must necessarily depend on the facts and circumstances of each case; in a proper case, it may be permissible to convict a person solely on the basis of the dying declaration.[39]

The fact that the language used in a dying declaration is chaste, while that used in the F.I.R., has some words which are spoken by villagers, is not of much significance because there is nothing abnormal or unusual in the same person using colloquial language while talking to one person and using refined language while talking to another.[40]

Evidence of the witness about dying declaration cannot be disbelieve only because the F.I.R. has no mention about it. The evidence of witnesses has to be tested on its own strength or weakness.[41] The deceased made a statement which was recorded and signed by the deceased and the villagers. It showed that he recognised the two accused, and his wife and son also identified those two accused. Though the written dying declaration was not mentioned in the F.I.R., which stated that he made some oral statement, it was held that it could not be said that the written dying declaration was brought into existence subsequently and the delay by the police in recording the statement of the scribe of the dying declaration did not render the prosecution case unreliable.[42]

Where the deceased made the dying declaration soon after the incident, and it was found that the injured was fully conscious and composed, it was held that, in the absence of any evidence of tutoring or false implication of the accused, it can safely be acted upon.[43] Where the deceased woman told everybody immediately after the incident that the accused had set her on fire and the dying declaration was recorded by a Judicial Magistrate when she was in a fit condition to make the statement, discrepancy

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33. *Hanumappa Bhimappa* v. *State of Mysore*, 1966 CAR 381 (SC). **See also** *Rafat Mian* v. *State of U.P.*, 2000 Cr LJ 3039 (para 11) (All).
34. *Gurbachan Singh* v. *State of Haryana*, 1996 Cr LJ 3051 (paras 13-15) (P&H). **See also** *Jaswant Kaur* v. *State of Punjab*, 1996 Cr LJ 3073 (paras 8, 10 and 11) (P&H).
35. *Kishanlal Seethi* v. *Jaganath*, AIR 1990 SC 1357.
36. *Pawan Kumar* v. *State of Haryana*, 2001 Cr LJ 1679 (para 7) (SC) : AIR 2001 SC 1324
37. *Madhu Bala (Smt.)* v. *State*, 1990 Cr LJ 790. **See also** *Harjit Kaur* v. *State of Punjab*, 1999 Cr LJ 4055 (para 6) (SC) : AIR 1999 SC 2571.
38. *Kumarchandra Mohan Singh* v. *State*, (1964) 1 Cr LJ 461; ILR 1963 Cut 443; *Kushalrao* v. *State of Bombay*, AIR 1958 SC 22; *Jagabandhu Jail* v. *State*, (1962) 2 Cr LJ 569 (Ori); *Aamad* v. *State of Gujarat*, 1999 Cr LJ 2823 (paras 17 and 18)(Guj).
39. *Ramavathidevi* v. *State of Bihar*, AIR 1983 SC 164.
40. *Bharati* v. *State of U.P.*, AIR 1974 SC 839.
41. *State of M.P.* v. *Dhirendra Kumar*, AIR 1997 SC 318. **Also see** *State of Haryana* v. *Jinder Singh*, (1997) 4 SCC 180 : 1997 SCC (Cri) 532.
42. *Nanahauram* v. *State of M.P.*, AIR 1988 SC 912.
43. *Waikhan Angamba Singh* v. *State of Manipur*, 1982 Cr LJ 1346 (Gau).

in dying declaration regarding the exact spot where she was set ablaze neither affected its credibility nor the identity of the accused was blurred.[44] Where the dying declarations made before the doctor and the Investigating Officer were found to be reliable and consistent and there was nothing to disprove them, besides the declarant was in full senses and able to speak clearly, the order of conviction of the accused was upheld.[45] Where the deceased voluntarily stated that his own son had injured him and the medical evidence established that he was conscious and capable of making statement, the same was held to be truthful and reliable as a father would not speak falsely against his son and there was no question of tutoring or prompting.[46]

Where no requisition was sent to the Judicial Magistrate without disclosing any reasons for the same and the dying declaration of the victim of burn was recorded by the Executive Magistrate without finding out the mental condition of the deceased and no mental fitness certificate of the doctor was appended to the declaration either, such dying declaration was not reliable.[47] Where the dying declaration stated that the accused inflicted two stab injuries to the deceased which was inconsistent with the medical evidence stating categorically that there was only one stab injury, the dying declaration was not reliable.[48] Where the deceased made oral statements before a Head Constable who obtained the thumb impression of the deceased on a blank paper and later on filled it up and it was received by the Magistrate only on the next day, of course before the death of the deceased, such a document was held to be not reliable.[49] Where the medical evidence supported by post-mortem report and the fact of serious nature of injury showed that the deceased could not have been conscious for more than half an hour after receiving the said injury, possibility of the deceased making dying declaration nine hours after receiving the injury was highly improbable.[50] Where an integral part of the dying declaration is false inasmuch as, an accused person has been falsely named therein, it cannot be accepted against a co-accused.[51] When, in the statement of the deceased to the police under Section 161, Cr. P.C., he simply named the accused as his assailant, without giving the name of his father or the place of residence of the accused, it was held that, though it was treated as a dying declaration, it would be difficult to say that it was the accused and none else that committed the murder, in the absence of other convincing evidence.[52] Where the report given by the deceased was not written in the original words uttered by him, and there was unexplained delay in lodging the report, it was held that no reliance can be placed on such a dying declaration.[53] Where the dying declaration was given with a detailed account of the occurrence, though the declarant was in a serious condition, and it was not attested by the wife of the deceased or the doctor who were present there, it was held that it cannot be relied on.[54] Where the facts contained in a dying declaration raise a suspicion in the mind of the court, it cannot be relied on for any purpose and has to be excluded from consideration.[55] Where the autopsy report stated that the deceased had sustained 100% burns over her body and both the thumbs were burnt and the medical evidence was that the thumb mark of the declarant on the dying declaration had clear ridges and curves, in view of such inconsistent evidence, the accused was held to be rightly given the benefit of doubt.[56] Where the dying declarations were inconsistent in material particulars, they could not form the basis of conviction.[57] Where the dying declaration was

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44. *Vajrala Paripurnachary* v. *State of Andhra Pradesh*, AIR 1998 SC 2680, at page 2681 : 1998 Cr LJ 4031.

45. *Mange Ram* v. *State Delhi Administration*, 1998 Cr LJ 2269 (SC).

46. *Bellana Kannam Naidu* v. *State of A.P.*, 1994 Cr LJ 1146 (para 7) (AP).

47. *Lingaiah* v. *State of A.P.*, 1994 Cr LJ 1242 (AP).

48. *State of Kerala* v. *N. Moideenkutty Haji*, 1994 Cr LJ 1250 (para 8) (Ker). **Also see** *Shrawan Kumar* v. *State of Rajasthan*, 1994 Cr LJ 314 (Raj).

49. *Subramanian* v. *State*, 1997 Cr LJ 3540 (Mad). Dying declaration not properly recorded, infirmities, not reliable. *State of Punjab* v. *Sita Devi*, 1997 Cr LJ 2210 (P&H). Discrepancies, not inspiring confidence, can't be relied upon. *State of Maharashtra* v. *Ahmad Gulam Nabi Shaikh*, 1997 Cr LJ 2377 (Bom).

50. *Mohammed Indris* v. *State of Rajasthan*, 1997 Cr LJ 1079 (Raj).

51. *State of Maharashtra* v. *Uttam Karbhari Dhage*, 1997 Cr LJ 2513 (Bom), **relying on** *Thurukanni Pompiah* v. *State of Mysore*, AIR 1965 SC 939 : 1965 (2) Cr LJ 31.

52. *Sudhir Kumar Shukla* v. *State*, 1990 Cr LJ 119 (All). **See also** *Yazali Venkataratnam* v. *State*, 1993 Cr LJ 3240 (paras 9 and 10) (AP); *Kale Mian* v. *State of Bihar*, 1997 Cr LJ 1848 (para 9) (Pat).

53. *Md. Ilahi* v. *State of U.P.*, 1990 Cr LJ 850.

54. *Mohan Singh* v. *State of Punjab*, AIR 1981 SC 1578.

55. *Darshan Singh* v. *State of Punjab*, AIR 1983 SC 554.

56. *State of Punjab* v. *Gian Kaur*, 1998 Cr LJ 2061 (para 5) (SC) : AIR 1998 SC 2809. **See also** *Gajanansingh* v. *State of Maharashtra*, 1996 Cr LJ 2921 (paras 13-16) (Bom).

57. *Abdul Hameed* v. *State*, 1994 Cr LJ 872 (para 17) (All).

neither reduced to writing, nor the exact words of the deceased were reproduced by the witness, it was held that it could not be relied upon.[58] Where the ASI neither recorded the dying declaration in the *rozanamcha* in the PCR van nor did he inform of it to the control room on the police station, his uncorroborated testimony as to the dying declaration could not be relied upon.[59] Where the author of the dying declaration was disputed and no evidence was led to prove the mental state of the declarant to give statement besides there being omissions and material contradictions in the statement of the witnesses before whom it was made, the dying declaration could not be relied upon.[60]

Where the contents of the dying declaration read with the other prosecution witnesses, is sufficient as to the identity of the accused it cannot be rejected merely because the witnesses were not cross-examined or suggestions were made to them that there were other persons with the same names.[61] When the doctor is not questioned in the cross-examination as to the condition of the deceased at the time of his giving the declaration, the dying declaration cannot be attacked on the ground that the deceased was not in a position to speak [62] Where there was mention of one shot, in the dying declaration, and the autopsy report mentioned two injuries one inward and another in the outward direction, it was held that the declaration could not be falsified on the ground that the victim must have sustained the two wounds by two separate shots.[63] Where the declaration contained the cause of death and gave the name of the accused, and it was corroborated by two eye-witnesses, it was held that it can be relied upon, though the parentage of the accused was not given in the dying declaration.[64]

It is no objection to the admissibility of a dying declaration that it was made in answer to leading questions or was obtained by earnest and pressing solicitations.[65]

Absence of names of eye-witnesses would not by itself introduce an infirmity in the dying declaration.[66]

Where the prosecution version about the occurrence was different from the version given in the dying declaration, there was no mention of the names of the eye-witnesses and of some of the accused in the dying declaration, the prosecution did not explain the injuries on the person of one of the accused, and the presence of the eye-witnesses at the place of occurrence was found to be doubtful, it was held that the acquittal was proper.[67] Where the serious injuries on the accused, and the victim of alleged rape and murder having been found naked with her undergarments in the room of the accused, probabilised the defence version that they had love affair and some unknown person came and assaulted the victim and that they had consented intercourse, the oral dying declaration made to her brother, inspired no confidence.[68] When the conviction by the High Court was based solely on the dying declaration, which showed some suspicious features, the Supreme Court held that the accused was entitled to be acquitted as the dying declaration could not be relied on.[69] Where there was no clear and cogent evidence to show that the accused had caused the injuries to the deceased, the statement of one of the deceased was not recorded by the Magistrate even though he was alive for nine days after the occurrence, and the injuries on the person of the accused were not explained, it was held that the acquittal of the accused was proper.[70] Where the F.I.R. showed that it was a case of accidential death, as a result of burn injuries, and the sole evidence of the mother of the deceased as to the oral dying declaration was found to be

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58. *Purushotham* v. *Sheo Prasad*, 1972 All LJ 744, **following** *Kushalrao* v. *State of Bombay*, AIR 1958 SC 22.
59. *Laxmi* v. *Om Prakash*, 2001 Cr LJ 3302 (para 16) (SC) : AIR 2001 SC 2383.
60. *Amar Singh* v. *State of M.P.*, 1996 Cr LJ 1582 (paras 16-18, 20 and 22) (MP).
61. *Waikhan Angamba Singh* v. *State of Manipur*, 1982 Cr LJ 1346 (Gau).
62. *Budhia Singh* v. *State of Orissa*, 1983 Cr LJ 1020.
63. *Brij Raj Singh* v. *State*, 1983 Cr LJ 1916.
64. *Preetam Singh* v. *State of U.P.*, 1985 Cr LJ 10.
65. *Queen-Empress* v. *Abdullah*, (1885) 7 All 385, 398, FB; *Chandrasekara* v. *King*, (1937) AC 220 : 39 Bom LR 359, PC. But **see contra** *Majan Mia* v. *State*, AIR 1970 Assam 121where it is stated that a dying declaration may be open to objection if leading questions are put to the declarant for the purpose of eliciting information.
66. *Rabichandra* v. *State of Orissa*, AIR 1980 SC 1738.
67. *State of U.P.* v. *Madanmohan*, AIR 1989 SC 1519.
68. *Ronal Kiprono Ramkant* v. *State of Haryana*, 2001 Cr LJ 3942 (paras 5, 7-10) (SC) : AIR 2001 SC 2488.
69. *Kake Singh* v. *State of M.P.*, AIR 1982 SC 1021.
70. *State of Assam* v. *Bhelu Shekh*, AIR 1989 SC 1097.

unreliable, it was held that the accused must be acquitted as there was no other legal evidence on which to found a conviction.[71]

Where the dying declaration is a long document narrating a large number of incidents which happened before the actual assault, such long statements, being more in the nature of first information report than a recital of the cause of death or circumstances resulting in death, are likely to give the impression of their being not genuine or not having been made unaided and without prompting. However, on the facts, the Supreme Court found that the dying declaration, though in the form of F.I.R. was unprompted and voluntary.[72]

Where there are suspicious circumstances and infirmities in the evidence, with regard to the dying declaration, it cannot be accepted for the purpose of conviction.[73]

Where the history of the patient recorded in the Medico Legal Register showed no clear statement that the information recorded was supplied by the deceased, the information was not recorded in question and answer form, it was held that the history recorded in the case paper of the Register cannot be treated as dying declaration, and has to be excluded from consideration.[74] Where the attending doctor neither deposed to having talked to the deceased nor did he depose to the deceased having made any disclosure or declaration to him, it could be said that merely his statement as to it could not be said to be a dying declaration.[75] Where a person lodged an F.I.R., but did not mention about the alleged dying declaration made to him, and the doctor before whom the declaration was alleged to have been made was not examined, it was held that the dying declaration was doubtful and cannot be considered.[76] Where the declaration was at variance with other evidence and was also not mentioned in the F.I.R., the Court held that it was not safe to convict on the basis of the declaration.[77]

Where the declarant allegedly knew the assailant from before, he was expected to have named him with certainty.[78]

A boy of twelve years, who was injured, was fast losing consciousness. Two dying declarations were produced which showed the presence of persons who bore enmity to the accused. The evidence was rejected.[79] Where, from the place of incident to hospital, the deceased was surrounded by his well-wishers, friends and relatives and it was likely that they availed every opportunity to tutor and brain-wash the decease before the arrival of the Magistrate, no reliance could be placed on such a dying declaration.[80] Where the dying declaration recorded by the Tehsildar and the Executive Magistrate without obtaining mental fitness certificate from the doctor and not in question and answer form, its wordings and the language were the same as that of the F.I.R. which created doubt about its truthfulness besides it was not corroborated, the said dying declaration could not be relied upon.[81] The dying declaration of a victim who had sustained brain injury impairing his brain function could not be riled upon[82]; so also where the declarant was stated to have suffered injuries severely damaging her spinal column of neck , larynx, trachea and oesophagus, rendering it not possible for her to speak.[83]

Where the deceased wife who had committed suicide due to harassment, torture and assault and demand for more dowry by her husband and the in-laws, absolved her husband and his relatives by stating in her dying declaration that she received the burn injuries while she was cooking food on a

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71. *Baldev Raj* v. *State of H.P.*, AIR 1980 SC 436.
72. *Basksish Singh* v. *State of Punjab*, AIR 1957 SC 904.
73. *Purnachandra Singh* v. *State of Orissa*, 1985 Cr LJ 248. Discrepancies and variation in dying declarations recorded by Executive Magistrate and doctor, evidence of having been tutored or faculties impaired, conviction not proper. *Dada Machindra Chaudhar* v. *State of Maharashtra*, 1999 Cr LJ 4009 (Bom).
74. *State* v. *Asaram Mahadu*, 1978 Cr LJ 1017 (Bom).
75. *Laxmi* v. *Om Prakash*, 2001 Cr LJ 3302 (para 17) (SC) : AIR 2001 SC 2383.
76. *Sambhubora* v. *State of Assam*, 1987 Cr LJ 1027 (Gau).
77. *Bhaiyan* v. *M.P.*, AIR 1978 SC 36.
78. *Bholaprasad* v. *State of Maharashtra*, (1998) 9 SCC 353 : 1998 SCC (Cri) 1035.
79. *Rasheed Beg* v. *M.P.*, AIR 1974 SC 332.
80. *State of U.P.* v. *Raj Bahadur*, 1993 Cr LJ 86 (para 36) (All).
81. *Pamni Bai* v. *State of M.P.*, 1996 Cr LJ 2769 (para 19) (MP).
82. *State of Rajasthan* v. *Teja Ram*, 1999 Cr LJ 2588 (para 11) (SC) : AIR 1999 SC 1776.
83. *State* v. *Hari Narayan Mahto*, 2000 Cr LJ 5009 (paras 27 and 28) (Pat).

kerosene stove, but her letters to her relatives disclosed incessant cruelty and physical violence to her which drove her to commit suicide, it was held that her dying declaration could not be said to be destructive of this evidence because the said declaration was an act of a terrified, helpless and submissive Hindu wife.[84]

The Court cannot ignore the statement of the parents of the deceased/declarant that the deceased was not mentally sound. If the Court has even a slight doubt about the mental soundness of the author of the dying declaration, it would be unsafe to base a conviction on such a statement, albeit its inadmissibility under Section 32 of the Evidence Act.[85]

16. SOLE BASIS OF CONVICTION

Once dying declaration is found to be true and voluntary, it can be the sole basis of conviction and needs no corroboration. Such a statement is admissible not only against the person actually causing death but also against other persons participating in causing the declarant's death.[86] Where one dying declaration was recorded by the Magistrate and the other by the medical officer and both were consistent in material particulars, such dying declarations can be the sole basis of conviction. The declaration having been not recorded in question-answer form was no ground to discredit it.[87] Where the dying declaration was recorded by the doctor, treating the declarant the victim of burning and was attested by another doctor and they positively stated that she was conscious at the time of giving the statement, no inference of her inability to speak on the ground of 80% burn could be drawn and the dying declaration could form the basis of conviction.[88]

While recording a dying declaration only five questions were put to the deceased and the first three related to his name, his father's name and his place of residence. There was not even a complete answer to the question as to who had assaulted him. There was nothing in it to fasten the guilt on the accused. Hence, they could not be convicted on this basis.[89]

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84. *State of Maharashtra* v. *Vasant Shankar Mhasane,* 1993 Cr LJ 1134 (para 18) (Bom).

85. *Dandu Lakshmi Reddy* v. *State of A.P.,* 1999 Cr LJ 4287 (para 22) (SC) : AIR 1999 SC 3255.

86. *Sant Gopal* v. *State of U.P.,* 1995 Cr LJ 312 (paras 33 to 36) (All). **See also** *State of Rajasthan* v. *Kishore,* 1996 Cr LJ 2003 (paras 11-14) (SC) : AIR 1996 SC 3035, **reversing** Criminal Appeal No. 116 of 1986, Dt. 13-5-1988 (Raj); *Jai Karan* v. *State of (N.C.T. Delhi),* 1999 Cr LJ 4529 (paras 10, 19 and 20) (SC) : AIR 1999 SC 3512, **reversing** Cri A No. 91 of 1994, Dt. 19-11-1997 (Del); *Prabhudaya Harijan* v. *State of Orissa,* 2001 Cr LJ 2987 (para 16) (Ori).

87. *Virendra Singh* v. *State,* 1997 Cr LJ 3098 (Del). No Magistrate available, recorded by I.O., consistent and coherent, fit mental condition, corroborated, can be the sole basis of conviction, not being in question-answer form immaterial, *Hasti Devi* v. *State of Rajasthan,* 1997 Cr LJ 2787 (Raj); *Malik Ram Bhoi* v. *State of Orissa,* 1993 Cr LJ 984 (para 6) (Ori), dying declaration in question and answer form, corroborated. **Also see** *Rajendra Singh* v. *State,* 1997 Cr LJ 2668 (All). The Court referred to *Tehal Singh* v. *State of Punjab,* 1979 SCC (Cri) 722 : AIR 1979 SC 1347; *Padmaben Shamalbhai Patel* v. *State of Gujarat,* (1991) 1 JT (SC) 205 : 1991 AIR SCW 464 : 1991 SCC (Cri) 275 and *Ganpat Mahadev Mane* v. *State of Maharashtra,* 1993 SCC (Cri) 491 : AIR 1993 SC 1180 : 1993 Cr LJ 298 : (1993) 6 JT (SC) 177. To the same effect *Ram Dhar* v. *State,* 1997 Cr LJ 292 (Del) and *Vakati Lavakishore* v. *State of A.P.,* 1997 Cr LJ 285 (AP). Dying declaration recorded by Magistrate, deceased mentally fit, cogent and direct answers to questions, can be relied upon to base conviction, *Baijnath* v. *State of U.P.,* 1997 Cr LJ 1691 (All). Two dying declarations, consistent, conviction can be based upon them, *Kartar Singh* v. *State of Haryana,* 1997 Cr LJ 4376 (P&H). **Also see** *State of Maharashtra* v. *Rajendra Garbad Patil,* 1994 Cr LJ 145 (para 14) : AIR 1994 SC 475; *Bhag Singh* v. *State of H.P.,* 1994 Cr LJ 1398 (HP); *Ajab Singh* v. *State of Punjab,* 1998 Cr LJ 1102 (SC); Dying declaration made within about two hours, clear, consistent with other evidence, *Bhola Turha* v. *State of Bihar,* AIR 1998 SC 1515 : 1998 Cr LJ 1102. **Also see** *Shabbir Mohmad Syed* v. *State of Maharashtra,* 1997 Cr LJ 4416 (SC), also corroborated by medical evidence, **followed in** *State* v. *Surya Prasad,* 2001 Cr LJ 2481 (para 11) (All). For conviction on lone dying declaration, **see** *Pallapolu Narasimha Rao* v. *State of A.P.,* 1997 Cr LJ 4448 (AP); *Gopal* v. *State of U.P.,* 1994 Cr LJ 240 (para 2) (SC).

88. *Kamlesh Rani* v. *State of Haryana,* 1988 Cr LJ 1251 (paras 3 and 4) (SC) : AIR 1998 SC 1534.

89. *State of Orissa* v. *Simanchal Gouda,* 1997 Cr LJ 1816 (Ori). The Court referred to *Gangotri Singh* v. *State of U.P.,* (1992) 2 JT (SC) 417 : 1992 Cr LJ 1290; *Govardhan Raoji Ghayare* v. *State of Maharashtra,* (1993) 5 JT (SC) 87 : 1993 Cr LJ 3414; *Meesala Ramkrishnan* v. *State of A.P.,* (1994) 3 JT (SC) 232 and *State of Rajasthan* v. *Kishore,* (1996) 2 JT (SC) 595 : 1996 Cr LJ 2003. Dying declaration not inspiring confidence, can't form basis for conviction, *Jagga Singh* v. *State of Punjab,* AIR 1995 SC 135, **reversing** the decision of Punj & Har. High Court (paras 3-7). Two dying declarations, accused running away immediately after incident, defence witness unreliable, corroborated by medical evidence, true, can be made basis of conviction, *Krishan Kumar* v. *State of Haryana,* (1998) 8 SCC 586 : 1998 SCC (Cri) 1544. Dying declarations contradictory and suffering from infirmities, uncorroborated, involuntary, suicide theory not completely ruled out, conviction solely on the basis of such dying declaration improper, In re :

17. DYING DECLARATION—MEDICAL EVIDENCE

The fact that the dying declaration is produced only during the trial is immaterial, if it is corroborated by the evidence of prosecution witnesses and the evidence of the doctor.[90]

Where the Magistrate verified from the doctor that the injured was in his senses and fit to give a statement, and he then recorded the statement, and that statement was corroborated by the evidence of the doctor and the post-mortem report, it was held that the dying declaration was authentic and was given by a person who was in a fit condition to give a statement.[91] Where the post-mortem report was brought on record by the Head Clerk as the doctor who conducted the post-mortem had died, it was held that the said report was admissible under this section.[92]

Where the doctor found that life was ebbing fast, and there was no time to call the police or a Magistrate, it was held that the doctor was justified in recording the statement (dying declaration); indeed he was duty-bound to do so, and as the doctor was a disinterested and respectable witness, the trial judge was unjustified in rejecting the evidence of the medical officer.[93] Even though the deceased had serious burn injuries the dying declaration made to a doctor has to be acted upon as she survivel 12 days after the declaration. It cannot be said that she was not in a position to make the declaration.[94]

The eye-witness gave evidence about the statement made by the deceased, but the doctor's evidence was that it was improbable that the deceased would have been in a position, either to walk or speak, so as to make a dying declaration. The evidence of the witnesses suffered from material contradictions as also that of the eye-witness. Therefore, it was held that their evidence regarding the dying declaration could not be relied on, in view of the doctor's evidence.[95] Where the dying declaration was recorded by a doctor, and his testimony was that the deceased was capable of deposing and was in his senses at the time of recording of the statement, it was held that a conviction, based on that evidence could not be interfered with.[96] Where the victim was in a gasping condition and his pulse was not palpable and the blood pressure unrecordable, but the doctor certified him to be in good condition, his statement was accepted.[97]

Where there was evidence regarding the dying declaration of the deceased to the eye-witnesses, immediately after the occurrence, and the doctor who examined him first and the doctor who conducted the postmortem, differed as to whether the injured was in a shock immediately after the occurrence, the Supreme Court held that the opinion of the doctor was not conclusive on the question of ability of the deceased to talk immediately after the occurrence.[98] Where the dying declaration showed that it was a coherent and consistent statement made by the deceased, and it gave out clearly the motive for the occurrence and also the names of the four assailants, it was held that the doctor's opinion to the contrary need not be taken into consideration, and the deceased was fully conscious and was not suffering from any confusion or hallucination.[99]

Basith, 1997 Cr LJ 3232 (Mad). Three dying declarations, glaringly different and inconsistent in material particulars, unsafe to conviction their sole basis, *Kalyan Balasaheb Barungale* v. *State of Maharashtra*, 1998 Cr LJ 1859 (para 12) (Bom), **relying on** *Kamla* v. *State of Punjab*, (1993) 1 SCC 1 : 1993 Cr LJ 68 and *Paniben* v. *State of Gujarat*, AIR 1992 SC 1817 : 1997 Cr LJ 2919.

90. *Babu* v. *State of U.P.*, AIR 1980 SC 443.
91. *Nirmal Singh* v. *State of Rajasthan*, AIR 1972 SC 945.
92. *Shyam Narayan Singh* v. *State of Bihar*, 1993 Cr LJ 772 (para 39) (Pat).
93. *Rehman* v. *State of Gujarat*, AIR 1976 SC 1782. **See also** *P. Babu* v. *State of A.P.*, 1993 Cr LJ 3547 (paras 6, 7 and 8) (SC).
94. *Om Prakash* v. *State of Punjab*, AIR 1993 SC 138.
95. *Bhagwan Das* v. *State of Rajasthan*, AIR 1957 SC 589.
96. *Suresh* v. *State of M.P.* AIR 1987 SC 860.
97. *State of Haryana* v. *Harpal Singh*, AIR 1978 SC 1530, *Somappa Vamanappa* v. *State of Mysore*, 1979 Cr LJ 1358.
98. *Vemanappa Madar* v. *State of Mysore*, AIR 1979 SC 1831; *Ravi Chander* v. *State of Punjab*, (1998) 9 SCC 303 : 1998 SCC (Cri) 1004.
99. *Dayaram Singh* v. *State of M.P.*, 1981 Cr LJ 580 (MP).

Merely because a dying declaration is not accompanied by a medical opinion that the deceased, when he made the statement, was in a fit state of mind, it does not affect its reliability.[1]

18. PLURALITY OF DECLARATIONS

If there are more than one dying declarations, they should be read as one and differences in them on material aspects with reasonable explanation may be taken at par with omissions covered by the explanation to S. 161 of the Cr.P.C. and may be considered as a matter of fact in each case on its own strength.[2] It is not the number of dying declarations which will weigh with the Court. Plurality of apparently consistent dying declarations themselves are not sufficient to pursuade the Court to act thereon.[3]

Where there were three dying declarations of a woman, corroborated by other circumstances, the Supreme Court held that the dying declarations are the groaning utterances of the dying woman in the grip of dreadful agony, and cannot be judged by the standards of fullness of particulars which witnesses may give in other situations; that if they are basically credible, even if there are some short-falls or there are some unrealistic and unnatural facts, the declarations cannot be discredited. When they are corroborated by other circumstances, the declarations are sufficient to bring home the offence.[4]

The first dying declaration was a short version of the occurrence given by the injured under great pain and agony, after arrival at the hospital. Later he gave a second declaration. The Supreme Court held that the contents of the first dying declaration were true, and the second declaration and the details therein might not have been given by the victim, and it cannot detract from the truthfulness of the first declaration.[5]

Where there was consistence story in all the three dying declarations, one made to the witness, the second one in the F.I.R. and the third made to Naib Tahsildar stating that it was the accused who poured kerosene and set fire to the deceased, it was held that minor contradictions would not affect the acceptability of the dying declarations.[6] Where the divergent statements, made by the deceased in her multiple dying declarations, are capable of being fully and totally reconciled, the Court need not reject them merely because *prima facie* they read differently.[7] Where there was no infirmity in the three dying declarations recorded respectively by the doctor, the police constable attested by the doctor and the Executive Magistrate endorsed by the doctor that she was in a fit condition of giving the statement, the conviction was upheld. The fact that the third dying declaration was not recorded in question and answer form was held to be immaterial[8] and the mere fact that the concerned doctor who gave the certificate was not examined, does not detract the reliability of the statement of the Magistrate.[9] Where the circumstances clearly showed that the first dying declaration was recorded when the deceased was not a free person which was not considered as voluntary and true and convincing reasons were given, the second dying declaration could not be regarded as untrue merely because it was contrary to the first.[10]

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1. *Md. Azisuddin* v. *State of A.P.*, 1985 Cr LJ 336.
2. *Radhey Shyam* v. *State of U.P.*, 1993 Cr LJ 3709 (paras 20 and 21) (All).
3. *Laxmi* v. *Om Prakash*, 2001 Cr LJ 3302 (paras 1 and 30) (SC) : AIR 2001 SC 2383.
4. *Somnath* v. *State of Haryana*, AIR 1980 SC 1226. **See also** *Prakash Shobharam* v. *State of Gujarat*, 2000 Cr LJ 2559 (paras 11 and 13) (Guj).
5. *Surat Singh* v. *State of Punjab*, AIR 1977 SC 705. **Also see** *Sreerama Murthy* v. *State of A.P.*, AIR 1998 SC 3040.
6. *Hari* v. *State*, ILR 1978 MP 873; **following** *Godhu* v. *State of Rajasthan*, AIR 1974 SC 2188. **Also see** *Ajit Singh* v. *State of Punjab*, 1998 Cr LJ 3460, at p. 3464 (P&H); *Vithal Sadashiv Gaikwad* v. *State of Maharashtra*, 1994 Cr LJ 2035 (para 9) (Bom); *Rajendra Kumar* v. *State of U.P.*, 1998 Cr LJ 3293 (SC) : AIR 1998 SC 2896; *Bathala Subbarayudu* v. *State of A.P.*, 1994 Cr LJ 446 (AP); *Mangat Ram* v. *State*, 1994 Cr LJ 3454 (para 18) (Del); *M.S. Satyanarayana* v. *State of A.P.*, 1995 Cr LJ 689 (AP); *Chinnamma* v. *State of Kerala*, 1995 Cr LJ 1711 (paras 10-12) (Ker). **Contra** : three dying declarations, inconsistent, uncorroborated, acquittal, *Public Prosecutor, A.P. High Court* v. *J. Nirmala*, 1997 Cr LJ 1420 (AP).
7. *Siddesha* v. *State*, 2001 Cr LJ 38 (paras 2 and 3) (Kant).
8. *Ganpat Mahadeo Mane* v. *State of Maharashtra*, 1993 Cr LJ 298 (SC) : AIR 1993 SC 1180, **followed in** *Imran Khan* v. *State of M.P.*, 1995 Cr LJ 17 (para 30) (MP).
9. *Rajendra Singh* v. *State of Rajasthan*, 1996 Cr LJ 1560 (para 21) (Raj), **relying on** *Suresh* v. *State of M.P.*, (1987) 2 SCC 32; *Subramanayam* v. *State of Andhra Pradesh*, (1993) 2 SCC 684 and *Ganpat Mahadev Mane* v. *State of Maharashtra*, 1993 Cr LJ 298 : AIR 1993 SC 1180 : 1992 AIR SCW 3442.
10. *Harjit Kaur* v. *State of Punjab*, 1999 Cr LJ 4055 (para 7) (SC) : AIR 1999 SC 2571.

Where there was glaring inconsistency in the four dying declarations made by the deceased, conviction based on one of the dying declarations was liable to be set aside.[11] Inconsistent dying declarations cannot be accepted in the absence of any corroboration.[12] The Court cannot sideline material divergence relating to the very occasion of the crime in the two dying declarations. In the instant case, the deceased gave different versions in the two dying declarations as to what she was doing at the relevant point of time.[13] In case of there being more than one inconsistent dying declarations made by the accused, it is not necessary for the High Court to compare them to assess the extent of incrimination.[14]

Where there are two dying declarations, there is no rule of law that the earlier one is to be preferred. Where the former is before a police constable and the latter is before a magistrate, the later has to be preferred. Dying declaration properly made before a magistrate who has satisfied himself that the declaration was made in a fit state of mind is sufficient to sustain a conviction without corroboration.[15]

When there is more than one dying declaration, the first dying declaration in point of time is to be preferred.[16] Where there is more than one dying declaration, the later declaration may not be a free and voluntary statement but may be a tutored and inspired one. The crucial test in all cases of plurality of dying declaration is whether the deceased's version is proved to be false in respect of the integral portion of the case. The test whether he has given a true version is not to be judged with reference to any one dying declaration, but in the light of several declarations made by him. It is only in extreme cases that the court can safely convict, relying upon the first dying declaration, provided there is convincing and adequate corroborative evidence.[17] Where the deceased made two dying declarations of which the former was duly recorded by a doctor in the presence two other doctors and the latter, recorded by another person was attested by the *Sarpanch* but not proved by a competent witness and was introduced by the police inspector in his cross-examination, the latter was not relied upon. The accused were convicted on the basis of former.[18]

19. DYING DECLARATION SHOULD BE PRECISE

Dying declaration should be short, concise and to the point. Questions and answers elicited should be written. It should not be in the mechanical cyclostyled form.[19] It is not the requirement of law that the person making the dying declaration should made an elaborate and exhaustive statement so as to cover each and every aspect of the incident and narrate the whole history of the case. Detailed statement covering the minutest details could not be expected from the declarant who is under a severe stress and agony.[20] The mere fact that the dying declaration did not contain the detailed version of the occurrence was no ground to disbelieve it.[21]

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11. *Kamla* v. *State of Punjab*, 1993 Cr LJ 68 (para 8) (SC) : AIR 1993 SC 374, **relying on** *Khushal Rao* v. *State of Bombay*, 1958 SCR 552 : 1958 Cr LJ 106. **Also see** *Govind Narain* v. *State of Rajasthan*, 1993 Cr LJ 2598 (paras 9, 10 and 12) (SC) : AIR 1993 SC 2457; *State of Gujarat* v. *Khumansingh Karsan Singh*, AIR 1994 SC 1641 (paras 2 and 3).
12. *Chakiri Saidulu* v. *State of A.P.*, 1994 Cr LJ 3782 (para 18) (AP). **See also** *Kishan Lal* v. *State of Rajasthan*, 1999 Cr LJ 4070 (paras 16 and 17) (SC) : AIR 1999 SC 3062, **reversing** 1998 Cr LJ 452 (Raj).
13. *Dandu Lakshmi Reddy* v. *State of A.P.*, 1999 Cr LJ 4287 (para 16) (SC) : AIR 1999 SC 3255, **reversing** Cri A No. 115 of 1996, Dt. 26-3-1997 (AP).
14. *Chakiri Saidulu* v. *State of A.P.*, 1994 Cr LJ 3782 (para 17) (AP).
15. *Mohanlal* v. *State of Maharashtra*, AIR 1982 SC 839; *Paniben (Smt.)* v. *State of Gujarat*, (1992) 2 An WR (SC) 60 at p. 65; *State of Karnataka* v. *Bapu Pujari*, ILR 1985 Kant 2257.
16. *Mohanlal* v. *State of Maharashtra*, AIR 1982 SC 839; *Paniben (Smt.)* v. *State of Gujarat*, (1992) 2 An WR (SC) 60 at p. 65; *State of Karnataka* v. *Bapu Pujari*, ILR 1985 Kant 2257.
17. In re : *Narayana Swamy*, 1973 Cr LJ 1295; *Moba Singh* v. *State*, 1975 Raj LW 354.
18. *Harbans Lal* v. *State of Haryana*, 1993 Cr LJ 75 (para 10) (SC) : AIR 1993 SC 819.
19. *Adevappa Nagappa Anagolkar* v. *State of Karnataka*, 1998 Cr LJ 584, at p. 586 (Kant).
20. *Charipalli Shankararao* v. *Public Prosecutor, A.P. High Court*, AIR 1995 SC 777 (paras 9-11). **See also** *Laljit Singh* v. *State of U.P.*, AIR 2000 SC 3594 (para 5) : 2001 Cr LJ 143.
21. *Ramesh* v. *State (Delhi Administration)*, 1996 Cr LJ 309 (Del), **relying on** *Surat Singh* v. *State of Punjab*, AIR 1977 SC 705 : 1977 Cr LJ 347.

20. DYING DECLARATION SHOULD BE COMPLETE

Where the doctor put all necessary questions to the deceased, but the last question as to "what more he wanted to say" could not be answered as the injured became semi-conscious, it was held that the last question was in the nature of formality and the dying declaration was not incomplete.[22] Where the dying declaration made it clear about the accusation against the accused, and there was nothing to show that the maker of the statement had anything further to add, but before taking the thumb impression of the deceased he suddenly collapsed, but his thumb impression was taken after his death in the presence of the witness, it was held that it was not an incomplete statement.[23]

It was held by the Supreme Court that, even though the dying declaration was incomplete by reason of deceased not being able to answer further questions because of his then condition, the statements insofar as they implicated the accused, were quite categoric in character; and definitely indicated that it was the accused who had shot the deceased.[24]

Where the SHO who recorded the dying declaration did not certify that the declarant was in a fit mental condition to make such a statement and the deceased allegedly only gave minor details like stengun number including butt number etc., it was held that such a document could not be accepted as a true dying declaration.[25] Where the declarant did not disclose the full names and addresses of the assailants but only disclosed the first names similar to that of the alleged accused, such an incomplete dying declaration was not proper.[26]

21. WHETHER PART OF DYING DECLARATION CAN BE USED

The Supreme Court, on evidence, found that a particular statement that the deceased was forcibly dragged inside the room by the accused was neither corroborated nor proved. It was held that such a statement is separable from the other part of the statement that the accused had shot at him and caused fatal injuries which was corroborated by the evidence, and so, that part can be admitted; that it is not correct to hold that if a part of the dying declaration has not been proved to be correct, it must necessrily result in the rejection of the whole of the dying declaration.[27]

22. RECORDING OF DYING DECLARATION BY MAGISTRATE

The person who records a dying declaration must be satisfied that the dying man is making a conscious and voluntary statement with normal understanding.[28]

In the case of dying declaration, the recording by a Magistrate in the exact words stated by the deceased is of great importance. Any suggestion that the deceased had said something by mistake cannot be entertained.[29]

It is always desirable that the dying declaration is recorded in the words of the injured, but simply because the very words uttered by the injured are not reproduced, it is no reason to reject it, if the court is otherwise satisfied that what was recorded, correctly reproduces what was stated by the injured.[30]

Where the Magistrate recorded the dying declaration after being satisfied as to the identity of the maker as well as her fitness to make the statement, and signature of the trainee nurse was got on the statement due to non-availability of the doctor, the concurrent finding as to its admissibility was

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22. *Kusa* v. *State of Orissa*, AIR 1980 SC 559.
23. *Maniappan* v. *State of Madras*, AIR 1962 SC 1252.
24. *Abdul Sattar* v. *State of Mysore*, AIR 1956 SC 168. **Also see** *Shashidharsingh* v. *State of M.P.*, 1998 Cr LJ 2676 (para 24) (MP).
25. *Paramjit Singh* v. *State of Punjab*, AIR 1997 SC 1614.
26. *Kajal Sarkar* v. *State of Assam*, 1993 Cr LJ 3869 (paras 14 and 17) (Gau).
27. *Godhu* v. *State of Maharashtra*, AIR 1974 SC 2188; *Namo Bora* v. *State of Assam*, ILR 1980 Gau 229; *Lakaram Surajmal* v. *State*, AIR 1953 MB 249; *Nandakumar Natha* v. *State of Maharashtra*, 1988 Cr LJ 1313 (Bom).
28. *Lallubhai Devchand Shah* v. *State of Gujarat*, AIR 1972 SC 1776; *Bodum Bhaskar Rao* v. *State of A.P.*, 1985 Crl LJ 32.
29. *Ramnath* v. *State of M.P.*, AIR 1953 SC 420.
30. *Hariram* v. *State*, AIR 1965 Raj 130; *Bakshish Singh* v. *State of Rajasthan*, AIR 1957 SC 904.

upheld.[31] The dying declaration, recorded the Magistrate in his own handwriting and in accordance with law after obtaining the fitness certificate from the duty doctor, could not be rejected merely on the ground that it was not recorded in question and answer form.[32] Where the dying declaration was recorded by S.D.M., an I.A.S. Officer, in absence of the relatives of the deceased, the mere fact that her relatives were agitating for recording her statement cannot lead to the inference that the Magistrate had recorded it under pressure and as desired by the agitators.[33]

The dying declaration recorded by an Executive Magistrate not enjoying the power of a Metropolitan Magistrate or Judicial Magistrate is admissible in evidence.[34]

23. DYING DECLARATION—RECORDED BY INVESTIGATING OFFICER/POLICE OFFICER

Where the investigating officer himself recorded the statement of the victim who was in a precarious condition, while making the statement, without requisitioning the services of the Magistrate, the Supreme Court held that such a practice of recording by the investigating officer was bad and should not be encouraged.[35]

Where the investigating officer had plenty of time and facility to procure the services of a Magistrate for recording a dying declaration, the dying declaration recorded by the investigating officer should be excluded from consideration[36] but the dying declaration recorded by the Police Officer could not be challenged on the ground that it was recorded by the Investigating Officer as the investigation had not commenced by then.[37]

Where the Head Constable attempted to procure the services of a Magistrate but the Magistrate was not available, the Head Constable was held to be competent to record the dying declaration in such circumstances.[38] The dying declaration recorded by a police officer, when the deceased was in a critical condition and no other person was available in the village to record, it is admissible under Section 32. In view of the exception provided in sub-Section 2 of Section 162 Cr.P.C. 1973, it is better to leave such a dying declaration out of consideration until and unless the prosecution satisfies the court as to why it was not recorded by a Magistrate or by a doctor.[39]

The dying declaration recorded by the Investigating Officer, not in conformity with law, was held to be not reliable.[40]

The investigating officer recorded a dying declaration of a bride who had been burnt, but the non-availability of the Magistrate and the doctor was not explained. The declaration was not signed by the declarant, although she was literate, and it was not proved that she was incapaciated to sign by reason of the burn injuries, none of the relatives were present at the time of the statement. The declaration was not recorded in the form of questions and answers. In view of the above circumstance the declaration was held to be not acceptable.[41] Where the dying declaration recorded by the Investigating Officer did not mention that the deceased was mentally fit to make statement, it was not in question and answer form and did not disclose the exact statement made, it was held to be unreliable.[42]

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31. *Ram Bihari Yadav* v. *State of Bihar*, AIR 1998 SC 1850 : 1998 Cr LJ 2515 (para 11).
32. *Rajendra Singh* v. *State of Rajasthan*, 1996 Cr LJ 1560 (para 16) (Raj); **distinguishing** *Rabi Chandra Pradhan* v. *State of Orissa*, AIR 1980 SC 1738 : (1980) 1 SCC 240 : 1980 Cr LJ 1257. The Court **referred to** *Padmaben Shambhai Patel* v. *State of Gujarat*, 1991 Cri LR (SC) 162.
33. *Harjit Kaur* v. *State of Punjab*, 1999 Cr LJ 4055 (para 5) (SC) : AIR 1999 SC 2571.
34. *State of U.P.* v. *Nawab Singh*, 1996 Cr LJ 934 (para 18) (All).
35. *Munna Raja* v. *State of M.P.*, AIR 1976 SC 2199; *State of Punjab* v. *Amarbir Singh*, AIR 1988 SC 2013.
36. *Jagadishlal Malhotra* v. *State*, 1984 Cr LJ (NOC) 53 : 1983 Chand Cr C 558. **See also** *Public Prosecutor, H.C. of A.P.* v. *Pothula Narsimha Rao*, 1993 Cr LJ 2789 (para 5) (AP).
37. *Gulam Hussain* v. *State of Delhi*, 2000 Cr LJ 3949 (para 7) (SC) : AIR 2000 SC 2480.
38. *Chanpalli Shankararao* v. *Public Prosecutor, A.P. High Court*, AIR 1995 SC 777 (para 8), **relying on** *Ramawati Devi* v. *State of Bihar*, AIR 1983 SC 164.
39. *Dalip Singh* v. *State of Punjab*, AIR 1979 SC 1173; *Dillirao* v. *State of Bihar*, 1986 Cr LJ 1483.
40. *Hariappan* v. *State*, 2001 Cr LJ 4286 (para 18) (Kant).
41. *State (Delhi Admn.)* v. *Lakshmankumar*, AIR 1986 SC 250.
42. *Mohd. Zakir* v. *State of Rajasthan*, 1995 Cr LJ 2837 (para 10) (Raj).

The dying declaration of a wife, recorded in the hospital by a police officer though bearing her signature or thumb impression, was held to be not reliable.[43] However, where it was attested by the doctor in the Government Hospital as made in his presence, it was held admissible[44]; so also where the dying declaration recorded by the Head Constable in question and answer form, after obtaining fitness certificate from the doctor, reproduced statements given by the deceased clearly and correctly.[45]

The Investigating Officer at a police-station, where the deceased was alleged to have sustained burn injuries, on information by wireless message went to the deceased in a hospital 92 k.m. away and recorded a statement of the deceased and on that basis he registered the F.I.R. The Supreme Court held that no fault could be-found with the investigating officer for not getting the dying declaration recorded by a Magistrate.[46] Strict scrutiny of the dying declaration recorded by the Investigating Officer is necessary and, if it is found truthful, conviction can be based upon it.[47]

The deceased made the dying declaration about his being beaten by a policeman in a police-station, while he was in the exclusive custody of the policemen. No one else had access to him. It was held that such statements not only excluded the possibility of his being tutored but also excluded the possibility that he was assaulted by any one else. Therefore, it was held, it was safe to accept the dying declaration.[48]

Where the injured gave a statement which it was recorded by the police, and the injured signed on it and died immediately thereafter, it was held that such a statement might be treated as a dying declaration, and it was admissible when duly proved; such a declaration which was treated as an F.I.R. was not hit by Section 162(2), Cr.P.C.[49]

Where the dying declaration was recorded in a narrative form, and the words used by the deceased were put within inverted commas, its authenticity or veracity would not be doubted merely because the investigating officer had stated new facts as to how he came to the spot prior to the recording of the dying declaration.[50]

Merely because a head-constable recorded a dying declaration, it cannot be said to be unsafe to rely upon it. Though desirable, it is not an indispensable requirement that it should be recorded by a Magistrate.[51]

The report made by a deceased at a police-station, being a dying declaration, can be made before or during investigation. Section 161, Cr.P.C. is not applicable. If the person does not give all minor details, that would not affect the validity or the merits of the dying declaration.[52]

Where, after making the statement before the police, the victim succumbed to his injuries, his statement could be treated as a dying declaration and would be admissible under Section 32(1), and would be protected by Section 162(2), Cr. P.C.[53]

Where a declaration recorded by a police-officer was found to be natural, coherent, truthful, narrating the incident without embellishment, and the declarant explicitly identified the accused, it was

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43. *Urgen Sherpa* v. *State of Sikkim*, 1985 Cr LJ 1988. Dying declaration recorded by Head Constable without associating any independent witness, not satisfactorily explained, acquittal proper. *State of H.P.* v. *Vinod Kumar*, 1995 Cr LJ 3134 (paras 18 and 25) (HP); police recording dying declaration before declarant was declared fit to make statement, declarant remained alive for two weeks, no effort to get it recorded by Magistrate, not credible. *Gulab Singh* v. *State*, 1995 Cr LJ 3180 (Del).
44. *Kachhwa* v. *State of Rajasthan*, 1986 Cr LJ 306. **See also** *Venkappa K. Chowdari* v. *State of Karnataka*, 1996 Cr LJ 15 (paras 8 and 9) (Kant).
45. *Ismail* v. *State of Karnataka*, 2000 Cr LJ 1994 (para 5) (Kant). **See also** *Mohd. Islam* v. *State (NCT of Delhi)*, 2001 Cr LJ 4317 (paras 16 and 19) (Del).
46. *State of Punjab* v. *Amarjit Singh*, AIR 1988 SC 2013.
47. *Babura* v. *State of Rajasthan*, 1993 Cr LJ 2696 (para 10) (Raj).
48. *State of U.P.* v. *Ramsagar Yadav*, AIR 1985 SC 416.
49. *Tapinder Singh* v. *State of Punjab*, AIR 1970 SC 1566; *Kochol* v. *State*, AIR 1956 Tra/Co 207; *Pratap Chandra Patnaik* v. *State*, ILR 1974 Cut 1325; *Kuttan Pillai alias Kuttappan* v. *State of Kerala*, 1960 Ker LJ 1273 : 1960 KLT 829; *Lakhan Lal* v. *State*, 1995 Cr LJ 2699 (paras 18 and 19 (Del).
50. *Prem Kumar* v. *State*, 1989 Cr LJ 1106 (Del).
51. *Vinayak Datta* v. *State*, AIR 1970 Goa 96.
52. *State of U.P.* v. *Moti Lal*, AIR 1968 All 83.
53. *Haroj Ali* v. *State of Assam*, 1981 Cr LJ 1745 (Gau).

held that a conviction could be based on such declaration[54] and otherwise reliable dying declaration cannot be rejected merely because some corrections in it were not initialled by the police officer recording it[55] but where the dying declaration was allegedly recorded by the police as the statement of the injured person, but it was neither submitted in the Court nor its copy was supplied to the accused, rather it was produced for the first time in the Court by the police while giving evidence, it could be rejected.[56]

24. DYING DECLARATION RECORDED BY DUTY DOCTOR

Where no relation of the deceased was present and hence there was no question of tutoring, the condition of hers being serious, recording of her dying declaration by the duty doctor was held to be proper and in the circumstances of the case even fitness certificate of the hospital incharge was not necessary.[57] Where the dying declaration was recorded by the doctor, the witnesses attested it and identified the signature of the doctor, mere non-examination or non-identification of his signature does not render it inadmissible.[58] Where the deceased narrated to the duty doctor at the time of her admission in the hospital as to how she received burn injuries and the doctor recorded it, it was held to be admissible as dying declaration.[59] Evidence of the doctor could not be discarded merely because the deceased had suffered 100% burn injuries and her general condition was poor, when she was mentally fit to make dying declaration as was stated by the doctor.[60] Where the doctor recorded the dying declaration of the deceased after waiting for the police for long as the condition of the victim was deteriorating fast and later on the police recorded the dying declaration containing further details which could not be said to be improvement, conviction on the basis of such a dying declaration was held to be proper.[61] The dying declaration recorded by the doctors in the hospitals was amply corroborated from the case history recorded by them and also by the testimony of the doctors conducting post-mortem, it could be said to be intrinsically sound and in accord with probabilities.[62] Where the dying declaration, recorded by the doctor in the medical case papers barely an hour after the incident was corroborated by two other dying declarations subsequently made, no capital can be made out by her stating that she was burnt by her father-in-law when in fact she meant her uncle-in-law.[63]

Where the doctor recording the dying declaration explained that due to extensive burn injuries, the thumb impression of the deceased could not be taken but his statement was not got attested either by the I.O. or any of the medical staff or relations of the deceased, the dying declaration was held to be unreliable.[64] Where the dying declaration recorded by the doctor suffered from infirmities and was uncorroborated, it could not form the basis of conviction.[65]

25. NON-PRODUCTION OF THE SCRIBE OF DYING DECLARATION

Where it was alleged that the dying declaration was reduced into writing but its scribe was neither examined nor cross-examined and the prosecution failed to explain the cause of his non-production, the same was discarded.[66]

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54. *Om Prakash* v. *State*, ILR (1979) 1 Del 752.
55. *Prayagsinha Bharatsinha* v. *State of Maharashtra*, 2001 Cr LJ 1327 (para 19) (Bom).
56. *Chakiri Saidulu* v. *State of A.P.*, 1994 Cr LJ 3782 (para 7) (AP).
57. *State of Rajasthan* v. *Ganesh Das*, 1995 Cr LJ 25 (paras 16 and 17) (Raj).
58. *M.S. Satyanarayana* v. *State of A.P.*, 1995 Cr LJ 689 (para 9) (AP).
59. *Lakhan Lal* v. *State*, 1995 Cr LJ 2699 (para 17) (Del).
60. *Chandrawati* v. *State*, 1996 Cr LJ 975 (para 15) (Del).
61. *Sarwan Singh* v. *State of Punjab*, 1995 Cr LJ 3630 (para 6) (SC).
62. *Chandrawati* v. *State*, 1996 Cr LJ 975 (paras 26 and 42) (Del). **See also** *Udayakar Sahu* v. *State of Orissa*, 1996 Cr LJ 3379 (para 8) (Ori).
63. *Narayan Pandhari* v. *State of Maharashtra*, 1996 Cr LJ 2174 (para 10-A) (Bom).
64. *Niru Nanhar Beck* v. *State of Orissa*, 1995 Cr LJ 2412 (para 8) (Ori).
65. *Niru Nanhar Beck* v. *State of Orissa*, 1995 Cr LJ 2412 (paras 9 and 10) (Ori).
66. *Govind Narain* v. *State of Rajasthan*, 1993 Cr LJ 2598 (para 14) (SC). **Contra :** *M.S. Satyanarayana* v. *State of A.P.*, 1995 Cr LJ 689 (para 9) (AP).

26. TUTORED DYING DECLARATION

The first dying declaration, not containing the names of all the accused, was recorded by the police immediately after the deceased gained consciousness and the second dying declaration was recorded by the Magistrate half an hour later and names of all the accused were mentioned in it. As there was no evidence to show that anyone was allowed to go near the deceased, the further details in the second dying declaration could not be treated as improvement over the first one.[67] Inference of the dying declaration being tutored cannot be drawn by the mere presence of her relatives prior to the recording of her statement.[68] Where there was possibility of improvement in the dying declaration, the accused was given benefit of doubt.[69]

27. F.I.R.

Where it was proved that the F.I.R. giving details of the incident was lodged by the deceased, it could also be used as dying declaration.[70] Where the statement of the victim of burn-injuries was recorded by the Police Officer in the presence of two independent witnesses after the incident as F.I.R., her version was natural and voluntary and fitness certificate was obtained from the duty doctor, the statement was admissible under Section 32 as dying declaration.[71]

Where the dying declaration was recorded by the Sub-Inspector in the nature of F.I.R. but there was no attestation from the doctor about the mental fitness of the deceased and her thumb impression or signature was also not taken, it was held to be highly doubtful.[72]

The dying declaration recorded in the form of the F.I.R. of the victim cannot be equated with a dying declaration in the form of statement recorded under Section 161, Cr.P.C.[73]

However the Supreme Court has subsequently held that that the statement given by the injured to the Investigating Officer and also the F.I.R. lodged by him, is not admissible as dying declaration under Section 32 of the Evidence Act.[74]

28. STATEMENT MADE IN COURSE OF BUSINESS [SUB-SECTION (2)]

This clause contemplates a statement by a person whose duty it was to make such a statement or whose business was such that statement of the kind were to be expected in the ordinary course of things.[75]

"The considerations which have induced the courts to recognize this exception appear to be principally that, in the absence of all suspicion of sinister motives, a fair presumption arises that entries made in the ordinary routine of business are correct, since the process of invention implying trouble, it is easier to state what is true than what is false; that such entries usually form a link in a chain of circumstances, which mutually corroborate each other; that false entries would be likely to bring clerks into disgrace with their employers; that, as most entries made in the course of business are subject to the inspection of several persons, an error would be exposed to speedy discovery; and that, as the facts to

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67. *Pratapaneni Ravi Kumar* v. *State of Andhra Pradesh*, AIR 1997 SC 2810 : 1997 Cr LJ 3505 (SC), **reversing** Cri A No. 933 of 1989, decided on 15-3-1990 (AP). **Also see** *Sarwan Singh* v. *State of Punjab*, 1997 SCC (Cri) 844; no relative present, no chance of tutoring, *Rukma* v. *State of Rajasthan*, 2001 Cr LJ 596 (para 10) (Raj); *Noorsab* v. *State of Karnataka*, 2001 Cr LJ 425 (para 10) (Kant). The three dying declarations consistent, no possibility of tutoring, conviction proper, *Ram Dhar* v. *State*, 1997 Cr LJ 292 (Del).
68. *Sarangdhar Rajaram Tembhikar* v. *State of Maharashtra*, 2001 Cr LJ 525 (para 9) (Bom).
69. *Santosh Kumar* v. *State of Madhya Pradesh*, 1998 Cr LJ 3081 (paras 16 and 17) (MP).
70. *Pancham Yadav* v. *State of U.P.*, 1994 Cr LJ 848 (All).
71. *Rajendra Singh* v. *State of Rajasthan*, 1996 Cr LJ 1560 (paras 9-11) (Raj). **See also** *Narayan Pandhari* v. *State of Maharashtra*, 1996 Cr LJ 2174 (para 12) (Bom); *Ismail* v. *State of Karnataka*, 2000 Cr LJ 1994 (para 4) (Kant).
72. *Maniram* v. *State of M.P.*, 1994 Cr LJ 946 (para 3) : AIR 1994 SC 840.
73. *Narayan Pandhari* v. *State of Maharashtra*, 1996 Cr LJ 2174 (para 13) (Bom), **relying on** *Munna Raja* v. *State of Madhya Pradesh*, AIR 1976 SC 2199 : 1976 Cr LJ 1718; *State of Punjab* v. *Amarjit Singh*, AIR 1988 SC 2013 : 1989 Cr LJ 95 (para 23) and *State of Uttar Pradesh* v. *Chetram*, AIR 1989 SC 1543 : 1989 Cr LJ 1785 (para 17) and **explaining** *Balak Ram* v. *State of U.P.*, AIR 1974 SC 2165 : 1974 Cr LJ 1486.
74. *Sukhar* v. *State of U.P.*, AIR 1999 SC 3883 (para 2).
75. *Soney Lal Jha* v. *Darabdeo Narain Singh*, ILR (1935) 14 Pat 461 (FB); **approving** *Ningawa* v. *Bharmappa*, ILR (1897) 23 Bom 63, on the interpretation of this clause, but differing on the interpretation of clause 3.

which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favour of such entries may often prove convenient, if not necessary, for the due investigation of truth".[76]

29. IN THE COURSE OF BUSINESS

This clause provides that a written statement of a relevant fact made by a person who is dead, is itself a relevant fact, when the statement was made by such person in 'the ordinary course of business'. The expression 'course of business' occurs in more than one place in the Act: See Sections 16, 34, 47, 114.

The phrase 'in the ordinary course of business' is apparently used to indicate the current routine of business which was usually followed by the person whose declaration, it is sought to introduce. The rule laid down in this clause extends only to statements made during the course, not of any particular transaction of an exceptional kind, such as the execution of a deed of mortgage, but of business or professional employment in which the declarant was ordinarily or habitually engaged. The particulars set out in this clause, though not exhaustive, may fairly be taken as indicating the nature of the statements made in the course of business. The expression 'in the ordinary course of business' must mean 'in the ordinary course of a professional avocation'.[77]

The business referred to may be of a temporary character. See illustrations (b), (c), (d) and (g).[78]

The words 'in the ordinary course of business' in Section 32(2) should be given a broad and liberal connotation. An important event in the history of a family, communicated by either the husband to his wife, or by an elder to a younger, one, even in the ordinary course of conversation, at a time when there was no controversy about it, may well be held to be a statement made in the ordinary course of business.[79]

Entries in account books should, in order to be relevant, be regularly kept in the course of business.[80]

Where accounts are kept in loose sheets of paper, they do not have the probative force of a book of account regularly kept in the course of business.[81]

A book of accounts may be said to be regularly kept, although the book is not entered up from day to day or from hour to hour as the transactions take place.[82]

30. DIFFERENCE BETWEEN SECTION 32, CL. (2) AND SECTION 34

The plaintiff relied on entries in the handwriting of her deceased husband, kept in the ordinary course of his business. It was held that entries in accounts, relevant only under Section 34, are not alone sufficient to charge any person with liability; corroboration is required. But where accounts are relevant under this clause also, they are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible only under Section 34, require corroboration. Entries in accounts may in the same suit be relevant under both sections, and where this is so, the necessity of corroboration prescribed by Section 34, does not arise. Though accounts which are relevant under this clause do not, as a matter of law, require corroboration, the Judge is not bound to act on them without corroboration; that is a matter on which he must exercise his own judicial discretion, as a judge of fact.[83]

Clause (2) does not make the account books conclusive proof of the facts stated therein. Under Section 34, a liability cannot be fastened on any person merely because in the account books of the opposite party, there are certain entries adverse to him. Taking Section 32(2) and Section 34 together, it

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76. TAYLOR, 12th Edn., S. 697, p. 446.
77. *Ningawa* v. *Bharmappa*, ILR (1897) 23 Bom 63, 67.
78. *Sheonandan Singh* v. *Jeonandan Dusadh*, (1908) 13 CWN 71.
79. *Devi Singh* v, *Phulma*, AIR 1961 HP 10.
80. *Alinas Chandra* v. *Pratul Chandra*, ILR 55 Cal 1070.
81. *Ganesh Prasad Raj* v. *Narendra Nath Sen*, AIR 1953 SC 431.
82. *Deputy Commissioner of Bara Banki* v. *Munshi Ram Parshad*, (1899) 26 IA 254 : ILR 27 Cal 118, **overruling** *Munchershaw Bezonji* v. *The New Dhurumsey S&W Company*, ILR (1880) 4 Bom 576; *Chandrashwar Prasad Narain Singh* v. *Bisheshwar Pratap Narain Singh*, ILR (1926) 5 Pat 777.
83. *Rampyrabai* v. *Balaji Shridhar*, ILR (1904) 28 Bom 294 : 6 Bom LR 50; *J.N Eranna Rao* v. *V D H Subbayya Setty & Co.*, AIR 1960 AP 331.

is clear that, even if the account books may be treated as relevant it is discretionary for the court to require additional proof of any particular entry.[84]

The material difference as between any entry relevant under Section 34 and one relevant under Section 32(2) is that, in the former case, the person who made the entry may be available as a witness, while in the latter case he is not.

Entries of payment made by a creditor in the ledger (*samadaskat* book) belonging to a debtor fall within this clause, and although they are admissions in his own favour, they are not excluded by Section 21.[85] In a limited company, the books and papers kept in the usual course of business are the best evidence and they can be admitted under Section 32(2), when the writer is dead or is not available etc.[86]

It is not necessary or useful to attempt an exact definition, "of a book". A collection of sheets is implied in the conception of "a book". It connotes an intention that it should serve as a permanent record. Beyond these two ideas, it is not necessary that it should consist of a particular number of sheets or that it should be bound in a particular way.[87]

However where there were loose sheets of almanac with blanks left at several places, it was held by the Supreme Court, that there was a possibility of entries or sheets being substituted or interpolated at different places; the entries cannot be said to have been made in regular course of business and cannot have the necessary probative value of a book of account.[88]

Where the account books were written from rough notes not from day to day, but once in a month, and the rough notes were not preserved and the cash balance was written in two parts every day, it was held that the practice adopted is not to make the account books any the less regular or not contemporaneous, and it did not show that the books were not kept in the regular course of business.[89]

Where the question was whether a building was constructed before or after 1-4-1947, in a proceeding for fixation of fair rent under the Rent Control Act, it was held that the counterfoils of the rent receipts made in the ordinary course of business by the landlord are admissible under Section 32(2).[90] *Panjis* are maintained by *Panjikars* who are professional genealogists and they systematically maintain pedigree tables in the community of Naitha Brahmins. They go from place to place and periodically ascertain the genealogies of their clients and enter them in *Panjis* (Palm leaf manuscripts of genealogy) and add them such fresh additions as occur in the family from time to time; they are considered important in this community in connection with questions of marriage (who may marry whom) and relationship and caste. They are admissible u/Section 32(2).[91] Where a husband had written to his wife making reference to a settlement, and asked her to do certain acts in pursuance of the settlement, such as telling his uncle that he would execute a mortgage deed in his favour, when the letters were filed to prove a family settlement, it was held that the letters were relevant u/Section 32(2), of the Act.[92]

The record, prepared by a Magistrate, of proceedings at an identification parade conducted by him cannot be regarded as a statement made by him in the ordinary course of business, and so, such a document cannot be admitted under Section 32(2) and treated as a substantive piece of evidence; the proceedings of the parade can only be proved by the oral deposition of the Magistrate who held them or, perhaps, by the deposition of some other person in authority who was present when the parade was held.[93]

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84. *Kachrulal* v. *Nandlal*, (1955) Nag 618.
85. *Jethibai* v. *Putlibai*, (1912) 34 Bom LR 1020.
86. *Lodna Colliery Co. Ltd.* v. *Bholanath Rai*, AIR 1954 Cal 233.
87. *Ambalavana Pillai* v. *Gowri Ammal*, AIR 1936 Mad 871.
88. *Ganesh Prasad Ray* v. *Narendra Nath Sen*, AIR 1953 SC 431.
89. *Kutch Bhabhanbai* v. *Kanji Ravji*, AIR 1950 Kutch 90. **See contra :** *Kanbidhanji* v. *Kandidhanji Ratna*, AIR 1950 Cut 47.
90. *P K. Rukmini Bai* v. *Venkateshwara Silk House, Bangalore*, AIR 1972 Mys 143.
91. *Sitaji* v. *Bijendra Narain*, AIR 1954 SC 601.
92. *Ramamurthy* v. *Subba Rao*, AIR 1937 Mad 19.
93. *Roshan Bahari* v. *State*, ILR 1956 Punj 140.

31. IN THE DISCHARGE OF PROFESSIONAL DUTY

PHIPSON ON EVIDENCE[1], states: "Declarations, oral or written, made by deceased persons, in the ordinary course of duty, as to facts within their personal knowledge, contemporaneously with the facts stated and without motive to misrepresent, are admissible in proof of their contents.

The grounds of reception are: (1) death; and (2) the presumption of truth which arises from the mechanical and generally disinterested nature of entries made in the ordinary course of duty, and from their constant liability, if false, to be detected by the declarant's superiors".

"The declarations must have been made contemporaneously with the facts recorded, which term, however, is not to be construed in the strict sense applicable to declarations that are a part of the *res gestae*; or in the loose one applicable to entries in public registers, or memoranda admitted to refresh the memory of a witness. The entry should be made at or near the time of the act—a record in the evening of an act done the same morning has been received; so, perhaps, might one be which was made the next day; while an interval of two days has sufficed to exclude."[2]

While under the English Law the declaration must be contemporaneous with the fact recorded and further the declarant must have personal knowledge of the fact, under this clause these conditions are not necessary though it may affect the weight to be attached.

A register of marriages kept by a *Kazi*, since deceased, who celebrated the marriage, in which register was entered the amount of the dower, was held to be admissible and relevant, as evidence of the sum fixed, being an entry in a book kept in the discharge of duty, within this clause.[3] Entries in the Draft Record of Rights are entries maintained in the normal course of business.[4] Entries in the Revenue Records, regarding the ownership and possession of lands are admissible under Section 32(2).[5] If a book is maintained by a *Chowkidar*, for noting about the death of the person within his jurisdiction, whether he made the entries himself or got the entries written by another as he was empowered to do so under clause (b) of rule 126 of the Police Manual, *Chowkidar* and the writer are dead, the entry is admissible in evidence.[6] Where there was a post-mortem report of a civil surgeon, since deceased, it was held that the post-mortem report prepared by the surgeon was admissible under Section 32(2) as being a statement made by a deceased person in the discharge of his professional duty.[7] Where a commissioner made an enquiry and submitted his report and later died, it was held that the report was admissible u/s. 32(2), as it was made in the performance of his official duty.[8]

32. PROOF

Section 32(2), deals only with relevancy of evidence and not the procedure for its proof. Before a relevant statement is admitted, its authorship must be established in the ordinary way.[9]

The primary evidence of a statement in a letter that of the writer, would be the writer, but if his whereabouts are not known, the statement could be proved by several modes of proof of handwriting laid down in the Act. Before admitting it under Section 32(2) it must be proved that such statement was written by the person alleged.[10]

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1. 15th Edn. (2000), Page 844 (para 35-21).
2. PHIPSON ON EVIDENCE, 15th Edn. (2000), p. 846, (para 35-24).
3. *Zakeri Begum* v. *Sakina Begum*, (1892) 19 IA 157 : ILR 19 Cal 689.
4. *Roy and Co.* v. *Nani Bala Dey (Smt.)*, AIR 1979 Cal 50.
5. *Sri Bimeshwara Swamy Temple* v. *Krishnamurthy*, AIR 1973 SC 1299.
6. ILR 1964 Cut 829; *Padmalal Mishra* v. *Fuladei (Smt.)*, 31 Cut LT 632: **relying on;** *Sitaji* v. *Bijendra Narain*, AIR 1954 SC 601; *Ramamurthy* v. *Subba Rao*, AIR 1937 Mad 19.
7. *Ram Balak Singh* v. *State*, AIR 1964 Pat 62; *Mohan Singh* v. *King-Emperor*, AIR 1925 All 413; In re : *Govindu*, 1969 Cr LJ 1157; *Chhedilal* v. *Shakuran*, AIR 1967 All 269. **See also** *Ram Balak Singh* v. *State*, AIR 1964 Pat 62. Where the medical officer was not easily available for examination. Injury report and post-mortem report in the handwriting of the doctor preparing it, proved, admissible, *Lakhu Singh* v. *State of Rajasthan*, 1997 Cr LJ 3638 (Raj).
8. *Lakshmi Narayan Arjun Das* v. *State Bank of India*, AIR 1969 Pat 385.
9. *Nagaraja Rao* v. *Koothappan*, AIR 1941 Mad 602.
10. *Pratapsinh Ved* v. *State*, AIR 1955 Sau 68.

Proof of authorship of the entries, can be done by calling a witness who saw the deceased making the entry or who is conversant with the handwriting of the deceased.[11]

The entries should have been made by the deceased person himself. Entries made by another person at his instance are not admissible under this section.[12]

Entries in registers prepared by an *Amin* who is dead, are admissible for proving the nature of the tenancy.[13]

33. DECLARATIONS AGAINST INTEREST OF MAKER [SUB-SECTION (3)]

This clause comprises three classes of declarations against interest *viz*; where they affect the declarant's (1) pecuniary interest; (2) proprietary interest; and (3) personal liberty or property, by tending to charge him with a crime or to subject him to payment of damages.

34. STATEMENT AGAINST THE INTEREST OF MAKER

A statement of a deceased person, in order to be admissible under this clause, must be a statement of a relevant fact and must be against the proprietary or pecuniary interest of the person making it.[14]

This clause makes a declaration against interest admissible in evidence. The principle upon which such statements are regarded as admissible in evidence, is that a person is not, in the ordinary course of affairs, likely to make a statement which is to his own detriment, unless it is true.[15]

The clause is based upon the knowledge of human nature. Self-interest induces a man to be cautious in saying anything against himself. When one makes a declaration in disparagement of one's own rights or interests, it is generally true, and because it is so, the law has deemed it safe to admit evidence of such a declaration. Illustrations (e) and (f) apply to this clause.

The form of the declaration is immaterial; it may be verbal or written, in a deed or a will, or in any other document.

Declarations against interest should, to be admissible, have been against interest at the time they were made, and it is no answer that they might possibly turn out to be so subsequently.[16] The interest that is predicated in Section 32(3), must be one which relates to the pecuniary or proprietary interest of the person making it. It is the present pecuniary or proprietary interest of the person making the statement that must be affected by the statement and should not be one of some future contingency that may be affected by the statement, in order that the same may be admissible.[17]

Before a statement can be admissible under this clause it must be shown that the person making it knew that it was against his pecuniary or proprietary interest. In most cases such knowledge would have to be inferred from the surrounding circumstances.[18] Where the statement of a person was received under Section 32(3), on the ground that it might have exposed that person to a suit for damages; but there was no person whatever for thinking that he knew that he was exposing himself to a suit for damages: the statement ought not to have been admitted in evidence.[19]

Where the question was whether a certain transaction was *benami*, the contention was that the question could not be examined on the basis of statements made several years after the date of the transaction. The Supreme Court repelled that contention and held that as the statements made, were against the proprietary interest of the maker, they were admissible under Section 32(3) and also under Section 21.[20] The statement of a person that he is separated from a joint family of which he was a coparcener, and that he has no further interest in the joint family property or claim to any assets left by

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11. *Sitaji* v. *Bijendra Narain*, AIR 1954 SC 601.
12. *Mussamat Naina Keor* v. *Gobardhan Singh*, (1916) 2 PLJ 42.
13. *Abinad Chandra Majhi* v. *Pratul Chandra Ghose*, (1928) 55 Cal 1070.
14. *Soney Lal Jha* v. *Darabdeo Narain Singh*, ILR (1935) 14 Pat 461 (FB).
15. *Dal Bahadur Singh* v. *Bijai Bhahadur Singh*, (1929) 32 Bom LR 487 : 57 IA 14 : AIR 1930 PC 79.
16. *Ex parte* EDWARDS: In re : *Tollemache*, (1884) 14 QBD 415.
17. *Arjunshukla* v. *Juteshi Shukla*, AIR 1954 Orissa 52.
18. *Ram Rati Kuer* v. *Dwarika Prasad*, AIR 1967 SC 1134 : (1967) 2 SCJ 789.
19. *Savitri Devi (Smt.)* v. *Ram Ran Bijoy Prasad Singh*, AIR 1950 PC 1.
20. *Bhim Singh* v. *Kan Singh*, AIR 1980 SC 727.

his father, would be a statement made against the interest of such a person. And after such a person is dead, it would be relevant under Section 32(3).[21] Where a statement was made in a gift-deed by a Hindu widow that the properties mentioned therein were already gifted away by her father-in-law and by her husband, it was held that the statement attracted the provisions of Section 32(3) and (7), as they are against her proprietary interest.[22] Where A, in a mortgage deed executed by him, admitted that B was the adopted son of his deceased brother C, it was held that such a statement, being against his pecuniary interest, as he would lose his share in the property of C, if B was the adopted son of C, was admissible under Section 32(3).[23] The documents showing the transfer of property by B as guardian of A and describing A as his adopted son, are admissible, as such statements were against his own proprietary interest.[24] A statement of the deceased, in a compromise petition in a previous suit in which she had challenged the adoption by her husband of a boy 11 years old, was held to be admissible, as she had given up her stand challenging the adoption, in the compromise, and as it affected her pecuniary and proprietary interest in the properties, and she would become only a maintenance holder.[25] A statement in a sale deed by the vendor, since deceased, that he had received the consideration for the sale, is against his own pecuniary interest and is good evidence in support of passing of consideration.[26] An affidavit containing an admission against the interests of the deponent is admissible under Section 32(3).[27] A statement by a landlord who was dead, that there was a tenant on the land, was a statement against his proprietary interest and was held admissible under this clause.[28]

When a particular statement that her husband was separated from the joint family, was made by a widow; it was held that the statement was made consciously, knowing what she was stating and also knowing that the effect of her statement would be against her proprietary interest in the family property.[29]

Statements by deceased members of a family as witnesses in prior litigation are admissible as evidence of conduct under Section 8 but not to prove a family arrangement because they are not statements made against their interests, as required under Section 32(3).[30] A statement made by a deceased person, in his will, that he had spent a certain amount in effecting repairs to his house was held to be not admissible in evidence as it was not a statement made against his pecuniary or proprietary interest.[31]

A Hindu widow purported to adopt her brother's grandson, fifty-four years after the death of her husband, in pursuance of a power to adopt conferred on her by her husband. The widow obtained mutation of the name of the adopted boy in place of her own in revenue registers. In her evidence in the mutation proceedings, she stated that she had her husband's authority to adopt. In a suit by the reversioners, against the adopted boy to recover the property, it was held that the evidence of the widow in the mutation proceedings was not admissible under this clause or under Section 33.[32] However a statement of a dead person, in an adoption deed relating to an authority to adopt was held admissible u/Section 32(3), being a statement against the interest of the dead person making it.[33]

Though a recital of boundary in a document between third parties, is not ordinarily admissible to prove possession of title as against a person who is not a party to the document, it could be admitted under Section 32(3), when the executant of the document is dead and when it was made against the

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21. *Bhagwati Prasad* v. *Rameshwari Kuer*, AIR 1952 SC 72 : 1951 SCR 603; *Gopinath Deb* v. *Jagannath Baral*, AIR 1969 Ori 18; *Ningavva* v. *Bharamappa*, ILR 23 Bom 63; *Appala Narasimham* v. *Udalama*, AIR 1959 AP 407; *Rangayyan* v. *Innasimuthu Mudali*, AIR 1956 Mad 226; *Kantilal Purushotam* v. *Narsibhai*, ILR 1972 Guj 790.
22. *Makkapati Purnananda Sastri* v. *Chintalapati Purnananda*, AIR 1961 AP 435.
23. *Harihar Mohapatra* v. *Nabakishore Rajguru Mohapatra*, AIR 1963 Ori 45.
24. *Jagabandhu Senapati* v. *Bhagut*, AIR 1974 Ori 120.
25. *Savitri Dei* v. *Baskhar Bhuyan*, AIR 1972 Ori 148; **following** *K.V. Subbaraju* v. *C. Subbaraju*, AIR 1968 SC 947.
26. *Ushamani Dei* v. *Gangadharba Barik*, AIR 1977 (NOC) 301 : ILR (1977) 2 Cut 157; *Harekrushna Samantaray* v. *Krushna Chandra Raut*, ILR 1974 Cut 33; *Gulam Ali* v. *Sulthan Khan*, AIR 1967 Ori 55.
27. *Saligram* v. *Takurjee*, AIR 1955 Ajmer 28.
28. *Abdul Azib Molla* v. *Ebrahim Molla*, ILR (1904) 31 Cal 965.
29. *Ram Rati Kuer* v. *Dwarika Prasad Singh*, AIR 1967 SC 1134.
30. *Madho Das* v. *Mukund Ram*, AIR 1955 SC 481.
31. *Narhari* v. *Ambabai*, (1919) 22 Bom LR 57 : ILR 44 Bom 192.
32. *Bal Bahadur Singh* v. *Bijai Bhadur Singh*, (1929) 32 Bom LR 487 : 57 IA 14 : 52 All 1.
33. *Andhi Kuer (Smt.)* v. *Rajeshwar Singh*, AIR 1972 Pat 325.

proprietary interest of the person making it.[34] The recitals as to boundaries in documents not *inter partes* are admissible in evidence under Sections 11, 13, 32(3), and 32(7) of the Evidence Act.[35] The plaintiff sued in 1893 to recover possession of certain land. The defendants denied the plaintiff's title. The plaintiff tendered in evidence a registered mortgage-deed of adjacent land executed in 1877, which set forth the boundaries of the land comprised in the mortgage, and as one of such boundaries, referred to the land in question as then belonging to the plaintiff. At the date of the deed, there was no litigation existing between the present litigants, and at the date of the present suit, the mortgagor was dead. It was held that the statement in the deed was admissible under this clause as a statement against the pecuniary or proprietary interest of the mortgagor.[36]

A Full Bench of the Patna High Court has dissented from this view. It has held that a statement of boundaries in a document of title between third parties, who are dead at the time the statement is sought to be put in evidence, unless it is shown that at the time the statement was made, it was contrary to the interest of the maker, and that at the time it was sought to be used, it was a statement of a relevant fact.[37]

35. STATEMENT EXPOSING DECLARANT TO CRIMINAL PROSECUTION OR SUIT FOR DAMAGES

A statement of a deceased person, which if true, would expose the maker to a criminal prosecution or suit for damages is relevant.[38]

The confession of an accused person implicating himself and an accomplice in a crime and who is since dead, is admissible under this clause and is not excluded by ill. (b) to Section 30.[39]

A letter from the co-respondent to the petitioner in a divorce suit, admitting adultery with the respondent, was held to be admissible in evidence as it would expose the co-respondent to a criminal prosecution.[40]

Where a member of a gang committing dacoity was caught by the villagers, and he disclosed the names of his companions before he died, it was held that the statement of the deceased implicating himself as well as his companions was admissible u/Section 32(3), and could be used against other accomplices named by him.[41]

Where an accused was charged with breach of trust, a statement by a deceased person to a witness that the accused gave him a document, that he wanted to know the contents of the document so as to find out in what way they would be useful to him, would expose him to the prosecution for abetting the criminal breach of trust or himself misappropriating the documents, and so is admissible.[42]

36. STATEMENT GIVING OPINION AS TO A PUBLIC RIGHT OR CUSTOM OR MATTER OF GENERAL INTEREST [SUB-SECTION (4)]

Clause 4 of Section 32 says that the statement of relevant facts made by persons who are dead, are admissible, provided such statements give the opinion of such persons, regarding the existence of any public right or custom, or a matter of public or general interest.

The admissibility of declarations of deceased persons in cases of public right or custom, or matters of public or general interest, is allowed, as these rights or customs are generally of ancient and obscure

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34. 1979 Punj LJ 376; *Thyagarajan Chetty* v. *Narayana Thevan*, AIR 1940 Mad 450; *Ningawa* v. *Bhar mappa*, ILR (1897) 23 Bom 63; *Tikaram* v. *Motilal*, AIR 1930 All 299; *Abdul Rahim Kazi* v. *Jonab Ali Sikdar*, AIR 1923 Cal 299 : 68 IC 329.
35. *V.A. Amiappa Nainar (died)* v. *Annamali Chettiar (died)*, AIR 1972 Mad 154.
36. *Ningawa* v. *Bharamappa*, ILR (1897) 23 Bom 63.
37. *Soney Lal Jha* v. *Darabdeo Narain Singh*, (1935) 14 Pat 461, (FB); *Subudhi Padhan* v. *Raghu Bhuyan*, AIR 1962 Orissa 40; *Chandreswar* v. *Ramachandra*, AIR 1973 Pat 215; *Bhuriya* v. *Ramakali*, AIR 1971 Punj 9.
38. *T.S. John* v. *State of Kerala*, 1984 Cr LJ 753 (Ker).
39. *Nga Po Yin* v. *King-Emperor*, (1906) UBR (Evi) (1904-06) 3.
40. *Cockman* v. *Cockman*, ILR (1933) 56 All 570.
41. *Narpat* v. *State*, (1961) 1 Cr LJ 591 (All).
42. *Mohal Lal Mulchand* v. *Mehta Kanaiya Lal Pranshanker*, AIR 1950 Kutch 52.

origin, and may be acted upon only at distant intervals of time; direct proof of evidence is not, therefore, demanded.[43]

The principle on which the exception of reputation regarding public rights rests is that the reputation can hardly exist without the concurrence of many parties interested to investigate the subject, and such concurrence is presumptive evidence of the existence of an ancient right, of which direct proof cannot be given in most cases.[44]

The admissibility of the deceased persons in such cases is sanctioned because in local matters, in which the community are interested, all persons living in the neighbourhood are likely to be conversant; because, common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be ture; because conflicting interests would lead to contradiction from others if the statements were false; and thus a trustworthy reputation may arise from the concurrence of many parties unconnected with each other, who are all interested in investigating the subjects.[45]

"Declarations made by deceased persons, of competent knowledge, *ante litem motam*, are admissible in proof of ancient rights of a public or general nature.

Evidence of this description is frequently included under the general term reputation; and is admissible for or against the Crown, as well as ordinary party.

The grounds of admission are (1) death; (2) necessity, ancient facts being generally incapable of direct proof; and (3) the guarantee of truth afforded by the public nature of the rights, which tends to preclude individual bias and lessen the danger of misstatements by exposing them to constant contradiction."[46]

TAYLOR ON EVIDENCE (8th Ed, Sections 546, 611) states: "The origin of the right claimed is usually of so ancient a date, and the rights themselves are of so undefined and general a character, that direct proof of their existence and nature can seldom be obtained, and ought not be required; in matters in which the community are interested, all persons must be deemed conversant; as common rights are naturally talked of in public, and as the nature of such rights excludes the probability of individual bias, what is dropped in conversation respecting them may be presumed to be true; the general interest which belongs to the subject would lead to immediate contradiction from others, if the statements proved were false; reputation can hardly exist without the concurrence of many parties unconnected with each other; who are all alike interested in investigating the subject; such concurrence furnishes strong presumptive evidence of truth; and it is this prevailing current of assertion which is resorted to as evidence, for to this every member of the community is supposed to be privy, and to contribute his share..... A distinction has to be drawn under English law between the meaning of the terms public and general, the former being applied to that which concerns every member of the State, while the latter is limited to a lessor, though still a considerable portion of the community, as for example, to the person living in a particular district or neighbourhood. In matters strictly public, reputation from any one has been held receivable, while in matters of general interest the testimony of persons wholly unconnected with the place has been regarded as inadmissible. So far as admissibility is concerned, the Indian Act makes to distinction..... The Indian Evidence Act here follows the English law. It appears that competent knowledge in the declarant is an essential pre-requisite to the admission of his testimony; and although all the Queen's subjects are presumed to have that knowledge in some degree where the matter is of public concernment, yet, in other matters, which are not strictly public, though they are interesting to many persons, some particular evidence of such knowledge is generally required."

In HALSBURY 4th Edn., Vol. 17, p. 59, Para 80 it is stated "public right" imports a right exercisable by every member of the community, for example, a right of highway or of fishery in tidal rivers, or a right of way. A general right is one which affects some considerable section of the community, for example, a right of common, or the right to elect the churchwardens of a parish."

The right must have been one of whose existence the declarant should be aware. If the declaration is made otherwise than upon the declarant's own knowledge, it will be rejected.

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43. *R* v. *Bedfordshire*, (1855) 4 E & B 535.
44. *Wright* v. *Tatham*, (1838) 5 Cl & F 670.
45. Per LORD CAMPBELL, C.J., in *R* v. *Bedfordshire*, (1855) 4 E & B, 535.
46. PHIPSON ON EVIDENCE, 15th Edn. (2000), Page 848 (para 35-28).

The recitals in the document are admissible under this section. The history dealing with the founding of a temple is a matter of general interest and when a statement about it is made by a deceased person at a time when there was no controversy on this question, that statement would clearly come within the scope of this clause.[47] Where the question as to who is the founder of a religious endowment is in dispute, a recital in a deed executed by a *Mahant*, who was for some time connected with the management of the religious endowment, mentioning the founder of the endowment, was held admissible under Section 32(4), as such statement was *ante litem motam*.[48] Where there was an assertion of a private right negativing a public right, a statement made by the great grandson's son of the original grantee in *inam* proceedings was relied on. It was held that such statements must be given great weight as one made *ante litem motam*, although it is in the interest of the maker then.[49]

In a suit filed by a *Zamindar* to recover certain forest tracts from the Government, on the ground they were included within the limits of his *Zamindari*, both the parties relied on *Ayakut* accounts containing certain statements of boundaries showing the inclusion of some disputed tracts in the *Zamindari* limits or in the limits of Government villages. It was held that those accounts were made for revenue purposes to show the source of revenue in each village, giving the limits of the villagers to which they are referred; they were admissible as evidence of reputation provided they were produced from proper custody and sufficiently proved to be genuine.[50]

This clause is inapplicable to a document purporting to deal with the rights of a private individual as against the public, in which the interests of the individual form the subject-matter of the statement.[51] A map prepared by a person, who is dead, in a previous case not *inter partes*, showing the limits of a particular district, is not admissible as it is not a matter of public right or public or general interest within the meaning of this clause.[52] Section 32(4) applies only when it is a public right or custom, or is a matter of general interest. When a document does not show what exactly were the rights or the customary privileges of the community in regard to a certain temple, it was held that the document was not admissible.[53]

The recitals relating to the boundaries of plots covered by a document do not constitute the opinion of the executant of the deed and are not admissible.[54]

37. BEFORE ANY CONTROVERSY HAS ARISEN

"Declarations made after the commencement of the situation from which the controversy springs, are admissible, if made before any dispute has in fact arisen; while those made after a dispute has arisen are inadmissible, although the dispute was unknown to the declarant, for that is a collateral issue which might be impossible to prove, or was fraudulently commenced with a view to excluding the declarations, or involved different parties or related to different property or claims.

On the other hand, declarations as to the right will be received although made for the express purpose of preventing disputes, or after a claim has been asserted but finally abandoned; or after the existence of non-contentious legal proceedings involving the same right or after the existence of contentious legal proceedings involving different rights or even the same right, if only collaterally and not directly involved."[55]

The declarations should have been made *ante litem motam*, *i.e.*, before the beginning of any controversy, and not simply before the commencement of any suit involving the same subject-matter.

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47. *K.C.M. Harichandan* v. *Commissioner of Endowments*, ILR (1961) Cut 109.
48. *Raghunath Misra* v. *Nityanand Sahu*, ILR 1963 Cut 257; ILR 1962 Cut 109; *Natabar Parichha* v. *Nimai Charan Misra*, AIR 1952 Ori 75.
49. *Mazhar Ali Saheb* v. *Gulam Murtujah Saheb*, AIR 1958 AP 8; *Rajkumar Lukhoisana Singh* v. *Ayekpam Angosingh*, AIR 1958 Mani 7; (declarations *post litem motam* are inadmissible).
50. *Siva Subramaniya* v. *Secretary of State for India*, ILR 9 Mad 285.
51. *Heiniger* v. *Droz*, (1900) 3 Bom LR 1 : ILR 25 Bom 433.
52. *Kesho Prasad* v. *Bhagjogna Kuer*, (1937) 39 Bom LR 731 : ILR 16 Pat 258, (PC); Illustration (i) exemplifies this clause.
53. *Mothilal* v. *Baba Baldeo*, AIR 1952 Vin Pra 36.
54. *Ram Sharan* v. *Narayan Chandra*, AIR 1954 Cal 125.
55. PHIPSON ON EVIDENCE 15th Edn. (2000) para 35-32, page 850.

The operation of bias is thus excluded.[56] Such declarations of persons must have been made *ante litem motam* and such persons must have been dead, or not found to give evidence, as contemplated u/s. 32, then only they are admissible.[57]

To render a statement as having been made *post litem motam* the same thing must be in controversy both before and after it is made.[58]

38. STATEMENT RELATING TO EXISTENCE OF RELATIONSHIP [SUB-SECTION (5)]

Under clause (5), a statement relating to the existence of any relationship between the persons alive or dead, is declared as relevant. But that person making the statement must have special means of knowledge.

Four conditions are to be satisfied for the application of clause (5) of Section 32.

(1) The statement must relate to the existence of any relationship by blood, marriage or adoption.

(2) The person making the statement must have special means of knowledge about the relationship.

(3) The statement must have been made before the question in dispute was raised.

(4) One of the four conditions namely, that a person who is dead, etc., is contained in the main provisions of Section 32.[59]

The language in Section 32(5), unrestricted as it is by any condition, embraces every statement as to relationship made by a person having special means of knowledge of it, and it is immaterial whether it was made in a judicial proceeding or otherwise.[60]

Evidence of general reputation is inadmissible as proof of relationship; it is necessary to put forward evidence of the kind described in Section 32(5), (6) & (7) and Section 50, to prove the existence of relationship between persons deceased, whenever the question is in issue.[61]

39. PARENT AND CHILD

Where a person brought a suit for declaration that he was the adopted son of one *Sardar* and is entitled to succeed to the *Sardarship*, evidence of documents from the official sources, wherein the *Sardar* who was dismissed, and other members gave statements to the officials, as to the adoption of the plaintiff by the dismissed *Sardar*, was filed. It was held by the Privy Council that as those statements were made in connection with a matter of local interest, *viz.*, the appointment of a new *Sardar*, they carried great weight and could not be rejected as mere self-assertion.[62]

Where a mortgage was executed by A & B wherein it was admitted by A that B was the adopted son of his deceased brother C, it was held that such a statement, *viz.*, the admission of A is relevant u/s. 32(5).[63] Where A mentioned in the gift deed, and also in the mutation proceedings, that B was her daughter, it was held that the statement was admissible u/Section 32(5), in a suit against B, after A's death, in which her relationship to A was denied.[64] In an application containing a statement before the *Tahsildar*, requesting him to enter the name of the person adopted, in the revenue accounts in the place of the applicant, it was held that the certified copies of such documents which were in the custody of the

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56. *Berkeley Peerage* case, (1811) 4 Camp 401, 417; *Amina Khatun Musammat* v. *Khalil-ur-Rahman Khan*, ILR (1933) 8 Luck 455.
57. *Busoid* v. *Newaj Ahmed Khan*, AIR 1929 Cal 533.
58. *Harichandan* v. *Commissioner of Endowments*, ILR 1961 Cut 109.
59. *Dolgobinda* v. *Nimai Charan*, AIR 1959 SC 914.
60. *Biro* v. *Atma Ram*, AIR 1937 PC 101.
61. *Lakshmi Reddi* v. *Venkata Reddi*, AIR 1937 PC 201; *Shivlal* v. *Joatha*, AIR 1952 Raj 167; *Kunjilal* v. *Subalal*, AIR 1952 MB 12; *Abdul Rahman* v. *Halima Khatun*, 84 CWN 539.
62. *Arjuno Naiko* v. *Modono Mohono Naiko*, AIR 1940 PC 150; *Subbarao* v. *Venkata Rama Rao*, AIR 1964 AP 53; (statement of adoptive father in an earlier Revenue Case) *Punjabrao Deorao* v. *Shesh Rao*, AIR 1962 Bom 175 (Deed of adoption).
63. *Harihar Rajguru* v. *Nabakishore Rajguru*, AIR 1963 Ori 45.
64. *Lal Devi* v. *Munilal*, ILR 1959 Punj 1269.

Government satisfied the requirements of Section 32(5), and the documents were admissible in evidence.[65]

Statements of the father (since deceased) in his written statement in a maintenance case filed by the mother of the child, denying the paternity of the child, were not within this clause or Section 33 and were not admissible in evidence as against the child. The judgment of the Magistrate in the same proceedings, holding that the child was not the child of that father, was not binding upon the child and was inadmissible in evidence. Statements by the mother that the child was begotten by a person other than her husband were inadmissible against the child.[66]

40. MARRIAGE

An admission by a plaintiff of her marriage with a person, made before there was any dispute about such marriage, may be proved under Section 21(1) read with this clause.[67]

Where a statement was made in an unregistered gift deed that the donee is his legally married wife, it was held that such statement is admissible u/Section 32(5), as an unregistered gift deed, is admissible in regard to collateral matters.[68] Where entry in the family was maintained under rules and on the basis of divorce the name of the first wife was deleted and that of the second wife, subsequently married, was entered, the representation made by the husband and recorded as entry in the family register is very much relevant under Section 32(5) to prove that the person mentioned in the entry had married the second.[69]

Strict proof of marriage is necessary in certain criminal offences, *e.g.*, bigamy, adultery, enticing away a married woman. This clause has no application in such cases. Otherwise general reputation of marriage is admissible.[70]

Age.—As the question as to the existence of any relationship also includes the question as to the commencement of that relationship, declarations of deceased, competent declarants, are admissible to prove a person's date of birth, and, consequently, his age, minority or majority, or the order in which the members of the family are born. Such declarations are also admissible to prove parentage, names of relations, or the date of death of a member of the family, as death implies termination of a relationship, just as birth implies its commencement.[71] A statement as to the age of a member of a family, made by a sister, or a statement as to his age made by a testator in his will, was held to be admissible after her death.[72]

Section 32(5), cannot be construed literally, and a statement regarding age cannot be said to be not one relating to existence of any relationship by blood or marriage or adoption.[73]

Entry as to age, in the school register, is a relevant piece of evidence, though slight evidence to the contrary may displace it.[74] A statement given to the school authority by the deceased father of the student and entered in the admission register of the school as to the age of the individual was held admissible u/Section 32(5).[75] The entry made by B in his *Panchang*, when A had gone to consult B about the position of stars at the time of birth of A's daughter, was held to be admissible in evidence as to the age of the girl, after B's death, since the question of age is a question of relationship by blood and B had special means of knowledge of the fact.[76] For the purpose of the decision of a question of

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65. *Lakshmi Reddy* v. *Subba Reddy*, ILR 1963 AP 1085; **relying on** *Dolgobinda Paricha* v. *Nimai Charan Misra*, AIR 1959 SC 914.
66. *Karapaya Servai* v. *Mayandi*, ILR (1933) 12 Ran 243 : 36 Bom LR 394 (PC).
67. *Mussammat Bashiran* v. *Mohammad Husain*, ILR (1941) 16 Luck 615.
68. *Subarna* v. *Arjuno*, AIR 1951 Ori 337; *Vaikuntam Mamikyamma* v. *Puppala*, AIR 1971 Ori 49.
69. *Twarku* v. *Surti*, AIR 1997 HP 76.
70. *Empress* v. *Pitambar Singh*, (1879) 5 Cal 566 (FB).
71. *Mahadeo Prasad* v. *Ghulam Mohammad*, AIR 1947 All 161 : ILR (1946) All 649.
72. *Oriental Government Security Life Assurance Co. Ltd.* v. *Narasimha Chary*, ILR (1901) 25 Mad 183; *K.V. Subbaraju* v. *C. Subbaraju*, AIR 1968 SC 947.
73. *K. Venkata Subbaraju* v. *C. Subbaraju*, AIR 1968 SC 947.
74. *Bhagwan Dass* v. *Harchand Singh*, AIR 1971 P&H 65.
75. *Shiv Ram* v. *Shiv Charan Singh*, AIR 1964 Raj 126; *Bhimmandal* v. *Magaram*, AIR 1961 Pat 21; *Bujhawan Singh* v. *Shyama Devi*, AIR 1964 Pat 301; *V.M. Nampoothiri* v. *K.K. Kuruvila*, AIR 1957 Ker 103.
76. *Madan Singh* v. *State*, AIR 1954 Raj 381.

limitation, it was necessary to prove the date of the plaintiff's birth. The plaintiff and one of his witnesses each spoke to statements made to them by the relatives of the plaintiff, who were since deceased, relating to the date of the plaintiff's birth. It was held that such statements were admissible in evidence.[77] A plaint in a former suit, verified by a deceased member of the family, and as such having special means of knowledge, was held admissible under this clause to prove the order in which certain persons were born and their ages.[78] In an action to recover the amount due upon certain mortgages, the defendant pleaded that he was an infant when he executed them. As evidence in support of this plea, there was tendered, at the trial, an entry, recording the date of the defendant's birth, made by the defendant's deceased father in a book in which he made similar entries with regard to his family. It was held, under an Ordinance exactly similar to the Evidence Act, that having regard to ill S. (1) to this section the entry was admissible in evidence.[79]

41. PEDIGREE

Statements contained in a pedigree or horoscope would come under Section 32(5), provided that the other conditions *viz.*, (1) statements, either written or verbal, must have been made by a person who is dead or cannot be found, etc. (2) The statements must relate to the existence of relationship by blood, marriage or adoption. (3) The person making the statement must have special means of knowledge as to the relationship in question. (4) The statement must have been made before the question in dispute was raised.

The statement in a genealogical table, by a member of the family, or by a person having special means of knowledge was held to be relevant under this clause.[80] Statements made by deceased members of a family are admissible in evidence to prove pedigree, if they are made before there was anything to throw doubt upon them.[81]

Evidence of witnesses as to their having heard the names of the ancestors recited by members of the plaintiff's family on ceremonial and other occasions, was held to be admissible evidence in support of the pedigree on which the plaintiff based his claim. Such evidence is not open to criticism merely on the ground that the witnesses are relatives.[82]

The oral evidence in a case consisted of statements made by the plaintiffs as to their descent, the information as to which they had received from their ancestors. Objection was taken that such of those statements as were made since 1847 were inadmissible in evidence under clauses (5) and (6), as being *post litem*. The Privy Council held that they were admissible, the heirship of the then claimants not being really in dispute at that time.[83]

The Supreme Court held that the *Panjis* are maintained by *Panjikars* who are professional genealogists, and they systematically maintain pedigree table in the community of Maithil Brahmins; they are maintained from time to time; by making fresh additions as they occur in the families, and they are considered important because questions of marriage (who may marry whom) and relationship and caste turn on them what they note down affect a whole family and of those who marry into it. Also there are checks and counter checks as information pours in different member of the family. Since statements are admissible under Section 32(2) and 32(6).[84]

The Privy Council held that it is the business of a *Mirasi* who is a hereditary family bard, to acquaint himself with the details of a family history, whose glories he recounts in a song on ceremonial occasions,

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77. *Ram Chandra Dutt* v. *Jogeswar Narain Deo*, ILR (1893) 20 Cal 758; *Bipin Behary Daw* v. *Sreedam Chunder Dey*, ILR (1886) 13 Cal 42 may be considered as **overruled**.
78. *Dhanmull* v. *Ram Chunder Ghose*, ILR (1890) 24 Cal 265, 268; *Gokhul Pande* v. *Baldeo Sukul*, ILR (1927) 7 Pat 90; *Mauladad Khan* v. *Abdul Sattar*, ILR (1917) 39 All 426.
79. *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*, (1916) 43 IA 256 : 19 Bom LR 157 : (1916) 2 AC 575.
80. *Shyamanand Das Mohapatra* v. *Rama Kanta Das Mohapatra*, ILR (1904) 32 Cal 6; *Lal Harihar Pratap Bakhsh Singh* v. *Bisheshwar Bakhsh Singh*, ILR (1927) 3 Luck 326; *Sarfaraz Khan* v. *Musammat Rajana*, (1928) 4 Luck 39; *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani*, (1901) 29 IA 24 : 4 Bom LR 167 : ILR 29 Cal 187.
81. *Abdul Ghafur* v. *Hussain Bibi*, (1930) 33 Bom LR 420 : 58 IA 188 : ILR 12 Lah 336; *Gokhul Pande* v. *Baldeo Sukul*, ILR (1927) 7 Pat 90.
82. *Debi Pershad Chowdhary* v. *Rani Radha Chowdharin*, (1904) 31 IA 160 : ILR 32 Cal 84.
83. *Bahadur Singh* v. *Mohar Singh*, (1901) 29 IA 1 : 4 Bom LR 233 : 24 All 94.
84. *Sitaji* v. *Bijendra*, AIR 1954 SC 601.

and the fact that he must speak from hearsay does not render his evidence valueless, where pedigree is to be proved.[85]

A family pedigree was sought to be proved by the books kept by the family chronicler and prepared by the chroniclers from time to time from the information supplied by members of the family. It was held that the pedigree would be admissible under this clause and also under Cl. 2.[86] A statement in the family pedigree, made long before the dispute about the existence of relationship of the deceased person who was aware of such relationship, was held admissible u/Section 32(5).[87]

In order to appreciate the evidence of such witnesses, the following principles should be kept in mind:

(1) The relationship or the connection however close it may be, which the witness bears to the persons whose pedigree is sought to be deposed by him.

(2) The nature and character of the special means of knowledge through which the witness has come to know about the pedigree.

(3) The interested nature of the witness concerned.

(4) The precaution which must be taken to rule out any false statement made by the witness *post litem motam* or one which is derived not by means of special knowledge but purely from his imagination, and

(5) The evidence of the witness must be substantially corroborated as far as time and memory admit.[88]

Deposition on pedigree based on information received from an ancestor was held to be admissible where the ancestor was dead at the time of the trial and information was given by him some 20 years prior to the question in dispute was raised.[89] A statement made by a deceased person, in a proceeding for the correction of a pedigree table started, not for the purpose of settling any dispute between any of the parties, but for the purpose of avoiding a dispute that might arise in future, falls under Section 32(5) and is admissible.[90] The statements of the deceased members of the family made *ante litem motam*, on the question of pedigree are evidence to prove the pedigree. It is not necessary to prove pedigree tables which were prepared at the time of settlement, by direct testimony of witnesses having personal knowledge.[91] A record known as "*Pothi*", kept by a Bard (*Bhat*) showing the relationship in a pedigree was held admissible if it comes from proper custody, though, on facts, it was held that the evidence given on the basis of the *Pothi* was unreliable.[92]

A party should prove every link in the genealogy. If one link is found missing genealogy cannot be said to be proved.[93]

A geneological table, purporting to have been made by a person since dead, but which was shown to be merely an exhibit binding on him for the purpose of a former suit, was held to be inadmissible in evidence, having been made without the personal knowledge and belief which must be found or presumed in any admissible statement by a deceased person.[94] The plaintiff, to prove his relationship, produced a pedigree which was prepared from the statements of bards and papers produced by them, some time ago by a Raja, to settle the class of Thakurs to which he belonged. It was held that the pedigree was not admissible, since neither any of the bards nor the Raja who assembled the bards of the family and with their assistance had the pedigree drawn up, was called as a witness, and no proof was given that they were within any of the descriptions given by this section which made it unnecessary to

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85. *Abdul Ghafur* v. *Hussain Bibi*, AIR 1931 PC 45.
86. *Mohansingh* v. *Dalpatsingh*, (1921) 24 Bom LR 289 : ILR 46 Bom 753.
87. *Shanker Daji* v. *Naranji Nathubhai*, AIR 1951 Kutch 85.
88. *State of Bihar* v. *Radha Krishan Singh*, AIR 1983 SC 684 : (1983) 3 SCC 118 : (1983) 2 SCJ 119 : (1983) 2 SCR 808.
89. *Baidri* v. *Ramdas Choudhary*, 1968 Pat LJR (SC) 26A.
90. *Sukhdarshan Singh* v. *Chanan Singh*, AIR 1951 Pepsu 81.
91. *Mangal Singh* v. *Manphul Singh*, AIR 1961 Punj 251.
92. *Manohan Lal* v. *Harish Chandra*, ILR (1971) 1 All 254.
93. 1983 SC 684 (Supra) on appeal from AIR 1951 Pat 356; *Dawood Bibi* v. *Abubakkar*, AIR 1972 Mad 228.
94. *Rai Jagatpal Singh* v. *Raja Jageshar Baksh Singh*, (1902) 30 IA 27 : 25 All 143.

call them.[1] In a suit where the plaintiffs alleged that they were collateral relations and heirs of the last male owner, a pedigree table was put in evidence. The persons from whose statements which were made at no distant date, the pedigree had been drawn up, were absent. It was held that the pedigree table was inadmissible.[2] Where the certified copy of the decree, along with two pedigrees, found with it, were produced in court, it was held that the court may presume that the two pedigrees found in the decree were the two pedigrees failed in the suit; that both pedigrees should have been admitted as pedigrees filed by the respective parties to the suit; and not as evidence of relationship u/Section 32(5).[3] Where, in a reversionary suit, the opposing parties produced old pedigrees, and they were mutually contradictory, it was held that there was no authenticity lent to the pedigree by the mere fact of its being part of a settlement record; and that it was incorrect to say that the later pedigree was to be preferred to an older one.[4]

42. HOROSCOPE

A statement in a horoscope need not necessarily be one made at or about the time of the birth of the child, in order to attract Section 32(5).[5]

In a suit to recover possession of immovable property, the plaintiff rendered in evidence a horoscope which, he said, had been given to him by his mother and had been seen by members of his family and used on the occasion of his marriage. He was unable to say by whom the horoscope, or an endorsement on it, which purported to state what his name was, had been written. It was held that the horoscope was not admissible.[6]

This case has been distinguished in a Madras case where the defendants relied on a horoscope produced by the plaintiff's mother, which had been a public record from a period *ante litem motam*, and was put in as an admission under Sections 17 and 18.[7]

43. ENTRIES KEPT BY *PUROHIT*

Entries made in the books of priests (*panda's bahis*), if made by persons who are dead or cannot be found, are relevant only under this clause and cl. (6), read with Section 90, and are admissible only if all the requirements laid down therein are proved, and, among other things, the identity of the maker of those statements is established.[8]

The *Bahis* of the *Pandas*, which have no index, in which several new pages have been added, and it is not known who was the writer of the particular entries, cannot be relied on as an evidence of the relationship of the parties.[9]

Panda's Bahis and Horoscope are not public documents, and so the entries in them cannot be regarded to be so conclusive or decisive as to turn the scales in favour of one party or the other.[10]

The entries in JAJMANI BOOK OF THE PANDA OF MATHURA was held admissible, to prove the name of the grandfather of the deceased through whom the parties to the suit claimed title.[11]

44. SPECIAL MEANS OF KNOWLEDGE

A special knowledge is to be presumed in the case of members of the family.[12]

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1. *Surjan* v. *Sardar*, 27 IA 183 : ILR 23 All 72.
2. *Surjan* v. *Sardar*, 27 IA 183 : ILR 23 All 72.
3. *Collector of Gorakhpur* v. *Ram Sundarmal*, AIR 1934 PC 157.
4. *Lohka* v. *Pohlu*, AIR 1952 Bilaspur 9.
5. *Secretary to Government* v. *Harirao*, AIR 1978 Mad 42; **following** *Dogobinda Paricha* v. *Nimai Charan Misra*, AIR 1959 SC 914; **See also** *Ramanathan Chetty* v. *Murugappa Chetty*, AIR 1917 Mad 930 : 33 IC 969 (Mad).
6. *Ram Narain Kallia* v. *Monee Bibee*, ILR (1883) 9 Cal 613; *Satis Chunder Mukhopadhya* v. *Mohendro Lal Pathuk*, ILR (1890) 17 Cal 849.
7. *Raja Goundan* v. *Raja Goundan*, ILR (1893) 17 Mad 134.
8. *Hazura Singh* v. *Mohindar Singh*, ILR (1937) 18 Lah 732; **disapproving** *Jahangir* v. *Sheoraj Singh*, ILR (1915) 37 All 600.
9. *Kundanlal* v. *Hukamsingh*, AIR 1952 Punj 115; **relied on** *Hazura Singh* v. *Mohindas Singh*, AIR 1937 Lah 599.
10. *Parasram* v. *Dayal Das*, AIR 1965 HP 32.
11. *Dukh Haran Tewary* v. *Dulhin Bihasa Kuer*, AIR 1963 Pat 390.
12. *Prabhakar* v. *Sarubai*, (1943) Nag 253.

A statement made *ante litem motam*, as to the relationship of persons, by those who have special means of knowledge of such relationship is clearly admissible.[13]

Whether the statement made in a document would be relevant will depend upon the fulfilment of the conditions laid down in cl. (5) of Section 32. The writer must be shown to have special means of knowledge about the relationship.[14]

The description of a transferee, in a document, as a son of particular named person is not admissible under Section 32(5), in the absence of any material that either the executant or the scribe of that document had any special means of knowledge about that relationship.[15]

A Hindu Brahmin has a special means of knowledge of the names and relationship of the members of his family, including collaterals, up to at least seventh degree.[16]

A witness may depose from his personal knowledge about the particular relationship between some persons. If the witness has no direct knowledge, still he can give evidence about the statements relating to the existence of any relationship by blood between two or more persons, heard from persons who made such statements, provided, those persons had special means of knowledge about such relationship, and such statements were made before the question in dispute was raised, those persons are dead, or cannot be found, and so on, as required u/Section 32. It is only in that light that the depositions of the witnesses will have to be looked into, where none of them had any direct knowledge about the relationship between the parties vis-a-vis the common ancestor.[17]

It is not necessary that one who gives evidence on his age should have had personal knowledge of his own birth. The information can only be from the parents or other elders in the family, *i.e.*, from persons who had special means of knowledge. If it is obtained before the commencement of any controversy, it would be admissible. So what legal writers call "the necessity principle" makes an in-road into the hearsay rule, which admits of certain carefully safeguarded and limited exceptions, one of which is that a witness can speak of his own age and date of birth in certain circumstances. It is true that neither birth nor age is specifically referred to in the section proper, but a statement by a dead person, on the existence of the relationship by blood between persons as to whose relationship by blood, the person making the statement had a special means of knowledge. But the date of birth is the commencement of a relationship by blood.[18]

It is not necessary that the declarant should have had personal knowledge of the facts stated; indeed, if this were otherwise, the main object of relaxing the hearsay rule would be frustrated, since most of family information is obtained second hand. It is sufficient, consequently, if his information purports to have been derived from other relatives, or from general family repute, or even simply from "what he has heard" provided such "hearsay upon hearsay" does not directly appear to have been derived from strangers.[19]

If the declarant's information expressly purports to have been derived, either wholly or in part, from incompetent sources, the declarations so founded will be excluded.[20]

The declarations need not refer to contemporaneous events; statements as to matters occurring six generations before have been received.[21]

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13. *Mangal Singh* v. *Manphul Singh*, AIR 1961 Punj 251.
14. *Sheojee Tiwary* v. *Prema Kuer*, AIR 1964 Pat 187.
15. *Bujhawan Singh* v. *Shyama Devi*, AIR 1964 Pat 301.
16. *Gobardhan Mandal* v. *Janaki Nath Mukharjee*, ILR (1953) 2 Cal 109.
17. *Sheojee Tiwary* v. *Prena Kuer*, AIR 1964 Pat 187; **relied on** *Dolgobinda Paricha* v. *Nimaicharan Misra*, AIR 1959 SC 914; *Sitaji* v. *Bijendra*, AIR 1954 SC 601.
18. *Anil Krishna Basak* v. *Sailendra Nath*, (1965) 69 Cal WN 593; **relied on** *Md. Syedol Arffin* v. *Y.O. Gark*, AIR 1916 PC 242; *Ramachandra Dut* v. *Jogeswar Narain Deo*, ILR 20 Cal 758; *Bhim Mandal* v. *Magaram*, 1916 Pat 21 (date of birth entered in the school register on the statement of the mother).
19. *Shedeen* v. *Att. Gen. and Patrick*, (1860) 30 LJP&M 217; *The Lovat Peerage*, 10 App Cas 763, 768.
20. *Davies* v. *Lowndes*, (1843) 6 M&G 473, 527; *The Lovat Peerage*, 10 App. Cas. 763.
21. PHIPSON 13th Edn., Page 492 (para 25-58); *Monkton* v. *Att. Gen.*, 2 Russ. & My. 147, 157-158; *Davies* v. *Lowndes*, ante.

Before the dispute was raised.—Clause 5 requires that such a statement should have been made before the question in dispute was raised. The statements which were made after the question in dispute in the suit had already arisen are not relevant.[22]

Where a woman who made a statement on her own behalf, and on behalf of her three sons, as to a pedigree was dead and one of the three sons also died, it was held that the statement was as much a statement of the woman and of one of her sons who was dead, as a statement of the brothers who were alive, and was admissible, if it was made *ante litem motam*.[23]

The words "before the question in issue was raised" do not merely mean before the commencement of the particular legal proceeding in which such statement is produced in evidence, but even before the actual controversy regarding the subject matter of the declaration had originated.[24]

Where the question was whether the applicant was the legally wedded wife of the deceased, a statement of a deceased person given on affidavit, subsequent to the date when the dispute arose, was held to be not relevant.[25]

45. STATEMENT MADE IN A WILL OR DEED RELATING TO FAMILY AFFAIRS [SUB-SECTION (6)]

A document written by the father of a witness, showing the relationship, much before the dispute was raised, is admissible under Section 32(6).[26]

Where a son of one of the members of a joint family executed a will, the statement in the will is admissible to show that there was a partition in the family.[27]

An ancient document, purporting to be a family pedigree; produced in evidence by a person who states that he received the same from his father or grandfather, but is unable to prove the handwriting, cannot be rejected as inadmissible, it is admissible under Section 32(6) of the Evidence Act.[28] A pedigree would become admissible u/Section 32(6) even though the writer or the person who dictated, it is not known, if it has been adopted by a person who had special means of knowledge.[29]

Documents of transfer of property by B as guardian of A, stating that A was his adopted son, were held admissible under Sections 32(3), (5) & (6) of the Act.[30]

Documents containing statements as to relationship of the parties which come into existence after the disputes as to succession to certain *Jagir* had been raised, were not admissible under Sections 32(5) & (6).[31]

46. DIFFERENCE BETWEEN CLAUSE (5) AND (6)

Clause (5) refers to statements relating to the existence of any relationship between persons alive or dead, and the statement is to be made by a person who had special means of knowledge, that is, it imposes the restrictions that the person making the statement should have special means of knowledge. See illus. (k). Clause (6) refers to the existence of relationship between deceased persons only; and it imposes no such restriction as under cl. (5). It is enough if the statement is made in a will or deed relating to the affairs of the family or in any family pedigree, etc., no matter by whom it was made.

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22. *Dwaraka Nath* v. *Lalchand*, AIR 1965 SC 1549; *Audilaksmamma* v. *Ramarao*, AIR 1973 AP 149; *Kishanlal* v. *Sohanlal*, AIR 1955 Raj 45; *Paras Ram* v. *Dayal*, AIR 1965 HP 32.
23. *Dolgobinda Paricha* v. *Nimai Charan Misra*, AIR 1959 SC 914.
24. *Motilal* v. *Sardar Mal*, AIR 1976 Raj 40.
25. *Sudershan Karir* v. *State*, AIR 1988 Delhi 368.
26. *Sitaji* v. *Bijendra*, AIR 1954 SC 601.
27. *Motisingh* v. *Fateh Singh*, ILR 1960 MP 815; **relying on** *Bhagwathi Prasad* v. *Rameshwari Kuer*, AIR 1952 SC 72.
28. *Sitaji* v. *B.N. Choudary*, AIR 1951 Pat 356.
29. *Shivlal* v. *Jootha*, AIR 1952 Raj 167.
30. *Jagabandu Senapati* v. *Bhagut*, AIR 1974 Ori 120.
31. *Kishanlal* v. *Sohanlal*, AIR 1955 Raj 45.

Clause (6) also refers to pedigree, but differs from cl. (5) in this, that in cl. (5) the evidence is the declaration of the person deceased or otherwise unproduceable, in cl. (6) the evidence is that of things, such a genealogical trees, tombstones, etc.

The statements in cl. (5) may be either written or verbal; the statement in cl. (6) must always be written as the evidence therein is that of things.

Under clause (6) statements relating to the existence of relationship between deceased persons made before the question in dispute was raised are admissible when they are contained in a will or a deed or in a family pedigree[32] or upon a tomb-stone. It is not necessary as in cl. (5) that the statements should have been made by a person who had special means of knowledge, simply because it is not probable that a person would insert in a will or a solemn deed any matter the truth of which he did not know. The statement should not have been made in the testator's own interest or in view of contemplated litigation.[33] The statement of testator in his will that the defendant No. 1 was his adopted son was held to be relevant to show the fact but not conclusive of it.[34]

47. DOCUMENT RELATING TO TRANSACTION CREATING A RIGHT OR CUSTOM [SUB-SECTION (7)]

This clause states that a statement contained in a deed, will or other document, which relates to any such transaction as is mentioned in Section 13(a), would be relevant.

A statement contained in any deed, will, or other document which relates to a transaction by which a right or custom in question was created, modified, recognised, asserted, or denied, is admissible under this clause. A statement in any relevant document, however recent and though not more than thirty years old, is admissible. Statements of facts contained in a will of a deceased person, tending to show that the properties are self-acquisitions, are admissible.[35] Recital of the gift-deed as old as 1945 as to the title of the property was held to be not acceptable and the title has to be decided on the basis of other evidence.[36]

The word 'verbal' used in the beginning of this section naturally does not apply to this clause as well. This clause does not allow introduction of parole evidence.[37]

Such parole evidence may be relevant under cl. (5) of Section 32. But, cl. (5) requires that such a statement should have been made before the question in dispute was raised. The statements which were definitely made after the question in dispute in the suit had already arisen, are not relevant.[38]

One *J* who was the owner of a house was carrying on his rice-mill business in that house had asserted his right in his written statement in a previous suit; it was held that the statement was relevant under Section 13(a), and as *J* had died, it was relevant u/Section 32(7) and was admissible.[39] Where the statement of a deed person, relating to an authority to adopt, had been recorded in an adoption deed, it was held that the statement was admissible under Section 32(7), and also under Section 32(3), being a statement against the interest of the (dead) person making it.[40] Where the property in question was purchased by the plaintiff's father in the name of his wife under a sale deed, but, in his will, it was stated that he had purchased the property with his own money but kept it in his wife's name, it was held that since the testator had asserted his right with respect to that transaction in his will, the statement in the will asserting the right was a relevant fact and was admissible in evidence under Section 32(7).[41] A statement in a will executed by the deceased that certain property was the joint property of three brothers, was held to be admissible under Section 32(7) read with Section 13(a), as the deceased executant was a

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32. *Jang Bahadur Singh Thakur* v. *Arjun Singh Thakur*, ILR (1927) 3 Luck 256.
33. *Chandreshwar Prasad Narain Singh* v. *Bisheshwar Pratap Singh*, (1926) 5 Pat 777.
34. *Banwari Lal* v. *Trilok Chand*, AIR 1980 SC 419.
35. *Venkatramayya* v. *Seshamma*, ILR (1937) Mad 1012; *Chandrakant* v. *Sharat Chandra*, (1954) MB 123.
36. *Kuldeep Sharma* v. *Satyendra Kumar Sharma*, AIR 2001 All 366 (para 29).
37. *Dwaraka Nath* v. *Lalchand*, AIR 1965 SC 1549.
38. *Dwarakanath* v. *Lalchand*, AIR 1965 SC 1549.
39. *Satyadeo Prasad* v. *Chander Joti Debi (Smt.)*, AIR 1966 Pat 110. **See also** *R. Sarvadamulu* v. *Special Tahsildar (Land Acquisition), Madras*, 2000 AIHC 1176 (para 47) (Mad).
40. *Andhi Kuer (Smt.)* v. *Rajeswar Singh*, AIR 1972 Pat 325; *Chitra* v. *Padhamini (Smt.)*, AIR 1975 Ori 24.
41. *Rangaswamy Pillai* v. *Subramania Pillai*, AIR 1975 Mad 141.

disinterested person being the common aunt of the three brothers.[42] Where, in a mortgage deed executed by A & B, it was stated that B was the adopted son of A's deceased brother C, it was held that the document constituted evidence of B's assertion of the right that he was the adopted son of C and it was relevant under Section 13 read with Section 32(7), as B was dead.[43] A recital in a will as to the nature of tenancy in a bequeathed property was held to be admissible in evidence under Section 32(7) read with Section 13(a), as the expression transaction is not confined to dealing in the property between two persons but also includes a testamentary dealing with property.[44] The statements made in a gift deed executed by a Hindu widow that the properties mentioned therein were already gifted away by her father-in-law and her husband, were held admissible under Section 32(3) & (7) as they were against her proprietary interest, and related to a transaction as is mentioned in Section 13.[45]

Under this clause the word 'right' will include both public and private rights.

48. STATEMENT OF SEVERAL PERSONS, EXPRESSING FEELINGS RELEVANT TO MATTER IN QUESTION [SUB-SECTION (8)]

The general reputation prevailing in the community and the opinions, inferences or beliefs of individuals (whether witnesses or not) are inadmissible in proof of a fact. To this there are important exceptions. Witnesses in some cases are allowed to testify to the opinions of third persons who are not upon oath, *e.g.*, when the opinion is that of the community. The concurrence of many voices among those most favourably situated for knowing raises a reasonable presumption that the facts concurred in are true.

At common law, by which criminal proceedings are still regulated, the opinions of skilled witnesses are admissible wherever the subject is one upon which competency to form an opinion can only be acquired by a course of special study or experience.[46]

In principle the same holds good for civil proceedings, but the topic is now governed by the regime set up by the Civil Evidence Act, 1972 and the rules of court made under it.[47]

Evidence that a plaintiff was publicly laughed at in consequence of a libel was admitted to prove that the libel referred to the plaintiff.[48]

When a number of persons assemble, to give vent to one common statement, which statement expresses the feelings or impressions made in their minds at the time of making it, that statement may be repeated by the witnesses, and is evidence.[49]

Thus, where a person was charged with raising a seditious mob, expressions of alarm by persons in the neighbourhood were admitted in evidence to show the feellings produced by the gathering.[50]

Illustration (n) is intended to exemplify this clause.

Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.

S. 33. Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable.

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42. *Chunilal Ojha* v. *Mulsankar Ojha*, ILR 1961 Cut 635.
43. *Harihar Rajguru* v. *Nabakishore Rajguru*, AIR 1963 Ori 45.
44. *Periasamy* v. *Varadappa*, AIR 1950 Mad 486.
45. *Purnananda Sastri* v. *Purnanandam*, AIR 1961 AP 435.
46. *Flokes* v. *Chadd*, (1782) 3 Doug 157.
47. PHIPSON 13th Edn., Page 556 (para 27-07).
48. *Cook* v. *Ward*, (1830) 4 M&P 99.
49. *Queen* v. *Ram Dutt Chowdhry*, (1874) 23 WR (Cr) 35, 38.
50. *Redford* v. *Birley*, (1822) 1 St Tr NS 1071 : 3 Stark 76.

***Provided*—**

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

***Explanation.*—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.**

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COMMENTS

1. PRINCIPLE

This section provides that the evidence given by a witness in an earlier judicial proceeding, or before any person authorised by law to take evidence, is relevant in a subsequent judicial proceeding or at a later stage of the same judicial proceeding, for the purpose of proving the truth of the facts contained therein if certain conditions mentioned in the section are satisfied.

Evidence of depositions in former trials is admissible as it forms an exception to the hearsay rules. Depositions are in general admissible only after proof that the persons who made them cannot be produced before the Court, to give evidence. It is only in cases where the production of the primary evidence is beyond the party's power that secondary evidence of oral testimony is admissible. Non-compliance with the provisions of this section is not cured by the fact that counsel for the accused gives his consent thereto.[1]

The principle underlying the admissibility of such evidence as is referred to in this section, is explained in PHIPSON on Evidence (15th Edn. (2000), Paras 39-14, 39-15 pages 1066-1067) as follows:

"Various theories have been advanced to justify the reception of such evidence. (1) Our view is that it constitutes an exception to the hearsay rule. (2) TAYLOR (S. 464) considered it an exception to the rule excluding secondary evidence of documents, holding that that rule is wide enough to exclude secondary evidence of oral testimony. However, this seems doubtful, and the courts have more than once decided that depositions are primary evidence, and of as high a nature and degree as *viva voce* testimony.[2] (3) WHARTON (S. 177) based its admission on the consideration that the parties and the issues being the

1. *Ghulam Haidar* v. *Crown*, ILR (1929) 10 Lah 837.
2. *Wright* v. *Tatham*, (1834) 1 A & E. 3, 22; *R.* v. *Christopher*, 2 C & K. 994, 1000.

same, and full opportunity of cross-examination having been allowed, the second trial is virtually a continuation of the first. (4) The rule might be *sui generis*; or (5) perhaps an aspect of the rule which makes admissible statements in the presence of a party.

(Some support for both (4) and (5) can be found in *R.* v. *Hall*. However, the latter can only be true of oral testimony, and it is probably better to regard it as a precondition of, rather than the justification for, admission of records of such testimony, as it will be rare that any evidence of adoption of unfavourable evidence will be forthcoming so as to justify its reception as an admission).

It has been suggested that the rule cannot be treated as an exception to the hearsay rules, because the evidence was given under oath and was subject to cross-examination. However, this entails a narrower definition of "hearsay" than is adopted in this work, and would mean that the absence of the opportunity to cross-examine would go to admissibility, while the jury's inability to consider the witness's demeanour would go only to weight. It is thought that the key factor is the presence or absence of the witness giving evidence before the jury actually seized of the case.

If previous testimony were not hearsay, it would be hard to see why it should be excluded when the witness is capable of being called, or when one of the other requirements mentioned above is not satisfied. An explanation which has been advanced is that the matters are in such cases *res inter alios acta*. But this is not true where the objection is that the witness can be called; and it is not in any event a rule of evidence.

Accordingly, it is submitted that the better view is that the rule represents a specialised exception to the hearsay rule, evolved at a time long before the House of Lords in *Myers* v. *D.P.P.*[3] laid a paralysing hand on the rule, It is, moreover, consonant with the other exceptions to that rule affecting statements by deceased persons."

LORD GODDARD in *Chainchal Singh* v. *Emperor*[4] observed: "Where it is desired to have recourse to this section on the ground that a witness is incapable of giving evidence, that fact must be proved, and proved strictly. It is an elementary right of an accused person or a litigant in a civil suit that a witness who is to testify against him should give his evidence before the Court trying the case, which then has the opportunity of seeing the witness, observing his demeanour, and can thus form a far better opinion as to his reliability than is possible from reading a statement or deposition. It is necessary that provision should be made for exceptional cases where it is impossible for the witness to be before the Court, and it is only by a statutory provision that this can be achieved. But the court must be careful to see that the conditions on which the statute permits previous evidence given by the witness to be read are strictly proved. In a civil case a party can, if he chooses, waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence."[5]

The section enumerates the conditions under which the evidence given by a witness (a) in a judicial proceeding, or (b) before any person authorised by law to take it, is relevant in a subsequent judicial proceeding or a later stage of the same proceeding. They are five in number, *viz*:—

(a) when the witness is dead;

(b) when he cannot be found;

(c) when he is incapable of giving evidence;

(d) when he is kept out of the way by the adverse party; and

(e) when his presence cannot be obtained without an amount of delay or expense which the court considers unreasonable.

The use of such secondary evidence is limited by three further conditions. Such evidence will be admissible only—

(1) if the proceeding was between the same parties, or their representatives in interest;

(2) if the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(3) if the questions in issue were substantially the same in the first as in the second proceeding.

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3. 1965 A.C. 1001, HL.
4. AIR 1946 PC 1.
5. **See also** *Hari Prasad* v. *State*, ILR (1955) 1 All 749.

Evidence given on a different occasion is also admissible to contradict a witness (Section 155) or to corroborate him (Section 157).

2. EVIDENCE GIVEN BY A WITNESS

An affidavit is not "evidence given by a witness" within the meaning of this section and cannot therefore be admitted in evidence.[6]

3. EVIDENCE IN A JUDICIAL PROCEEDING

Evidence must have been given by a witness in a judicial proceeding or before any person authorised by law to take evidence. This pre-supposes the administration of oath or solemn affirmation, as required by the law in force. Section 80 of the Evidence Act deals with the presumption stating that whenever any document is produced before any court, purporting to be a record of the memorandum of the evidence, or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence etc., the court shall presume that the document is genuine; that any statement as to the circumstances under which it was taken, purporting to be made by the person signing it, is true and that such evidence, statement or confession was duly taken.

The proceedings and the evidence shall not be invalidated, where there is an omission to take the oath or to make any affirmation or there is some irregularity is administering the oath. Even if there was some irregularity or omission in the administration of oath, the statement of a witness in an earlier proceeding can be presumed to be correct.

"It must be proved that the witness was duly sworn in some judicial proceeding, to the authority of which the party, against whom his testimony is offered, was legally bound to submit, and in which he might have exercised the right of cross-examination".[7]

Evidence of a witness in a proceeding subsequently pronounced to be *coram non judice* is not admissible if the witness is dead, on a re-trial before a competent Court.[8]

Where a person was examined in an earlier proceeding or at an earlier stage of the same proceeding, his earlier evidence can be admitted provided the conditions of Section 33 are fulfilled.[9]

Evidence in one case cannot be considered in another case.[10]

Where the plaint was returned after taking evidence, on the ground of pecuniary jurisdiction, for presentation before the subordinate judge, it was held that Section 33 would not apply in the subsequent proceedings.[11] Which was subsequently affirmed by the Federal Court : In *R.* v. *Benorilal,*[12] where it was held that the person Mr. Hattiangadi was not authorised by law to take evidence nor could it be said that the witnesses before him deposed in a judicial proceeding. Hence there was want of jurisdiction to entertain the case.[13]

However, where there is no lack of inherent jurisdiction, and the Court records evidence to decide whether it has local jurisdiction to entertain the suit, and returns the plaint for presentation to proper court, the evidence so recorded is admissible in the proceedings of the latter Court which must be regarded as a later stage of the same judicial proceeding.[14]

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6. *Malik Jaindkhan* v. *Province of Sind*, ILR (1947) Kar 273.
7. TAYLOR, 12th Edn., S. 465, page 320.
8. *Rami Reddi*, ILR (1881) 3 Mad 48, 51; *Buta Singh* v. *Crown*, ILR (1926) 7 Lah 396; *Sankappa Rai* v. *Koraga Pujary*, ILR (1930) 54 Mad 561.
9. *Ramvilas* v. *State of M.P.*, 1985 Cr LJ 1773 (MP).
10. *Mitthulal* v. *State of M.P.*, AIR 1975 SC 149.
11. In re : *Rami Reddy*, ILR (1881) 3 Mad 48. **See also** *Emperor* v. *Ajit Kumar Ghose*, AIR 1945 Cal 159; *Benari Lal Sharma* v. *Emperor*, AIR 1943 Cal 285.
12. AIR 1943 FC 36.
13. **See also** *Sudhindra Nath* v. *State*, AIR 1953 Cal 339.
14. *Sarup Singh* v. *Ramdithamal*, ILR (1961) 1 Punj 508.

Where there is jurisdiction, though improperly or irregularly exercised, it stands on a different footing; and the evidence in the former proceeding can be taken in a subsequent proceeding or at a later stage of the same proceeding.[15]

Where an appellate court after setting aside the conviction, directs the Magistrate to commit the accused to the Sessions Court, the former proceedings in the trial court are not rendered without jurisdiction, and therefore, the deposition of a witness in those proceedings can be brought on record in the Sessions Court under Section 33, if the witness is dead or any other conditions of Section 33 are fulfilled.[16]

Where an *ex parte* decree is set aside, all proceedings which took place subsequent to the stage of non-appearance of the defendant, leading to the decree, are set aside, and they are not binding on the defendant. Thus, the evidence of the plaintiff recorded by the trial court in the absence of the defendant, prior to the setting aside of the *ex-parte* decree, is not legal evidence so as to attract the applicability of Section 33. It cannot be looked into and made the basis of a judgment and decree at a fresh trial subsequently, notwithstanding the fact that the fresh trial is also *ex-parte*.[17] The objection that the evidence of the plaintiff relied upon was recorded in absence of the defendant, was held to be not tenable in an *ex parte* proceeding and more so when the defendant defaulted even after the order to proceed *ex parte* was set aside.[18]

The expressing of opinion by any other authority about the oral evidence before it is analysed and assessed by the Criminal Court is certainly a prejudice or interferes or tends to interfere with the due course of judicial proceeding.[19]

4. STATEMENT OF INJURED RECORDED U/S. 161, Cr.P.C.

The statement of the injured recorded under Section 161 Cr.P.C. cannot be held to be admissible in evidence under Section 33 of the Evidence Act.[20]

5. AFFIDAVIT

An affidavit allegation is not evidence under Section 33 of the Evidence Act but it can become evidence when the person, who has sworn the affidavit, steps into the witness-box to speak to the affidavit averment and the opposite party has the opportunity to cross-examine him.[21]

6. BEFORE ANY PERSON AUTHORISED BY LAW

A deposition is inadmissible unless it was taken by an officer or other person authorised by law.[22]

7. 'IS RELEVANT'

Depositions which satisfy the conditions laid down in this section are relevant for the purpose of proving the truth of the facts which they state. They are, however, open to all the objections which might have been raised if the witness himself had been present during the trial. Leading and other illegal questions are, therefore, not allowed to go in.

The burden of proving that the conditions essential to the admissibility of depositions under this section have been complied with lies on the person who tenders the evidence. The depositions of

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15. *Empress* v. *Illahi Baksh*, ILR 2 All 910; *Sahdeo Ram* v. *Emperor*, AIR 1935 All 579.
16. *State* v. *Surajbali*, 1972 Cr LJ 1223 (All).
17. *Aziz Ahmed Khan* v. *A. Patel*, AIR 1974 AP 1 (FB); **dissenting from** *Doraiswami* v. *Palaniandi*, AIR 1956 Mad 633; *Seva Rayan* v. *Amalaor Pavanan*, AIR 1928 Mad 969; *Lakshmi Devi* v. *Roongta*, AIR 1962 All 381. **See contra:** *Shah Bharat Kumar* v. *Motilal*, AIR 1980 Guj 51; where it was held that if the witness was offered for cross-examination after the *ex-parte* decree was set aside, such evidence was admissible under Section 33.
18. *Punjab and Sind Bank* v. *Manjit Singh*, AIR 1995 Del 22 (para 6).
19. *D.P. Anand* v. *State of T.N.*, 1998 Cr LJ 724, at p. 729 (Mad).
20. *Sukhar* v. *State of U.P.*, AIR 1999 SC 3883 (para 2) : 2000 Cr LJ 29 (SC).
21. *Jai Natarajan* v. *M.I. Syed Ibrahim*, 1999 AIHC 4457 (para 13) (Mad).
22. *K. Venkatappa* v. *Uday Shankar*, AIR 1981 AP 34.

witnesses given in a counter-case may be used as evidence against them on their trial as accused persons, but such depositions can only be evidence against the persons making them.[23]

Objections as to the admissibility of evidence should be raised at the trial and at any rate in the Court of first appeal, and will not, as a general rule, be entertained by the High Court if raised for the first time in second appeal.[24]

8. WHEN THE WITNESS IS DEAD

The death of the witness whose evidence is to be admitted should first be strictly proved unless it is admitted on the other side.[25] Where a deposition of a person was taken before 60 years in one case and before 50 years in another case, no presumption of death can be drawn in the absence of any proof of search having been made for such person or any account of him, and such deposition is inadmissible.[26] However, in *Pritam Singh* v. *Tilak Singh;* it was held that a person who conducted an enquiry and submitted his report 70 years back can be presumed that he must have died by now, and that the objection that no attempt was made to prove that he was dead or that he cannot be put in the witness-box for any other reason cannot be accepted.[27]

Evidence of a witness in a previous judicial proceeding is relevant in a subsequent judicial proceeding, or in the later stage of the same proceeding, when such witness is dead.[28]

Where the witnesses deposed to what they saw and observed and have referred to the statements made to them personally by the deceased and not to third parties, it was clearly admissible in evidence and would not be hit by the rule of hearsay.[29] Where a deposition was recorded by the committing Magistrate, and it was stated that the witness was dead, but the death was not proved, it was held that the deposition was not admissible under Section 33[30] but where there was sufficient material to establish that the arrest of the accused could not be procured as he was absconding and the records showed that the summons were received back with the report that the witnesses had died, the deposition of the deceased witnesses could form the basis of conviction.[31]

It was held by the Supreme Court that, when *Panjis* (Pedigree tables) were maintained by *Panjikars,* in the course of their discharging their professional duties, and a witness examined in a previous case to prove the entries had deposed that they were partly in his hand and partly in the handwriting of his ancestor, the evidence was admissible under this section, as that witness had died in the meanwhile.[32]

Before a deposition of a dead witness is admitted, the party tendering such evidence of a dead man should have summoned that witness before his death.[33]

Where a witness who had been examined and cross-examined in the committal court, is dead, his deposition, though admissible in Sessions trial, cannot be treated as evidence unless an order is passed by the Sessions Judge under Section 288, Cr. P.C. for using it on record.[34] When a witness dies after examination-in-chief and before cross-examination, his evidence its admissible but its probative value may be very small and may even be discarded and the Court should carefully see whether there are

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23. *Queen-Empress* v. *Ganu Sonba,* ILR (1888) 12 Bom 440.
24. *Radha Kishan* v. *Kedar Nath,* ILR (1924) 46 All 815.
25. *Sajan Singh* v. *Crown,* ILR (1925) 6 Lah 437.
26. *Benson* v. *Olive,* (1732) 2 Str 919.
27. 1954 Pepsu 14.
28. *Papa Rao* v. *Satyanarayana,* AIR 1983 AP 257, 259.
29. *State of Maharashtra* v. *Vasant Shankar Mhasame,* 1993 Cr LJ 1134 (para 17) (Bom).
30. *Jagadish Lal Ramnath* v. *State,* (1963) 1 Cr LJ 385 (Punj); *Arabinda Dey* v. *State,* AIR 1953 Cal 206; *Sajjan Singh* v. *Crown,* AIR 1925 Lah 418; *Indar* v. *Emperor,* AIR 1930 Lah 1041; *Kala* v. *Emperor,* AIR 1944 Lah 206; *Jagadishlal Ramnath* v. *State,* 62 Punj LR 538 : (1963) 1 Cr LJ 385, 386; *Behera Tanti* v. *State,* AIR 1950 Ori 202.
31. *Nirmal Singh* v. *State of Haryana,* 2000 Cr LJ 1803 (paras 4 and 5) (SC) : AIR 2000 SC 1416.
32. *Sitaji* v. *Bijendra Narain Choudhari,* AIR 1954 SC 601; *Hadi* v. *State,* AIR 1966 Ori 21 (Doctor's *post mortem* certificate).
33. *Subramanya* v. *Lakshmi Narasamma,* AIR 1958 AP 22.
34. *Tarlok Singh* v. *State of Punjab,* AIR 1974 SC 1797; *Nathu* v. *State of Rajasthan,* ILR (1971) 21 Raj 400.

indications that by completed cross-examination, his testimony was likely to seriously shaken.[35] However such evidence cannot form basis of conviction.[36]

The deposition of a witness taken before one Magistrate is admissible in evidence at a re-trial before another Magistrate if the witness is dead at the time of the re-trial.[37]

9. WITNESS CANNOT BE FOUND

Where a witness cannot be found, his evidence in the former proceedings will be relevant in subsequent proceedings. In this connection there is possibility of collusion between one party and a witness. To avoid that possibility, the Court has to be satisfied by the party concerned that *bona fide* search had been made, as otherwise a valuable right of the adverse party to cross-examine that witness would be lost. Before a deposition can be admitted under this provision, the court must be satisfied that all reasonable steps were taken to secure the attendence of the witness.

Where the summons were issued to the witness and the witness could not be found at his address though the police went 2 or 3 times to serve the summons, it was held that the evidence of that witness cannot be brought on record under Section 33 without first making a diligent search for him.[38] A Sessions Judge, finding that the witnesses, who had been summoned to give evidence for the prosecution, did not appear on the date fixed, adjourned the case for eighteen days and ordered fresh summonses to be issued. On the adjourned date, the witnesses were again absent. Thereupon the Sessions Judge made use of the evidence, which those witnesses had given before the committing Magistrate, purporting to do so under this section. It was held that the evidence could not be so used; the Sessions Judge ought to have directed warrants to be issued to enforce the attendence of the prosecution witnesses and compel their attendence in Court.[39]

A statement of a witness cannot be admitted if it has not been proved that he could not be found. If all that is proved is that the witnesses had gone away to a particular place, that alone is not sufficient to prove that the witness could not be found.[40] It is the duty of the prosecution to prove strictly, to the satisfaction of the Court, that the witnesses could not be found inspite of attempts to trace them and serve summonses on them. The fact that the counsel of the accused consented to the statements made before the committing Magistrate being admitted in evidence before the Sessions Court, does not do away with the necessity of the court being satisfied by proof. Where, before the Sessions Judge, the only ground for admitting the evidence was that the girls and their mother were not traceable and the court, allowed that applicant to put forward new grounds of unreasonable delay and expense in producing those witnesses, it was held that the order of the Sessions Judge in admitting the evidence was not justifiable.[41] The Court must give its decision on the evidence legally taken and recorded; the mere statement that the witness cannot be traced is not enough. Evidence must be adduced to show that attempts were made to trace the witness.[42] Where the Court was informed by the police that a witness had shifted to a particular place, an attempt should be made to serve that witness at that new station. The whereabouts of a person can be said to be unknown when the witness cannot be found at all at the places which he had, or was informed to have, visited either permanently or for a temporary stay.[43] Where a constable deputed to serve the summons on a witness could not trace him inspite of his best efforts, and the residents of the locality also could not give the whereabouts of the person, it was held that the Court was justified in admitting in evidence the previous statement of the witness.[44]

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35. *T.R. Srikantaiah Setty* v. *Balakrishna*, 1999 AIHC 3477 (para 11) (Kant).
36. *Nandram Khemraj* v. *State of M.P.*, 1995 Cr LJ 1270 (paras 15-17) (MP).
37. *Lekal* v. *Crown*, ILR (1927) 8 Lah 570.
38. *Hari Prasad* v. *State*, AIR 1953 All 660; **see also** *Dwaraka Singh* v. *Emperor*, AIR 1922 Oudh 254.
39. *Emperor* v. *Dost Muhammad*, ILR (1905) 28 All 98.
40. *Krishan* v. *Sohanlal*, AIR 1955 Raj 45.
41. *Bismillah Khan* v. *State*, 1959 Raj 21 : 1959 Cr LJ 84; **relying on** *Chanchal Singh* v. *Emperor*, 1946 PC 1; **see also** *Kottamma Kalathingal Ummar Haji*, **In re** : AIR 1923 Mad 32.
42. 1961 MPLJ (notes) 54.
43. *Tulsiram* v. *State*, AIR 1956 Bhopal 52.
44. *Harumal* v. *State*, AIR 1951 Ajmer 25. **Also see** *Turner Morrison & Co., Bombay* v. *K.N. Tapuria*, 1993 Cr LJ 3384 (paras 20 and 21) (Bom).

There may be a possibility of more than one person having the same name in the villages. Before concluding that the witness cannot be found, one has diligently to try to establish the identity of the witness whose evidence is sought to be tendered.[45]

Where a witness had gone to a particular place for training for some time, and would not return within a particular time, it was held that the provisions of this section are not satisfied.[46] But where it was proved that the witness left for Pakistan, it was held to be sufficient ground to take the previous deposition into evidence.[47] Where the witnesses for the prosecution are graziers and nomads, and their whereabouts are not traceable, their depositions before the Magistrate can be taken into evidence in the Sessions Court.[48]

Section 299 of the Code of Criminal Procedure, 1973 supersedes this section to a certain extent. It provides that if it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of, may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions, and that such depositions may be used at the subsequent trial of the absconder, if the witnesses are dead or are otherwise incapable of appearing.

Where the approver was examined before the committal court and the prosecution was unable to produce him before the Sessions Court, it was held that the approver's deposition in the Committal Court can be admitted as evidence in the Sessions Court.[49]

10. WITNESS INCAPABLE OF GIVING EVIDENCE

The Privy Council observed: "Where it is desired to have recourse to this section on the ground that a witness is incapable of giving evidence, the fact must be proved and proved strictly... In a criminal case strict proof ought to be given that the witness is incapable of giving evidence."[50]

It is necessary for the Judge to satisfy himself on the material placed before him, whether the witness is incapable of giving evidence. It is not sufficient to accept the statement of the public prosecutor or of the defence counsel for admitting such evidence. Strict proof has to be place, to come to a conclusion that the witness is incapable of giving evidence.[51] The Court cannot, on its own judgment, conclude that the witness is incapable of giving evidence. It should fortify itself by inviting a doctor's opinion in the form of a report or some other reliable evidence.[52]

The expression 'is incapable of giving evidence' denotes an incapacity of a permanent character, and not of transient or temporary character.[53] Temporary inability of a witness, because of ill-health or some other ground, is no ground to bring his previous deposition on record under this section.[54] However, something short of permanent incapacity might satisfy the stipulations of this section.[55] Where a person has become very old, blind, or cannot move, he must be taken to have become incapable of giving evidence.[56] Where a witness who was examined and cross-examined in the Committal Court, was suffering from paralysis at the time of the sessions trial, it was held that the Sessions Judge was justified in admitting the evidence under Section 33.[57]

Where a medical certificate was produced showing that the witness had to take rest for a week, it was held that it was insufficient to admit his deposition under Section 33.[58]

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45. *Dukhamandal* v. *W.N Grant*, 16 I.C. 467 : 16 C.L.J. 24; *Chandulal Asharam* v. *Bhaaikashi*, AIR 1939 Bom 59.
46. *Savlimiya Miyabhai* v. *Emperor*, AIR 1944 Bom 338; *Bahera* v. *State*, AIR 1950 Ori 202.
47. *Gurdial* v. *Emperor*, AIR 1949 Punj 228.
48. *Khimji Punja* v. *Maun Devshi Bhanji*, AIR 1950 Kutch 24.
49. 1984 Mad LJ 590.
50. *Chainchal Singh* v. *Emperor*, 1946 PC 1.
51. *Chainchal Singh* v. *Emperor*, 1946 PC 1; *Isher Das* v. *State*, AIR 1954 JK 19; *Kesar Singh* v. *State*, AIR 1954 Punj 286; *R.* v. *Gajendra*, AIR 1943 Cal 222; *T.S.R. Sarma* v. *Nagendra*, 1957 Cal WN 1.
52. *State* v. *Gajraj*, AIR 1953 Raj 66.
53. In re : *Pyarilal*, 4 CLR 504.
54. *Hariprasad* v. *State*, AIR 1953 All 660.
55. In the matter of the petition of *Aggur Hussain*, (1881) 6 Cal 774.
56. *Bhim Mandal* v. *Magaram*, AIR 1961 Pat 21.
57. (1964) 30 Cut LR 43.
58. *R* v. *Gajendra*, AIR 1943 Cal 222.

Where the indisposition of a witness is only temporary, the proper procedure is not to admit the evidence, but to postpone the trial.[59] Where a witness is found to be ill, the party requiring his testimony should move to put off the trial. Such course is less open to objection and abuse.[60] Where the deponent was expected to be confined for a month and consequently unable to travel, it was held that the ground was insufficient to apply the provision, and the trial can be postponed.[61]

Mere statement of the police of the prosecution about the inability of the prosecutrix to attend and give evidence, in a rape case, before the Sessions Court, is not sufficient to transfer the earlier statement to the sessions record under this section. In that case it was alleged that the prosecutrix was suffering from mental shock, but it was found that she was preparing to appear for an examination. On those facts it was held that the submission of the prosecution was not sufficient to transfer the statement to the record of the sessions.[62]

Where a witness was examined-in-Chief by the prosecution and after the charge was framed it was found that he was so ill that he could not travel, and when interrogatories were sent he was not in a fit condition to answer the questions put to him and, as a result he was not subjected to cross-examination, it was held that such evidence was admissible, but the weight to be attached to it would depend upon the circumstances of that case.[63] If the illness is such that there is no probability of the witness ever being able to attend, the depositions are, of course, admissible; so, probably, if it is such as to prevent his attendance within a reasonable time.[64] Where a person is insane, he is incapable of giving evidence.[65]

If the depositions were taken shortly before the second trial, it is unnecessary to show that the witness was sane when they were taken.[66]

Where, after questioning the witness, the court found that he was not in a fit state of mind to give evidence, and to fortify itself the witness was sent to a doctor for his opinion, it was held that the witness was proved to be incapable of giving evidence.[67]

Precise evidence should be required by the court as to the nature of the illness and incapacity to attend and give evidence.[68]

It is not necessary in every case where a witness is unable to attend the court on the ground of physical incapacity, that there must be evidence of a medical person. There may be many cases in which the facts are such that the incapacity can be proved by a lay witness.[69]

11. WITNESS' PRESENCE CANNOT BE OBTAINED WITHOUT DELAY AND EXPENSE

This condition can be said to have been fulfilled only when the court considers that the delay and expense involved in securing the presence of the witness is unreasonable.

Independent evidence has to be placed before the court can excercise the powers given under this section. Reliable evidence showing the impracticability of procuring the attendance of a witness has to be given.[70] It is only in extreme cases of expense or delay that the personal attendance of a witness is

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59. PHIPSON ON EVIDENCE, 13th Edn., p 675 (para 29-18).
60. *Harrison* v. *Blades*, (1813) 3 Camp 457.
61. *R.* v. *Omant*, 6 Cox 466; *R.* v. *Butcher*, (1900) 64 JP 808.
62. 1975 Kashmir LJ 391.
63. *Mangalsen* v. *Emperor*, AIR 1929 Lah 840; **See also** *Maharaja of Kolhapur* v. *Sundram Iyer*, AIR 1925 Mad 497.
64. **See** *Beaufort (Duke of)* v. *Crawshay*, LR 1 CP 699, deciding that the words "permanent sickness or infirmity", in the Evidence on Commission Act, 1831, were to be thus construed. But **see** now *St. Edmundsbury and Ipswich Diocesan Board* v. *Clark*, (1973) Ch 323; (PHIPSON ON EVIDENCE, 13th Ed., page 675 (para 29-18).
65. *R* v. *Enswell*, 3 TR 707, 720-21; even if the insanity is temporary *R.* v. *Marshall* (1841) C&M 147.
66. *Cf R.* v. *Wall*, cited in (1830) Russ. Cr. (8th ed.), p. 2089; (PHIPSON ON EVIDENCE, 13th Ed., page 675) (para 29-18).
67. *State* v. *Gajraj*, AIR 1953 Raj 66.
68. In re : *Ashgar Hussain*, ILR 6 Cal 774; *Abdul Ghaffoor* v. *Govind Prasad*, AIR 1928 Rang 284; *S.C. Mitter* v. *State*, AIR 1950 Cal 435.
69. *Chainchal Singh* v. *Emperor*, (1945) 48 Bom LR 284 : 72 IA 270.
70. *Annavi Muthirivan* v. *Emperor*, 1916 Mad 851; *Emperor* v. *Gajendra Mohan*, AIR 1943 Cal 222 : ILR (1943) 1 Cal 405; *G. Bulliswamy* v. *C. Annapurnamma*, 1976 AP 270.

dispensed with, and his evidence given in a former inquiry is referred to.[71] It must be shown that necessary steps were taken to procure the attendance of the witness.[72]

It was held that the same principle as is laid down by the Privy Council in *Chainchal Singh* v. *Emperor*[73] can be applied where the presence of the witness cannot be secured without delay or expense which the court considers as unreasonable.[74]

Where a statement of a doctor made before the committing Magistrate was brought on record before the Sessions Judge, the evidence of a constable was given to the effect that from the enquiries he made he learnt that the doctor's whereabouts were not known; besides that evidence, there was also a report of the hospital superintendent stating that the doctor was no longer in service and it was not known where he was. The Public Prosecutor made an application that the doctor's statement be transferred to the Sessions record on the ground that there was no likelihood of the witness being available without unreasonable delay and expense. The defence counsel took no objection at that stage, and the record was transferred to the file of the Sessions Judge. On those facts the Supreme Court held that, though the Judge might have been well-advised to give fuller reasons for making the order transferring the statement, it was clear that he transferred it on the ground of unreasonable delay and expense; and there was no infirmity in the order of the transfer.[75] The carbon copy, made by one uniform process, of a doctor's certificate issued in discharge of his professional duty, is admissible when it is proved that the doctor's attendance could not be procured without considerable delay and expenses.[76]

Only when all reasonable efforts to secure the attendance of a witness have failed, can it be said that there is unreasonable delay in securing his attendance. The provisions of Section 33, are an exception to the general rule that, in order that the evidence of a witness may be admissible against an accused or a party, he must have an opportunity to test the truth of the statement by cross-examination. The exception must not be lightly availed of. Where no attempt has been made by summoning the witness or by other means to secure his presence, the earlier statement before the committing Magistrate is not admissible in the court of Sessions under Section 33.[77]

One main prosecution witness had been examined in a case and also cross-examined before the original charge was framed. But he was not produced for recross-examination after the charge, on the ground that he could not be procured without unreasonable delay. The Magistrate convicted the accused. On appeal, the Sessions Judge directed the Magistrate to call the witness for cross-examination. Later, the Magistrate failed to secure the presence of the witness and sent a certificate to that effect. Then the Sessions Judge transferred that evidence to his file. On those facts, it was held that the Sessions Judge was right in taking the record to his file on the ground of unreasonable delay and expense.[78] Where a witness was brought from Calcutta to Rangoon twice for the purpose of his examination and cross-examination, it was held that, as it involved undue delay and heavy expenses to call witness again, it was sufficient for his prior deposition to be brought on record u/s. 33.[79]

Mere consent of the prosecutor and the pleader for the accused is not sufficient.[80] Mere inconvenience to witness or amount of expenses is no ground where the entire case rests on the evidence of those witnesses.[81] Where the witness joined the army and was stationed at Muttra, it was held that it would be improper to apply Section 33 for taking his earlier deposition before the Sessions, as the witness was available for production before the Court.[82]

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71. *Empress of India* v. *Mulu*, ILR (1880) 2 All 646; In re : *Ramureddy*, ILR (1881) 3 Mad 48.
72. *Emperor* v. *Kangal Mali*, AIR 1915 Cal 256; *Noshai Mistri* v. *Empress*, ILR 5 Cal 958; *Queen* v. *Likhunsenthal*, 21 WR (Cri) 56.
73. 1946 PC 1.
74. *Nathuram* v. *State*, AIR 1951 HP 1; *State* v. *Rikshpal Singh*, AIR 1953 All 520.
75. *Bakshish Singh* v. *State of Punjab*, AIR 1957 SC 904; *Krashan Alias Khatu Padhan* v. *State*, (1958) 28 Cut LT 494; (Where the doctor was in England and his presence could not be secured without unreasonable delay and expense).
76. *Pruthi Chand* v. *State of H.P.*, AIR 1989 SC 702.
77. *Murli Singh* v. *Rex*, 1951 All LJ 677.
78. *Narain Singh* v. *State*, (1962) 64 Punj LR 142.
79. *Fernandez* v. *R.* AIR 1934 Rang 434.
80. Re : *Annavi Muthiriyan*, ILR (1915) 39 Mad 449; *Emperor* v. *Savlimiya Miyabhai*, (1944) 46 Bom LTR 589; *Emperor* v. *Gajendra Mohan*, ILR (1943) 1 Cal 405; *Bismilla Khan* v. *State*, AIR 1959 Raj 21.
81. *Queen Empress* v. *T. Burke*, ILR (1884) 6 All 224.
82. In re : *Antony Nadar*, AIR 1944 Mad 319.

12. WITNESS KEPT OUT-OF-THE-WAY BY THE ADVERSE PARTY

The admisibility of evidence of a witness who is kept out-of-the-way by the adverse party is to be based on the broad principle of justice which will not permit a party to take advantage of his own wrong. Strict proof is essential that the witness has been kept out-of-the-way, for admission of his previous deposition.[83]

Where a person did not appear as a witness for the plaintiff but appeared on behalf of the defendant on the occasion and was not examined, and it was found that the witness was not kept out-of-the-way by the defendant, it was held that there was no ground for admitting the deposition under this section.[84]

13. PROCEEDING BETWEEN THE SAME PARTIES [PROVISO 1]

This proviso states that the proceeding in the earlier litigation must be between the same parties or their representatives in interest.[85]

This proviso is based on the grounds of recriprocity because the right to use evidence being co-extensive with the liability to be bound thereby, the adversary in the second suit has no power to offer evidence in his own favour which, had it been tendered against him, would have been clearly inadmissible.

The conditions of Section 33 can be said to have been fulfilled when all the parties in the subsequent proceedings were also parties in the earlier proceedings, and the self-same question was required to be determined in the previous stage, in which the deposition was taken and the witness was also cross-examined.[86]

The use of the word 'was' in the first proviso indicates the first proceeding. Under the English Law, the former deposition is admissible in a subsequent proceeding between the same parties or the parties who represent the original parties or are their privies in estate, when the deponent is dead, insane, or ill, or kept out of the way by the opposite party.

PHIPSON ON EVIDENCE, (15th Edn. (2000), page 1065-66; para 39-13) says: "At common law, depositions and oral testimony given by a witness were admissible in a civil case, and are still in criminal proceedings in a subsequent (or in a later stage of the same) trial in proof of the facts stated, provided: (1) that the proceedings are between the same parties or their privies; (2) that the same issues are involved; (3) that the party against whom, or whose privy, the evidence is tendered had on the former occasion a full opportunity of cross-examination; and (4) that the witness is incapable of being called on the second trial. (In peerage cases, evidence given before a Committee of Privileges is admissible in a hearing of the same case before a subsequent committee; *The Beaumount Peerage*, 6 C. & F., 868.

The rule for civil cases had been supplanted by the Civil Evidence Act, 1995, although criminal cases are governed by the common law. This section is therefore relevant *only* to criminal cases."

LORD RUSSEL in *Krishnayya Surya Rao Bahadur* v. *Venkatakumara*[87]; observed "Whatever may have been the intention of those who framed the section, the first proviso exactly inverts the requirements of the English Law, which requires that the parties to the second proceeding should legally represent the parties to the first proceeding or be their privies in estate..... The legislative authority was, it must be remembered, dealing with a country in which (amongst other institutions) the Hindu joint family involved representation of interest of a kind and degree and in circumstances unfamiliar to English Law. In view of this fact, their Lordships cannot but surmise that the omission of strict English legal terminology and the employment of the less restricted phrase "representatives-in-interest" was deliberate and intentional..... Turning back to the first proviso, it requires, in their Lordships' view, that the party to the first proceeding should have represented in interest the party to the second proceeding in relation to the question in issue in the first proceeding to which "the facts which the evidence states" were relevant. It covers not only cases of privity in estate and succession of title, but also cases where both the following conditions exist, *viz.*, (1) the interest of the relevant party to the second proceeding in

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83. *Mokshed* v. *Emperor*, AIR 1930 Cal 756; *R.* v. *Scaife*, (1851) 17 QB 238; *Egan* v. *Larkin*, (1842) 1 Arm M & O 403.
84. *Brajaballav Ghose* v. *Akhshay Bagdi*, AIR 1926 Cal 705.
85. *Sitanath Dass* v. *Mohesh Chunder Chuckerbati*, ILR (1886) 12 Cal 627.
86. *Fakirnath* v. *Krushna Chandra Nath*, AIR 1954 Ori 176.
87. AIR 1933 PC 202 : 60 IA 336 : ILR 57 Mad : 1 (1933) 35 Bom LR 1076.

the subject-matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding; and (2) the interest of both in the answer to be given to the particular question in issue in the first proceeding is identical. There may be other cases covered by the first proviso, but if both the above conditions are fulfilled, the relevant party to the first proceeding in fact represented in the first proceeding the relevant party to the second proceeding in regard to his interest in relation to the particular question in issue in the first proceeding, and may grammatically and truthfully be described as a representative-in-interest of the party to the second proceeding."[88]

The decision of the Privy Council was rendered before the Civil Evidence Act, 1968. In England, evidence given in previous proceedings is admissible in subsequent proceedings, subject to the provisions of the Act.

This proviso requires that the party to the first proceeding should have represented in interest the party to the second proceeding, in relation to the question in issue in the first proceeding to which the facts which the evidence states were relevant.[89]

Proviso 1 to Section 33, not only covers cases of privity in estate and succession of title, but also cases where both the following conditions are fulfilled:—

(1) The interest of the relevant party in the second proceeding is the subject matter of the first proceeding and is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding; and

(2) The interest of both in the answer to be given to the particular question in issue in the first proceeding is identical.

If both these conditions are fulfilled, it could be said that the relevant party in the first proceeding in fact represented in the first proceeding the relevant party to the second proceeding in regard to his interest in relation to a particular question in issue in the first proceeding; and may be correctly described as a representative-in-interest of the party to the second proceeding.[90]

After a son had been adopted by the widow of a deceased Hindu, she does not represent the estate of the deceased as a representative-in-interest within the meaning of this section. If after the death of the first adopted son, a second son is adopted to the deceased, he would not be called a representative in interest of the first adopted son, as sons in a joint family governed by *Mitakshara* Law claim through their father only.[91]

Depositions of persons were recorded in a suit in which the respondent in a subsequent suit was not party. By the time of the subsequent suit, the witnesses died and their depositions in the prior suit were sought to be tendered in evidence in the subsequent suit. It was held that it could not be done as the respondent was not a party to the prior suit and hence Section 33 is not attracted.[92]

The daughter A of the deceased father filed a suit for declaration that one V was not the adopted son of her deceased father. In a prior suit by the alleged adopted son V, against a debtor of the deceased, the defence was that V was not the adopted son. The witnesses who were examined by the adopted son were all dead. It was held that the depositions in the earlier suit for recovery of the debt were admissible, as the debtor represented the estate of the deceased in the same way as the alleged adopted son was representing it in the subsequent suit for declaration.[93]

Partners and joint contractors who are each other's agents for the purpose of making admissions against each other in relation to partnership transactions or joint contractors are regarded as privies in estate, and are included in the term "representatives in interest".[94]

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88. **See also** *Subramanya Shastry* v. *Lakshminarasamma;* AIR 1958 AP 22; *Karrivenkata Narasayamma* v. *Venkatarattanamma,* AIR 1957 AP 378.
89. *Krishnayya Rao* v. *Venkata Kumara,* AIR 1933 PC 202 : (1933) 35 Bom LR 1076, 60 IA 336 : ILR 57 Mad 1.
90. *Krishhayya Rao* v. *Venkata Kumara Mahipati,* AIR 1933 PC 202 : 60 IA 336 : ILR 57 Mad 1 : (1933) 35 Bom LR 1076; *Kamla Devi* v. *Rodre Shwar Prasad Singh,* 1976 Hindu LR 185 (Pat); *Karri Venkata Narasayamma* v. *Venkatarathnamma,* AIR 1957 AP 378.
91. *Mrinmayi Debya* v. *Bhuban Mayi Debya,* 23 WR 42; **see also** *Lakshman Dada Naik* v. *Ramachandra Dada Naik,* ILR 5 Bom 48 (PC).
92. *Ayyavar Thevar* v. *Secretary of State,* AIR 1942 Mad 528.
93. *Karri Venkata Narasayamma* v. *Venkatarathnamma,* AIR 1957 AP 378.
94. *Chandreshwar Prasad Narain Singh* v. *Bisheshwar Pratap Narain Singh,* ILR (1926) 5 Pat 777.

R charged A with breach of trust, and S gave evidence in support of the charge. A being acquitted, R was tried for making a false charge and S for prejury. It was held that the depositions given by witnesses in the first case could be used against R in the second case, but not against S under this section.[1]

14. CROSS-EXAMI .TION BY ADVERSE PARTY IN THE FIRST PROCEEDING [PROVISO 2]

The adverse party in the first proceeding is the party against whom the witness is produced in the previous proceeding. The party producing the witness and having the advantage of examining the witness is not such adverse party referred to in 2nd proviso.[2]

Under this proviso, the adverse party in the first proceeding must have had the right and opportunity to cross-examine the witness. The object of cross-examination is to elicit information regarding the relevant fact in issue which is favourable to the party who conducts the cross-examination and to cast doubts upon the accuracy of the evidence in chief examination. The section contemplates that the party must have not only the right but also the opportunity to cross-examine the witness. The word 'and' cannot be read as 'or'.[3]

In *Dal Bahadur* v. *Bijay*[4], an application was filed for mutation of the name of the adopted son. The reversioners of the deceased wanted to cross-examine the widow in that proceeding. An objection was taken against allowing the cross-examination on the ground that the question involved in the proceeding does not relate to the real issue as to whether the widow had power to adopt a son. That objection was upheld, though it appeared that some cross-examination took place inspite of the objection. In the subsequent suit filed by the reversioners, questioning the widow's power to adopt, the revesioners wanted to tender, the evidence of the widow given in the mutation proceeding. The Privy Council held that the evidence of the widow in the mutation proceeding was not admissible, as the other party never had the opportunity to cross-examine the widow nor had they right to cross-examine her.

The proviso uses the word 'right'. It follows that the opposite party must have a legal right to cross-examine. The word 'right' used in Section 33 means a right conferred by a statutory provision, such as that contained in Section 138 of the Evidence Act, and not a right occurring from mere permission granted by the Court. If the Court permits the accused to cross-examine a witness, it is nothing but giving him an opportunity of cross-examining the witness. Section 33 expressly requires a right in addition to an opportunity to cross-examine.[5] Where a witness is not produced for cross-examination, after a charge in a warrant case, his evidence should not be taken into consideration even if the accused was given the option to cross-examine him before the charge, but he did not do so.[6]

This proviso is based on the fundamental principle in the administration of justice that every man should have an opportunity of cross-examining witnesses whose evidence is to be used against him. If the adverse party has had liberty to cross-examine and has not chosen to exercise it, the case is the same in effect as if he had cross-examined. It is not necessary that the opponent should have exercised his right of cross-examining, for the depositions will be relevant if he deliberately forbore from, or waived the exercise of, an opportunity for cross-examining.[7]

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1. *Rami Reddi*, In re : (1881) 3 Mad 48, 51. **See** *Emperor* v. *Kadhe Mal*, ILR (1919) 42 All 24. **See** *Phool Chand* v. *Amrit Lal*, AIR 1980 P&H 122 (where the earlier proceeding was *ex parte* and, therefore, not between the same parties.)
2. *V.M. Mathew* v. *V.S. Sharma*, AIR 1996 SC 109 (paras 7 and 8).
3. *Mulkhraj* v. *Delhi Administration*, AIR 1974 SC 1723; *Dal Bahadur Singh* v. *Bijay Bahadur Singh*, 57 IA 14, 52 All 1 : AIR 1930 PC 79.
4. AIR 1930 PC 79. **See also** *V.M. Mathew* v. *V.S. Saramma*, 1996 AIHC 973 (para 17), **dissenting from** *Poonamchand* v. *Motilal*, AIR 1955 Raj 179.
5. *Banwarilal* v. *State*, AIR 1956 All 385; *Arabinda Dey* v. *State*, AIR 1953 Cal 206. **See contra** *Mahboodan* v. *Fakima Begum*, 1950 All 167; (when permission is given the accused becomes vested with the right); *S.C. Mitter* v. *State*, AIR 1950 Cal 435 : ILR (1951) Cal 480 (vested right).
6. *S.C. Mitter* v. *State*, ILR (1951) 1 Cal 480. **see however** *State* v. *Baldev Kishan*, (1952) Patiala 543.
7. *M'Combie* v. *Anton*, (1843) 6 M & G 27; *Gurudin* v. *Emperor*, (1934) 31 NLR 276; *Queen-Empress* v. *Ramchandra Govind Harshe*, ILR (1895) 19 Bom 749; *Sadu* v. *Express*, (1885) PR No. 26 of 1885 (Cr); *State* v. *Hazura Singh*, ILR (1952) Patiala 48; *Mulkhraj* v. *Delhi Admn*, AIR 1974 SC 1723, (where opportunity of cross-examination was not made use of).

The Supreme Court in *Mulkhraj Sikka* v. *Delhi Admn.*,[8] held that, where in a sessions trial, the witness whose deposition was recorded by the committing Magistrate was sought to be brought on record on the ground that the witness could not be found inspite of all reasonable steps taken, including the one taken by the High Court during the hearing of the appeal, and the counsel of the accused, although he had a right to cross-examine that witness in the committing court, had preferred not to cross-examine at that stage and had reserved it for the Sessions Court trial, both the conditions of Section 33 were satisfied and the evidence of such a witness recorded in the committing court was admissible in the Sessions Court, as there was opportunity, for the accused or his counsel to cross-examine that witness, but the opportunity to cross-examine was not availed of by them.

The Allahabad High Court has held that the evidence of a witness who had been examined in Court, is not admissible in the course of the same judicial proceeding merely because it is impossible to cross-examine him on account of his death in the meanwhile, but the weight to be attached to his testimony depends on the circumstances of the case.[9]

Under this proviso, the party must have the opportunity to cross-examine the witness in full and not partially.[10] A statement made by an informant before the police was treated as FIR, and the investigation started; that informant, however, died before the case was committed to a Court of Session. It was held that the statement cannot be admitted in evidence.[11] The deposition of a witness who was not cross-examined before the committing Magistrate and who died before the trial is inadmissible as the accused had the right to cross-examine him.[12] But if a witness under examination dies before his cross-examination is completed, no part of his evidence can be made use of.[13]

Where the death of a witness took place after he had been examined and cross-examined in the Committal Court, it was held by the Supreme Court, that his deposition, though admissible in Sessions Trial by virtue of Section 33 of the Evidence Act, cannot be treated as evidence under Section 288, Cr.P.C.[14]

Where the accused claims to cross-examine the prosecution witness before charge, the Magistrate cannot refuse the request. If he refuses, the evidence recorded by him becomes admissible if the other conditions of the section are satisfied.[15]

When the witness is dead, or cannot be found, the evidence given by him in the committing Court cannot be admitted in the sessions trial if he had been examined in Chief in the Sessions Court and if he dies or cannot be found after such examination in chief.[16]

Where the prosecution witness was examined and the cross-examination was reserved, it was held that, in the absence of anything on record to show that the Magistrate afforded the opportunity to the accused to cross-examine the witness before he framed a charge, Section 33 would have no application and the Magistrate was right in omitting such evidence from consideration.[17] The deposition of a witness before the committing Magistrate, whom the counsel had not preferred to cross-examine at that stage, but had reserved his right to cross-examine before the Sessions Court, was held to be admissible before the Sessions Court as both the conditions of Section 33 were satisfied and the witness could not be found inspite of all reasonable steps taken.[18] Where the witness died before he could be cross-examined after the framing of the charge, his evidence in chief before the charge, was held to be not admissible under Section 33.[19]

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8. AIR 1974 SC 1723.
9. *Ahmad Ali* v. *Joti Prasad*, AIR 1944 All 241.
10. *Laxmmavva* v. *Hanamappa Bhimappa*, (1967) 1 Mys LJ 553.
11. ILR 1984 Bom 1215.
12. *Queen* v. *Baswanta*, 25 Bom 168.
13. *Narsingh Das* v. *Gokul*, ILR (1927) 50 All 113.
14. *Tarlok Singh* v. *State of Punjab*, 1974 SC 1797 : 1974 Cr LJ 1265.
15. *Karmadhan Lama* v. *State of Sikkim*, 1979 Cr LJ 610.
16. *State* v. *Dhua Kandy* 1970 Cr LJ 1322 (Ori).
17. *State of Assam* v. *Ramani Mohan Chandra*, 1953 Assam 176 : 1953 Cr LJ 1593 (Assam).
18. *Mulkh Raj Sikka* v. *Delhi Admn.*, AIR 1974 SC 1723; **relied on** *Dal Bahadur Singh* v. *Bijai Bahadur Singh*, AIR 1930 PC 79; **See also** *State of Hyderabad* v. *Bhimaraya*, 1953 Cr LJ 524 : 1953 Hyd 63; *Harumal* v. *State*, AIR 1951 Ajmer 25.
19. *Kalyan Lahiri* v. *State*, 1980 CrLJ 484 (Cal) : (1972) 1 Cut WR 464; *State* v. *Dhusa Kandy*, 1970 Cr LJ 1322 (Ori); *Dr. A.N. Mukerjee* v. *State*, AIR 1969 All 489; *Brahmachari* v. *Ananth Bandhu*, AIR 1954 Cal 396 : ILR (1955) 2 Cal 19; *State* v. *Hazura Singh*, ILR (1952) Patiala 48.

The evidence recorded in the Committal Court can not be admitted in the Sessions Court if that witness was partly examined in the Sessions Court. Such evidence can only be admitted under Section 288, Cr.P.C.[20]

Unless the examination of a prosecution witness is complete, that is, to say, unless he has been cross-examined and re-examined, or unless his cross-examination and re-examination have been deferred, his evidence cannot be considered except under the circumstances mentioned in Section 33, although it is in favour of the defence.[21]

The Karnataka High Court held that the deposition given in a previous criminal trial cannot be admitted in subsequent trial in respect of an absconding accused who was apprehended later, as that accused was not a party to the previous trial and had no opportunity to cross-examine the witnesses.[22]

In a warrant case under Section 256, Cr.P.C., the accused has no right to cross-examine the witnesses until the charge has been framed. The fact that the accused cross-examined the witness does not make his evidence admissible under Section 33.[23]

Where in a case of prosecution for cheating under Section 420, I.P.C. the complainant died before framing a charge after his examination but without being cross-examined, it was held that it cannot be said that the opposite party had a right to cross-examine the complainant before he died.

The complainant's evidence given before the charge is inadmissible.[24] However, a **contrary view** was expressed in:—[25]

Under the old code there were two types of cases which were treated as warrant cases. One was on a complaint by a private party, and the other was where the police filed a case which had to be tried as a warrant case. In the former one, the witness accused could cross-examine the witness before framing the charge, by exercising his right of cross-examination under Section 208(2) of Cr.P.C., whereas in the latter, he had no right to cross-examine the witness before the charge was framed. Under the Amendment Act 26 of 1955, under Section 251-A Cr.P.C. in the interest of speedy disposal of warrant cases instituted on police report, the examination of witnesses before the charge is framed is dispensed with. So, in the police warrant cases, the question of cross-examination by the accused would not arise. Under the new Cr.P.C. of 1973, in warrant cases on police report, witnesses are to be examined only after the charge is framed, and the accused can cross-examine them, and there is no right to the accused to reserve the cross-examination, though the Court in its discretion can allow deferring the examination (cross) u/s. 231, 242(3), Cr.P.C. In the private warrant cases, the witnesses are to be examined before the framing of the charge, and the accused is given a right to cross-examine them immediately or after framing the charge u/s. 244, 246(4)(6), Cr.P.C.

Section 33 does not require, for a deposition to be admissible, that the adverse party should have actually exercised his right to cross-examine.[26]

Such an opportunity is available to the accused in the committal proceedings under Chap. 18, Cr.P.C., (Pvt. Warrant Procedure), unlike in Chap. 21 (police warrant cases) where cross-examination is allowed only after the framing of the charge.[27]

Justice GURNAM SINGH, while delivering the majority judgment in *State* v. *Baldev Kishan*[28] observed: "the words 'in a later stage of the same judicial proceedings' in Section 33, contemplate a stage at which attendance of a witness is required for the purpose of introducing his evidence; when the

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20. *Kasim Ali* v. *King*, AIR 1950 Assam 75.
21. *Phani Bhusan Ghosh* v. *Sibakali Basu*, 1952 Cal 218 : 1952 Cr LJ 582 (Cal).
22. *Gavi Siddiah* v. *State*, ILR 1975 Kant 355.
23. *Arbinda Dey* v. *State*, AIR 1953 Cal 206.
24. *Brahmachari* v. *Anant Bandu Dutt*, AIR 1954 Cal 395; *State* v. *Gajaraj*, AIR 1953 Raj 66; *Emperor* v. *C.A Mathews*, AIR 1929 Cal 822; *Lachmi Narain* v. *Emperor*, AIR 1931 All 621.
25. *Muthayya Pilai* v. *Emperor*, AIR 1932 Mad 559; In re : *Muthayya Chetti*, AIR 1924 Mad 735; *Banwari Lal* v. *State*, AIR 1956 All 385; *Local Government* v. *Maria*, AIR 1925 Nag 44.
26. *Chintamandas* v. *State*, AIR 1970 Ori 100.
27. *Gauri* v. *Dowring*, AIR 1934 Pat 413; *Panalal Pal* v. *State*, (1959) 2 Cut LT 307; In re : *Bora Narasimhulu*, AIR 1952 Mad 165; (cross-examination does not mean effective cross-examination; *Sundara* v. *Gopala*, AIR 1934 Mad 100 (Cases under the old code).
28. 1953 Cr LJ 51 (Pepsu-FB).

deposition of a witness is already recorded, the question of introducing his evidence does not arise. Once a witness's evidence is complete, his non-availability cannot in any way affect its admissibility or relevancy. Where a witness in a warrant case is examined, cross-examined and re-examined before the framing of the charge, such evidence is complete and such evidence before charge is admissible after framing a charge. A stage at which evidence is sought to be admissible is not 'later stage' within the meaning of Section 33, so Section 33 does not apply to such a situation.[29]

In a private warrant case, where evidence was recorded before the charge in full and where the witness could not be produced for cross-examination after the charge u/s. 256, Cr.P.C. (Old), it was held that his evidence before the charge, if otherwise relevant, would continue to remain admissible and relevant as before, without the aid of the provisions of Section 33, though the absence of cross-examination may very much affect, its reliability.[30]

Where the investigation was recorded regarding an employee by the Junior Inspector of Mines, it was held that the deposition of the witness was not admissible, as the proceeding was not a judicial proceeding, and the delinquent at that stage had no right or opportunity to cross-examine the witness.[31]

The second proviso protects the right of 'adverse party in the first proceeding' and not the right of the person who produces and examines the witness. The object of this proviso seems to be to protect those parties against whom the previous proceedings might have gone *ex parte*, or those who could have no right or opportunity to cross-examine for some reason; it would also protect co-plaintiffs or co-defendants who may not have had the right or opportunity to cross-examine the witness produced from their own side.[32]

Where the defendant, in a subsequent suit was examined and cross-examined by the adverse party in an earlier summary suit for eviction under the Portuguese Civil Procedure Code, (between the same parties) it was held that the statements made by the defendant in the earlier proceedings would be admissible under Section 33 in a subsequent suit, and the fact that, under the Portuguese Civil Procedure Code, a party to the earlier proceeding was not a witness on his own behalf, but could be examined if the other party so desired, and therefore the scope of cross-examination was limited, would not affect the applicability of Section 33.[33]

15. SAME QUESTION IN ISSUE IN BOTH THE PROCEEDINGS [PROVISO 3]

The principle involved in requiring identity of the matter in issue is to secure that, in the former proceeding, the parties were not without the opportunity of examining and cross-examining to the very point upon which their evidence is adduced in the subsequent proceeding. And though separate proceedings may involve issues, of which some only are common to both, the evidence of those common issues given in the former proceeding may be given in the subsequent proceedings. Thus, "if in a dispute respecting lands, any facts come directly in issue, the testimony given to that fact is admissible to prove the same point in another action between the same parties or their privies, though the last suit relates to other lands."[34] The recitals of boundaries in deeds not *inter partes* are inadmissible in evidence unless the executants are examined.[35]

In the third proviso it is stated that the questions in issue must be substantially the same in the first as in the second proceeding. It is not necessary that all the questions in issue in the two proceedings should be substantially the same. It is sufficient if the principal question in issue in both the proceedings is identical.[36] It must be established that the issues in the two proceedings are substantially the same,

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29. *Mangal Sen* v. *Emperor*, **relied on** AIR 1929 Lah 840; *Maharaja of Kolhapur* v. *Sundaramal*, AIR 1925 Mad 497; *Horil Kuer* v. *Rajab Ali*, AIR 1936 Pat 34; *Sri Kishun* v. *Emperor*, AIR 1946 Pat 384; *Ahmed Ali* v. *Jyothi Prasad*, AIR 1944 All 188; *Jaman Singh* v. *State*, 1957 Cr LJ 232 (Raj).
30. *State of Sikkim* v. *Pemba Sherpa*, 1981 Cr LJ 856.
31. *Bhurangya Coal Co.* v. *Saheb Jan Mian*, AIR 1956 Pat 299.
32. *Poonam Chand* v. *Motilal*, AIR 1955 Raj 179.
33. *Sadassiva Rauj Gaitonde* v. *Jose Jogaquim Fonseca*, AIR 1976 Goa 11.
34. *Rami Reddi*, In re : (1881) 3 Mad 48, 52; TAYLOR, 12th Edn. (para 467), p. 321.
35. *Sadhurajan* v. *Sriramulu Naidu*, AIR 1999 Mad 377 (para 28) **relying on** *Amiappa Nainar* v. *Annamalai Chettiar*, 1972 (1) MLJ 317 : AIR 1972 Mad 154.
36. *Krishnayya Rao* v. *K. Mahipati*, AIR 1933 PC 202 : 60 IA 336 : ILR 57 Mad 1; *Subrahmanya* v. *Lakshminarasamma*, AIR (1958) AP 22.

though any specific issue was not raised in any of the two.[37] Whether the questions at issue are substantially same, depends upon whether the same evidence is applicable, although different consequences may follow from the same fact.[38] Where the same question is substantially in issue both the proceedings, it does not matter that they relate to different transactions or properties.[39]

A prosecution was instituted by *S* against *N*, at the instance and on behalf of *F*, for criminal trespass in respect of a certain house, and on his own behalf for assault and insult. *S* gave evidence at the trial in support of those charges. *F* subsequently brought a civil suit against *N* for possession of the same house under Section 9 of the Specific Relief Act. *S* died before the institution of the civil suit. At the trial of the civil suit, the deposition of *S* in the criminal Court was tendered by *F* as evidence on the issue of possession. It was held that, *S* being dead, and the proceedings being between the same parties and the issues being the same (substantially), the deposition of *S* was admissible.[40] In the proceedings before a Magistrate on a charge of causing grievous hurt, two (among other) witnesses, one of whom was the person assaulted, were examined on behalf of the prosecution. The accused were committed for trial. Subsequently, the person assaulted died in consequence of the injuries inflicted on him. At the trial before the Sessions Judge, charges of murder and of culpable homicide not amounting to murder were added to the charges of grievous hurt. The deposition of the deceased witness was put in and read at the Sessions trial. It was held that the evidence was admissible either under Section 32, Cl. (1), or this section, notwithstanding additional charges before the Sessions Court.[41] Statements of scribe and attesting witness were recorded in a proceeding involving the genuineness of a will. Copies of their statement were held to be relevant in a matter of the same will, as they had died in the meantime.[42]

16. A CRIMINAL TRIAL OR INQUIRY DEEMED TO BE A PROCEEDING [EXPLANATION]

This explanation was intended to do away with any objection, in criminal cases, that the Crown or the State, is the prosecutor and not a party. It says that the prosecutor and the accused are the parties in a criminal trial or enquiry. The object of Section 33 is to make the previous deposition of the witnesses admissible in subsequent proceedings, when the witnesses cannot be produced, or when the witness is dead, or, is incapable of giving evidence, etc., in the subsequent proceedings. This explanation has been inserted for the purpose of excluding the objection which arises when the depositions are taken in criminal cases, that they cannot be used in a subsequent proceeding for want of mutuality or reciprocity, because the Crown is the prosecutor in all proceedings.[43]

The effect of the explanation is that the deposition taken in criminal proceedings may be used in a civil suit, and *vice versa*.

By reason of this explanation, as the prosecutor and the accused are deemed to be parties in the criminal proceeding, it would be possible to allow depositions in a criminal case to be admitted in subsequent proceedings provided the conditions in Section 33 are satisfied.[44]

Under the English Law, a former deposition in a criminal case is not admissible on mere proof that the witness cannot be found after diligent search, nor even if it is shown that, being a foreigner, he has left the country, without any intention to defeat justice. This was relaxed under the Explanation by making it possible to use the former deposition in a criminal case, in a subsequent proceeding, subject of course to the other conditions mentioned in Section 33.

FIELD ON EVIDENCE (11th Edn, Vol. 3, p. 2072, para 46) states: "The effect of the explanation seems to be that a deposition taken in a criminal trial may be used in a civil suit and conversely, provided that the conditions of the section are fulfilled. It is not a principle of universal application that if the police or the magistracy act on information by a private individual, without a formal complaint or application for process, the State and not the individual becomes the prosecutor."

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37. *Sarvabhotla* v. *Kanala*, 1939 Mad 446; *Sadasiva Rauji Gaitonde* v. *Jose Joaquion Forseca*, AIR 1976 Goa 11; *Arabinda Dey* v. *State*, AIR 1953 Cal 206.
38. In the matter of the Petition of *Rochia Mohato*, ILR (1881) 7 Cal 42.
39. *Llanover* v. *Homfray; Phillip* v. *Llanover*, (1881) 19 Ch D 224.
40. *Foolkissory Dasee* v. *Nobin Chunder Bhujno*, ILR (1895) 23 Cal 441.
41. *In the matter of the Petition of Rochia Mohato*, ILR (1881) 7 Cal 42. **See also** *Mulkh Raj* v. *Delhi Admn.*, AIR 1974 SC 1723 (where the evidence in committal proceedings was brought in the Sessions trial, the witness being dead)
42. *Mohinder Kaur* v. *Piara Singh*, AIR 1981 P&H 130.
43. *Soojan Bibee* v. *Achmut Ali*, (1874) 12 Beng LR (Appx) 3.
44. *State of Himachal Pradesh* v. *Charan Dass Dogra*, 1976 Cr LJ 1466.

In *Gaya Prasad* v. *Bhagath Singh*,[45] it was observed: "A prosecutor has been described as a man actively instrumental in putting the law in force. A person would be a prosecutor where he files the complaint himself, or has it filed through the instrumentality of an agent or a counsel. A private person, at whose instance and report, the prosecution is launched by the police is a prosecutor within the meaning of the present context..... The answer to the question, who is the prosecutor, must depend on the whole circumstances of the case. Mere setting the law in motion is not the criterion; the conduct of the complainant before and after making the charge must also be taken into consideration.[46]

Under Section 495, of the old Criminal Procedure Code, corresponding to Section 302 of the Cr.P.C. of 1973, a private person is also allowed to conduct the prosecution. So it would be possible for the court to consider him as the prosecutor.[47]

There is a distinction between a person simply giving information to the police and a person making a complaint upon which the prosecution is launched. In the former case, the informant cannot be taken as prosecutor, unless he subsequently complains and takes proceedings against another. So the question whether such a person is the real prosecutor or informant only, is to be determined by his conduct before and during the trial.[48]

In cases of malicious prosecution, or a suit for damages, the foundation for the action lies on the abuse of the process of the Court, by wrongfully setting the law in motion, and it is designed to discourage the perversion of the machinery of the justice for any improper purpose. The previous depositions in a criminal case are admissible in a subsequent criminal case for malicious prosecution or a civil suit for damages, under this section, provided other conditions are satisfied.[49]

The deposition of a witness taken in the course of an enquiry before the Coroner cannot, in the event of death of the witness, be taken in evidence at the trial of the case in the High Court, because the enquiry before the Coroner is not a proceeding between the prosecutor and the accused.[50]

The introduction and use of depositions taken in criminal cases in bulk in a subsequent civil suit for the purpose of either contradicting or discounting the evidence of witnesses given in the suit, are illegitimate, unless the particular matter of point had been placed before the witness as one for explanation, in view of its discrepancy with the evidence then being tendered.[51]

17. VALUE OF PRIOR DEPOSITION

This section only deals with relevancy of the statements of witness in previous proceedings. The section does not enjoin upon the court that the statement of a witness examined in the previous proceeding must be believed. It would always be open to the person against whom the statement is produced to show that it should not be believed, for the reasons given by him.[52]

In the committing Magistrate's Court, witness was not cross-examined with reference to his earlier statements during investigation or statement recorded under Section 512, Cr.P.C. The Sessions Judge brought on record the deposition of the witness given before the committing Magistrate by dispensing with the personal attendance. It was held that it was pre-mature for the Sessions Judge to give a finding at the time of admitting the deposition that it was of little use to prosecution, because the witness had not named the accused before he was examined in the committal Court. And the reason given by the Sessions Judge for dispensing with the personal attendance of the witness in Court was quite insufficient.[53]

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45. ILR 30 All 525 (PC).
46. **See also** *S.T. Sahib* v. *Hasan Ghani Sahib*, AIR (1957) Mad 646.
47. *Gaya Prasad* v. *Bhagat Singh*, ILR 30 All 525 (PC).
48. *Periya Goundan* v. *Kuppa Goundan*, ILR 42 Mad 880; *Rajagopala* v. *Spencer and Co.*, AIR 1920 Mad 712.
49. *S.T. Sahib* v. *N. Hasan Ghani Sahib*, AIR 1957 Mad 646.
50. *Emperor* v. *Mohomed Yusuf*, (1932) 35 Bom LR 1020.
51. *Bal Gangahdar Tilak* v. *Shri Shrinivas Pandit*, (1915) 17 Bom LR 527 : 42 IA 135 : 39 Bom 441.
52. *Poonam Chand* v. *Motilal*, AIR 1955 Raj 179.
53. *Birey Singh* v. *State*, 1953 Cr LJ 1817 (All) : AIR 1953 All 785.

Despite the fact that recording of evidence of the same witness twice, in two independent proceedings, is cumbersome and burdensome, this section cannot be availed of for admitting the former deposition of a witness in the second proceeding when the witness is alive and available.[54]

18. WAIVER

In a civil case a party can, if he chooses, waive the proof; but in a criminal case, strict proof ought to be given that the witness is incapable of giving evidence, and even the consent of the accused's counsel cannot do away with the necessity of the Court being satisfied by proof of that fact.[55]

The Supreme Court observed: "While what is not relevant under the Evidence Act cannot, in proceedings to which Evidence Act applies, be made relevant by consent of parties, relevant evidence can be brought on the record for consideration of the Court or the Tribunal without following the regular mode, if parties agree. The reason behind this rule is that it would be unfair to ask any party to prove a particular fact when the other party has already admitted that the way it has been brought before the Court has sufficiently proved it."[56]

Where the advocate for the defendant gave consent to the deposition of an absent witness to be brought on record, it was held that such consent cannot make it admissible, if it is not otherwise admissible.[57] Consent of the accused to the admission of the evidence under Section 33 has no meaning and it would not relieve the court of the duty of examining the circumstances in order to come to a decision whether or not the evidence was legally admissible. Consent can, however, lead to some inference on a point of fact, such as that a certain witness is seriously ill or his whereabouts are not known.[58] Where the previous depositions of prosecution witnesses were agreed to be admitted as evidence against one accused, by his counsel in a subsequent trial, it was held that the Sessions Judge had committed grave error of law in the procedure he had followed, and that Section 33 and Section 145 of the Evidence Act do not apply to the facts of the case, and consent of the counsel would not cure the irregularity of the procedure adopted in the case.[59]

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES

[60][Entries in books of account including those maintained in an electronic form] when relevant.

S. 34. [60][*Entries in the books of account, including those maintained in an electronic form*] regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

ILLUSTRATION

A sues *B* for Rs. 1,000, and shows entries in his account books showing *B* to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence, to prove the debt.

SYNOPSIS

1. *The Information Technology Act, 2000—Entries in books of account* ... 461
2. *Principle and scope* ... 461
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4. *Regularly kept in the course of business* ... 463
5. *Proof of entries and accounts* ... 464
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7. *Absence of entry* ... 468

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54. 1972 Ker LT 728.
55. *Chainchal Singh* v. *Emperor*, AIR 1946 PC 1; *Ratna Munda* v. *State*, AIR 1951 Ori 245; *Queen* v. *Bholanath*, ILR (1876) 2 Cal 23 : 1960 MPLJ 1235; *Bisimillah Khan* v. *State*, AIR 1959 Raj 21 : 1975 Cut LR 1.
56. *Kalyan* v. *Dulhan Bibi*, AIR 1966 SC 1072.
57. *Savlimiya Miyabhai* v. *Emperor*, AIR 1944 Bom 338; *Kesar Singh* v. *State*, AIR 1954 Punj 286; *Meharlila Meraman* v. *State*, AIR 1954 Sau 159 (DB); *M/s. Power & Power* v. *C.B.C.I. Society for Medical Education*, ILR (1980) 2 Kant 930; *Ghulam Haider* v. *Crown*, ILR (1929) 10 Lah 837.
58. *Gaya Prasad* v. *State*, 1954 All 59 : 1954 Cr LJ 68 (All).
59. *Ram Singh* v. *State*, 1956 All LJ 919.
60. Substituted by the Information Technology Act, 2000, S. 92, Sch. II (w.e.f. 17.10.2000).

COMMENTS

1. THE INFORMATION TECHNOLOGY ACT, 2000—ENTRIES IN BOOKS OF ACCOUNT

Now, this expression would also include entries maintained in an electronic form.

2. PRINCIPLE AND SCOPE

Under this section entries in books of accounts regularly kept in the course of business are relevant, though they may not be sufficient by themselves to charge any person with liability[61] and in case of the entries being allegedly vague and false the party must adduce evidence to substantiate them and show that they are genuine.[62]

This section is based upon the principle that entries made regularly in the course of business can be presumed to be accurate. In all such entries the writer has full knowledge, there is no motive to falsehood, and there is the strongest improbability of untruth.

This section provides (1) that entries in books of account regularly kept in the course of business are relevant and therefore admissible whenever they refer to a matter into which the Court has to enquire; and (2) that such entries, though admissible, are not alone sufficient to charge a person with liability unless corroborated by other evidence.[63]

Account books are admissible in evidence without any formal proof that they were regularly kept in the course of business.[64]

STEPHEN in his introduction (at p. 165) observes, "We have admitted entries in books kept in the ordinary course of business. We have also made admissible written acknowledgements of the receipt of money, goods, securities, or property of any kind, and documents used in commerce. Declarations which under the English Law are only admitted because they have been made against interest, will, by the effect of our rules, be excluded, unless they have been made in the ordinary course of business. The test of pecuniary interest is exceedingly difficult of application, and appears to us to be of little value as a test of truth. (Fifth Report). In certain cases statements are made in circumstances which in themselves are a strong reason for believing them to be true, and in these cases there is generally little use in calling the person by whom the statement was made. The sections which relate to them are 34-38".

An account book which is kept regularly, necessarily results in a continuity which makes fraudulent addition extremely difficult and dangerous; it is a chain of forged links into which a subsequent interpolation of a link of forgery without discovery is almost impracticable. A man who wishes to defraud his neighbour generally avoids keeping a regular account, or having kept them, supresses them; the labour of weaving falsehood with truth in regularly kept accounts is too great to be popular, because of the mathematical connection running through them.

In *State of A.P.* v. *Sri Ganeshwar Rao,*[65] the Supreme Court held that all entries in books of account, regularly kept in the course of business, are relevant and admissible whenever they refer to a matter into which the Court has to enquire notwithstanding any want of corroboration; but such entries, though admissible, are not by themselves sufficient to charge a person with liability.

Though the statement made by a person in his own favour, whether oral or documentary, is usually not admissible in evidence, the entries in the books of account if proved to have been regularly kept in the course of business, are admissible under this section.[66] Normally, entries in books of account, if regularly kept, carry some weight, unless there be counteracting elements to throw sufficient doubt as to

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61. *Gulamahammad* v. *Government of J & K,* 1960 J&K 136; *Godavari Bai Ammal* v. *Seshadrinathan,* (1961) 2 MLJ 333.
62. *Y. Venkanna Chowdry* v. *G. Lakshmidevamma,* AIR 1994 Mad 14.
63. *Gopeswar Sen* v. *Bijoy Chand Mehatab,* ILR (1928) 55 Cal 1167; *Kakaram Sohanlal* v. *Firm Thakardas Mathradas,* AIR 1962 Panj 27; *Kandaswami* v. *Theagaraja,* AIR 1968 Mad 203.
64. *Emperor* v. *Narbada Prasad,* ILR (1929) 51 All 864.
65. AIR 1963 SC 1850.
66. *Suklal Deb Barman* v. *Kalaram Malakar,* AIR 1976 Gau 103.

their genuineness.[67] In order to be relevant under Section 34, the books of account must be kept regularly in the course of business; they must be in conformity with some known system of accounting.[68]

Under the English Common Law, entries in books of account are admissible only when they are against a person's interest on the principle that a man ought not to be allowed to make evidence for himself by writing things behind the back of others.[69]

Section 34 of the Evidence Act has no application to the proceedings under Section 32 of Rajasthan Act of 1962 for determination of the compensation payable to the *Jagirdhar*.[70]

3. BOOKS OF ACCOUNT

A book of account should be fool-proof. A bundle of sheets detachable and replaceable at pleasure cannot be characterised as a book of account. A ledger by itself is also not proof. There must be supporting evidence.[71]

Where the accounts consisted of loose sheets of paper, they would not have the same probative force as account books which are regularly kept in the course of the business.[72]

In its ordinary sense a 'book' signifies a collection of sheets of paper bound together in a manner which cannot be disturbed or altered except by tearing apart. The binding is of a kind which is not intended to be moveable in the sense of being undone and put together again. A collection of papers in a portfolio, or clip, or strung together on a piece of twine which is intended to be united at will, would not, in ordinary English be called a book ..... the term "book" in Section 34 may properly be taken to signify, ordinarily, a collection of sheets of paper bound together with the intention that such binding shall be permanent and the papers used collectively in one volume. Unbound sheets of papers in whatsoever quantity, though filed up with one continuous account, are not a book of account.[73] "Book" implies a collective unity of sheets even at the time the entries are made. It is not necessary that it should contain a particular number of sheets or that it should be bound in a particular way.[74] Even though, no particular form is prescribed for an account book to be maintained, it should be such a regular and usual account book as explains by itself. Mere loose sheets are not admissible and a single entry does not constitute an account book.[75] Spiral note book recording monetary transactions *i.e.* entries of receipt of money from certain persons on the left side of the page and payment to certain persons on the rights side—entries totalled and balanced and thus duly reckoned—is a 'book of account'.[76] In account books regularly kept in due course of business, usually the pages are interconnected; particularly in daily accounts, the balance of one day or one page is carried over to the other day or the other page, so that interpolation or replacement of a particular page becomes very difficult, and sanctity is to be attached to such books. Where the credit register is not a bound book but a stitched one, the pages can be replaced or interpolated. No importance can be attached to the entries made in such a register and they cannot be taken to be accounts regularly kept in the course of business.[77]

When an entry is tendered in evidence, it must be shown to be in a book, that book must be a book of account, and that account must be kept in regular course of business.[78]

Khata Bahi is a book of account and, if maintained in regular course of business, can be admitted in evidence. But the entries are not however, admissible if not supported by corresponding entries.[79] The presumption of genuineness of books of account is not available to the partner of a firm who has

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67. *Maidhandas Agarwalla* v. *Sri Charana Barua*, AIR 1956 Assam 170.
68. *Chandiram Deka* v. *Jamini Kanta Deka*, AIR 1952 Assam 92.
69. See BEST ON EVIDENCE 11th Ed., Section 503.
70. *Thakur Bhanu* v. *State of Rajasthan*, ILR (1964) 14 Raj 90.
71. *Zenna Sorabji* v. *Mirabe*, AIR 1981 Bom 446; *Mohanlal* v. *Dwarkanath*, AIR 1985 J&K 85.
72. *Ganesh Prasad* v. *Nagendranath*, AIR 1953 SC 431.
73. *Mukundram* v. *Dayaram*, AIR 1914 Nagpur 44 Spiral pads and note books are books but not loose sheets of paper contained in files. *Central Bureau of Investigation* v. *V C Shukla*, AIR 1998 SC 1406 : 1998 Cr LJ 1905 (para 18)
74. *Ambalawana* v. *Gowri*, AIR 1936 Mad 871.
75. *Fuljari Lal* v. *Ramsarup*, AIR 1953 MB 177.
76. *Central Bureau of Investigation* v. *V C Shukla*, AIR 1998 SC 1406 : 1998 Cr LJ 1905 (para 26) (SC).
77. *Hira* v. *Birbal*, ILR (1957) Cut 437 : AIR 1958 Ors. 4.
78. *Mukundram* v. *Dayaram*, AIR 1944 Nag 44.
79. *Rokar and Naqual Bahi; Sohanlal* v. *Gulab Chand*, AIR 1966 Raj 229.

fiduciary relationship with other partners and is bound to make full and correct disclosure to other partners.[80] If the accounting partner has not maintained the accounts properly and when the account books submitted by him do not reflect the true account, the Court must order to reopen and/or reject the accounts submitted by him.[81]

Where the books of accounts were kept in normal course of business but they were not mentioned in the plaint and were produced instead at the time of evidence as supporting documents of the bill on which the money suit was based, it was held that it could be relied upon for evidencing the transaction[82] but entries in diaries disclosing acceptance of payment of illegal gratification by the petitioners are not admissible in evidence as the said diaries are not books of accounts within the ambit of Section 34.[83] A hotel register also kept at its counter cannot be a book of accounts unless it is shown that such a register also pertained to pecuniary transactions involving customers of the hotel.[84]

4. REGULARLY KEPT IN THE COURSE OF BUSINESS

The word 'business' is one of wide import and it means an activity carried on continuously and systematically by application of skill and labour with a view to earning an income.[85]

The Privy Council has laid down that the admissibility of books of account regularly kept in the course of business is not restricted to books in which entries have been made from day to day, or from hour to hour, as and when transactions took place. The time of making the entries may affect the value of them but should not, if they have been made regularly in the course of business afterwards, make them irrelevant.[86] The entry need not be made in the book of account at or about the time, the related transaction takes place so as to enable the book to pass the test of 'regularly kept'.[87]

The Privy Council has also held that books of account professing to record facts relating only to the particular transaction in question are less reliable than a book in which the same is recorded in common with other transactions in the ordinary course of business.[88]

Entries in an account book which is not regularly kept in the course of business are not admissible in evidence under this section[89] but the entries made in the ledger account, maintained in the regular course of business are admissible.[90]

The phrase 'regularly' means that the accounts must be kept according to a system, though that system need not be elaborate. It is wrong to think that the expression 'regularly kept', is synonymous with 'correctly kept' though, if they are not correctly kept, that would affect the weight to be attached to the entries made therein, but not their admissibility.[91] The words 'regularly kept' do not necessarily mean kept in a technically correct manner; even the roughest memoranda of account, kept by petty shopkeepers, are admissible if they are authentic. Where not a single entry in the account book, running for a period of five years, is false or bogus, and the only mistake is about an entry which was entered as debit entry instead of credit entry, but the accounts, though not scientifically maintained, were regularly kept in the course of business carried on by the plaintiff who made the entries by himself and who had personal knowledge of the dealings, the account book can be relied upon.[92] The words 'regularly kept' only mean that they should be kept according to a certain fixed method or in some customary form, and

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80. *Y. Venkanna Chowdry* v. *G. Lakshmidevamma*, AIR 1994 Mad 140 (para 41).
81. *Y. Venkanna Chowdry* v. *G. Lakshmidevamma*, AIR 1994 Mad 140 (paras 30 and 35).
82. *P. Shanmugam* v. *Reddiar & Co.*, 1998 AIHC 3264 (para 6) (Mad).
83. *L.K. Advani* v. *Central Bureau of Investigation*, 1997 Cr LJ 2559 (Del). **See also** *C. Murugan* v. *N. Saghadevan*, 2000 AIHC 1411 (paras 23, 25-27) (Mad).
84. *Manish Dixit* v. *State of Rajasthan*, 2001 Cr LJ 133 (para 16) (SC) : AIR 2001 SC 93.
85. *Central Bureau of Investigation* v. *V.C. Shukla*, AIR 1998 SC 1406 : 1998 Cr LJ 1905 (para 27) (SC).
86. *Dy. Commissioner of Bara Banki* v. *Ram Parshad*, ILR (1899) 27 Cal 118 : 26 IA 254; **overruling** *Munchershaw Bezonji* v. *New Dhurumsey S & W Co.*, ILR (1880) 4 Bom 576; *Emperor* v. *Narbada Prasad*, ILR (1929) 51 All 864; *Gulab Chand Lala* v. *Manni Lal Lala*, ILR (1940) 16 Luck 302; *Pannalal* v. *Labhchand*, (1954) MB 237; **See however**, *Balmukund* v. *Jagan Nath*, AIR 1963 Raj 212.
87. *Central Bureau of Investigation* v. *V.C. Shukla*, AIR 1998 SC 1406 : 1998 Cr LJ 1905 (para 31) (SC).
88. *Bhoy Hong Kong* v. *R.M.M.S.P. Ramanathan Chetty*, (1902) 6 CWN 401.
89. *Vithoo* v. *Thakurdas*, AIR 1949 Nag 414.
90. *State Bank of India* v. *Ramayanapu Krishna Rao*, AIR 1995 Ori 244 (para 5).
91. *Balmukund* v. *Jagan Nath*, AIR 1963 Raj 212.
92. *Thomas* v. *Govinda*, ILR 1960 Ker 51.

has reference to the system of book keeping rather than to the truth or correctness of the entries in the account books.[1] The words "regularly kept" mean account kept in accordance with certain fixed method or form refering to any system. Section 34 although dispenses with formal proof that the accounts were kept in the regular cause of business, it is a matter of intrinsic evidence as to whether the books in question were books of account and regularly kept in the court of business, and Section 34 is subject to the silent proviso that such entries shall not alone be sufficient evidence to charge any person with liability.[2] An exercise book containing unnumbered slips of papers with entries not proved by any witness is not admissible. The fact that the said exercise book was exhibited without any objection does not take away the right of the Court to question its evidentiary value.[3]

For the purpose of this section no particular form of book is prescribed. All that is necessary is that the book should be such a regular and usual account book as explains itself and as appears on its face, to create a liability in an account with the party against whom it is offered. The person making the entry should have personal knowledge of the facts stated therein.[4]

No doubt an account book kept in the form of daily entries of debits and credits is far more satisfactory, but it is not essential that the accounts should be made up daily. An account book containing entries made of all transactions would be a regular one, even if it is made up every month.[5] Where the practice of noting transactions of eight days at one time in *Rokar* System was followed, it was held that, though the system was defective, it could not be said on that ground that the account books were not maintained in the regular course of business. The fact that those books were not filed before the Income Tax Department would not show that they were not maintained in the regular course of business.[6] *Kachchi Rokar*, the genuineness of which is not seriously contested, and in which the balance is struck daily, is a book regularly kept in the course of business within the meaning of Section 34.

An entry in an account book regularly kept is relevant only to prove that the entry was made at the time of the transaction. An entry made in 1917 in the account book of the creditor was held not relevant on the question whether a person had taken a loan from the creditor in 1916.[7]

There is a distinction between a faked book and a book with irregularities and mistakes. A genuine book may be improperly or irregularly kept, but nevertheless it is genuine. After effecting the necessary corrections it is possible to use that book in evidence.[8]

Where a debit entry at the end of a page in an account book showed certain goods as sold at a certain rate, and the description was written closely in a cramped style on the same page, though it could have been written on the next page, and the total amount debited was written in a different ink, which entry, was relied upon to prove the price agreed, it was held by the Supreme Court, that these circumstances detracted from the value of the entry, and it cannot be said that such entry was made in the course of business. Hence it cannot be relied on.[9]

A *Khata* entry and an entry in the *Rokar* or *Nakal Bahi* have to be proved as corresponding to each other, and *Katha* entry alone is not admissible.[10]

5. PROOF OF ENTRIES AND ACCOUNTS

The Privy Council observed: "The regular proof of books and accounts requires that the clerks who have kept those accounts, or some person competent to speak to the facts, should be called to prove that they have been regularly kept, and to prove their general accuracy".[11]

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1. *Gulab Halwai* v. *Bhagwan Dass*, AIR 1932 Oudh 225.
2. **Following** *Chandradhar* v. *Gauhati Bank Ltd.*, AIR 1967 SC 1058; *Pit Ram Singh* v. *Vimala Devi*, AIR 1992 Raj 149.
3. *State of Meghalaya* v. *Joinmanick Nosmel Giri*, AIR 1995 Gau 23 (para 20).
4. *Pannalal* v. *Labhchand*, AIR 1955 MB 49; *Parasram Kalyandas* v. *Champalal*, AIR 1957 MB 118.
5. *Parasram Kalyandas* v. *Champalal*, AIR 1957 MB 48.
6. *Firm Ramlochan Ram Lakshmi Prasad* v. *Maikha Shethani*, AIR 1960 Pat 271.
7. *Ramaji Batanji* v.*Manohar Chintamani*, AIR 1961 Bom 169.
8. *Sarat Kumar Paul* v. *Sudhir Kumar Pal*, AIR 1960 Cal 231; (The mere fact that a ledger contains blank pages is no reason to reject it as it is common knowledge that ledgers have blank pages); *Jagdish Kaur* v. *Rabinder Singh*, AIR 1991 Del 51.
9. *Venkata Mallayya* v. *Thodepu Ramaswami and Company*, AIR 1964 SC 818; *Dharm Chand Joshi* v. *Satya Narayan Bazaz*, AIR Gau 35 (paras 7 and 9).
10. *Sohanlal* v. *Gulab*, AIR 1966 Raj 229.
11. *Dwaraka Das* v. *Janaki Das*, 6 MIA 88. **See also** *Arakkan Narayanan* v. *M/s. Indian Handloom Traders*, AIR 1999 Ker 279 (para 6).

It was held by the Supreme Court that the books of account must be held to have been proved even in the absence of examining the writer as a witness, provided, there is proof firstly of proper maintenance of the books in the regular course of business; and secondly, of the impossibility of securing the presence of the writer.[12] It is not always necessary that, in order to establish that the account books have been kept regularly in the course of business, the person who had written them should be examined; what the law requires is that some one competent to speak about it should be tendered as a witness.[13] Where a person having personal knowledge of the facts regarding the entries in the account books stated that they were maintained regularly in the course of business, and the accounts were prepared from rough books or memoranda, it was held that they should be treated as the original account, and they cannot be rejected on the ground that they were not entered regularly from day to day.[14] When the accountant could not be examined, and when most of the items claimed by the plaintiff are shown to be real by other independent evidence, the plaintiff cannot be nonsuited. It is not necessary that each entry should be further corroborated.[15] Where a witness deposed that the entries were made by a clerk under his supervision, it was held that the entries were duly proved.[16] Where the plaintiff produces account books, and a witness on his behalf gives evidence in support of the entries, and there is no cross-examination of the witness with respect to his personal knowledge of the facts stated therein, it has been held to be sufficient corroboration.[17]

Where the writer of the account books is alive but has not been examined, the account books cannot be said to be duly proved, and they are inadmissible in evidence.[18]

Mere production of the extracts of the account books is not tantamount to a proof of those extracts. They are to be proved by evidence.[19]

When the entries were not admitted by the opposite party, the person who tenders them in evidence has to establish that the entries were regularly kept in the course of business.[20]

When account books are produced in evidence, firstly, it must be shown that they were produced from proper custody and, secondly, the account books have been kept in the ordinary course of business. Where no objection was taken by the opposite party regarding their admissibility at the time of their production, no objection can be taken subsequently in the appellate stage.[21]

Entries in certified copies of statements of account corroborated by the certificate of their truth, are sufficient to charge a person with debt or liability.[22]

The law requires not only the proof of account books but also of each entry therein.[23]

The section does not mean that there should be independent evidence to prove each and every transaction entered in a book of account. What is necessary to be seen in each case is whether besides the entries in a book of account, there is any evidence to prove that the transactions referred to in those entries actually took place. Such corroboration will be best afforded by the evidence of the person who

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12. *Ram Janaki Devi* v. *Juggilal Kamlapati*, AIR 1971 SC 2551 : (1971) 3 SCR 573.
13. *Sahharan* v. *Velayudhan*, ILR (1978) 1 Ker 619.
14. *Ram Kunwar Jainarayan* v. *Pyarchand*, AIR 1952 MB 55.
15. *Gopala Pillai* v. *Gopala Pillai*, AIR 1957 Trav/Co 184.
16. *Ram Kunwar Jainarayan* v. *Pyarchand*, AIR 1952 MB 55.
17. *Balmukund* v. *Jaganath*, AIR 1963 Raj 212; *Narain Das* v. *Firm Ghasi Ram*, AIR 1938 All 353.
18. *Kakaram Sohanlal* v. *Firm Thakar Dass*, AIR 1962 Punj 27; *Gajendra Shah* v. *Shankar Bux Singh*, AIR 1935 Oudh 16; *Haggamilal* v. *Bhuralal*, AIR 1961 Raj 52; *Lachmi* v. *Musaddi*, AIR 1942 Oudh 155.
19. *Duni Chand* v. *Munshi Amarnath*, AIR 1953 HP 68. **See also** *N. Nagarajan* v. *State of T.N.*, 1994 Cr LJ 1007 (para 11) (Mad); original account books must be produced, *Ishwar Dass Jain* v. *Sohan Lal*, AIR 2000 SC 426 (paras 23, 24 and 31).
20. *Lilawati (Smt.)* v. *Parasram*, AIR 1977 HP 1.
21. *Jaganath Prasad* v. *Hanuman Prasad*, ILR 36 Cal 833 (PC); *Official Liquidator M.E. Moola and Sons Ltd.* v. *Burjojee*, 1932 PC 118; *Ramaji* v. *Manohar*, AIR 1961 Bom 169; *Gopal* v. *Sri Thakurji*, AIR 1943 PC 83; *Kakaram Sohanlal* v. *Firm Thakur Das*, AIR 1962 Punj 27.
22. *Kalipada Sinha* v. *Mahalukshmi Bank Ltd.*, AIR 1961 Cal 191.
23. *Mathilda* v. *Fritz Gaebelie*, AIR 1926 Mad 955; *Dwarka* v. *Baksh*, ILR (1895) 18 All 92; *Aswatha Narayanaiah* v. *Sameeviah*, AIR 1965 AP 33; *Imambandi* v. *Haji Mutsaddi*, AIR 1918 PC 11.

wrote the books of account and in whose presence the transactions took place.[24] Where the entries made in the books of account produced by the bank were corroborated by the evidence of the Branch Manager and the other bank employees, it was held to be sufficient proof of transaction of loan.[25] Where there was nothing to prove that the books of accounts were not properly kept by the bank or that the amount paid by the defendant/loanee has not been properly entered into them, the entries in them could be relied on to fasten liability on the loanee/defendant.[26]

6. SUCH STATEMENTS ALONE SHALL NOT BE SUFFICIENT EVIDENCE

The entries in books of account, regularly kept in the course of business, are relevant in all proceedings in a court of law but these entries are not by themselves sufficient to charge any person with liability.[27] By mere proof of the entries in the account books regularly kept in the course of business, one cannot get a decree; he has to prove by some other independent corroborative evidence that it was a real and honest transaction.[28]

There has to be evidence to prove payment of the money which may appear in the books of account in order that the person may be charged with liability thereunder, except where the person to be charged accepts the correctness of the books of account and does not challenge them.[29]

The object behind this is that a man cannot be allowed to make evidence for himself by writing his own account books behind the back of the third parties. So, independent evidence is required of the transaction to which the entries relate.[30]

Though account books by themselves are not sufficient to charge the defendant with liability to pay, the defendant can be made liable if there is corroboration in support of the account books.[31] When there is independent evidence, the entries could be used as a piece of corroboration.[32] The entries in the account books which are kept in the regular course of business are merely corroborative; primary evidence is always required to prove the transactions mentioned therein.[33] Though entries in the account books are relevant, mere entries without any oral evidence are not sufficient to prove entrustment.[34] However in the case of transactions which are numerous and which extend over some length of time, it is not reasonable to expect independent evidence to prove each particular transaction. In such cases the genuineness of the account books, if they are kept in regular course of business, will be the determining factor. It must, however, be understood that mere proof of the correctness of the entries in the account books would not be enough. There must be some further evidence to corroborate the entries in the account books.[35] Account books alone are not sufficient to charge a person with liability unless there is

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24. *Ramgobind Prasad* v. *Gulab Chand Sahu*, ILR (1940) 20 Pat 273; *Dwarka Doss* v. *Baboo Jankee Doss*, (1855) 6 MIA 88, 98; *Lachmi Narain* v. *Musaddi Lall*, ILR (1941) 17 Luck 327; *Himmat Mal* v. *Shah Magaji Khubaji*, ILR (1953) 3 Raj 815.
25. *State Bank of India* v. *Yumnam Gouramani Singh*, AIR 1994 SC 1644 (para 5).
26. *Raigarh Khetriya Gramin Bank* v. *Taliram Gupta*, 1999 AIHC 2823 (para 9) (MP).
27. *State of A.P.* v. *Ganeswara Rao*, AIR 1963 SC 1850; *Consolidated Coffee Ltd.* v. *Workmen*, (1970) 2 Lab LJ 376 SC; *Mettur Beardsell Ltd.* v. *Salem Textiles Ltd.*, AIR 2001 Mad 466 (para 9).
28. *Chandradhar Goswami* v. *Gauhati Bank Ltd.*, AIR 1967 SC 1058; *V.K. Abraham* v. *N.K. Abraham*, AIR 1978 Mad 56; *Seetharamaiah* v. *Srirama Motor*, AIR 1977 AP 164; *Sajjanraj* v. *Mehta Commercial Co. Ltd.*, AIR 1973 Guj 57; *H. Motor Works Ltd.* v. *Haranath Baura*, AIR 1965 Assam 10; *Deluxe Roadlines* v. *Palani Chetty*, (1992) 2 MLJ 481; *Chandi Ram* v. *Jamini Kanta*, AIR 1952 Assam 92; *Central Bureau of Investigation* v. *V.C. Shukla*, AIR 1998 SC 1406 : 1998 Cr LJ (paras 34 and 39) (SC); *Dharam Chand Joshi* v. *Satya Narain Bazaz*, AIR 1993 Gau 35 (para 7).
29. *Chandradhar* v. *Gauhati Bank*, AIR 1967 SC 1058 **followed in** *Pitram Singh* v. *Vimla Devi*, AIR 1992 Raj 149.
30. *Beni* v. *Bisan Dayal*, 89 Indian Cases 371 (Nag).
31. *Himat Singka Motor Works Ltd., Gauhati* v. *Haranath Baura*, AIR 1965 Assam 10, **relying on** *Sorabjee Waca Ganda* v. *Koonwurjee Manjhi*, (1866) 1 Moo IA 47; *Sri Kishen* v. *Rai Huri Kishen*, 5 Moo IA 432 (PC); *Chandi Ram Deka* v. *Jamini Kanta Deka*, AIR 1952 Assam 92; *Ramkishen Ramnarayan Agarwal* v. *Vallabh Dass Chunnilal*, AIR 1958 Raj 255; *Hiralal* v. *Ram Rakha*, 1953 Pepsu 113; *Kulu Transport Co-operative Society Ltd., Kulu* v. *Arora Traders*, (1978) 90 Punj LR 503 (P&H); *Kelu Sahu* v. *Hadibandhu Sahu*, AIR 1968 Ori 19; *Shubh Karan Rameshwaralal Agarwal* v. *Durga Prasad Pvt. Ltd.*, AIR 1972 Guj 208; *Gulam Ahmad* v. *Government of J&K*, AIR 1960 J&K 136; *Purushottam Sahu* v. *Rajkishore Prvsty*, ILR (1977) 1 Cut 376.
32. *State* v. *Kishen Dayal*, AIR 1952 HP (B) 46; *Sajjanraj Swaroop Chand* v. *Mehta Commercial Co.*, AIR 1973 Guj 57 : *Kulu Transport Co-operative* v. *Arora Traders*, 1978 (80) Punj LR 503.
33. *Jai Narain* v. *Zubeda Khatoon*, 1972 All 494.
34. *Dadarao* v. *State of Maharashtra*, AIR 1974 SC 388 : 1974 Cr LJ 447.
35. *D.K. Aswathanarayanaiah* v. *Nallapula Sanjeeviah*, AIR 1965 AP 33 EKBOTE J.

sufficient corroborative evidence in support of the account books.[36] No doubt entries in the account books maintained by a creditor are not by themselves evidence to attach a liability to the debtor but they can be used to corroborate the evidence given by the creditor that the payments had been made and a decree can be passed on the basis of such corroborative evidence.[37]

The Court is not bound to act on the entries in the account books which are relevant under Section 34 and also Section 32(2), without corroboration.[38]

One party cannot bind the other by merely producing his own books of account.[39] But the plaintiff's own testimony on oath in support of the entries in his books could be sufficient to fasten the defendant with liability.[40]

Section 34 does not limit in any way at all the nature of the material upon which a court may rely to support the statements in a book of account. Such material may take the shape of contemporary vouchers, receipts or other documentary evidence or of sworn oral testimony.[41]

When the plaintiff says in evidence that the account books are regularly maintained, and he is not cross-examined with regard to the genuinenss of the accounts, the plaintiff's own statement of oath in support of the entries is sufficient to fix the defendant with the liability. No other corroboration is required.[42]

Where it was proved that the entries in the ledger account were kept in the ordinary course of business, and they were corroborated by some other admitted transactions evidenced by documents of unquestioned genuineness, it was held that the mere fact that the party had not produced the day book of his business did not detract from the evidentiary value to be attached to the ledger; that the evidence of the party himself was a substantial compliance with the provisions of Section 34 corroborating the entries, to fasten liability.[43]

Where the plaintiff did not assert that the transaction was on credit, it was held that it was a very material omission on account of which the plaintiff's evidence cannot be treated to be corroborative of the entry in the credit register.[44]

Where the question is whether a house was built by the deceased with joint family funds, the party tendering the account books cannot rely on entries here and there. All the entries have to be taken together and an inference consistent with the surrounding circumstances and probabilities has to be drawn in deciding whether the cost was met by the deceased, exclusively from his funds, or whether it was met by the joint family fund, at least partly.[45]

Entries in the party's own account book regarding payment to the opposite party, are to be supported by corroborative evidence, either by production of receipts or by proving the payments by independent and reliable testimony.[46] Where there was a practice of a bank to deposit on each day its cash box in a sealed condition, in a police station and when it was found there was shortage, the cash book of bank and the detailed book of account showing an amount on hand from day to day was held admissible to prove the contents of the box.[47] Where the ex-secretary of a bank proved entries in the ledger book maintained

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36. *Kakaram Sohanlal* v. *Firm Thakurdas Mathradas*, AIR 1962 Punj 27.
37. *Suraj Prasad* v. *Makhna Devi*, AIR 1946 All 127.
38. *J.N. Eranna Rao* v. *Vitta Dodda*, AIR 1960 AP 331; *Hari Bux Gowri Shankar Firm* v. *Subhakaran Tulsiram*, AIR 1965 Ori 211; *Ganapati Ram* v. *Narasigha Charan Sahu Others*, (1972) 38 Cut LT 309; *Kelu Saho* v. *Hadibandhu Saho*, ILR 1967 Cut 413.
39. *Hira Bhagat* v. *Gobind Ram*, (1897) PR No. 63 of 1897 (Civil); *Abdul Ali* v. *Puran Mal*, (1914) PR No. 82 of 1914 (Civil); *Bichha Lal* v. *Jai Pershad*, (1899) PR No. 45 of 1899 (Civil); *Gopeswar Sen* v. *Bejoy Chand Mahatab*, ILR (1928) 55 Cal 1167.
40. *Kakaram* v. *Firm Thakar Das Madhna Das*, 1962 Punj 27; *Firm Jodholal Budhulal* v. *Bhavani Das*, 1925 Lah 242.
41. *Kallumal Dhakkan Lal* v. *Bhawani Das Rekhab Das*, AIR 1925 All 742.
42. *Kakaram Sohanalal* v. *Firm Thakurdas Matra*, AIR 1962 Punj 27; *Balmukand* v. *Jaga Nath*, 1963 Raj 212; *Aswathanarayanaiah* v. *Sanjeeviah*, AIR 1965 AP 33.
43. *Gopasundar* v. *Chunnilal*, AIR 1955 Ori 6; *Mohanlal Bodj Raj* v. *Dwarka Nath Kuldeep Kumar*, AIR 1985 J&K 85.
44. *Hira Mehare* v. *Birbal Prasad*, AIR 1958 Ori 4.
45. *Chandrasekhar Praharaj* v. *Pitambari Dibya*, AIR 1953 Ori 315.
46. *Banshidhar Ganga Prasad* v. *Chaman Lal*, ILR (1975) 1 Del 445; *Vasireddy Seetharamaiah* v. *Sriram Motor Finance Corp., Kakinada*, AIR 1977 AP 164.
47. *Bilaspur Central Co-operative Bank Ltd.* v. *State of M.P.*, AIR 1959 MP 77.

in the regular course of business, it was held that the claim was sufficiently proved, and no adverse inference could be drawn against the bank for non-production of its cash book.[48] In a money suit part payment was claimed by the defendant; the plaintiff produced an account showing the outstanding balance due, which was acknowledged by the defendent by putting his signature at the foot of the account. It was held that it amounts to account stated as proved; and the defendant is liable to pay the balance.[49] Where the books of account on which the plaintiff relied are not those maintained by the plaintiff, but the account books of an entirely different institution namely, The High Commission of India in London, it was held that neither the illustration to Section 34, nor the argument that self-serving admissions without more cannot be sufficient basis to charge the defendant with liability, can strictly speaking be applicable; the circumstances surrounding, the existence of books of account and recorded therein may constitute sufficient corroborative material. The quantum of other evidence required in each case will depend upon the circumstances of that case.[50]

Accounts relevant under Section 32(2), are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible only under this section, require corroboration. Entries in account may, in the same suit, be relevant under both the sections; and in that case the necessity for corroboration does not arise.[51]

In the absence of evidence that the book produced is an account book, regularly kept in the ordinary course of business, it should not be admitted, though, if no objection was taken at the time of production of the book, it is not permissible to take objection subsequently in an appeal. However, even if no objection could be taken in appeal, the reliability and the weight to be given to the account book have still to be considered.[52]

Where some entries in an account book are proved to be bogus, by independent evidence, the whole book is to be discredited, when such independent evidence precludes the possibility of error or accident. Such bogus entries cannot fasten any liability on the defendant; it is only when the evidence proving the entries is reliable and inspires confidence in the Court, the entries can be made relevant as having been made in the regular course of business.[53]

7. ABSENCE OF ENTRY

This section applies to entries in the books of account; and not to an absence of entry; no inference can be drawn from the absence of an entry relating to any particular matter.[54]

Where the account books were produced by the plaintiff, showing the absence of an entry of the receipt of rent for a relevant period, and the account books are proved, in the absence of any reliable evidence on behalf of the defendant, except saying that the rent was paid to the servant of the plaintiff, it was held that the statement of the defendant was not believable and that the finding of the lower court that the rent was not paid, was legal, and that the account book may be admitted to prove the absence of the entry.[55] However, it was held by the Supreme Court, that where an entry in A's account books regularly kept in the course of business, of a certain payment made to B is relevant; the non-existence of such an entry in B's account book, though not relevant under Section 34, is relevant under Section 5 and 11 and can be proved by B's account book.[56]

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48. *Official Liquidator Puri Bank Ltd.* v. *Ramaniklal Joshi*, AIR 1967 Ori 169.
49. *Sachindra Prasad Chakravarthy* v. *Ahmed Ali*, AIR 1988 Gau 33.
50. *Ghulam Ahmad* v. *Government of J&K*, AIR 1960 J&K 136; *Kelu Sahu* v. *Hadi Bandhu Sahu*, AIR 1968 Ori 19; *Shubh Karan Rameshwaralal Agrawal* v. *Durga Prasad Pvt. Ltd.*, AIR 1972 Guj 208; *Kallu Mal* v. *Bhavani*, AIR 1925 All 742.
51. *Rampyarabai* v. *Balaji*, (1904) 6 Bom LR 50 : 28 Bom 294.
52. *Official Liquidator M.E. Moola and Sons Ltd.* v. *Burjorjee*, AIR 1932 PC 118; *Jagarnath Pershad* v. *Hanuman Pershad*, 36 IA 221 (PC); *Ramji Bataiji* v. *Manohar Chintaman*, AIR 1961 Bom 169.
53. *Seth Magan Mal* v. *Darbarilal Chowdhry*, AIR 1928 PC 39; *Chanbey Sushil Chandra* v. *Raj Bahadur*, AIR 1977 All 259; *Siddalingappa* v. *M.C. Moben*, AIR 1978 Kant 10; *Chandradhar Goswami* v. *Gauhati Bank Ltd.*, AIR 1967 SC 1058; *Kurapati Venkata Mallayya* v. *Thondepu Ramaswami and Co.*, AIR 1964 SC 818 : 1982 Mad WN (Cri) 120; *Thomas* v. *Gounda Gurukkal*, ILR 1960 Ker 5.
54. *Rampandit* v. *Lakpati*, 30 Cal 231; **See also** *R.* v. *Girish*, 10 Cal 1024.
55. *Babulal* v. *Kamaladevi (Smt.)*, AIR 1954 Cal 145; *Debendra* v. *Arun*, AIR 1925 Cal 64; *Kasam* v. *Haji Jamal*, AIR 1924 Nag 22; *Suresh Kumar* v. *Mewaram*, AIR 1991 P&H 254.
56. *State of A.P.* v. *Chimalapathy Ganeshwararao*, AIR 1963 SC 1850; **See also** *Imam Bandi* v. *Haji Mutsaddi*, AIR 1918 PC 11; *Pragdas* v. *Dawalatram*, 11 Bom 157; *Alinasar* v. *Manik*, ILR (1902) 25 All 90.

Relevancy of entry in public record, made in performance of duty.

S. 35. An entry in any public or other official book, register or [57][*record or an electronic record*], stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or [58][*record or an electronic record*] is kept, is itself a relevant fact.

SYNOPSIS

1. *The Information Technology Act, 2000—Record* ... 469
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COMMENTS

1. THE INFORMATION TECHNOLOGY ACT, 2000—RECORD

The meaning of the word "record" has been expanded by the above Act so as to include in it an electronic record also.

2. PRINCIPLE AND SCOPE

This section is based upon the circumstances that in the case of pubic documents, entries are made in discharge of public duty by an officer who is an authorized and accredited agent appointed for the purpose. The law reposes such confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity.[59]

To render a document admissible, three conditions must be satisfied. Firstly, the entry that is relied on must be one in any public or other official book, register, or record, secondly, it must be an entry relating to a fact in issue or relevant fact; and thirdly, it must be made by a public servant in the discharge of his official duty, or any other person in performance of a duty specially enjoined by law.The reason why an entry made by a public servant in a public record or other official book or register or record stating a fact in issue or relevant fact, has been made relevant is that when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high.[60]

"A FURTHER class of exceptions to the hearsay rule consists of statements contained in public or official documents, which, subject to the qualifications hereinafter specified, are in general *prima facie*, though not conclusive, evidence of the truth of the facts recorded, even against strangers.

The general grounds of receiption are (1) that the statements and entries have been made by the authorised agents of the public in the course of official duty; and (2) that the facts recorded are of public interest or notoriety. To which it may be added that it would not only be difficult, but often impossible, to prove facts of a public nature by means of actual witnesses examined upon oath."[61]

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57. Substituted by the Information Technology Act, 2000, S. 92, Sch. II (w.e.f. 17.10.2000).
58. Substituted by the Information Technology Act, 2000, S. 92, Sch. II (w.e.f. 17.10.2000).
59. *Ramprasad Sharma* v. *State of Bihar*, AIR 1970 SC 326.
60. *Brij Mohan Singh* v. *Priya Brat Narain Sinha*, AIR 1965 SC 282 : (1965) 3 SCR 861; **See also** *State of Bihar* v. *Radha Krishna Singh*, AIR 1983 SC 684 : (1983) 2 SCR 808; *Harpal* v. *State of H.P.*, AIR 1981 SC 361; *Samar Dasadh* v. *Jugoll Kishore*, ILR (1895) 23 Cal 366; *State* v. *Qamruddin*, ILR 1956 Nag 282.
61. PHIPSON ON EVIDENCE (paras 25.01, 25.03), page : 508.

"The principle upon which entries in a register are received is that it is the public duty of the person who keeps the register to make such entries after satisfying himself of their truth; it is not that the writer makes them contemporaneously, or of his own knowledge, for no person in a private capacity can make such entries."[62]

However, the Supreme Court observed that in interpreting this section decisions on common law of England, would not be of much help.[63]

Statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorised agents of the public in the course of official duty, and respecting facts which were of public interest or required to be recorded for the benefit of the community.[64] Evidentiary value of the entries in the records will not be presumed to be correct if they are shown to be not correct by the evidence produced.[65]

3. PUBLIC OR OTHER OFFICIAL BOOK, REGISTER OR RECORD

As no definition is given in the Act for the expressions 'public' or 'official book', reference can be made to Section 74 of the Act, which states, what are public documents.[66]

The Madras High Court held, that a statement amounting to an admission which was contained in a judgment can be received u/s. 35 as an entry in a record made by a public servant in the course of his duty.[67]

This was approved by the Privy Council in Collector of *Gorakhpur* v. *Ramasundur*,[68] and held that a statement by a predecessor in title of the party contained in a previous judgment, against whom the document, a pedigree referred therein, was sought to be used, was admissible u/s. 35 of this Act as an entry in public record.[69]

Section 35 read with Section 74, pre-supposes that a document produced is really an extract from the official register.[70]

In a case, the Calcutta High Court held that the section is confined to that class of cases where a public officer has to enter in a register or other books some actual fact which is known to him.[71] But this case has not been approved of in a subsequent case in which it was held that certified copies of entries in a register kept by a public servant under a statute are admissible in evidence.[72]

However, the privilege given to public records under this section does not extend to entries which the public officer is not expected to, and is not permitted to, make.[73]

The Gazette, being an official record evidencing public affairs, is admissible under Section 35 r.w. Section 81 of the Evidence Act and the Court may presume their contents as genuine.[74]

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62. PHIPSON ON EVIDENCE, 13th Ed., p. 513 (para 25-12); *Doe* v. *Andrews*, (1850) 15 QB 756, per ERLE J; *CF. Sturla* v. *Freccia*, (1850) 5 App Cas 623, 644, per LORD BLACKBURN; *Lyell* v. *Kennedy*, 56 LT 647, per C.A.; *Ioannou* v. *Demetriou*, (1952) 1 All ER 179 (PC).
63. *Bakhshish Singh* v. *State of Punjab*, AIR 1967 SC 752.
64. *Gulam Rasul Khan* v. *Secretary of State*, (1925) 6 Lah 269 : AIR 1925 PC 170 : 52 IA 201; *Secretary of State* v. *Chimanlal Jamnadas*, (1941) 44 Bom LR 295 : AIR 1942 Bom 161 : (1942) Bom 357.
65. *Motilal Lakhotia* v. *Mewang Tobgyal Wangchuk Tenzing Namgyal*, AIR 1994 Sikkim 6 (para 12), **following** *Sita Ram* v. *Ramchandra*, AIR 1977 SC 1712 (para 20).
66. *Samar Dosadh* v. *Jugoll Kishore Singh*, ILR 23 Cal 386.
67. *Krishnasamy Iyyangar* v. *Rajagopala Iyyangar*, ILR (1895) 18 Mad 73.
68. AIR 1934 PC 157, 164 : 61 IA 286, 306.
69. *Krishnasami Iyyangar* v. *Rajagopala Iyyengar*, ILR (1895) 18 Mad 73, **see also** *Ramaswami Goundan* v. *Subbaraya Goundan*, AIR 1948 Mad 388.
70. *Bhagirathammal* v. *Bibhuti Bhushan*, AIR 1942 Cal 309; war diaries of Bombay Pioneers and Chief Engineer Bus Corps were records of official acts and therefore admissible, *Bakshish Singh* v. *State of Punjab*, AIR 1967 SC 752 : (1967) 1 SCR 211.
71. *Saraswati Dasi* v. *Dhanpat Singh*, ILR (1882) 9 Cal 431.
72. *Shoshi Bhooshun Bose* v. *Girish Cunder Mitter*, (1893) 20 Cal 940; *Rai Durgaj Deo Bahadur* v. *Beni Mahto*, AIR 1917 PC 197(1) : (1917) 20 Bom LR 712 (PC).
73. *Ali Nasar Khan* v. *Manik Chand*, ILR (1902) 25 All 90 (FB).
74. *Bala Shankar Maha Shankar Bhattjee* v. *Charity Commissioner, Gujarat*, AIR 1995 SC 167 (para 22).

The registers maintained by public bodies are public documents and extracts from those documents are admissible under this section.[75] Where land was allotted to the tenant under Punjab Security of Land Tenures Act, 1953 and the certificate of allotment appeared in the index of the relevant file and the delivery of possession of land was also mentioned in the report, the fact of non-availability of certificate on file would be of no consequence.[76]

Entries in a book which is prescribed under Section 154, Cr.P.C. (Old) may be relevant under the section. A report as provided by Section 157, Cr.P.C. (Old) made to a Magistrate may be a public document but it being a report is not relevant under this section.[77] A report of the Court of Enquiry, appointed under rule 75 of the Aircraft Rules, 1937, cannot be regarded as an entry in a public or official book, register or record within the meaning of Section 75, though it is relevant under Section 5 of the Act, because it bears on the question of the existence or non-existence of every fact in issue, or of such facts as are regarded as relevant under the Evidence Act, and it may also be admissible under Section 7 & 9 of the Act.[78] A certificate of Guardianship issued by a Court is not admissible in evidence under Section 35 to prove the minority of a person, as the certificate is neither a book nor a register nor a record kept by any officer in accordance with any law.[79] Where there was a *Tahsildhar's* Report recording a fact about holding a cattle fair at a particular place, it was held such report was not admissible under this section, though it may be admissible under some other provisions of the Act, if the *Tahsildhar* is examined as a witness.[80] A death certificate by certain respectable person of the place where the family of the dead person once resided, does not satisfy the requirements of Section 35, and is inadmissible in evidence when there is no satisfactory proof that any statutory duty was cast upon him to keep a record of births and deaths.[81]

This section does not deal with the binding nature or the effect of judgements.[82]

An entry from a register made by a public officer under the Municipal Act, is to be presumed to be true as it is a public document.[83]

Section 35 only provides that an entry in an official or public book, which is duly made by a public servant in the discharge of his duty, is by itself a relevant fact. But, it does not make the public book evidence to show that a particular entry has not been made.[84]

For the admissibility of an entry under Section 35, it is not necessary that the clerk who actually wrote the entry should have had any personal knowledge, or that the register should be a copy of a previous register which had become untidy.[85]

The entries made by the Police Officer in the Site Inspection Map and the Site Inspection Memo are record made in discharge of his official duties and the entries are relevant under this section.[86]

The certified copies of FIR, Inspection Map and Site Inspection Memo, *Panchnama*, Injury Report or Post-mortem Report and other relevant documents prepared by the police and the doctor while

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75. *Harilal* v. *Amriksingh*; **following** AIR 1978 All 292; *Municipal Board Aligarh* v. *Mumtaz Khan*, AIR 1948 All 309 : (1948) ALJ 87.
76. *Krishna Kumari* v. *State of Haryana*, (1999) 1 SCC 338 : AIR 1999 SC 854.
77. *Hasan Abdulla* v. *State of Gujarat*, AIR 1962 Guj 214.
78. *Indian Airlines* v. *Madhuri Chaudhury*, AIR 1965 Cal 252 **reversing**, *Madhuri (Smt.)* v. *Indian Airlines Corporation*, AIR 1962 Cal 544.
79. *Muktipada* v. *Aklema*, AIR 1950 Cal 533.
80. *State of U.P.* v. *Smt. Ram Sri*, AIR 1976 All 121.
81. *Rajrani (Smt.)* v. *Chief Settlement Commissioner, Delhi*, AIR 1984 SC 1234 : (1984) 3 SCR 763.
82. *Govind Kesheo* v. *State of M.P.*, AIR 1955 Nag 236; *K. Khedia* v. *Turia*, AIR 1962 Pat 420; *Ram Kirpal* v. *Munabati Kumari*, AIR 1958 Pat 477; *Chandulal* v. *Pushkar Raj*, 1952 Nag 271; *Jagannath Nanda* v. *Bishnu Dalei*, ILR 1974 Cut 675 : 40 Cut LT 888; *Naiak* v. *Salilendra Narayan*, AIR 1961 Ori 327; *Asa Singh* v. *Mansha Ram*, AIR 1930 Lah 238.
83. *Nanhaklal* v. *Baijnath*, AIR 1935 Pat 474; *A.K. Basak* v. *Sailendra Nath Paul*, (1965) 69 Cal WN 593; *Komal (Mst.)* v. *Gurcharan Prasad*, AIR 1938 All 242.
84. In re : *K. Rama Rao*, AIR 1960 AP 441; **following** In re : *Siram Reddy*, AIR 1960 AP 253.
85. *William Graham* v. *Phanindranath*, AIR 1916 Cal 617.
86. *Rajasthan State Road Transport Corporation* v. *Nand Kishore*, AIR 2001 Raj 334 (paras 5 and 7).

discharging official duty are admissible in evidence without formal proof as strict provision of the Evidence Act are not to be insisted upon in summary proceedings of claim for compensation before a Tribunal.[87] Entries in a village crime notebook are admissible in evidence.[88] When a statutory duty is laid upon a public officer to investigate and report, his report is an official record within the meaning of Section 35.[89] The Telephone Trunk Call tickets prepared under rules 49 and 50 of the Posts and Telegraphs Financial Rules, are official records, and the entries are made by the public servants in the discharge of their duties. They are not inadmissible because their writers were not called as witnesses. There is the presumption about their genuineness, because those tickets purport to be documents kept under rule 49 of the rules.[90] Even if a first information report was not signed by the informant, its admissibility in evidence is not affected if the informant is examined, as it is a part of the official record.[91] The documents proved to have been received in official correspondence by the witness and found to be genuine are admissible as official record.[92] Sri S. VARADACHARIAR J., in *Sevugan* v. *Raghunatha*[93] held that where a book or file of papers containing copies of the communications, was maintained according to a practice, that book or the file was itself an official register u/s. 35 and was a public document under Section 74 of the Act. Where disciplinary proceeding was initiated against the respondent for obtaining employment by showing a higher percentage of marks in SSC examination but the original documents like his application and the certificate were not available so the charge was proved on the basis of the extracts produced from "Z" Register and the oral evidence of another employee who was conversant with the practice of making entries in the Register, it was held that the Tribunal failed to appreciate that the Register was a public document and the entry made in it was a relevant evidence.[94]

The endorsement by a sub-registrar may be treated as sufficient proof of the execution of a document. Specific denial of execution is necessary before the document is required to be proved.[95]

Though the statements in the F.I.R. are not substantive evidence, they can be used as previous statements for purpose of corroboration u/s. 157 or for contradiction u/s. 145 of this Act, and not for any other purpose.[96]

The iner-departmental secretariat notes do not come within the purview of Section 35, as they are not supposed to be exhibited to the public.[97]

4. BIRTH AND DEATH REGISTERS

Certified copy of the entry in the birth register maintained by an official in discharge of his official duty, is admissible u/s. 35, and it is not necessary to examine the official.[98] Where the date of birth given in the Register of Births and Deaths, the LIC policy and the matriculation certificate was the same, a different date of birth filled in by the father in the application form at the time of admission pales into

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87. *Rajasthan State Road Transport Corporation* v. *Nand Kishore*, AIR 2001 Raj 334 (para 8).
88. *Amdumiyan* v. *Crown*, ILR (1937) Nag 315 : AIR 1937 Nag 17; *Shrikisan* v. *Jagoba*, ILR 1937 Nag 382 : AIR 1937 Nag 264.
89. *Ramkrishna* v. *Tirunarayana Pillai*, AIR 1932 Mad 198; *Krish Nandan* v. *State*, AIR 1958 Pat 166.
90. *Nandlal More* v. *State*, (1965) 1 Cr LJ 393 (Punj); *Public Prosecutor* v. *Sadagopan*, AIR 1953 Mad 785; *Ramarao* v. *Emperor*, AIR 1943 Oudh 1; *D'C Ruz* v. *D'C Ruz*, 1927 Oudh 310.
91. *Ratanchand* v. *State*, AIR 1960 Bom 146; *Emperor* v. *Nazir Ahmad*, AIR 1945 PC 18.
92. *Desa V.P.* v. *Union of India*, AIR 1958 MP 297.
93. AIR 1940 Mad 273.
94. *Union of India* v. *A. Nagamalleshwar Rao*, AIR 1998 SC 111.
95. *Fateh Md.* v. *Ghosia Bibi*, AIR 1953 Ajmer 19; *Ganpatrao* v. *Nagorao*, 1940 Nag 382; *Bhima Singh* v. *Fakir Chand*, AIR 1948 Nag 155; *Bam Jassa Kunwar* v. *Sahu Narain Das*, AIR 1946 All 178.
96. *Hasib* v. *State of Bihar*, AIR 1972 SC 283; *Sankaralinga* v. *Emperor*, ILR 53 Mad 590; *Mohan* v. *R.*, AIR 1925 All 413; *Rahenuddin* v. *Emperor*, AIR 1944 Cal 323; *Miyana* v. *State*, AIR 1962 Guj 214.
97. *Biswabhusan* v. *State*, AIR 1952 Ori 289.
98. *Harpal Singh* v. *State of H.P.*, AIR 1981 SC 361; *Anita* v. *Atal Bihari*, 1993 Cr LJ 549 (para 5) (MP); *Mohandas Suryavanshi* v. *State of M.P.*, 1999 Cr LJ 3451 (para 10) (MP), birth entry prevails over school entry and is conclusive.

insignificance.[1] An entry of birth made in the register by another person, at the request of an illiterate *chowkhidar* who maintained the register, was held inadmissible.[2]

Where a birth register was maintained at a police station by Head Moharir (registration officer), in accordance with the provisions of U.P. Police Regulations, it was held that the entries therein are relevant under Section 35, in the absence of any evidence to rebut the presumption as to the correctness of the regular performance of the official acts.[3] The birth or death registers which are kept by the Police *Patil* at the Police Station are relevant under section 35 and certified copies are admissible in proof of the original entry under Section 77.[4]

The fact that the entry in the register relates to a particular person and none other is required to be proved.[5]

Though an entry regarding the birth of a certain person was made on information after the expiry of the period prescribed by Section 7 of the Bengal Birth and Death Registration Act, 1873, it was held that it was still admissible under this section, as it was maintained by a public servant in the discharge of his official duties.[6]

A certified copy of birth certificate, which is signed by the executive officer of the Municipal Corporation, is a public document. It is conclusive evidence, unless it is disproved.[7] Entry of the date of birth in the register of births is *prima facie* evidence but not conclusive in nature[8] but in case of variation of age given by the medical opinion by two years from age given in the birth register, the latter should be preferred.[9] A birth register is conclusive proof of age, but the entry does not prove itself and is not proof of age of any particular person unless the person connected with the entry, either by making the entry or giving information, comes forward and speaks regarding the entry and connects it with the individual concerned.[10] Where the father of the person concerned had no other male child except him and the entry was corroborated by the testimony of the witness, the same could not be ignored.[11]

Birth entries in registers of public schools, though relevant under Section 35, have far less evidentiary value to show the correct age, than the entries in the birth register which furnish the best evidence of the date of birth and can be accepted unless they are shown to be wrong.[12]

An entry relating to the date of birth, made pursuant to the directions of the Magistrate, is not conclusive evidence of a disputed date of birth.[13]

When information is given by a village servant to the registering officer that a child was born to a male and a female, it is his duty to make entries. An extract of the entries from the book is proof of the entries, though the registering officer, cannot be supposed to have knowledge of the fact, that the male was the paramour of the woman nor can it be assumed that the servant informed him that the child was an illegitimate child. It cannot be said that when he made the entries he did not discharge his official duty within the meaning of section 35.[14] In the absence of testimony by some competent witness to speak to the knowledge of the relationship or as to the source of information on which recitals came to be

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1. *Santenu Mitra* v. *State of W.B.*, (1998) 5 SCC 697 : 1998 SCC (Cri) 1381 : AIR 1999 SC 1587.
2. *Brijmohan* v. *Priya Brat*, AIR 1965 SC 282; *Jogindra Kaur* v. *Balbir Kaur*, AIR 1974 Punj 31; *Jaladhar Sanal* v. *Malatidei*, 1971 Ori 230.
3. *Rajindra Kumar* v. *C.N. Singh*, (1970) 2 SCC 277; *Ghuia Devi* v. *Shyamlal Mandal*, AIR 1974 Pat 68; *Biswnath Gosain* v. *Dulhia Lalmuni*, AIR 1968 Pat 481; *Manick Chand* v. *Bhagwan Das*, AIR 1964 Pat 353; *Shib Deo Misra* v. *Ram Prasad*, ILR 46 All 637 : AIR 1925 All 79; *Tamijuddin* v. *Taju*, ILR 46 Cal 152 : AIR 1919 Cal 721.
4. *Manik Rao Jairamji* v. *Deorao Baliram*, AIR 1955 Nag 290.
5. *Mukhtar Ahmad Khan* v. *Board of Revenue, Uttar Pradesh*, 1962 All LJ 1094.
6. *Manick Chand* v. *Bhagwan Das*, AIR 1964 Pat 358.
7. *Dalipkumar Sain* v. *Nandarani Dassi (Smt.)*, AIR 1970 Cal 292. **See also** *Goverdhan* v. *State of M.P.*, 1995 Cr LJ 632 (para 6) (Mad).
8. *Parkashchander* v. *Parameshwari (Smt.)*, AIR 1987 P&H 37. However, M.P. High Court has held it to be conclusive in *Mohandas Suryavanshi* v. *State of M.P.*, 1999 Cr LJ 3451 (para 10) (MP).
9. *State of Gujarat* v. *Inayathusen Mohmadmiya*, 1996 Cr LJ 3225 (para 13) (Guj).
10. *Alekh Prasad* v. *State*, (1964) 2 Cr LJ 102 (Ori).
11. *Kanji Bibi* v. *Md. Siddique*, 1996 AIHC 3913 (para 13) (Cal).
12. *Krishnarajan* v. *Doraswamy*, AIR 1966 Ker 305; *Banshi Ram* v. *Jit Ram*, AIR 1964 Punj 231.
13. *H. Subbarao* v. *Life Insurance Corp.*, AIR 1976 Kant 231.
14. *Tatayya* v. *Nakaraju*, AIR 1958 AP 611.

incorporated, the recitals themselves cannot be treated as substantive evidence concerning the paternity indicated in the said documents, as such entries are matters extraneous to what is strictly enjoined upon the officer to record.[15]

An entry in a birth register mentioning the names of the complainant and the accused as father and mother of a new born child, made by a village *Munshif* in the course of his official duty, is a public document; when it is produced from the office of the Register of Assurances. Its authenticity cannot be doubted and as it is a public document, it is admissible, to show that the complainant lived with the first accused as his wife and gave birth to a child.[16]

The certificate relating to an entry in the death register, though admitted in evidence without objection, is not conclusive evidence regarding the date of death of the deceased.[17] It was held that an extract from the register of deaths is bound to be accepted as conclusive as to the date of death of a person, when there is no controversy that the extract did not relate to the person whose death is in question. The death register is covered by the language of Section 35.[18] Entries in a death register maintained by *Gram Panchayat* under the Bihar *Panchayat* Raj Act, 1948 are admissible in proof of a person's date of death.[19] Entry of date of death in the death register maintained by *Gram Sevak* in a *Gram Panchayat* is admissible under the section.[20] The register of deaths maintained by the Sub-Registrar under Calcutta Municipal Act, 1923, is admissible under the section and an entry in such register can be proved under section 77 of the Evidence Act, by the production of a certified copy, but the particulars as to the cause of death or the age of the deceased, of which the officer concerned can have no personal knowledge or any other means of checking, cannot be treated as evidence.[21] Entry in a municipal register of deaths or Land Record Register is admissible.[22] As an outdoor ticket and discharge certificate, granted by the authorities of a public hospital, contain entries in the official register made by a public servant in the discharge of his official duties, they are admissible in evidence on the combined effect of Section 35 and 74 of the Evidence Act.[23]

A birth and death register (*Hath Chitha*) is admissible under this section; it is not admissible when it is not proved as to who made the death entry and whether it was made in discharge of official duty or not. If it is so proved, it is admissible.[24] But the *Hath Chitha* is not admissible if the book is not maintained in the hand of the *Chowkidar*.[25]

Entries in the register of birth, death or marriage are *prima facie* evidence, though they not be always conclusive; it is not necessary to prove who made the entry and what was the source of information. The ground of reception of such evidence is that it is the public duty of a person who keeps the register to make the entry after satisfying himself of the truth.[26]

Only such of the entries as are made in the birth and death register by the persons in discharge of their official duty are admissible.[27]

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15. *Thimmakku* v. *Rangappa*, AIR 1977 Kant 115.
16. *Chellammal* v. *Angamuthu*, 1978 Mad LJ (Cri) 327 : 1978 Cr LJ 752 (Mad).
17. *Swarnalatha* v. *K.I.F.&M. Works Ltd.*, AIR 1974 Cal 393 **following** *Purushothama Reddiar* v. *S. Perumal*, AIR 1972 SC 608.
18. *Bagiammal* v. *Kamalammal*, AIR 1965 Mad 205; *Rangappa* v. *Rangaswami Naiker*, AIR 1925 Mad 1005; *Ramalinga Reddy* v. *Kotayya*, ILR 41 Mad 26; *Secretary of State* v. *Kasturi Reddy*, ILR 26 Mad 268.
19. *Manni Devi* v. *Ramyan Singh*, AIR 1985 Pat 35 (for an entry as to birth in an official record) **See** *Harpal Singh* v. *State of H.P.*, AIR 1981 SC 361.
20. *Manni Devi* v. *Ramyan Singh*, AIR 1985 Pat 35.
21. *Haridas* v. *Kishenchand*, AIR 1952 Cal 393.
22. *Anis-ul-Rehman Khan* v. *Beni Ram*, (1901) PR No. 59 of 1901 (Civil); *PO Gaung* v. *Ma Shwe Bwin*, (1908) 4 LBR 231; *Gangabai* v. *Fakirgowda*, (1929) 57 IA 61 : 32 Bom LR 368 : 54 Bom 336.
23. *Ramani Bala Devi* v. *Kanai Lal Malakar*, AIR 1965 Tripura 17.
24. *Ramprasad Sharma* v. *State of Bihar (Chowkidars Hath Chitha)*, AIR 1970 SC 326; *Jaladhar Samal* v. *Malati Dei*, AIR 1971 Ori 230; *Sanatan Senapati* v. *Emperor*, AIR 1945 Pat 489; *Biraj Ananda Banarjee* v. *Sitaram Chatterjee*, AIR 1949 Cal 192; *Nanda Kishare Swain alias Nanda Swain* v. *Gour Mani Debi*, ILR 1962 Cut 409; *Khyali Ram* v. *State of H.P.*, 1979 Cr LJ 620.
25. *Jaladhar Samal* v. *Malatidei*, 1971 Ori 230; *Jogindra* v. *Babir Kaur*, AIR 1974 Punj 31.
26. *Bishwanath Gossain* v. *Dulhia Lalmuni*, AIR 1968 Pat 481; *Dasiram* v. *Emperor*, AIR 1947 All 429; *Bujhawan Singh* v. *Shyama Din*, AIR 1964 Pat 301; *Kunja Mohanta* v. *State of Bihar*, 1967 BLJR 227.
27. *State* v. *Qamruddin*, AIR 1956 Nag 74; *Rai Bhaiya Durgrag Deo Bahadur* v. *Beni Mahto*, AIR 1917 PC 197

Statement of an adulteress, recorded in a Government Maternity and Rescue Home register is admissible to corroborate the evidence of the spouse in case of accusation of adultery.[28]

5. MARRIAGE REGISTER

The Bombay High Court did not rely upon the extract from the register of marriages maintained by the *Gram Panchayat*, without the informant or the *Gram Sewak* being produced.[29]

6. SCHOOL REGISTERS

An entry in the S.S.L.C. book[30] and School Admission Register,[31] with regard to the age of a pupil, is admissible in evidence to prove the age of the person concerned. But for determining the age of the victim of abduction/kidnapping school admission register cannot be regarded as the sole clinching factor.[32] Where the testimony of the father of the minor prosecutrix had contradictions regarding her age, the school certificate was held to be suspicious and unreliable.[33] Originals of the admission register from the schools are admissible for proving the date of birth.[34]

Where two public documents of two different public schools showed the same age of a child, it was held that they would be admissible under Section 35.[35]

Under the standing orders, there is a duty imposed upon a school master to ascertain and enter in his register the age of all pupils whom he admits; such entries are therefore admissible in evidence to prove the age of the person concerned.[36]

However, the Supreme Court observed that, in actual life, it often happens that persons give a false age of the boy at the time of his admission in a school, so that, later in life, he would have an advantage when seeking public service for which a minimum age or eligibility is often prescribed. The Court cannot ignore this fact while assessing the value of the entries in the school register.[37]

Matriculation certificate is admissible on the question of a person's age.[38] Entry made in the High School certificate is presumed to be correct and burden lies on either side to prove it otherwise.[39]

The register of a Municipal High School under the Madras Educational Rules of 1958, requiring the school to keep a register of admissions and withdrawals in the form prescribed, is an official register, and the entries therein are relevant under Section 35; because under Section 385 of the District Municipalities Act, every Municipal Officer or servant shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code. Normally, it is unnecessary, for the purpose of proving the entries, to call the concerned clerk as a witness, but the absence of entries by itself may be capable of explanation such as that the public servant was not enjoined to enter every transaction, or that he was negligent or

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28. *Vedavalli (Smt.)* v. *Ramaswamy*, AIR 1964 Mys 280.
29. *Baby* v. *Jagat*, AIR 1981 Bom 283.
30. *Manikoth Achara Moidu* v. *Puthalath Kuniyil Parkum*, 1999 AIHC 3321 (para 9) (Ker), **relying on** *State of Kerala* v. *Jose*, (1989) 1 Ker LT 296.
31. *Manikchand* v. *Krishna*, (1931) 28 NLR 127; *Mohd. Ikram Hussain* v. *State of U.P.*, AIR 1964 SC 1625; *Deoki Nandan Dayma* v. *State of U.P.*, (1997) 10 SCC 525 : 1997 SCC (Cri) 875; *Mahendra Prasad Singh* v. *State of Bihar*, AIR 1995 Pat 162 (paras 8 and 14); *Bhim Mandal* v. *Magaram*, AIR 1961 Pat 21; *Sumitra Bai* v. *State of M.P.*, 1999 Cr LJ 2541 (para 13) (MP); *Manikoth Achara Moidu* v. *Puthalath Kuniyil Parkum*, 1999 AIHC 3321 (para 9) (Ker).
32. *Bishnudas Dehera* v. *State of Orissa*, 1997 Cr LJ 2207 (Ori).
33. *Annakodi* v. *State*, 1995 Cr LJ 3387 (para 8) (Mad).
34. *Maniyamkandi Kunhiraman* v. *Machil Parambath Vanaja*, AIR 1998 Ker 24, **following** *Umesh Chandra* v. *State of Rajasthan*, AIR 1982 SC 1057.
35. *Umesha Chandra* v. *State of Rajasthan*, AIR 1982 SC 1057.
36. *Harpal Singh* v. *State of H.P.*, AIR 1981 SC 361.
37. *Brijmohan Singh* v. *Priya Brat*, AIR 1965 SC 282; **reversing** *Priyabrat Narain Singh* v. *Brijmohan Singh*, AIR 1964 Pat 2; *Sita Ram* v. *District Pilibhit*, 1957 All LJ 383; *Banshiram* v. *Jitram*, AIR 1964 Punj 231; *Anant Ram* v. *State of Punjab*, AIR 1975 Pun 198.
38. *Jagadhananda* v. *Rabindranath*, AIR 1958 Cal 533; *Hrishikesh* v. *Sushil Chandra*, AIR 1957 Cal 211; *Anadi Mohan Ghose* v. *Rabindra Nath Dutta*, AIR 1962 Cal 265; *Vaidhyanath* v. *Rambadan*, AIR 1966 Pat 383.
39. *Mayank Rajput* v. *State of U.P.*, 1998 Cr LJ 279 (para 26) (All).

had some motive in omitting some of the transactions. It is from this point of view that the non-examination of the clerk who maintained the register becomes material.[40]

Entries relating to the date of birth, made in accordance with the duties imposed and instructions issued by the Government, were held relevant u/s. 35[41]; but the entry in the school register which is not shown to be maintained by a public servant in the discharge of his official duty or any other competent authority, cannot be accepted as a positive proof regarding the date of birth.[42]

An unproved and unexhibited school certificate cannot be relied upon in proof of age.[43]

Once the school leaving certificate is duly proved in accordance with law, it is not necessary to produce the Head Master of the school who issued the certificate; it is for the other side to disprove it.[44] The School register is an official register which is kept in the discharge of official duties of the concerned school authorities. The question of assessing the evidentiary value of the records which are relevant under Section 35, depends upon the facts of each case.[45] The question whether a school certificate or college certificate can be taken into consideration for determining the age of a person, without formal proof of the particulars contained in the certificate, is a matter which has to be decided with reference to the circumstances of each case.[46]

An entry made by a teacher in a private school, in his admission register or transfer certificate, cannot come within the scope of this section.[47] The Rangoon High Court has held that if the school is not a Government School, such entry has but little probative value.[48] Entry relating to the date of birth, in a non-government school's general register, maintained under a Statutory Rule, is admissible under this section however. Its evidentiary value depends upon other factors. In a kidnapping case, where the parents of the girl were not examined as to her age, it was held that the entry could not be held to have proved the age.[49] If the school is not a Government or a State School, the entries in the school register or transfer certificate issued by it are not admissible under this section, as the employee of that school is not a public servant u/s. 21 of the Penal Code, and the entries in the register made by him are not made in public or official registers.[50]

Where there was a difference regarding the year of birth, in the school attendence register and a staff card, it was held that, in the absence of independent proof relating to the year of birth as entered in the school register, the Court cannot prefer the entry in the school register to the entry in the staff card.[51] Where in the school certificate produced, the name of the original school from which the student was transferred was not mentioned, such a certificate could not be relied upon.[52]

Correction in the entry.—In case of error or mistake alteration of caste, entered in the admission register, can be made as the name, date of birth and religion can be corrected on the ground of wrong

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40. In re : *Sriram Reddy*, AIR 1960 AP 253; *Subbarao* v. *Venkata Ramarao*, 1964 AP 53.

41. *Brijmohan Singh* v. *Priya Brat*, AIR 1965 SC 282; *Shivram* v. *Shivcharan*, AIR 1964 Raj 126; *Abdul Majeed* v. *Bhargavan*, AIR 1963 Ker 18; *V.M. Nampoothiri* v. *K.K. Kuruvila*, AIR 1957 Ker 103; In re : *Siram Reddy*, AIR 1960 AP 253 : 1971 Punj LJ 859 : 75 Punj LR 33; *Bhim Mandal* v. *Magaram*, AIR 1961 Pat 21; *Arathan* v. *State of Kerala*, 1966 Cr LJ 210 (Guj); *Radhakrishan* v. *Bhushanlal*, AIR 1971 J&K. 62; *Liladhar* v. *Mohibu*, AIR 1934 Nag 44; *Samsuddin Isabhai* v. *State*, AIR 1970 Guj 178.

42. *Ram Deo Chauhan* v. *State of Assam*, AIR 2001 SC 2231 (paras 20 and 41) : 2001 Cr LJ 2902.

43. *Rammurthi* v. *State of Haryana*, AIR 1970 SC 1029.

44. *Durga Prasad* v. *Subedhar Singh*, AIR 1978 All 472.

45. *Vidhyadhar* v. *Mohanlal*, ILR 1978 HP 174.

46. *Shanmugham* v. *State*, 1984 Cr LJ 1081 (Mad).

47. *Rajappan*, ILR 1960 Ker 481.

48. *Hoak Saing* v. *Moung E. Hla*, 1940 Rang LR 481 : AIR 1940 Rang 191.

49. *Samsuddin Isabhai* v. *State*, AIR 1970 Guj 178 : 1970 Cr LJ 1348.

50. *Anant Ram* v. *State of Punjab*, AIR 1975 Punj 198 **following** ILR 1940 Rang LR 481; *Hoak Saing* v. *Ma E Hla*, AIR 1940 Rang 191; *Asa Nand* v. *Gian Chand*, AIR 1936 Lah 598; *Brijmohan Singh* v. *Priya Brat*, AIR 1975 SC 282; *Gopalan* v. *Kannan*, AIR 1959 Ker 12.

51. *Tata Iron and Steel Co. Ltd.* v. *Abdul Wahab*, AIR 1966 Pat 458.

52. *Jagtar Singh* v. *State of Punjab*, 1993 Cr LJ 2886 (para 1) (SC) : AIR 1993 SC 2448 **See also** *Union of India* v. *Kantilal Hemantram Pandya* AIR 1995 SC 1349 (paras 5 and 7); *Burn Standard Co. Ltd.* v. *Dinabandhu Majumdar*, AIR 1995 SC 1499 (para 10).

entry or subsequent changes.[53] Where the petitioner's date of birth was wrongly type-written in school records for the correction of which he produced the hospital records as well as municipal record showing his correct date of birth and accordingly the school authorities corrected the error and the C.B.S.E. issued his date of birth certificate, it was held that it only amounted to removing of typographical error which is permissible.[54]

7. ELECTORAL ROLL

Electoral roll prepared under the Representation of People Act is a public record within Section 35, and is admissible in evidence.[55] It is admissible to show that the plaintiff is the wife of one S.[56] Certified extracts from electoral rolls and the family register of a village, which are public documents, are admissible.[57] The electoral roll is not conclusive regarding the entry relating to the date of birth.[58]

In determining whether a person had completed 21 years of age on the qualifying date or not, for the purpose of elections, as between the competing entries in the electoral roll, (which is prepared under the Representation of People Act and the rules framed thereunder) and the admission register prepared under the education code, uncorroborated by anything else, the Kerala High Court held that the electoral roll was entitled to greater probative value than the latter.[59] Where the entries in previous electoral rolls betrayed a motive behind them, to enable the candidate to stand for a certain election, and they did not inspire confidence, it was held that no finality could be attached to the entries in the electoral rolls and they were at best a piece of *prima facie* evidence, liable to be rebutted.[60]

If the entries in the voters' list of a village show relationship of two voters as husband and wife and the entries supported by the evidence of the village *Karanam*, they are admissible to prove marriage.[61] Voters' list has no evidentiary value on the question of identity of the house under the occupation of a particular person, and it cannot displace what is established by the entries in a Municipal record, which is a public record.[62]

8. RECORD OF RIGHTS

Entries in the records of right, maintained in the official course of business are a relevant piece of evidence.[63] Entries made in the record of rights, in pursuance of a notification issued under the Bombay Land Revenue Code, are to be considered under Section 35.[64]

An entry in the record of rights is presumed to be correct until it is proved by evidence that it is incorrect; but the said presumption would arise only if the entries have been made by persons authorised under some enactment and the rules framed thereunder.[65] Where there was no entry in the record of right that a feast was celebrated in the suit open space but the fact that the feast was carried out there, was admitted and the material placed on record disclosed that the feast was celebrated there for the last 40 years, the material was held to be sufficient to rebut the presumption arising from no entry in the record of rights.[66]

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53. *Kerala Pattika Jathi Samrekshana Samithy* v. *State (FB)*, AIR 1995 Ker 337 (paras 24, 25 and 34), **following** *Bishamber Dayal Chandra Mohan* v. *State of U.P.*, AIR 1982 SC 33 and *State of Sikkim* v. *Dorjee Tshering Bhutia*, AIR 1991 SC 1933.
54. *Rajesh Kumar Jain* v. *Secretary, C.B.S.E.*, AIR 1999 Del 395 (paras 10-12).
55. *Kirtan Sahu* v. *Thakur Sahu*, AIR 1972 Ori 158.
56. *Linga* v. *Ajodhy*, AIR 1974 Ori 107.
57. *Aina Devi* v. *Bachan Singh*, AIR 1980 All 174 at 177.
58. *Kunhiraman* v. *Krishna Iyer*, AIR 1962 Ker 190 (FB).
59. *Abdul Majeed* v. *Bhargavan*, AIR 1963 Ker 18. **Also see** *Nazir Hossain Halder* v. *State*, 1998 Cr LJ 1720 (Cal).
60. *Shivram* v. *Shivcharan*, AIR 1964 Raj 126.
61. *Chellammal* v. *Angamuthu*, 1978 Cr LJ 752 (Mad).
62. *Kewalchand* v. *Samirmal*, AIR 1953 Nag 146.
63. *Digambar Adhar Patil* v. *Devram Girdhar Patil*, AIR 1995 SC 1728 (para 5).
64. *B.M. Kharwar* v. *Ramanlal Motiram*, (1964) 5 Guj LR 701.
65. *Krishnadayal* v. *Rani Bhubaneshwari*, AIR 1931 PC 221; *Jatindra Nath* v. *Sushilendra Nath*, AIR 1965 Cal 328 (prepared under West Bengal Estates Acquisition Act 1 of 1954) *Ramakrishna* v. *Arjuno*, AIR 1963 Ori 29; *Suraj Mal* v. *State*, 1959 Raj LW 381 (entries in Khasra Girdawari in Rajasthan); entries in *Khasra* and *Bandobast Missal*, *Jayaprakash* v. *State of Maharashtra*, 1996 AIHC 1329 (paras 12 and 15) (Bom).
66. *Joaguim Gama* v. *Custodio Gama*, 1999 AIHC 2503 (para 6) (Bom).

The entries are not the foundations of the title, but are mere items of evidence, the presumption raised by them is not conclusive; they are *prima facie* correct, if not rebutted.[67] Records of rights of themselves may not confer title, but old records supporting title can be treated as basis of title.[68] Records of rights neither destroy nor create title; therefore, omission of the deity's name in the record of right would not destroy its title to the property acquired by it under a sale deed.[69] Where there is an entry in the record of rights showing the plaintiff's name as the holder, as the presumption is in favour of the plaintiff, onus lies on the defendant to prove his own independent title to one half of the land and his alleged *korfa* right to the other half an alleged agreement.[70] An order under the Record of Rights Act, directing the name of the respondent to be entered in the record of rights, is not conclusive to show that he is the actual holder of the land.[71] The record of rights is conclusive to show the character of land and not the nature of title.[72]

Where a particular land was recorded as jointly belonging to two branches of a family, such entry must be deemed to be correct unless the contrary is shown. Mere fact of possession is not sufficient to rebut the presumption attached to the entry.[73]

Record of rights, like the *Dag Chittas* and *Jama Bandi* records, have presumptive value as to possession by persons whose names have been recorded.[74]

The Court is entitled to take into consideration the entry in the record of rights for coming to the conclusion that a certain person was the *raiyat* of the land in question.[75]

Where the *Khasra* itself is the instrument which confers or embodies the right, and there is no other document which creates title, the *Khasra* and the Map are not merely historical materials, but are instruments of title or, otherwise, the direct foundations of the rights.[76] In *Keshav Krishnaji* v. *Municipal Corp.*,[77] it was held that *Khasra* is not conclusive evidence of title. In that case, the municipality relied in *Khasra*. But the plaintiff and their predecessors were found to be in long possession. It was held that this was *prima facie* proof of title and the *Khasra* was not sufficient to rebut the presumption. *Khasra* is a record of right according to Section 45(2), of Central Provinces Land Revenue Act, 1917. Section 80(3) of that Act provides that such entries in the record of right shall be presumed to be correct unless the contrary is shown.[78] Entries in *Khasra* are evidence of title because they are good evidence of possession. Entries made contrary to the fact of possession carry little weight, especially when entries are made as routine and without motive of the parties.[79] Entries in *Khasra* are good evidence till they are proved to be false.[80] Entries in *Khasra Girdawaries* are public documents and are relevant for purpose of considering surplus area for purpose of cultivation.[81] *Khasra Girdawari* is admissible under Section 35, but no statutory presumption of correctness attaches to it.[82] Entries in *Khasra Girdawari* are valuable evidence under Section 35. It is not necessary to produce *patwaris* who made the entries.[83]

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67. *Ahmed Khan* v. *Union of India*, AIR 1955 Punj 37.
68. *Ganesh Das* v. *Jagabandhu Prusti*, (1971) 37 Cut LT 420.
69. (1975) 1 Cut LR 35 : (1975) 2 Cal LJ 305.
70. *Prafulla Nalini Bhowmick (Smt.)* v. *Dajendra Garoo*, AIR 1968 Tripura 5.
71. *Payappa Neemauna* v. *Chamu Appayaya*, (1969) 2 Mys LJ 198.
72. *Parameshwaridevi* v. *Khusali Mandal*, AIR 1957 Pat 482 (under Santal Paraganas Settlement Regulation 2 of 1872).
73. *Harak Narain* v. *Sham Behari*, AIR 1968 Pat 450.
74. *H.B. Sharma* v. *H.G. Sharma*, AIR 1975 Gau 47.
75. *Salabat Mahata* v. *Malati Mahatani (Smt.)*, AIR 1954 Pat 481.
76. *Ballabh Das* v. *Nur Mohammad*, AIR 1936 PC 83.
77. AIR 1951 MP 114.
78. *Shikarchand Jain* v. *D.J.P. Kariani Sabha*, AIR 1974 SC 1178, **relied in** *Secretary to Government of India, Ministry of Defence, New Delhi* v. *Indira Devi*, 1999 AIHC 4682 (AP), **relying on** *Shikarchand* v. *D.J.P. Karimi Sabha*, AIR 1974 SC 1178; *Shankarrao* v. *Shambu Nathu Patil*, AIR 1940 PC 192 (Section 80(3) of C.P. Land Revenue Act corresponds to Section 135-J of Bombay Land Revenue Code).
79. *Keshoprasad Singh* v. *Bhag Jogna Kuer*, AIR 1937 PC 69.
80. *Sheojee* v. *Prema Kuer*, AIR 1964 Pat 187; *Beant Singh* v. *Natha Singh*, AIR 1966 HP 48; *Shyam Pratap Singh* v. *Collector of Etawah*, AIR 1946 PC 103.
81. *Tara Singh* v. *Financial Commissioner Punjab*, 1969 Punj LR 983; *Beant Singh* v. *Natha Singh*, AIR 1966 HP 48
82. *Gurucharan Singh* v. *Prithi Singh*, AIR 1974 SC 223 (Punjab Land Revenue Act 17 of 1887), *Khiali Ram* v. *Santlal*, AIR 1972 Punj 393.
83. 1975 Punj LJ 151.

Where the entries in the record of rights show that certain properties were resumable on certain conditions, there would be presumption of correctness of the entries unless rebutted.[84] Where the record of rights reveal that a land was recorded as *Puratan Patita*, and there is no entry in favour of the villagers, the presumption is in favour of immemorial user as *Puratan Patita*. Hearsay evidence regarding the user since time immemorial becomes admissible, as an exception to the general rule of evidence.[85] Where the entries in the record of rights are relied on, and there is conflict between old and new record of rights, it is the latter entry which must prevail.[86] Presumption of correctness attaching to a latter entry cannot be rebutted by an earlier entry in the old record of rights.[87]

It is the entry in the record of rights and not the entry in the Tenancy Register, that has greater probative value.[88]

Under the Bengal Tenancy Act, the entries in the record of right, after final publication, are presumed to be correct unless proved to be incorrect. But the entries in the draft record of right do not carry such a presumption of correctness. As the entries were made by a public servant in the discharge of his duties, they are admissible under section 35.[89]

Under the Chottanagapur Tenancy Act of 1908, the entry made in the record of rights, in respect of the property, a *Khorposh* Grant, that they are *Kabilzapati* properties on failure of legitimate descendants of the original grantee, is not only admissible in evidence but has a much higher value, namely that it carries with it the presumption of correctness and will prevail until rebutted by proper evidence.[90]

9. REVENUE RECORDS

Where the entries in the Revenue Records are made after a careful public enquiry, they are cogent evidence of the facts recorded, though not conclusive[91] but where the details of manner, mode, time etc. of the entry was not shown, failure to examine the *Patwari* to prove the same was fatal.[92]

An entry in the *Monzawari* Register is admissible under Section 35.[93]

Entries in revenue record as to possession are presumed to be true[94]; but the presumption is rebuttable.[95] The pencil entry made in records showing the possession of the defendant on a certain land without having been verified or attested by any revenue officer, can not be relied upon.[96]

The entries in the Revenue Records are to be accepted at their face value, and the Courts should not embark upon an appellate enquiry into their correctness. But, the presumption of correctness can apply only to genuine, not forged or fraudulent entries. The distinction may be fine, but it is real. The distinction is that one cannot challenge the correctness of what the entry in the Revenue Record states, but the entry is open to the attack that it was made fraudulently or surreptitiously. Fraud and forgery rob the document of all its legal effect and cannot found a claim to possessory title.[97]

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84. *Bhageshwari Charan Singh* v. *Kamakhya Narain*, AIR 1931 PC 30; *Charu Chandra Ghose* v. *Kamakhya Narain*, AIR 1931 PC 5; *Srinath Ray* v. *Maharaja Pratap*, AIR 1923 PC 217.
85. *Shyama Charan Mohanty* v. *Upemdra Mohanty*, ILR 1973 Cut 1080 : 39 Cut LT 1136: **relying on** *Paddayya* v. *Krishnamurthy*, AIR 1927 Mad 653; *Raja Rajendra Narain* v. *Kumar Gangananda Singh*, AIR 1925 PC 213; *Subhani* v. *Nawab*, AIR 1941 PC 21.
86. *Durga Singh* v. *Tholu*, AIR 1963 SC 361; *Hrishikesh Bank* v. *State of W.B.*, AIR 1978 Cal 556.
87. *Banka* v. *Bartul*, AIR 1952 Pat 157.
88. *State* v. *Bharatsingh*, 1961 (1) Cr LJ 649.
89. *Haridas* v. *Kishan Chand*, AIR 1952 Cal 393.
90. *Hariharsahu* v. *Sheo Prasad*, AIR 1954 Pat 173; *Ghosi Sahu* v. *Shib Sahu*, 1942 Pat 140.
91. *Gangabai* v. *Fakir Gowda*, AIR 1930 PC 93.
92. *Sitaram* v. *Ram Charan*, AIR 1995 MP 134 (para 9).
93. *Cantonment Committee* v. *Satish Chandra*, AIR 1931 PC 1.
94. *Sant Ram* v. *Faquiroo*, AIR 1986 HP 10; *Gurcharan Singh* v. *Prithi Singh*, AIR 1979 SC 223; *Avadh Kishore Das* v. *Ram Gopal*, AIR 1979 SC 861, (about Wajibulzar Paper, a Village Admn. Paper) *Vishwa Vijay* v. *Fakhrul Hassan*, AIR 1976 SC 1485 : (bogus entries).
95. *Vishal Singh* v. *State of M.P.*, AIR 1998 SC 308 : 1998 Cr LJ 505.
96. *Sohan Singh* v. *Gulzari*, AIR 1997 HP 12.
97. *Vishwa Vijay Bharati* v. *Fakhrul Hassan*, AIR 1976 SC 1485 : 1976 (Supp) SCR 519.

Where the evidence of *Jama Bandi* and mutation proceedings showed the property to be joint property, it was held that the evidence outweighed the inference from other facts.[1] Where the land was settled on an Annual *Patta*, the entries in the *Jama Bandi* indicate only possession in that year and not for other years.[2] The entries in the *Jama Bandi* made under the Himachal Pradesh Land Revenue Act are to be presumed to be correct under Section 46 of that Act.[3]

It is not safe to rely upon an entry itself for determining the right, but recourse must be had to the origin of the entry.[4]

Entries in revenue records is the paradise of the '*patwari*' and therefore, creation of records is a camouflage to defeat the just and legal right or claim and interest of the tiller of the soil on whom the Act confers title to the land he tills.[5] The entries in the revenue records, though they may be relevant under Section 35, are not evidence of title.[6]

Khatauni Papers prepared under the Uttar Pradesh Land Revenue Act are admissible under Section 35, and presumption of correctness would prevail until rebutted[7] but the entries in the remark column have no presumptive value as to rights/possession.[8] Extract of *Khatauni* is an authentic piece of documentary evidence of possession, and is relevant in the proceedings under Section 145, Cr.P.C.[9]

A *Kancha Khatian*, though relevant, is not sufficient to rebut the presumption of correctness of a finally published record.[10]

The entries of persons as possessing certain land, made in the village papers, are only for the purpose of realisation of revenue and are not conclusive of the title of the person to the property.[11]

Where the revenue records or village papers which are kept for purpose of revenue, and not for purpose of title of the persons, showed members of a joint family as owners of definite shares, it was held that no presumption can be raised as to the separation of the joint family, as the presumption in law was that the family was joint.[12]

The entry in the revenue record showing a *sir* land in the possession of the plaintiff, is only presumptive evidence which can be rebutted.[13] Presumption of truth is attached to the entries in the revenue record; to rebut such presumption, convincing and reliable evidence is required.[14]

Though there is no strong presumption of the correctness of title on the basis of entries in the Municipal *Khasra*, however, its evidentiary value has to be considered along with other material on the record.[15]

In the case of discrepancies between the entries in the *Khasra* and *Wajib-ul-arz*, it was held that the entries in the latter must prevail.[16]

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1. *Bhagawan Dayal* v. *Reoti Devi*, AIR 1962 SC 287.
2. *Abdul Hasem* v. *Haji Mahiuddin*, AIR 1967 Assam 9.
3. *Lilawati (Smt.)* v. *Paras Ram*, AIR 1977 HP 1.
4. *Pirtha Singh* v. *Raja Md. Ali*, AIR 1926 Oudh 427; *Nageshwar Baksh* v. *Ganesh*, AIR 1920 PC 46.
5. *Baleshwar Tewari* v. *Sheo Jatan Tiwary*, AIR 1997 SC 2089. **Also see** *Himachal Pradesh* v. *Keshav Ram*, AIR 1997 SC 2181 (para 4); *Abasaheb Ali Gharge* v. *Balaji Ramhari Gharge*, 1996 (1) Mah LJ 209; *Bhaguji Bayaji Pokale* v. *Kantilal Baban Gunjawate*, AIR 1998 Bom 114 (para 10).
6. *Rammanna* v. *Sambamoorthy*, AIR 1961 AP 361 (Diglot Register); *Durga Prasad* v. *Ghanshiam Das*, AIR 1948 PC 210; *Nirman Singh* v. *Rudra Pratab Narain Singh*, AIR 1926 PC 100; *Nageshwar Baksh* v. *Ganesha*, AIR 1920 PC 46; *Balwant Singh* v. *Daulat Singh*, AIR 1997 SC 2719; *R.K. Madhuryyajit Singh* v. *Takhellambam Abung Singh*, AIR 2001 Gau 181 (paras 12, 13, 17 and 22).
7. *National Investment Co.* v. *Mohandra Nath*, AIR 1960 Cal 724.
8. *J.R. Ahir* v. *P.R. Yadav*, AIR 2000 MP 223 (paras 5 and 6), **relying on** *Chusamani* v. *Ramadhar*, 1991 MPLJ 311. **Contra** : *Gajraj Singh* v. *Krishna Pal Singh*, 2001 AIHC 1432 (para 30) (MP).
9. *Hari Saran* v. *Patangal*, AIR 1967 All 486.
10. *Badridas Goenka* v. *Fani Bhusan Dhar*, ILR (1958) 2 Cal 692.
11. *Amarchand* v. *Paramanand*, AIR 1934 All 474.
12. *Brajraj Singh* v. *Yogendrapal Singh*, AIR 1952 MB 146.
13. *Budhilal* v. *Jagannath Das*, AIR 1963 MP 344.
14. *Santram* v. *Faquiroo*, AIR 1985 HP 10.
15. *Lal Babu Yadava* v. *Ram Bilash Rai*, AIR 1997 Pat 131.
16. *Manturabai* v. *Ital Chiman*, AIR 1954 Nag 103.

The record known as *Tankithat* is not the result of any mechanical process of adopting the entry found in the existing record. Where the regular settlement of records takes place for the first time, it does not carry with it any statutory presumption of truth.[17]

Where the entry in the revenue records was made by the *Patwari* after the commencement of *lis* but the *Patwari* was not examined to eliminate the element of concoction, it was held that the rights and obligations of the parties are adjudicated as they obtain at the commencement of *lis*.[18]

10. MUTATION ENTRIES

Mutation of name by itself confers no proprietary title upon a person, for the proceedings regarding mutation of names are not judicial proceedings in which title to, and proprietary rights in, immovable property are determined.[19] The order of the revenue officer in mutation proceedings based on untruthful evidence, has no evidentiary value in a civil suit.[20] Mutation entries are not admissible in evidence.[21] The mutation of names in the revenue records is not conclusive and the civil court can go behind the *pattas* issued by the revenue authorities.[22] There is no presumption of correctness attached to a mutation entry as to the date of death of the last holder.[23]

Tabdilat Papers maintained under the Revenue Rules are public documents. The entry therein, showing separate mutations in favour of different persons, proves that it was made according to an agreement between those persons. The entry does not lose its evidentiary value even if the document of agreement is not produced.[24]

An acknowledgement of a mortgage in mutation entry made by some of several mortgagors, does not bind the remaining mortgagors and cannot be used against them under Section 21(2) of the Limitation Act.[25]

Omission on the part of the plaintiff to object to mutation being effected in the revenue records, on the application of the defendants, will amount to a relinquishment by the plaintiff of his title to the plaint property.[26]

In a case of acquisition of land, compensation cannot be claimed merely on the basis of mutation entries.[27]

11. *WAJIB-UL-ARZ*

Wajib-ul-arz is a village administration paper prepared by the village official, prepared with care and after due inquiry. It is a part of the settlement record and a presumption of correctness attaches to it.[28] *Wajib-ul-arz*, which is a part of a revenue record, is of greater authority than a *Riwaj-i-am* which is of general application.[29] An entry regarding an agreement in a *Wajib-ul-arz* holds good during the period of the settlement in which it is made, and becomes inoperative when the settlement comes to an end.[30] An entry in *Wajib-ul-arz* is admissible under Section 35, as part of an official record, and also under Section 48 and 49 of the Evidence Act as being statements by persons who had special means of knowledge as regards the custom.[31]

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17. *Vidhyadhar* v. *Mohanlal*, ILR 1978 HP 174.
18. *Sitaram* v. *Ram Charan*, AIR 1995 MP 134 (paras 8 to 10).
19. *Abid Alikhan* v. *Secretary of State*, AIR 1951 Nag 327; *Nirman Singh* v. *Rudra Pratab Narain Singh*, AIR 1926 PC 100; *Chokhey Singh* v. *Jote Singh*, ILR 31 All 73 (PC); *Mehr Singh* v. *Hukmi*, AIR 1949 HP 22.
20. *Dayaram* v. *Dawalatshah*, AIR 1971 SC 681 : (1971) 3 SCR 324.
21. *Pakhar Singh Atwal* v. *State of Punjab*, AIR 1995 SC 2185 (para 5).
22. *Hooriya* v. *Munna*, AIR 1956 MB 56.
23. *Dalpat Singh* v. *Rajvant Singh*, AIR 1954 Punj 33.
24. *Gobardhan Gountia* v. *Labanyanidhi Bhai*, ILR 1966 Cut 816.
25. *Bagga Singh* v. *Lal Chand*, AIR 1952 Pepsu 6.
26. *Edward Top* v. *State*, AIR 1954 Tra/Co. 7.
27. *Durga Das* v. *Collector*, AIR 1996 SC 2786 (para 2).
28. *Murtaza Husain* v. *Md. Yasin Ali*, AIR 1916 PC 59; *Avadh Kishore Dass* v. *Ramgopal*, AIR 1979 SC 961.
29. *Rajindra Chand* v. *Sukhi*, AIR 1957 SC 286.
30. *Chhotekhan* v. *Malkhan*, AIR 1954 SC 575 : 1955 SCR 60.
31. *Premalata* v. *Janka*, ILR (1951) 2 All 328.

12. *RIWAZ-I-AM*

Riwaj-i-am is a public record prepared by a public officer in discharge of his duties under government rules, and the statements therein in support of the custom are admissible, to prove facts recited therein; it would form a strong piece of evidence unless rebutted by a party denying the custom.[32]

There is an initial presumption of correctness as regards the entries in the *Riwaz-i-am* and when the custom, as recorded in the *Riwaj-i-am*, is in conflict with the general custom as recorded in RATTIGAN'S DIGEST or ascertained otherwise, the entries in the *Riwaj-i-am* should ordinarily prevail except where the *Riwaj-i-am* affects adversely the rights of females who had no opportunity of appearing before the revenue authorities. The presumption would be weak and only a few instances would suffice to rebut it.[33] An entry in it recording a special custom is *prima facie* proof of that custom and the onus is on the other to rebut it.[34] A certified copy of *Riwaj-i-am* prepared by the settlement officer in 1913 is of very high evidentiary value.[35] If the *Riwaj-i-am* is a reliable and a trustworthy document, and is carefully prepared and does not contain contradictory statements relating to a custom, it would be presumptive piece of evidence in proof of the special custom set-up. The quantum of evidence necessary to rebut the presumption will, however, vary on the facts and circumstances of each case.[36]

13. *INAM* REGISTER

The Privy Council dealing with the *Inam* Register of the year 1864 observed: "It is true that the making of this Register was for the ultimate purpose of determining whether or not the lands were tax-free. But it must not be forgotten that the preparation of this Register was a great act of state, and its preparation and contents were the subject of much consideration under elaborately detailed reports and minutes. It is to be remembered that the *Inam* Commissioners through their officials, made enquiry on the spot, heard evidence and examined documents, and with regard to each individual property, the Government was put in possession not only of the conclusion come to, as to whether the land was tax-free, but of a statement of the history and tenure of the property itself. While their Lordships do not doubt that such a report would not displace actual and authentic evidence in individual cases; yet the Board, when such is not available, cannot fail to attach the utmost importance, as part of the history of the property, to the information setforth in the *Inam* Register."[37]

The Privy Council held that the title deeds and the entries in the *Inam* Register are evidence of the true intent and effect of the transaction and of the character of the right which was being recognised and continued; that the entries in the *Inam* Register and the description of the *Inam* therein were accepted as indications of the nature and quantum of the right and the interest created in the land.[38]

The two decisions above were referred to with approval by the Privy Council.[39]

The Supreme Court, **relying on** *Arunachalam Chetti's* case and the *Secretary of State* v. *Vidya Sri Varada Tirtha Swamigal* case, observed: "The entries in the *Inam* Register are evidence of the true intent and effect of the transaction and of the character of the right which was being recognised and continued. The entries in the *Inam* Register and the description of the *Inamdar* therein can be accepted as indications of the nature and quantum of the right and the interest created in the land. The entries made in the *Inam* Register are the result of an elaborate enquiry based upon oral evidence, on the spot enquiry and scrutiny of available accounts and records. The *Inam* statement is only one of the pieces of evidence which the *Inam* Commissioner might have taken into consideration in compiling the *Inam* Register. The recitals in the statement must, therefore, give place to the recitals in the *Inam* Register, though an attempt shall be made to harmonize them, if possible.[40]

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32. *Ujagar Singh* v. *Jeo*, AIR 1959 SC 1041.
33. *Jai Kaur Singh* v. *Sher Singh*, AIR 1960 SC 118 : (1960) 3 SCR 975; *Kehr Singh* v. *Diwan Singh*, AIR 1966 SC 1555
34. *Basant Singh* v. *Brij Raj Saran*, AIR 1935 PC 132.
35. *Badri Narayan* v. *Nagarmal*, AIR 1959 Bom 241; *Subhani* v. *Nawab*, AIR 1941 PC 21; *Vaishno Ditti* v. *Rameshri*, AIR 1928 PC 294. *Basant Singh* v. *Brij Raj Saran*, AIR 1935 PC 132; *Beg* v. *Allah Ditta*, ILR 1916 PC 129
36. *Saligram* v. *Mayadevi*, AIR 1955 SC 266 : 1955 SCR 1191.
37. *Arunachallam Chetty* v. *Venkata Chalapathi Swamigal*, ILR 43 Mad 263 : 1919 PC 62 : 46 IA 204
38. *Secretary of State* v. *Vidhya Sri Varudi Tirtha Swamigal*, AIR 1942 PC 21.
39. *Shankarnarayana* v. *Board of Commissioners*, AIR 1948 PC 25.
40. *Perla Swami Gounder* v. *Sundaresa Ayyar*, AIR 1965 SC 516.

The decision of the *Inam* Commissioner in *Inam* Register has great evidential value as to the nature and quantum of right and the interest in the lands in the absence of authentic evidence to the contrary.[41] Though in the absence of the original grant, the *Inam* Register is of great evidentiary value, it does not mean that the entry or entries in any particular column or columns of the Register should be accepted at their face value, without giving due consideration to other matters recorded in the Register itself. The entries cannot displace actual or authentic evidence in individual cases.[42] The inference drawn from the Register must be based on the cumulative effect of all the entries, and not on a particular phrase describing on Inam as *Hissa Shrotriem*.[43] Entries in *Inam* Register are of great evidentiary value and are almost conclusive.[44] Though there is no statutory presumption of the correctness regarding the entries in the *Inam* Register, as in the case of entries in a record of rights, yet, as the *Inam* Register was prepared after a thorough enquiry at the spot by the public officials, entries contained therein should, in the absence of actual and authentic evidence to the contrary, be given the utmost importance.[45]

In determining the question whether the grant of *Inam* was to the deity or to the *Archaka* burdened with service to the deity, it was held that in the absence of the *sanad* (grant), the entries in the *Inam Fair Register* are entitled to great weight, as the enquiry by the Inam Commissioner is a great act of State and the entries are made by the responsible officer.[46]

Inam Fair Register entries are not conclusive, but are strong piece of evidence, not to be lightly disregarded, excepting for solid and substantial reasons or contrary evidence.[47]

"Yadast Bogatta" purported to have been prepared in 1818 but not under any law or under any other orders or instructions of any authority, cannot be said to be an authentic document, especially when it was not referred to at the time of the *Inam Fair Register* enquiry, held subsequently. As that *Yadast Bogatta* is not a public document, there is no presumption regarding the correctness of its contents, and it would not prevail over the contents in the *Inam Fair Register*.[48]

14. F.I.R. AND CASE DIARY

The statements made in the F.I.R. as well as in the case diary cannot be utilised as substantive evidence even before the Claims Tribunal for the purpose of finding out about the manner of accident.[49]

15. TEXT BOOK OF ACADEMIC INTEREST

Reference in any text book of academic interest cannot be construed as a document of title.[50]

16. PROBATIVE VALUE OF ENTRIES OF A DOCUMENT ADMISSIBLE UNDER SECTION 35

Admissibility of a document is one thing and its probative value quite another—these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight or its probative value may be nil.[51] The Court or Tribunal, entrusted with the duty of ascertaining a truth on the basis of the entries of a document, relevant under Section 35, must make effort to find out the probative value of the entries contained in the document. This necessity arises from the fact that such a document is a relevant fact constituting the circumstantial evidence of which a presumption may be drawn under 114 having regard to common course of natural events, human conduct, and public and private business in relation to the facts of a particular case.[52] If an entry regarding the date of birth in the scholar's register is made on the information given by parents or some one having special knowledge of

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41. *Narayan Bhagwantrao* v. *Gopal Vinayak*, AIR 1960 SC 100.
42. *Sadavarthy* v. *Commissioner, R.C. Endowments*, AIR 1963 SC 510 : 1962 Supp (2) SCR 276.
43. *Seethamma* v. *Chalapathi*, (1969) 2 And WR 219.
44. *Brahmayya* v. *Rajeshwara Swami Temple*, AIR1953 Mad 580.
45. *Padmanabho* v. *Arjuna*, AIR 1953 Ori 92.
46. *Venkayya* v. *Srirama Murthy*, AIR 1957 AP 53; *Thirulakshmi Ammal* v. *Special Tahsildar*, AIR 1974 Mad 182.
47. *Harihar Mahapatra* v. *Hari Otha*, AIR 1950 Ori 257.
48. *V Appayya* v. *D. Narasimhamurty*, AIR 1976 AP 295.
49. *Sk Kalu* v. *Kumar Bohera*, AIR 1997 Ori 197.
50. *Karnataka Wakf Board* v. *State of Karnataka*, AIR 1996 Kant 55 (para 18).
51. *State of Bihar* v. *Radha Krishna Singh*, AIR 1983 SC 684 : (1983) 3 SCC 118.
52. *Tara Devi* v. *Sudesh Chaudhary*, AIR 1998 Raj 59 (paras 22 and 36).

the fact, the same would have probative value. But the date of birth mentioned in the scholar register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined.[53] An entry relating to date of birth made in the school register is relevant and admissible under Section 35 but the entry regarding to the age of a person in a school register is not of much evidentiary value to prove the age of the person in the absence of material on which the age was recorded.[54] Failure to rebut the entries, made in a public record, relevant under Section 35, cannot increase the evidentiary value of those entries. It will have to be assessed by the Court under Section 114, Keeping in view all relevant facts and circumstances and the common course of natural events, human conduct, and public and private business.[55]

Relevancy of statements in maps, charts and plans.

S. 36. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of the Central Government or any State Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

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COMMENTS

1. PRINCIPLE AND SCOPE

This section mentions two kinds of maps or charts, *viz.*, (1) maps or charts generally offered for public sale; (2) maps or plans made under the authority of Government. The admissibility of the first kind of maps rests upon the ground that they contain the result of inquiries made under competent authority, concerning matters in which the public are interested. The admissibility of the second class rests on the ground that, being made and published under the authority of Government, they must be taken to have been made by, and to be the result of, the study or inquiries of competent persons.

To render inquisitions, reports, surveys, and other similar documents admissible in evidence as public documents, it must appear that they were made so that the public might make use of them and be able to refer to them, for the fact that the public are interested in the documents, and are in a position to challenge or dispute them, if inaccurate.[56]

There is a distinction between relevancy and admissibility. Relevancy connotes logically probative evidence, whereas admissibility is to the legally receivable facts, irrespective of the consideration whether the legally receivable facts are or are not logically probative. Under this section, published maps, or charts generally offered for public sale, and maps or plans prepared under the authority of the Government, are relevant. In the former case, they are relevant because the publications of the maps or charts are accessible to the whole community and open to criticism of all, and the accuracy of them can be challenged, and because there is no presumption as to accuracy. In the second case of maps and plans which are made under the authority of the Government, except those prepared for a specific purpose, the presumption under Section 83 would be applicable including as regards their accuracy.[57]

This section speaks of relevancy of facts contained in the maps, charts or plans, whereas Section 83, says that the Court shall presume that the maps, or plans purporting to be made by the authority of

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53. *Birad Mal Singhvi* v. *Anand Purohit*, AIR 1988 SC 1796, at p. 1806 : 1988 Supp SCC 604.
54. *Birad Mal Singhvi* v. *Anand Purohit*, AIR 1988 SC 1796, at p. 1807 : 1988 Supp SCC 604. **Also see** *Rakesh* v. *State of Rajasthan*, 1998 Cr LJ 1434 (paras 27 and 31) (Raj).
55. *Tara Devi* v. *Sudesh Chaudhary*, AIR 1998 Raj 59 (paras 40 and 42). The Court referred to *Birad Mal Singhvi* v. *Anand Purohit*, AIR 1988 SC 1796, at p. 1808 : 1988 Supp SCC 604.
56. TAYLOR, 12th Edn., S. 1769 A, P. 1113. *Rahmat-Ulla-Khan* v. *Secretary of State*, (1913) PR No. 63 of 1913 (Civil).
57. *Ram Kishore Sen* v. *Union of India*, AIR 1965 Cal 282.

Central Govt., or State Govt., were so made and are accurate. However maps or plans made for the purpose of any cause must be proved to be accurate.

The presumption which can be raised under Section 83 of the Evidence Act, about the correctness or accuracy of the maps, charts or plans, is rebuttable.[58]

2. MADE UNDER THE AUTHORITY OF GOVERNMENT

(a) Survey Maps

When the survey maps are prepared by the Government after making enquiries in the villages, they become valuable evidence of possession, but under no circumstances they are evidence of title. As they are prepared after due enquiry they are presumed to be correct unless the contrary is proved.[59] Regarding the survey maps, there is presumption of accuracy and it is for the party who challenges it to show that they are incorrect.[60]

Statements of fact in the plans and line plans of a property purchased from the Custodian Department, purporting to be made under the authority of the Central Government, were held to be relevant.[61] A Cadastral survey map is admissible and presumed to be correct[62] but not the sketch map prepared on the basis of a cadastral map.[63] A map prepared by the municipality under the Calcutta Survey Act was held to be admissible as it is prepared under the authority of the Government.[64] Maps of different wards of a city printed by Government are admissible in evidence.[65]

This section does not say that the authority under which a map is prepared must be an authority under any statute. In the preparation of the map or chart, if the enquiry is of a public nature, and the survey was done for a public purpose, it would be sufficient under this section.

(b) Thak bast maps

During a survey of a district the *Amin* draws a map of the locality and enters in a register particulars gathered from the people. The map is called *Thak Bast* map and the register *Thak Kasra*. (*Thak* means a small boundary demarcation mark).

Thak Bast maps were held to be evidence of possession and also of title, though, they were not conclusive.[66]

The Calcutta High Court held that when the parties in the localities admitted the boundary lines of various estates of the *Thak Bast* survey based prepared maps, at that time, it constituted strong evidence that they were correct.[67]

Statements of *Zamindars* or their agents during the preparation of *Thak Bast* maps may amount to admissions by them that the land belonged to one village or the other, and such admissions can be relied on, as they were made at a time when there was dispute regarding the boundaries.[68] It was held by the Privy Council that the decree based on an entry in the remarks column of the *Thak Bast* map prepared

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58. *Shib Chandra Roy Chowdhury* v. *Harendra Lal Rai Chowdhury*, AIR 1919 Cal 752, 794; *Kamakhya Narayn Singh* v. *Abhiman Singh*, AIR 1934 PC 182 : 619 A 333 (entry in the survey Khewat).
59. *Tarakdas Acharjee Choudhury* v. *Secy. of State*, AIR 1935 PC 125; *Srinivas Chariar* v. *T.N. Evalappa Mudaliar*, AIR 1922 PC 325 : 49 IA 237; *Secretary of State* v. *Birendra Kishore*, AIR 1916 PC 141; *Ramanandhan Sahay* v. *Jaigovind*, AIR 1924 Pat 213; *Jagadindra* v. *Secretary of State*, ILR (1902) 30 Cal 291 PC : 30 IA 44.
60. *Kamakhya Narain Singh* v. *Abhiman Singh*, AIR 1934 PC 182 : 619 A 333. **Contra :** Gujarat High Court has taken a contrary view in holding that no presumption as to their accuracy could be attached when surveyors were not examined. *Prabhatbhai Shankerbhai Parmar* v. *Mahijbhai Nanabhai Parmar*, 1998 AIHC 4395 (paras 14 and 15) (Guj) (It seems that the learned counsel failed to bring to the notice of his Lordship the view of the Apex Court).
61. *Mannumal* v. *Prit Bai*, 1970 Raj LW 302.
62. *Mazharul Ekbal* v. *Gopallal*, AIR 1924 Pat 719.
63. *Coal India Ltd.* v. *Ananga Mohan Dutta*, 1998 AIHC 2877 (para 8) (Gau).
64. *Jagan Koeri* v. *Chairman, Gaya Municipality*, AIR 1937 Pat 567.
65. *Secretary of State* v. *Chimanlal*, (1941) 44 Bom LR 295 : ILR (1942) Bom 357 : AIR 1942 Bom 161.
66. *J.G.N. Pogose* v. *Mokoond Chandur Surma Sircar*, (1876) 25 WR 36.
67. *Syamasunderi Dasya* v. *Jogobundu*, ILR (1889) 16 Cal 186.
68. *Collector, Rajshahye* v. *Doorga Soondurree Debia*, (1865) 2 WR 210.

during the survey proceedings, relying on the *ex parte* statement of *Zamindar's* agent which was contradicted by the agent immediately, was unsustainable.[69]

Thak Bast maps are of great value and they are good evidence of things at the date of the Permanent Settlement in the absence of evidence to the contrary.[70]

(c) Chittas

Chittas are documents prepared by a public servant after making enquiries and survey of the fields. The Privy Council, dealing with *chittas,* held that they would not by themselves be evidence, if unsupported by other substantial evidence, but they can be treated as corroborative piece of evidence.

However, it was held that the *chittas* of the Government survey can be admitted as they are the basic records forming the basis of the survey maps, if they are verified and attested *chittas*.[71]

(d) Superimposition of Maps

The Privy Council observed: "It is true that one map was superimposed upon another, surely a very natural thing to do when land was supposed to have, undergone accretion between the two dates; but the land itself was visited and surveyed.... The results of a comparative map formed by inscribing the results of superimposition marked upon the maps used in that process formed a comparative map were not put upon a separate piece of paper which contained the outline of the alluviated land... Their Lordships are clearly of opinion that all this was in a practical region eminently cognizable by the officials acting in the revenue proceedings and eminently fit for settlement and decision by the Board of Revenue..... There is nothing wrong with this (superimposition of maps) from the legal point of view, and from the practical point of view, the revenue court can deal with it".[72]

Where the question in dispute was whether municipal plot No. 106 was a part of the cadastral survey plot Number 1090. To prove that, copies of municipal survey map and cadastral survey map prepared by the *Amin* were produced but the *Amin* was not examined. Instead, another witness who was a survey-passed pleader was examined, he deposed that he checked the copies of the maps by superimposition and he found that plot 106 was a part of plot No. 1090. It was held that, when the accuracy of the copies of the maps prepared by the *Amin*, had not been established, the conclusion derived from superimposing one map upon the other could not be accepted.[73]

There is nothing wrong in the operation of superimposition of maps and plans from the legal point of view, and the court may rely on a plan which is superimposed, provided both these plans are brought to the same scale, and no cogent reasons are shown for rejecting the plan.[74]

3. PRIVATE MAPS

Maps prepared by private persons and not under the authority of the Government, are irrelevant unless proof of the fact that they were generally offered for public for sale is given.[75] Even where private maps offered for public sale, are relevant they do not get the benefit of presumption of accuracy under Section 83 of the Act.[76]

This section is not applicable, if the documents were prepared for private purposes. In *Kanto Prashad Hazari* v. *Jagatchandra Datta,*[77] it was observed; "It appears to have been made by the Government (Deputy Collector) for a particular purpose which is not a public purpose, namely, the settlement of the silted bed of a certain river. That being so, we do not think that the provisions of Section 36 and 83 on the Evidence Act, are applicable to this map".[78] A plan prepared by a commi-

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69. *Jagadindra Nath* v. *Hemantakumari,* (1910-11) 15 CWN 887 (PC).
70. *Kumar Raj Krishnaprasad* v. *Barbani Coal Concern Limited,* AIR 1935 Cal 368.
71. *Sarasati Desi* v. *Ambikanand Biswas,* 24 WR 192.
72. *Secretary of State* v. *Roy Jatindra Nath,* AIR 1924 PC 175 : 51 IA 241 at 252, 253.
73. *Chintamani* v. *Zahiruddin,* AIR 1956 Pat 57.
74. *State of A.P.* v. *P.V. Raju,* 1959 An LT 305.
75. *Ram Kishore Sen* v. *Union of India,* AIR 1966 SC 644 : (1966) 1 SCR 430.
76. *Ram Kishore* v. *Union of India,* AIR 1966 SC 644.
77. ILR (1895) 23 Cal 335.
78. See also *Jummajoy Mullik* v. *Dwarakanath Mytee,* ILR 5 Cal 287; *Ramochandunder Sao* v. *Bunsee Dhur Nayak,* 9 Cal 714; *Secretary of State* v. *Wajed Ali,* AIR 1921 Cal 687.

assigned in a suit, even if not an integral part of the judgments of the trial and appellate courts is admissible to understand the judgments.[79] Where the Electricity Supply Company was supplying electricity outside the area of supply, and later revoked the licence given to a company, it was held by the Calcutta High Court, that the map produced by the Government to show the area of supply, was not admissible, under Section 36 since it was not prepared under the authority of the Government, and no question of presumption under Section 83 arose.[80]

4. MAPS AND PLANS IN CRIMINAL PROCEEDINGS

The Supreme Court, held that the site plan relating to the offence prepared by the Police Officer is not admissible, as it was drawn relying on the statement of witnesses during investigation, and was hit by Section 162, Cr.P.C.[81]

In *Tori Singh* v. *State of U.P.*,[82] Justice WANCHOO observed: "If the sketch map is prepared by a police inspector, basing on his own observations at the scene of offence, it can be admitted, but when he draws the sketch map based on the statement of the witnesses, it would be hit under Section 162, Cr.P.C."[83] In *Santa Singh* v. *State of Punjab,*[84], the plan produced in the case by the prosecution was drawn to scale by a draughtsman, on being shown the places by the witnesses. The witnesses also corroborated the statement of the draughtsman that they showed him the places. It was held that such map is not hit by Section 162, Cr.P.C, and it can be admitted. In that case, there was another sketch prepared by the Sub-Inspector and it was held not admissible, as it was hit by Section 162, Cr.P.C.

Relevancy of statement as to fact of public nature, contained in certain Acts or notifications.

S. 37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament of the United Kingdom or in any Central Act, Provincial Act or a State Act or in a Government notification or notification by the Crown Representative appearing in the Official Gazette or in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony or possession of His Majesty, is a relevant fact.

COMMENTS

1. PRINCIPLE AND SCOPE

Acts of Parliament of the United Kingdom, or of the Central Government or of Provincial or State Government, are admissible in evidence when the Court has to form an opinion as to the existence of any fact of a public nature stated therein. Under Section 81 the Court "shall presume" the genuineness of these documents. These documents, as well as all others of a public nature, are generally admissible in evidence, although their authenticity is not confirmed by the usual test of truth, namely, the swearing, and the cross-examining, of the persons who prepared them.

Public statutes are judicially noticed and no proof of them is required.

"Statements contained in any public statute, speech from the throne, Royal Proclamation, Parliamentary journal, Government gazette or State paper are admissible in evidence to prove facts of a public nature. The journals of either House of Parliament are proved by copies purporting to be printed by the printer to either House, and are admissible as evidence of the facts relating to parliamentary procedure recorded in them."[85]

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79. *Joseph* v. *Makkaru,* AIR 1960 Ker 7.
80. *Electric Supply* v. *State of W.B.,* AIR 1958 Cal 85.
81. *Dharam Singh* v. *State of U.P.,* (1962) Supp. (3) SCR 769 : (1964) 1 CrLJ 78 (SC).
82. AIR 1962 SC 399.
83. *Bhgirathi Chowdhury* v. *Emperor,* AIR 1926 Cal 550; *Ibraakanda* v. *Emperor,* AIR 1944 Cal 339; *Empress of India* v. *Idu Beg,* ILR 3 All 776; *Kalia* v. *Emperor,* AIR 1925 Cal 959.
84. AIR 1956 SC 526.
85. HALSBURY'S LAWS OF ENGLAND, Vol. 17, page. 111 (para 151).

"Statements contained in any public statute, speech from the throne[86], royal proclamation[87], parliamentcary journal[88] government gazette[89] or state paper[90] are admissible in evidence[91] to prove facts of a public nature[92].

The journals of either House of Parliament are proved by copies purporting to be printed by the printer to either House[93], and are admissible as evidence of the facts relating to parliamentary procedure recorded in them.[94]"

2. FACTS SHOULD BE OF PUBLIC NATURE

Under this section the fact as to the existence of which the Court has to form an opinion should be a fact of public nature. The expression 'public nature' is used in Section 42 also. Under Section 35 an entry in any public or other official book, etc., made by a public servant in the discharge of his official duty, and under Section 36, statement of facts in issue or relevant facts made in published maps or charts offered for public sale, or in the maps or plans made under the authority of the State Government or Central Government, are made relevant. Section 57 says that the court shall take judicial notice of all Public Acts passed by Parliament. Whereas Section 78 deals with the mode of proof of such Acts, orders or notifications of the Government, Section 81 deals with the presumption to be drawn by the court about the genuineness of the official gazette, if they are substantially in the form required by law and are produced from proper custody.

Where public statutes recited that great outrages had been committed in a particular part of the country, and a public proclamation was issued, with similar recitals, and offering a reward for the discovery and conviction of the perpetrators, these recitals were held admissible and sufficient evidence of the existence of those outrages, to support the averments to that effect in an information for a libel on the Government in relation thereto. So, a recital of a state of war in the preamble of a public statute, is good evidence of its existence, and the war will be taken notice of without proof, whether this country be or be not a party to it.[95]

In England a private Act of Parliament is not evidence of the facts recited against strangers. This section makes no distinction between Private and Public Acts and makes the recital admissible provided the fact recited is of a publication.

Entries in a diary in a solicitor's office, though a contemporaneous record maintained in the ordinary course of business, are not admissible for showing the truth of the contents of those entries, under this section. They may be admissible under Section 32, and may also be admissible under Section 157 as corroborative of other evidence.[96]

The word "notification" means a formal declaration, proclamation and publication of an order of a Government which shows it as an act of authority. Under the Land Acquisition Act, the Government, by the issue of a notification, shows its intention to acquire property and it is relevant under this section.[97]

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86. *R.* v. *Francklin,* (1731) 17 H. State Tr 625 at 636-638.
87. *R.* v. *Sutton,* (1816) 4 M & S 532; *R.* v. *De Berenger,* (1814) 3 M & S 67.
88. *A-G* v. *Bradlaugh,* (1885) 14 QBD 667 (CA); *Forbes* v. *Samuel,* (1913) 3 KB 706 at 721.
89. *R.* v. *Holt,* (1793) 5 Term Rep 436; *A-G* v. *Theakstone,* (1820) 8 Price 89.
90. *E.g.* an official dispatch; **see** *Thelluson* v. *Cosling,* (1803) 4 Esp 266.
91. Such statements are not conclusive evidence: **see** *R.* v. *Greene,* (1837) 6 A & E 548; *R.* v. *Francklin,* (1731) 17 H. State Tr 625.
92. At common law such statements were admissible as being statements in public documents. They are now admissible in civil cases by virtue of the Civil Evidence Act 1968, S. 9(2)(c): **see** para 76, *ante*.
93. Evidence Act 1845, S. 3. No proof is required that such copies were in fact so printed; S. 3.
94. *A-G* v. *Bradlaugh,* (1885) 14 QBD 667 (CA), when a cause is being tried in London, and a journal of the House is required in evidence, it is usual for an officer of the House to attend with the necessary volume; in other cases a certified copy of the required entry in the journals can be obtained from the Journal Office of the House; **see** ERSKINE MAY'S PARLIAMENTARY PRACTICE (19th Edn.) 247, 253. Journals, minutes of evidence and other parliamentary documents may only be produced by leave of Parliament, which is given during recess by the Speaker: **see** ERSKINE MAY'S PARLIAMENTARY PRACTICE (19th Edn.) 89, 253. The test roll of the House of Commons and the official copy of the division lists are admissible in evidence; *Forbes* v. *Samuel,* (1913) 3 KB 706.
95. TAYLOR, 1660.
96. *Md.Yusuf* v. *D.,* AIR 1968 Bom 112.
97. *Kashmirilal* v. *State of Punjab,* AIR 1984 Punj 87.

A statement made in the gazette notification that an Act has been assented to by the President is proof of that fact.[1]

In *Jyotindra Mohan Tagoe* v. *Brojo Sundari*,[2] it was held that the Government Gazette containing the advertisement of sale and the condition of sale appended in a printed paper which were issued in the name of the Master, from the office of the Master of the Court office, can be admitted in evidence to prove the actual conditions of the sale.

In the *Wahabi* trials, several official letters which were published in the Gazette of India and the Calcutta Gazette were admitted as evidence regarding hostility between British Government and certain Mahammaden rebels in the Frontier.[3]

The Gazette will be judicially noticed on its mere production, provided the entire paper and not a mere cutting is shown.[4]

In *District Bar Association, Kurukshetra* v. *State of Haryana (FB)*[5] the Court observed that creation of new districts is the discretion of the State Government and the Court cannot interfere. However, the Court can take judicial notice of the absence of judicial complexes due to paucity of funds and inconvenience caused to all and the Government should pay attention to it.[6]

Relevancy of statements as to any law contained in law books.

S. 38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

COMMENTS

1. PRINCIPLE AND SCOPE

Statements in books of law and in law reports are admissible on grounds similar to those stated in sections 35, 36 and 37.

Section 3 of the Indian Law Reports Act 18 of 1875, states that no Court shall be bound to hear, cite, or shall receive or treat as an authority binding on it, the report of any case decided by any of the said High Courts on or after the said day, other than a report published under the authority of the Governor General in Council.

The Madras High Court held that the above said Act has no application to the decisions of the Privy Council and the Courts are at liberty to refer to an unauthorised report of the decision of the Privy Council, and once the Court is satisfied that it is a correct report, it is bound to follow it.[7]

When a view was expressed in a judgment of a High Court which was not officially published in the Indian Law Reports, it was not to be followed blindly like the one officially published.[8]

When the Court is satisfied about the accuracy of the judgment placed before it, whether it is officially published or unofficially reported, or is a certified copy, it is the duty of the Judge to follow it.

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1. *Gajapati Narayan Dev* v. *State of Orissa*, AIR 1953 Ori 188.
2. 1864 WR 50.
3. *R.* v. *Amiruddin*, 7 BLR 63 : 15 WR 25 (Cri) 25.
4. *R* v. *Lowe*, (1883) 15 Cox 286; (PHIPSON'S EVIDENCE 13th Edn. p. 512) (para 25.10).
5. AIR 1997 P&H 231, **following** *J.R. Raghupathy* v. *State of A.P.*, (1988) 4 SCC 364 : AIR 1988 SC 1681 and *Sundarjas Kanyalal Bhathija* v. *Collector, Thane*, (1989) 3 SCC 396 : AIR 1990 SC 261. The Court referred to CW No. 10428 of 1995, decided on 27.3.1996 (P&H).
6. AIR 1997 P&H 231, **following** *J.R. Raghupathy* v. *State of A.P.*, (1988) 4 SCC 364 : AIR 1988 SC 1681 and *Sundarjas Kanyalal Bhathija* v. *Collector, Thane*, (1989) 3 SCC 396 : AIR 1990 SC 261. The Court referred to CW No. 10428 of 1995, decided on 27.3.1996 (P&H).
7. *(Nawab) Shuja-ul-Mulk* v. *Umir-ul-Umra Bahadur*, AIR 1926 Mad 20.
8. *Muralidhar* v. *Anand Rao*, AIR 1925 Nag 414.

The Indian Law Reports Act is nothing more than an addendum to Section 78 of the Evidence Act. An officially certified copy of the Judgement of a High Court is bound to be treated in the same way as an officially reported judgment.[9]

A Judge cannot disregard an unreported ruling of the High Court to which he is subordinate. Section 3 of Act 18 of 1875 does not prevent the court from looking at an unreported judgment.[10]

It was held by the Calcutta High Court that, going strictly by Section 38, the report of a judgment in a case, in a newspaper, does not appear to be relevant, because a newspaper cannot be regarded as a book purporting to be a report of the rulings of the Courts; the presumption under Section 84 cannot also arise, strictly speaking; all the same, a report of a case reported only in the newspaper 'Statesman' was allowed to be relied upon.[11]

2. FOREIGN LAW

When it is necessary to form an opinion as to the law of any country, statements of such law in a book published under the authority of Government of that country and reports of cases decided by courts of that country and contained in books purporting to be reports of such rulings, are relevant, that is, may be referred to by the court.

Section 45 of this Act says that when the court has to form an opinion upon a point of foreign law, opinions of skilled persons in such foreign law would be relevant. Section 84 of this Act, says that the court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country and to contain any of the laws of that country and of every book purporting to contain reports of decisions of the court of such country. The only effect of Section 38 and 84 read together is that the Court may take judicial notice of a publication containing a foreign law, if it is issued under the authority of the foreign government concerned, and may be accepted, as set-out in such publication, as a law in force in the particular foreign country at the relevant time. But such a publication cannot be evidence that what is contained in it is the whole law. What the whole law of a foreign country at a particular point of time is, cannot, therefore, be proved except by calling in an expert, as provided for in Section 45, Evidence Act.[12]

Where the original record of the Law of Limitation passed prior to 1942 in Kota State was not available, that which was purported to have been published under the authority of His Highness of Kota was presumed to be genuine, and the law of limitation contained therein relevant. The fact that it did not contain reference to the order of His Highness could not lead to an inference that the law did not receive His assent. The presumption is in favour of its validity.[13]

A statement contained in an unauthorized translation of the Code Napoleon as to what the French Law is, on a particular matter, is not relevant.[14]

Production of a copy of a foreign Government Gazette attested as true copy by a seal of the Court is not the mode approved by this Act, for proving a foreign law and the Court cannot take notice of such copy, for the purpose.[15]

No Court takes judicial notice of the laws of a foreign country, but they must be proved as facts.

"Where it is necessary for an English Court to know or apply the law of any country or territory outside the United Kingdom, or of any part of the United Kingdom other than England and Wales, that law may be proved in civil poceedings by a person suitably qualified to give expert evidence of such law on account of his knowledge or experience. It is immaterial whether he has acted or is entitled to act as a legal practitioner in the country concerned. A court is not generally entitled to construe a foreign code itself, without expert assistance, but, where any question as to the law of any country or territory outside the United Kingdom or any part of the United Kingdom other than England and Wales with respect to any matter has already been determined, and any finding made or decision adduced before the court (which must be done on notice), the law will be taken to be in accordance with the finding or decision,

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9. *Vinayak* v. *Moreshwar*, AIR 1944 Nag 44.
10. *Mahomed Ali* v. *Nazarali*, ILR (1901) 28 Cal 289.
11. *State* v. *Sardar Bahadur*, AIR 1969 Cal 451.
12. *Jagdish* v. *I.T. Commissioner*, AIR 1956 Cal 40.
13. *Bhanwarlal* v. *Lila Dhar*, 1959 Raj LW 323.
14. *Christien* v. *Delanney*, (1899) 26 Cal 931.
15. *Ramanlal* v. *Ramgopal*, ILR (1954) 4 Raj 262 : AIR 1954 Raj 135.

unless the contrary is proved, unless there are conflicting decisions on the same question adduced by virtue of the same provision of the same poceedings."[16]

Foreign law need not be proved if it is admitted.[17]

In exceptional circumstances and with the parties' consent a court can itself decide a question of foreign law.[18]

HOW MUCH OF A STATEMENT IS TO BE PROVED

What evidence to be given when statement forms part of a conversation, document, electronic record, book or series of letters or papers.

[19][S. 39. When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or is contained in part of electronic record or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, electronic record, book or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.]

SYNOPSIS

1. *The Information Technology Act, 2000—How much statement is to be proved* ... 491
2. *General* ... 491
3. *Statement* ... 492
4. *Discretion of Court* ... 492

COMMENTS

1. THE INFORMATION TECHNOLOGY ACT, 2000—HOW MUCH STATEMENT IS TO BE PROVED

Section 39 has been recast by the Act above so as to accommodate the words "electronic record".

2. GENERAL

When evidence is given of a statement which forms part of (a) a longer statement or (b) a conversation, or (c) an isolated document, or (d) a document contained in a book, or (e) a series of letters or papers, the Court has the discretion as to how much evidence should be given of the statement, conversation, document, book, or series of letters or papers, for the full understanding of the nature and effect of the statement and the circumstances under which it was made. The principle on which this section is based is that it would not be just to take part of a conversation, letter, etc., as evidence against a party, without giving to the party, at the same time, the benefit of the entire residue or what he wrote or said on the same occasion.[20]

Thus, the rule enacted in this section will not warrant the reading of distinct entries in an account book, or distinct paragraphs in a newspaper, unconnected with the particular entry or paragraph relied on by the opponent.

If such a restriction is not there, much time of the Court would be wasted and some inadmissible matter would also be let in. Thus the rule contained in this section is founded on convenience and justice.

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16. HALSBURY'S LAWS OF ENGLAND 4th Edition, Vol. 17 (para 93), Page 68.
17. *Moulis* v. *Queen*, (1907) 1 KB 746 CA.
18. *Beatty* v. *Beatty*, (1924) 1 KB 807 at 914 CA; *Jabbour* v. *Custodian of Israeli Absentee Property*, (1954) 1 All ER 145 at 153.
19. Substituted by the Information Technology Act, 2000, S. 92, Sch. II (w.e.f. 17.10.2000).
20. *Queen's case* (1820) 2 Br & B 284, 302.

3. STATEMENT

Dealing with Section 157 of this Act, the Supreme Court held that the word 'statement' has been used in a number of sections of the Act in its primary meaning of "something that is stated", that a "statement" may be made to some one in the sense of a communication, but that is not its primary meaning; that there is no reason to hold that communication to another is the essence, and there cannot be a statement without communication.[21]

4. DISCRETION OF COURT

In the case of an admission or confession the whole of it must be taken; it is unfair to take that which is against the declarant's interest as the very next sentence may contain a material qualification.[22]

It is the court which has to consider what is necessary to make a statement intelligible.[23]

When a police officer uses the police diary to refresh his memory, the accused is entitled to see not only the entry relied on by the officer but so much of the diary as in the opinion of the court may be necessary to the proper understanding of the entry.[24]

This section cannot be invoked for the purpose of allowing a confession in respect of which there is a bar, under Sections 24, 25 and 26 of the Evidence Act, which is not removed by Section 27. It was never intended that a matter, which is expressly ruled out, should be allowed to come in the garb of an explanatory statement.[25]

JUDGMENTS OF COURTS OF JUSTICE, WHEN RELEVANT

Previous judgments relevant to bar a second suit or trial.

S. 40. The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial.

SYNOPSIS

1. *Principle* ... 492
2. *Civil Cases—Judgment inter partes* ... 494
3. *Civil Cases—Judgment not inter partes* ... 495
4. *Land acquisition cases* ... 495
5. *Criminal proceedings* ... 496
6. *Criminal Court judgment whether binding on Civil Court* ... 496
7. *Prior Judgement in Civil Proceedings whether binding in later Criminal Proceeding* ... 497

COMMENTS

1. PRINCIPLE

Sections 40 to 43 deal with the relevancy of judgements.

Judgements, *qua* judgements or adjudications are admissible as *res judicata* under this section, and as relating to matters of public nature under Section 42. Judgements other than those mentioned in Sections 40, 41 and 42 may be relevant under Section 43, if their existence is a fact in issue or is relevant under some other provision.

Under this section, the existence of a judgement, decree, or order, is a relevant fact, if, by law, it has the effect of preventing any Court from taking congnizance of a suit, or holding a trial. It is intended to

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21. *Bhogilal* v. *State*, AIR 1959 SC 356 (see commentary under Section 157).
22. WOODROFFE 9th Edition Page 406.
23. *Karam Din* v. *Emperor*, AIR 1929 Lah 338.
24. *R.* v. *Mannu*, ILR 19 All 390 (FB).
25. *Sukhan* v. *Emperor*, 1929 Lah 344 : ILR 10 Lah 283.

include all cases in which a general law relating to *res judicata* inter partes applies. The main object of the doctrine of *res judicata* is to prevent multiplicity of suits and interminable disputes between litigants. *Res judicata* means, by its very words, a thing upon which the Court has exercised its judicial mind. Section 11 of the Civil Procedure Code lays down the law as to *res judicata*.

This section has nothing to do with questions of evidence beyond the admissibility of the judgements, because a plea of *res judicata* is not a plea as a matter of evidence, but only a plea barring the action as a matter of procedure as distinguished from the rules of evidence.[26]

STEPHEN in his Digest (7th Ed., p. 175) has observed: "The subject, as ordinarily dealt with, introduces into the Law of Evidence, an attempt to distinguish between judgments *in rem*, and the judgments *in personam* or *inter partes*, the question of the effect of the pleas of *autrefois acquit and autrefois convict*, which belongs to criminal procedure; the question of estoppel, which belongs rather to the law of pleading than to evidence; and the question of the effect given to the judgments of foreign courts of justice, which would seem more properly to belong to private international law".

The principle is that when once an issue was tried and determined by a competent civil or criminal court, the same cannot be reopened between the same parties to such an adjudication or their privies. In other words, no one ought to be twice harassed, if it be clear to the Court that it is for one and the same cause. This rule is consistent with justice to the individual. It is also for the benefit of the State that there should be a limit to litigation.

The intendment of the section is that judgments *inter partes* in a previous proceeding can be taken cognizance of in a later proceeding between the same parties or their privies, to decide a question whether, it can proceed with the trial of the subsequent proceedings. GARTH C.J., observed: "But, I cannot doubt that it was intended to include all judgments which by law operate to prevent the Court, whether civil or criminal, from taking cognizance of a suit or trying any particular issue. The words 'holding a trial' are amply large to admit of this construction".[27]

If judgments do not fall within one or the other of Sections 40 to 43, they must be held to be irrelevant unless they can be brought under any other provision of the Act. Under this section, previous judgments can be admitted in evidence in support of a plea of *res judicata* in civil cases or *autre fois acquit or autre fois convict* in criminal cases.[28]

This section applies where a Court has jurisdiction to decide a matter, and one of the parties to the suit raises the plea of *res judicata* and claims that the Court cannot proceed to decide the case because the matter was already decided earlier.[29]

Sections 40 to 42, were held not applicable to the proceedings before the Motor Accidents Tribunal and the criminal courts' judgments cannot be taken as relevant in the tribunal's proceedings, as the Motor Vehicles Tribunal has to come to independent conclusions for awarding compensation to the injured or the heirs of the deceased who were involved in the motor vehicle accident; and the degree of negligence on the part of the driver required to be proved in a civil action is different from the one the law requires in a criminal prosecution.[30]

However, the Karnataka High Court has held that the fact of conviction is relevant before the Claims Tribunal, under Section 43 of the Act.[31]

Under Sections 40 to 44 of this Act, a judgment is not admissible to prove that the plaintiff filed a false case.[32]

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26. *Collector of Gorakhpur* v. *Palkdhari Singh*, ILR (1880) 12 All 1, 44 FB.
27. *Gujjulal* v. *Fathelal*, 6 Cal 171.
28. *Ramanamma* v. *Appalanarasayya*, ILR 55 Mad 446; *Kashyap* v. *Emperor*, AIR 1945 Lah 23 (FB); *Mahabir Mahton* v. *Sonmati Kuer*, AIR 1964 Pat 66; *Purnima Debya* v. *Nandalal*, AIR 1932 Pat 105; *Ram Parekha Pande* v. *Ramjhari Kuer*, AIR1933 Pat 690; *Ajmer Singh* v. *Jangir Singh*, AIR 1952 Pepsu 76.
29. *Lakshan* v. *Ramdas*, AIR 1929 Cal 374 (FB).
30. *Prabhakar Babusso Chodankar* v. *Meria Victoria (Smt.)*, 1977 Goa 15; *Mahuir Pershad* v. *Municipal Corporation of Delhi*, 1975 ACJ 190 (Del); *Municipal Committee Jullundhar* v. *Romesh Saggi*, AIR 1970 Punj 137; *Yaginder Paul Chowdhry* v. *Durga Das, Punj.*, 1972 ACJ 483.
31. *Vinobabbai* v. *K.S.R.T.C.*, (1979) 1 Kant LJ 257; *Badrinarayan Prasad* v. *Anilkumar Gupta*, AIR 1979 Pat 204.
32. *Miyana Hasan Abdulla* v. *State of Gujarat*, AIR 1962 Guj 214.

2. CIVIL CASES—JUDGMENT *INTER PARTES*

The Supreme Court, observed: "The principle of *res judicata* is based on the need of giving finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall not be adjudged again. Primarily, it applies as between past litigation and future litigation. When a matter, whether on a question of fact, or on a question of law, has been decided between two parties in one suit or proceeding, and the decision is final, either because no appeal was taken to a higher Court, or because the appeal was dismissed, or no appeal lies, neither party will be allowed, in a future suit or proceeding between the same parties, to convass the matter again. The principle of *res judicata* is embodied in relation to suits under Section 11, C.P.C. but even where Section 11, C.P.C., does not apply, the principle of *res judicata* has been applied by Courts for the purpose of achieving finality in litigation. The result of this is that the original Court as well as the higher Court must, in any future litigation, proceed on the basis that the previous decision was correct".[33]

SIR LAWRENCE JENKINS, in *Sheo Parsan Singh* v. *Ramnandan*[34] observed: "It has been well said" declared LORD COKE, '*interest republicae ut sit finis litium*. Otherwise, great oppression might be done under colour and pretence of law'. Though the rule of the Coke may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu Commentators. VIJNANESWARA and NILKANTA include the plea of a former judgment among those allowed by law, each citing for this purpose the text of KATYAYANA, who describes the plea thus: 'If a person, though defeated at law, sues again', he should be answered, 'you were defeated formerly'. This is called the plea of former judgement. And so the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law."[35]

Where the present controversy was directly and substantially in issue in the former suit against the defendants, the decision in the prior suit is conclusive and the present contentions of the defendants are barred by *res judicata* and the previous judgment is relevant under Section 40.[36] Where there was a decision of the High Court, in an earlier petition between the same parties, issuing directions to the respondent Government, and the Government did not follow the directions but issued fresh notification for acquisition, it was held that the decision in the earlier petition was binding on the Government on the principle of *res judicata*.[37] Where, in a previous suit, a decree was obtained under fraud or collusion, it was held that it could be relied on for the purpose contemplated under Section 40 & 44, and the collusive decree would still be relevant to support the plea of estoppel if the ingredients of estoppel were made out.[38]

Section 11 of the Civil Procedure Code dealing with this type of principle does not cover all cases of estoppel by judgment.[39] Even though, the previous judgment between the same parties may not operate as *res judicata* under Section 11, C.P.C., nevertheless, it would be a valuable piece of evidence under Section 40, and a party would be estopped from contesting the correctness of the judgment.[40]

A finding of fact arrived at on the evidence before the court in one case cannot be evidence of that fact in another case and this evidence even if admissible would be of very little weight.[41] Where a judgment was not *in rem*, nor relating to matters of public nature, nor between the parties to a subsequent suit, a point decided in a particular way cannot be held relevant in another case, for the purpose of the decision of the same question in a subsequent suit.[42] A finding in a previous suit *inter partes* would not

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33. *Satyadhyan* v. *Deorajin Debi*, AIR 1960 SC 941 : (1960) 3 SCR 590 at 594.
34. AIR 1916 PC 78 : 43 IA 91, 98.
35. *Kalipada De* v. *Dwijapada Das*, 57 IA 24 : AIR 1930 PC 22; *Hook* v. *Administrator General of Bengal*, 48 IA 187 : AIR 1921 PC 11.
36. *Joseph alias Kochu* v. *Makkaru Pillai*, AIR 1960 Ker 127. **See also** *Udit Gopal Beri* v. *State of Rajasthan*, AIR 2001 Raj 147 (paras 4, 6, 7 and 9).
37. *Ramprasad* v. *State of U.P.*, AIR 1988 All 309.
38. *Ibne Hasan* v. *Hasina Bibi (Smt.)*, AIR 1984 All 216.
39. *Ramamurthy Dhora* v. *Secretary of State*, AIR 36 Mad 141.
40. *Ybka Rajamma* v. *P.Y. Digantam Buthiramayya*, (1967) 2 An LT 283.
41. *Gopika Raman Roy* v. *Atal Singh*, 56 IA 119 at 125 : AIR 1939 PC 99; *Govinda* v. *Shamlal*, 58 IA 125 : AIR 1931 PC 89; *Ramaji* v. *Manohar*, AIR 1961 Bom 169.
42. *Maharaja Sir Kesho Prasad Singh Bahadur* v. *Bahuria Bhagjogna Kuer*, AIR 1937 PC 69.

operate as *res judicata* but the party against whom finding was given is bound to displace that finding.[43] A finding in a judgment in order to operate as *res judicata*, must be material and necessary to support the precise and particular ground or grounds on which the decree or some operative part of it was made. Otherwise, the finding must be considered either as superseded by the decree, or as entirely immaterial, or as no more than incidental and subsidiary to the main question in the suit, although in the latter case the finding may have been necessary to the decision of the court.[44]

Whether an adverse finding against a successful party is *res judicata* or not depends on the right of appeal, against that finding.[45] A party aggrieved by a finding in a decree favourable to a party has no right of appeal; unless the finding is necessarily implied in the decree and has prejudiced the party wishing to appeal, such a finding does not operate as *res judicata*.[46] An unappealable finding may operate as *res judicata*.[47]

Where the decision of the Court on an issue was unnecessary to dispose of the prior suit, it would not operate as *res judicata* in a subsequent suit.[48]

3. CIVIL CASES—JUDGMENT NOT *INTER PARTES*

BEST (8th Ed, Section 590, p. 543) states: "The record of a Court of justice consists of two parts, which may be denominated respectively the substantive and judicial portions. In the substantive portion, the Court records or attests its own proceedings and acts. It can neither be allowed to be contradicted nor to be proved in any other way than by the production of the record itself; or by copies proved to be true in the prescribed manner. In the judicial portion, on the contrary, the Court expresses its judgment or opinion on the matter in question. In forming that opinion it is bound to have regard only to the evidence and arguments adduced before it by the respective parties to the proceedings. Such a judgment, therefore, with respect to any third person, who was neither a party nor privy to the proceedings in which it was pronounced, is only *res inter alios judicata*, and hence the rule that it does not bind and is not, in general evidence, against any one who was not such party or privy."[49]

A right in dispute cannot be proved on the basis of the findings in respect of that right in a previous suit not *inter partes;* hence previous judgment is not relevant.[50] A finding in judgments not *inter partes* about the title or possession of the property would be irrelevant in a suit for an injuction restraining the defendant from interfering with plaintiff's possession of property.[51] A judgment not *inter partes* is admissible only as showing that certain observations were made on certain facts found in a certain judgment, but is not admissible as evidence of the truth of the facts found or observations made.[52]

4. LAND ACQUISITION CASES

Judgments not *inter partes* would be relevant if they relate to similarly situated properties and contain determination of value on the dates fairly proximate to the relevant date.[53]

For detailed discussion of cases relating to *res judicata*, reference may be made to commentary Section 11, C.P.C. in standard treatises on Civil Procedure Code.

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43. *Joseph alias Kochu* v. *Makkaru Pillai*, AIR 1960 Ker 127.
44. *K. Venkatasubbayya* v. *Virayya*, AIR 1957 AP 981; **see contra** *K. Virayya* v. *K. Venkatasubbayya*, AIR 1955 AP 215; *Abdeali Abdul Hussain* v. *Taiyab Ali*, AIR 1951 Nag 355; *Gourisankar* v. *Gurupada Haldar*, AIR 1931 Cal 511.
45. *Muthaya Setty* v. *Kantappa Setty*, 34 MLJ 431; *Parbati* v. *Mathura*, ILR 40 Cal 29.
46. *Secretary of State* v. *Swaminatha*, ILR 37 Mad 25 : AIR 1915 Mad 294.
47. *Peary Mohan* v. *Ambica*, ILR (1896) 24 Cal 900.
48. *Angati Venkateswarlu* v. *Maharanipeta Military Mosque*, AIR 1972 AP 132.
49. *Ram Kirpal* v. *Munabati*, AIR 1958 Pat 477.
50. *Hiralal* v. *Harinarain*, AIR 1964 All 302.
51. *Gopal Krishna Guptan* v. *Ammalu Ammal*, AIR 1972 Ker 196.
52. *Muneswari* v. *Jugal Mohini Dasi*, AIR 1952 Cal 368; *Ramaji Batanji* v. *Manohar Chintaman*, AIR 1961 Bom 169.
53. *Land Acquisition Officer, City Improvement Trust, Bangalore* v. *H. Narayanaian*, AIR 1976 SC 2403; *Collector of Bilaspur* v. *Lachhman*, AIR 1965 HP 18; *State of U.P.* v. *Nathhoo*, AIR 1986 All 172; *Madan Mohan Burman* v. *Secretary of State*, AIR 1925 Cal 481; *Mariam* v. *State*, AIR 1980 Ker 176; *Bombay* v. *Lakhamsi Ghelabai*, AIR 1960 Bom 78; (cannot be regarded as good law in view of the decision of the Supreme Court).

5. CRIMINAL PROCEEDINGS

The principle of this section applies to criminal courts as well. The plea of *autrefois convict* or *autre fois acquit*, that is, of a previous lawful conviction or lawful acquittal, has always been held to be a good plea.

See Section 403, Criminal Procedure Code.

The Privy Council in *Sambasivam* v. *Public Prosecutor*[54], held that the principle of *res judicata* is applicable to criminal proceedings, because a finding has been reached by a competent court in favour of an accused and it constitutes *res judicata* against the prosecution. But it is not a bar to the trial and conviction of an accused for a different or distinct offence. That finding only precludes the reception of evidence to disturb the finding of a fact in issue, provided that the parties are the same and the fact in issue, proved or not, is identical with what is sought to be subsequent trial.[55]

Where there are two different trials for distinct offences, arising out of different transactions, and the common object in both the cases is different, acquittal in one does not bar the conviction in the other case, because the reasoning of the judgment of acquittal is not admissible as evidence in the other.[56]

Following the above case, the Allahabad High Court held that neither the reasons for acquittal in earlier case, nor the evidence on record, is relevant for the decision in the later case. Though the two offences in the two cases were the same offence of dacoity at night, the circumstances in the two cases are different. It was further observed that the reasoning in the earlier judgment could not be relied upon as it proceeded on evidence which was recorded separately and which was considered separately. The earlier judgment could be admissible only if it fulfilled the conditions laid down in sections 40 & 43 of the Evidence Act. The earlier judgment was admissible to show the parties and the decision, but was not admissible for the purpose of relying upon the appreciation of evidence.[57]

Where an exporter of handloom cloth was charged for tampering with bales of goods before loading, the case was split up into two cases according to the two different invoices on different dates. The accused was acquitted in the first case. When the second case was taken up for trial, an application was filed for quashing the proceedings in the second case. The Supreme Court held, that the application for quashing the proceedings was not maintainable as the two cases stood on two different footings, though the object might be same.[58] Where several persons apprehended in an offence of dacoity, were tried and acquitted, and afterwards two more accused connected with the same dacoity and who were absconding were arrested and tried separately, it was held that the finding given in the previous trial of the other accused was not binding in the second trial concerning the two other accused.[59]

6. CRIMINAL COURT JUDGMENT WHETHER BINDING ON CIVIL COURT

The judgment of a Criminal Court that a person did or did not commit an offence, does not operate as *res judicata* to prevent a Civil Court from determining such questions for purposes of a suit.[60]

The Supreme Court has held: "Where in a proceeding for revocation of the grant of probate under Section 263, Succession Act, the question is whether the son of the testator murdered him, it cannot be assumed, on the basis of a previous judgment of a Criminal Court convicting the son of the murder of his father and sentencing him to transportation for life, that the son was the murderer of the testator. The judgment of the Criminal Court is relevant only to show that there was such a trial, resulting in the conviction and sentence of the son to transportation for life. It is not evidence of the fact that the son was the murderer of the testator. That question has to be decided on evidence.[61]

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54. 54 Cal WN 695.

55. *Pritam Singh* v. *State*, AIR 1956 SC 415; *Mohar Rai* v. *State*, AIR 1968 SC 1281; *Piara* v. *State*, AIR 1969 SC 961; *Manipur Administration* v. *Bira Singh*, AIR 1965 SC 87; *Bajrang Ram Bhadani* v. *Bharath Ram Razak*, 1974 BLJR 121.

56. *Kharkan* v. *State of U.P.*, AIR 1965 SC 83.

57. *Ali Hasan* v. *State*, 1975 CrLJ 345 (All).

58. *S.P.E. Madras* v. *K.V. Sundaravelu*, AIR 1978 SC 1017.

59. *Sheonandan* v. *State* AIR 1964 All 139. **See also** *Pritam Singh* v. *State of Punjab*, AIR 1956 SC 415.

60. *Ram Lal* v. *Tularam*, (1881) 4 All 97; **See** *Bishen Das* v. *Ram Lubhaya*, 32 IC 18 Pr. No. 106 of 1915 (Civil).

61. *Anil Bihari* v. *Lakika Bala Dassi (Smt.)*, AIR 1955 SC 566.

A Criminal Court judgment can be relevant only to establish the fact that an acquittal had taken place in a civil suit for damages in a malicious prosecution case.[62] It cannot be relied on as one binding in a civil action[63] but it still holds the field of proof by corroboration.[64] It can be admitted in a civil proceeding (departmental enquiry) for purposes of showing that there was a criminal case of identical facts, ending in acquittal.[65] When a person was prosecuted by the Sales Tax Department and he was acquitted, it was held that the judgment of the Criminal Court is admissible though it did not debar the Sales Tax authority from assessing him.[66]

It is a well-recognised principle of law that a conviction in a criminal case is no evidence of the facts on which that conviction was based, in a civil case in which those facts are in issue or form the subject-matter of the suit. But, the authorities are clear that when the conviction is based on a plea of guilty that plea is relevant and to prove it, the judgment in the criminal case is admissible in evidence in the subsequent civil suit in which the facts giving rise to the charge are in issue or form the subject-matter of the suit.[67]

7. PRIOR JUDGEMENT IN CIVIL PROCEEDINGS WHETHER BINDING IN LATER CRIMINAL PROCEEDING

The judgement of a Civil Court is not admissible in a criminal prosecution, for proving the innocence of the accused.[68] In a Bombay case, the judgment of a Civil Court dismissing a suit to recover moneys was held relevant in a prosecution for criminal breach of trust for some of the items covered by the civil suit.[69]

In a criminal trial, it is for the court to determine the question of the guilt of the accused, and it must do this upon the evidence before it, independently of decisions in civil litigation between the same parties. A judgment or a decree is not admissible in evidence in all cases as a matter of course and, generally speaking, a judgment is only admissible to show its date and legal consequences.[70]

A judgement of a Civil Court, other than one *in rem,* cannot finally decide a matter subsequently dealt with in a Criminal Court, even though the facts in dispute in the civil suit govern the only question that can arise in the criminal proceedings.[71]

To hold that when a party has been able to satisfy a Civil Court as to the justice of his claim and has, in the result, succeeded in obtaining a decree which is final and binding upon the parties, it would not be open to Criminal Courts to go behind the findings of the Civil Courts, to place the Civil Court, without any valid reason, in a much higher position than what is actually occupies in the system of administration in this country, and to make it master not only of cases which it is called upon to adjudicate but also of cases which it is not called upon to determine and over which it has really no control.[72]

Where a person was charged under Section 467 read with Section 109 Penal Code for forging a will, it was held that a judgment in a civil suit holding that the will in dispute was a forged one, was not admissible, as the degree of proof of evidence was different between civil and criminal proceedings.[73]

Findings of tax authorities in the assessment proceedings as to the genuineness of a document was held to be not binding in the criminal case.[74]

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62. *Maru Paudi Kutumba Rao* v. *Parvathanani Venkataramayya,* AIR 1951 Mad 344; *Perumal* v. *Devarajan,* AIR 1974 Mad 14; *Radha Mohan* v. *Barelal,* 1972 All LJ 15.
63. *Krishnan Asari* v. *Adaikalam,* AIR 1966 Mad 425.
64. *Sardar Prahlad Singh* v. *Syed Ali Musa Raza,* 1997 AIHC 3122 (para 16) (AP).
65. *Banta Singh* v. *National Coal Development Corp.,* AIR 1968 Pat 300.
66. *Macherlappa and Sons* v. *State of A.P.,* AIR 1958 AP 371.
67. *B. Meenakshisundaam Chetty* v. *Kuttimalu,* AIR 1958 Ker 39.
68. *Ramanamma* v. *Appalanarasayya,* AIR 1932 Mad 254 : ILR (1931) 55 Mad 346.
69. *Markur,* (1914) 41 Bom 1, 18 Bom LR 185; **see also** *Narayanan* v. *Mathan Mathai,* AIR 1982 Ker 239.
70. *Trailokyanath Das* v. *Emperor,* ILR (1931) 59 Cal 136 : AIR 1932 Cal 293.
71. *Maung Po Nwe* v. *Ma Pwa Chone,* ILR 1940 Ran 163.
72. *B.N. Kashyap* v. *Crown,* ILR (1944) 25 Lah 408 FB : AIR 1945 Lah 23.
73. (1982) 2 Chand LR (Cri) 250.
74. *State of Maharashtra* v. *Rasiklal K. Mehta,* 1978 CrLJ 809 (Bom).

A decision of a competent court on a question of title, even if followed by delivery of possession to the successful party is not conclusive evidence of the party is possession, in an enquiry under Section 145(4), Cr.P.C. A Magistrate is not bound by any law to give his finding in accordance with such a decision, regardless of the actual evidence. If the evidence satisfied him that the other party is in actual possession, he is bound by law to declare him to be in possession, despite the decision of the Civil Court or the delivery of the possession by it. It was further observed that, even if the Civil Court's decision involves a finding on possession in favour of the title holder, the possession might have been disturbed after the decision, and there was no reason why the Magistrate should ignore that fact and hold the party who was successful in the Civil Court to be still in possession.[75]

When both parties claimed in a criminal case, possession in respect of certain property, it was held that the judgment of a Civil Court which was in favour of the complainant in the criminal case, was held relevant in determining the probabilities, in the criminal case, though a civil proceedings were pending in second appeal.[76]

An order in a previous claim petition, rejecting the claim of the accused, can be used in a subsequent criminal case for committing the theft of the crop in the very same land.[77]

Relevancy of certain judgments in probate, etc., jurisdiction.

S. 41. A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order or decree is conclusive proof—

that any legal character, to which it confers accrued at the time when such judgement, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

SYNOPSIS

1. *Principle*	... 499	5. *Matrimonial Jurisdiction*	... 505
2. *Judgments in rem*	... 499	6. *Admirality Jurisdiction*	... 507
3. *Judgments not in rem*	... 501	7. *Insolvency Jurisdiction*	... 508
4. *Probate Jurisdiction*	... 504	8. *Legal Character*	.. 508

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75. *Hosnaki* v. *State through Sheobaran Rai*, AIR 1956 All 81; **See contra** : *Makhanlal* v. *Mangal*, ILR 1943 All 150 : AIR 1942 All 150; *V.E. Argles* v. *Chhail Behari*, AIR 1949 All 230; *Imtiaz Ali Khan* v. *Shekh Badruddin*, AIR 1943 Oudh 410; *Jang Bahadur* v. *Nazimul Haque*, AIR 1947 Pat 245.
76. *Shiv Charan* v. *State*, AIR 1965 All 511.
77. *Haripanda* v. *State*, AIR 1956 Ori 212.

COMMENTS

1. PRINCIPLE

Under this section a judgment, order or decree, given by a competent Court in the exercise of (1) probate, (2) matrimonial, (3) admiralty, or (4) insolvency jurisdiction, will be conclusive proof as to the legal character conferred on, or taken away from, any person or to which any person is declared to be entitled.

2. JUDGMENTS *IN REM*

The section deals with what are usually called judgments [22]*in rem*, *i.e.*, judgments which are conclusive not only against the parties to the proceedings but also against the whole world. "A judgment *in rem* has been defined to be 'an adjudication pronounced, as its name indeed denotes, upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose." (TAYLOR, 12th Edn., S. 1674, p. 1050). "This rule appears to rest, partly, upon the ground that..... every one who can possibly be affected by the decision is entitled, if he thinks fit, to appear and assert his own rights, by becoming an actual party to the proceedings; partly, upon the ground that judgments *in rem* not merely declare the *status* of the subject-matter adjudicated upon, but, *ipso facto*, render it such as they declare it to be; and, partly, if not principally, upon the broad ground of public policy, it being essential to the peace of society, that the social relations of every member of the community should not be left doubtful, but that, after having been clearly defined by one solemn adjudication, they should conclusively be set at rest".[78]

Normally, a judgment is conclusive, as against the parties to it or their privies, of the facts directly in issue in the case and actually decided by the court. But there are certain exceptions to this general rule and this Section 41 is by way of an exception. For attracting Section 41, the judgment must be (1) of a competent court in the exercise of probate, matrimonial, admirality or insolvency jurisdiction and (2) it must (a) confer upon or take away from any person any legal character, or (b) declare any person to be entitled to any such character, or (c) to be entitled to any specific thing, not as against any specified persons but absolutely.[79]

A judgment *in rem e.g.* judgments or orders passed in admirality, probate proceedings etc. would always be admissible irrespective of whether they are *inter partes* or not.[80]

PHIPSON ON EVIDENCE (15th Edn. (2000), page 997, para 34-14) states: "As applied to judgments, the terms *in rem* and *in personam*, which are adopted from, though not belonging to, the Roman Law, have never been clearly defined in reference to our own or any other system. A judgment *in rem* has been described as "an adjudication upon the *status* of some particular subject-matter by a tribunal having competent authority for that purpose," a definition which, though seemingly the best that can be framed upon a difficult subject, is *imperfect* in that it fails to distinguish between territorial and ex-territorial *status*, besides including in its terms matters which are not properly classed as judgments *in rem* : *e.g.* inquisitions and criminal convictions. It has also been defined as "a judgment by a court having special jurisdiction over the subject-matter"; such judgments, however, only operate *in rem* if they alter *status*."

In the report of the Select Committee published in the Gazette of India dated 1-7-1871 part 5 p. 273, it was stated: "For the sake of simplicity, and in order to avoid the difficulty of defining or enumerating judgments *in rem*, we have adopted the statement of law by SIR BARNES PEACOCK in *Kanhyalal* v. *Radhachurn*[81]. In this section, only four types of judgements, namely, those of courts of probate, matrimony, admirality and insolvency are made relevant, and conclusive as against the whole world as judgements *in rem*.

In *Viswanathan's* case[82] the Supreme Court dealt elaborately with judgements[22] *in rem* and judgments *in personam*, and observed: "Roman lawyers recognised a right either as a *jus in rem or jus in*

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78. TAYLOR, 12th Edn. S. 1676, p. 1054
79. *Ripumadhusudan Prasad* v. *Rama Shanker Prasad*, AIR 1970 Pat 138.
80. *State of Bihar* v. *Radhakrishna Singh*, AIR 1983 SC 684.
81. (1867) 7 WR 338.
82. (1963) 3 SCR 22 : AIR 1963 SC 1.

personam. According to its literal meaning "*jus in rem*" is right in respect of a thing, a "jus in *personam*" is a right against or in respect of a person. In modern legal terminology, a right *in rem*, postulates a duty to recognise the right imposed upon all persons generally; a right *in personam* postulates a duty imposed upon a determinate person or class of persons. A right *in rem* is, therefore, protected against the world at large; a right *in personam* against determinate individuals or persons."

"There is another sense in which an action *in rem* is understood. A proceeding in relation to personal *status* is also treated as a proceeding *in rem*, for the judgement of the proper court within the jurisdiction of which the parties are domiciled is, by comity of nations, admitted to recognition by other courts. As observed by CHESHIRE in his "Private International Law", Sixth Edn., at page 109, "In Roman law, an action *in rem* was one brought in order to vindicate a *jus in rem*, *i.e.*, a right such as ownership available against all persons, but the only action *in rem* known to English law is that which lies in an Admiralty court against a particular *res*, namely, a ship or some other *res*, such as cargo, associated with the ship." Dealing with judgment *in rem* and judgment *in personam*, CHESHIRE observes, at page 653: "It (judgment *in rem*) has been defined as a judgment of a court of competent jurisdiction determining the *status* of a person or thing (as distinct from the particular interest in it of a party to the litigation); and such a judgment is conclusive evidence for and against all persons, whether parties, privies or strangers of the matter actually decided..... A judgment *in rem* settles the destiny of the *res* itself 'and binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence'; a judgment *in personam*, although it may concern a *res*, merely determines the rights of the litigants *inter se* to the *res*. The former looks beyond the individual rights of the parties; the latter is directed solely to those rights."

JUSTICE HIDAYATULLA observed in a separate judgement: "The salient point of English law on the subject may be stated to be that all judgments are divided into two broad categories—judgments *in rem* and judgments *in personam*. The best definitions of these terms are to be found in HALSBURY'S LAWS OF ENGLAND, Vol 22, p. 742, para 1605, which reads:

"A judgment *in rem* may be defined as the judgment of a court of competent jurisdiction determining the *status* of a person or thing, or the disposition of a thing, as distinct from the particular interest in it of a party to the litigation. A judgment *in personam* determines the rights of the parties *inter se* to or in the subject-matter in dispute, whether it be corporeal property of any kind whatever, or a liquidated or unliquidated demand, but does not affect the status of either persons or things, or make any disposition of property, or declare or determine any interest in it except as between the parties litigants. Judgments *in personam* include all judgments which are not judgements *in rem*, but, as many judgments in the latter class deal with the *status* of persons and not of things, the description 'judgment *inter partes*' is preferable to 'judgment *in personam*'.

The definition of HALSBURY is merely a restatement of a definition given by BOWEN and it has been accepted and applied by EVERSHED, M.R., in *Lazarus-Barlow* v. *Regents Estates Co. Ltd.* Such judgments, says PHIPSON ON EVIDENCE, 8th Edn., p. 401, are conclusive in the case of judgments *in rem* against parties or their privies or strangers, and in the case of judgments *in personam*, against the parties and their privies only. In the matter of foreign judgments, the rule about judgments *in rem* has been somewhat reduced in its extent in one direction and extended in another in recent years in England. In the matter of *status*, it has been extended to give more and more faith to foreign decrees but in the other direction, it has been curtailed. In respect of things and determinations of rights or title to things (excluding immovable property as to which I shall say something later) judgments *in rem* are now confined to Admirality actions. There is, however, a remnant in respect of movables, which is represented in the three rules of WESTLAKE (s.149) which are:

(a) judgments which immediately vest the property in a certain person as against the whole world;

(b) judgments which decree the sale of a thing in satisfaction of a claim against the thing itself; and

(c) judgments which order movables to be sold by way of administration.

This distinction is summed up by HOLMES, C.J., in *Tyler* v. *Judges of the Court of Registration*, as follows:

"If the technical object of the suit is to establish a claim against some particular person, with a judgment which generally in theory, at least binds his body, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defence, the action is *in personam*,

although it may concern the right to, or possession of, a tangible thing..... If on the other hand the object is to bar indifferently all who might be minded to make an objection of any sort against the right sought to be established, and if any one in the world has a right to be heard on the strength of alleging facts which, if true show an inconsistent interest, the proceeding is *in rem* ..... All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected."[83]

This classic exposition, which was evoked the admiration of every text-book writer and also the Privy Council in *Ingenohl* v. *Wing on & Co.*,[84] sums up in an admirable manner the distinction between the two kinds of judgments".

He further observed as follows: (page 170-71).

"It is not possible to add to the list of subjects mentioned in Section 41 of the Indian Evidence Act, except by legislation. Conclusiveness there attaches only to the subjects mentioned therein, and a fact established by a judgment of a competent Court on any of the subjects is taken to be proved, and established in all subsequent proceedings and does not require to be proved again. The Judicial Committee in *Appa Trimbak* v. *Waman Govind*[85], did not extend the principle of Section 41 to a case of adoption and a former judgment on the question of adoption was considered under Section 11 of the Code and not under Section 41 of the Indian Evidence Act. The former judgment was not accepted under Section 11 of the Code as it did not come within its terms, and the fact was allowed to be proved *de novo*. The reason given for the non-applicability of Section 41 was said to be that the decisions on adoption were excluded by SIR BARNE P EACOCK in *Kanhya Lal* v. *Radha Charan*[86] and also in Section 41.

From the above, it follows that conclusiveness, from the point of view of the law of evidence, will attach to a judgment, order or decree, only if it falls within the categories mentioned in Section 41. Once a judgment etc. falls within it, the law dispenses with the proof of the fact the conclusion of the former judgment etc., about the legal character which it confers or declares, together with the declarations of property arising from the legal character, is final."

A judgment *in rem* is an adjudication pronounced upon the *status* of some particular subject-matter by a tribunal having competent jurisdiction and authority to that office.[87]

A judgment *in rem* can only be impeached if it can be shown—

(1) that the Court had no jurisdiction; or

(2) that the judgment was obtained by fraud or collusion; or

(3) that it was not given on the merits; or

(4) that it was not final, *e.g.*, interlocutory.

3. JUDGMENTS NOT *IN REM*

Under the West Bengal Premises Rent Control Act 17 of 1950, standard rent was determined in the case of a sub-tenant. It was held that such judgment determining standard rent is not a judgment *in rem*.[88] A judgment regarding the validity of an ante-adoption agreement between the adopting mother and the natural father of the adopted son will not come in the category of a judgment *in rem*, so as to be binding against the whole world.[89] A judgment in a partition suit declaring the right of a person to share in particular properties is not a judgment *in rem*.[90] An order passed by the court in guardianship proceedings cannot be treated as a judgment *in rem* as in the case of a grant made under the Succession Act. But a certified copy of the order may be admissible to prove only that such an order had, in fact

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83. *Cheatham*—Cases and Materials on Conflict of Laws, p. 168.
84. AIR 1928 PC 83.
85. AIR 1941 SC 85.
86. (1867) 7 WR 338.
87. *Sriram* v. *Prabhu Dayal*, AIR 1972 Raj 180.
88. *E. Scott* v. *Residence Ltd.*, AIR 1956 Cal 606.
89. *Radhabai* v. *Kadar Ali*, AIR 1957 MB 159.
90. *Abdurahiman Koya Kutty Hajee* v. *Agastheenju Joseph*, AIR 1952 Tra/Co 176.

been made but not to prove its contents.[1] Where there are joint tenants, and a decree was passed against one of them for eviction, it was held that it was open to proceed in execution for eviction against others on the basis of the decree, against them only, as the judgment obtained was not a judgment *in rem*.[2]

An order passed under Bihar Hindu Religious Trusts Act 1 of 1951 is not an order *in rem*[3] but not a judgment deciding whether a temple is a private or a public one and therefore in a case between a third party and one of the parties to earlier proceedings the said judgment can be treated as precedent inasmuch as it decides the nature of the temple.[4]

Where a petitioner in an execution proceedings was not a party in another case against the same judgment debtors, it was held that the order passed in that execution case could not be held to be judgment in binding on other decree holders.[5]

In *Kanliyalal* v. *Radhacharan*[6] SIR BARNES PEACOCK observed: "If a judgment in a suit between A & B that certain property for which the suit was brought belonged to A as the adopted son of C, were a judgment *in rem* and conclusive against strangers as to the fact and validity of the adoption the greatest injustice might be caused. Referring to this decision the Privy Council in *Appa Trianbak* v. *Waman Govind*, 59 IA 64 observed at p. 69 "Section 41 of the Indian Evidence Act does not give to such decision as those arived at in *Trianbak's* suit of 1894 (where a particular adoption was held invalid) the character of judgments *in rem*".

In *Duggamma* v. *Ganeshayya*[7] dealing with the binding nature of a judgment of a foreign court the High Court discussed elaborately the meaning of the word "*Status*". It had that the judgment of a foreign court which declared the *status* of a person is by courts of Nations treated in India as analogus to a judgment *in rem*. It observed: "It is difficult to predicate what are all the matters comprehended by the term '*status*'. There is an exhaustive discussion of the meaning of this term by ROSCOE POUND' in his 'Jurisprudence' (See Vol. IV pages 262 to 272, Edition 1959). It is sufficient to note that status of a person means his "personal legal condition, that is to say, a man's legal condition only so far as his personal rights and burdens are concerned, to the exclusion of the proprietary relation". An adjudication on adoption will in law amount to a declaration of *status* and is decided according to the law of domicile of the party making the adoption. The claim to succession is not a matter of *status* in this sense but would relate to the 'proprietary relation' of the claimant with reference to deceased estate-holder.[8]

A decision whether a person is or is not a partner of a firm, does not amount to conferring or taking away the legal character of the person within the meaning of Section 41; hence the judgment is not *in rem*.[9]

According to BEST ON EVIDENCE, 9th Ed., Section 593, Page 492, in order for the judgment to be *in rem*, the Court or the tribunal must have the lawful control of the subject matter within the state under the authority of which the Court or the tribunal sits and the State should have conferred on the Court or tribunal jurisdiction to decide as to the disposition of the thing and the court or tribunal should act within its jurisdiction.

The word 'Court' is not limited to Courts in India. The expression 'competent Court' means the Court of any country which is competent to pass such judgment as is referred to in this section, that is to say, judgment *in rem*.[10]

The reason for accepting, u/Section 41, the judgments of courts having competent jurisdiction in a foreign country was explained by the Bombay High Court, stating that a declaration by a court affecting

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1. *Muktipada Dawn* v. *Aklema Khatun*, AIR 1950 Cal 533.
2. *Md. Mustafa* v. *Mansoor*, AIR 1977 All 239.
3. *Bihia State Board of Religious Trust* v. *Raj Ratan Gir*, ILR 1968-47 Pat 1.
4. *K M. Rathinam Nadar* v. *Arulmigu Hanumantharayar Bhajanai Madam*, 1996 AIHC 5469 (para 18) (Mad), **dissenting from** *Ramaji Batanji* v. *Manohar Chintaman*, AIR 1961 Bom 169.
5. *Mukhdeo Singh* v. *Kaushalya Devi*, 1979 BLJR 688.
6. (1867) 7 WR 338.
7. AIR 1965 Mys 97.
8. AIR 1965 Mys 97 at page 101, Col. 12.
9. *Radhakishin* v. *Gangabai*, AIR 1928 Sind 121; *Official Assignee Madras* v. *Official Assignee Rangoon*, AIR 1924 Mad 662, *Punjab National Bank* v. *Balkram*, AIR 1940 Cal 225.
10. *Messa* v. *Messa*, (1938) 40 Bom LR 571 : ILR (1938) Bom 529 : AIR 1938 Bom 394.

the *status* of a person domiciled within its territory is treated by the Comity of Nations as being analogus to a judgment *in rem*.[11]

The validity of a foreign judgment rendered in a civil proceeding must be determined in India on the terms of Section 13, C.P.C. If the judgment falls under any of the clauses of Section 13, C.P.C., it will cease to be conclusive as to any matter thereby adjudicated upon, and will be open to collateral attack on the grounds mentioned in Section 13, C.P.C. Thus, a foreign *ex parte* divorce decree obtained by the husband from the Neveda State Court in U.S.A., without the wife submitting to its jurisdiction will not be valid and finding of a criminal court in proceedings for maintenance under Section 488, Cr.P.C., when it is found from the facts on record that the decree of divorce was obtained by fraud or by making a false declaration as to a jurisdictional fact *viz.*, that the husband was a *bona fide* resident and was domiciled in Neveda, was valid. The decree being open to collateral attack on the jurisdictional fact, the recital in the judgment of the Neveda Court that the respondent was a *bona fide* resident of and was domiciled in Neveda is not conclusive and can be contradicted by satisfactory proof. The judgment of Neveda Court, though a judgment *in rem*, is open to attack on the grounds mentioned in Section 44 of the Evidence Act, *i.e.*, fraud, or collusion, or want of jurisdiction in the other foreign Court.[12]

Where a will was duly proved and deposited in a competent Court having jurisdiction beyond Mysore, and the named executor in the will, applied in Mysore for an ancillary grant, it was held that, as the probate of the will was granted by the High Court of Justice having jurisdiction in England and as it had to be deemed to be a judgment *in rem* binding on all the Courts, the letters of administration which partake of the nature of probate could be granted in Mysore.[13]

A probate granted by a foreign competent Court, would be sufficient proof of title of the legatee or the executor, and it is admissible under Section 41 in proof of that right.[14]

The decision of a foreign Court regarding the question of title to the property situated beyond its jurisdiction cannot operate as *res judicata* in a suit filed on the same question, in an Indian Court.[15]

No Court can pronounce a judgment *in rem* binding outside the State in which the Court exercises jurisdiction, unless such judgment affects either a thing situate, or a person domiciled, within such State. Thus it was held that a judgment of the Supreme Court at Alexandria as to the validity or otherwise of a will made by a person domiciled at Aden would be binding on the parties so far as the properties in Egypt are concerned; but it had no effect as a judgment *in rem* in respect of assets outside Egypt.[16]

Where the fact in issue was whether the detenus were foreigners within the meaning of the Foreigners Act, it was held that the prior judgments of Baroda State Court, deciding that they were not Baroda State subjects, was not admissible under Sections 11, 40 or 41 of the Evidence Act.[17] A judgement passed in a suit under Section 92, C.P.C., representative is not one that comes within Section 41. It may be relevant under any other provisions of the Act, but it will not have conclusive effect.[18]

In suits filed u/Section 92, C.P.C., in regard to the appointment of *Mutwalli* under the *Waqf Act* in relation to public *Waqf*[19], and framing schemes in respect of temples where there are a large number of worshippers, [20]and in respect of public trusts of a permanent character and charitable institution[21], the judgments would be *in rem* by the application of a fiction that the whole world is a party to the suit.

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11. *Mehahem Mesha* v. *Moses Bunin*, AIR 1938 Bom 394; *Viswanathan* v. *Abdul Wajid*, AIR 1963 SC 1; *Channalappa* v. *Abdul Wahab*, ILR (1911) 35 Bom 139.
12. *Satya* v. *Teja Singh*, AIR 1975 SC 105; *Viswanathan* v. *Ruku-ul-Mulk Syed Abdul Wajid*, AIR 1963 SC 1; *Firm Ramnath Ramachandra* v. *Firm Bhagatram and Co.*, AIR 1959 Raj 149 (FB).
13. 49 Mys HCR 188; **referred in** *S. Abdul Wajid* v. *Gajambal Ramalingam*, AIR 1050 Mys 57; **See also** *Mehahem Mesha* v. *Moses Bunin*, AIR 1938 Bom 394.
14. *Black Wood & Sons Ltd.* v. *A.N. Parasuraman*, AIR 1959 Mad 421; **See also** *Lakshminan Chetti* v. *Karuppan Chetti*, ILR 6 Mad 273; *Nalla Karuppa Settiar* v. *Md. Iburam Saheb*, ILR 20 Mad 112.
15. *Duggamma* v. *Ganeshayya*, AIR 1965 Mys 97.
16. *Messa* v. *Messa*, (1938) 40 Bom LR 571 : ILR (1938) Bom 529.
17. In re : *Antonius Raab*, AIR 1950 Bom 101.
18. *Anjuman Islamia* v. *Latafat Ali*, AIR 1950 All 109; *M. Enayatullah Inbrhri* v. *Hajji Saleh Mohammad Ahmfd Salt*, (1959) 37 Mys LJ 234.
19. *Sunni Central Board of Waqf U.P.* v. *Sirajul Haq Khan*, AIR 1954 All 88.
20. *Sakharam Daji* v. *Ganu Raghu*, AIR 1921 Bom 297; *Sri Ram* v. *Prabhu Dayal*, AIR 1972 Raj 180; *Surajgir* v. *Bramh Narain*, AIR 1946 All 148 (decree in a scheme suit would be a bar to a suit claiming hereditary trusteeship.

4. PROBATE JURISDICTION

The word 'probate' is not defined in this Act. But it is defined in Section 2(f) of the Indian Succession Act, as follows:— "Probate means the copy of a will certified under the seal of a Court of Competent Jurisdiction with a grant of administration to the estate of the testator." When a probate is granted it establishes conclusively the legal character of the person to whom, it is granted.

The grant of probate under the Indian Succession Act (XXXIX of 1925) is conclusive proof of the title of the executors and of the genuineness of the will admitted to probate. The conclusiveness of the probate rests upon the declared will of the Legislature as expressed in Sections 227 and 273 of the Indian Succession Act, 1925. The grant of probate is the method which the law specially provides for establishing a will.

The judgment of a probate court regarding the genuineness of the will and the legal character of the widow as an executor of the will is binding in the proceedings in Court exercising other than the testamentay jurisdiction.[22] The judgment of a probate court in respect of a will and on the contentions rasied, is conclusive and it is not open to any civil court (in a subsequent suit) to retry those issues.[23] The action of the probate court in admitting the will to probate, so long as the order remains in force, is conclusive as to the due execution and validity of the will, and a party to those proceedings cannot be permitted to contest the will unless the grant of probate is revoked.[24] Where a person wanted to intervene in the proceedings before the Court having probate jurisdiction, by filing a caveat, and it was refused stating that he had no *locus standi,* it was held that the order of the probate court was binding on such a person who wanted to intervene, and so he could prefer an appeal against the order granting the probate. He can not challenge it in any other proceedings.[25] The judgment of a probate Court granting probate of a will in favour of the petitioner must be presumed to have been obtained in accordance with the procedure prescribed by law and it is a judgment *in rem*[26] binding on the whole world and failure to implead other legal heir in probate proceedings would be of no consequence.[27] A judgment of a Court of Probate is conclusive proof that the person to whom letters or probate have been granted has been clothed with the powers and the responsibilities of the deceased and of nothing else, and a question of *status* decided by a Court of Probate can be raised again.[28]

One can ask for revocation of the grant of probate only on the ground of fraud or want of jurisdiction or its having been granted wrongly by applying to the same court of probate.[29]

The grant of probate or letters of the administration is decisive only of the genuineness of the will and the right of the person to whom the grant is made to represent the estate. It is impossible to say, therefore, that the grant of probate or letters of administrations with a copy of the will annexed would be at all a bar to the determination of any question of title or construction of the will. The fact that third parties may have acquired rights in the properties can be no ground for refusing probate or letters of the administration, as the one cannot prejudice or be prejudiced by the other.[30]

But a stranger may come and assert his title to the property which was not the subject of the trust and dispute the scheme).

21. *Ramdas* v. *Hanumantha Rao,* ILR 36 Mad 364; *Yara Kalamma* v. *Naramma,* (1864) 2 Mad HCR 276; *Abdur Rahim* v. *Abu Mahomed Barkat Ali,* AIR 1928 PC 16; Bower on *Res Judicata* P. 126; *Hassanullah Khan* v. *Royal Mosque Trust Board (Scheme in charitable trust),* AIR 1948 Mad 134.
22. *Sheo Parsan Singh* v. *Ramnandan Prashad Singh,* ILR 43 Cal 694 (PC) : AIR 1916 PC 78:43 IA. 91.
23. *Brendon* v. *Sunderabai (Smt.),* AIR 1914 Bom 181.
24. *Damodarlal Sunderlal* v. *Gopinath Sunderlal,* AIR 1956 Nag 206; **See also** *Alegemmal* v. *Rakkammal,* AIR 1992 Mad 136.
25. *Malati* v. *Dhanpati,* AIR 1964 Cal 41; **See also** *Venkatarathnam* v. *Satyavati,* AIR 1924 Mad 578; *Maung Hmat* v. *Ma Htay,* AIR 1923 Rang 257; *Bakhsh Singh* v. *Underaj Singh,* AIR 1930 Oudh 29.
26. *Surinder Kumar* v. *Gian Chand,* AIR 1957 SC 875 : 1958 SCR 548; *Annaswami* v. *Janaki Ammal,* AIR 1951 Tra/Co 229; *Rukh-ul-mulk S. Abdul Wazid* v. *Gajambal Ramlingam,* AIR 1950 Mys 57.
27. *Subaitha Beevi* v. *Yvonn Thambi,* 1999 AIHC 3763 (paras 26 and 20) (Mad).
28. *Mi Ngwe Zan* v. *Mi Shwe Taik,* (1910) 1 UBR (1910-13) 61, 63; *Mali Muthu Servay* v. *King-Emperor,* ILR (1926) 4 Ran 251 : AIR 1926 Rang 202.
29. *Komollochan Dutt* v. *Nierutten Mundle,* ILR (1878) 4 Cal 360; *Daropti* v. *Santi,* AIR 1929 Lah 483; *Pannalal* v. *Hansraj Gupta,* AIR 1940 Cal 236; *Runk-ul-Mulk S. Abdul Wajid* v. *Gajambal Ramalingam,* AIR 1950 Mys 57.
30. *John Simon* v. *Gorge John,* AIR 1955 Tra/Co 177.

A finding of a court that a will was not proved is not a judgment within the meaning of Section 41, the only kind of negative judgment contemplated under the section is that which takes away from a person of a legal character which has up to the time subsisted.[31]

However Madras High Court held when the court refuses to grant the probate, it amounts to taking away the legal right from the executors or the legatees who were mentioned in the will and hence the judgment is a judgment *in rem*.[32]

The judgment of a court of probate is *in rem* and binds all the world; a judgment in a civil case operates only between the parties to the suit or their privies: so a judgment *in rem* cannot be revoked or set aside by a civil court judgment. Where there is an allegation of forgery, the proper remedy of a party who wants revocation of a grant of a probate, is only to apply before the probate court under Section 263 of the Indian Succession Act and not to file a civil suit.[33]

However, it was held that under Section 41, the judgment of the probate court is conclusive proof only with respect to the various legal characters or declarations made in those proceedings, insofar as they are within the scope of the proceedings. The probate court has no jurisdiction to decide that a document is forged within the meaning of the Penal Code. So, the declaration that a will was forged cannot be binding on the criminal court.[34]

Mainly, this section is concerned with wills of Indian Nationals and those executed in India. But, in view of Section 228 of the Indian Succession Act, which enables the Court to grant an ancillay probate in the case of foreigners, this section applies to such probate also.

Section 213 of the Indian Succession Act, prescribes a rule of evidence and provides the procedure of requirement of *lex fori*. The Madras High Court has held that it stands to reason that Section 213 of the Indian Succession Act, cannot be construed as insisting on the production of probate, which no court in India is competent to grant in regard to a will for which probate has been granted by a foreign Court of Competent Jurisdiction; if this were the proper construction of Section 213 of the Succession Act, and there is no doubt as to the correctness of the position, the foreign probate would be sufficient proof of the title of the legatee or the executor, and is admissible in evidence u/Section 41 in proof of that right.[35] Where a deceased is alleged to have executed a will in the United Kingdom where he was working and letters of administration were granted there, it was held that if conclusively proved execution of the will and by operation of *res judicata*, the matter could not be re-opened in a civil court under Section 213 of the Indian Succession Act.[36]

Where there is a decision of a civil court regarding the proof of the will, it has been held that such decision cannot be *res judicata* in probate proceedings, as the nature of the judgment in probate court is different.[37]

Section 41 does not exclude proof by secondary evidence, or by evidence of conduct in respect of matters dealt with in that section.[38]

Judgments of probate court in the testamentary suit of the first caveator is a judgment *in rem*.[39]

5. MATRIMONIAL JURISDICTION

This jurisdiction is conferred on Courts by Special Acts such as:—

(a) The Indian Divorce Act (IV of 1869) relating to the divorce of persons professing the Christian religion.

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31. *Kalyan Chand Lalchand* v. *Sitabai*, AIR 1914 Bom 8 (FB).
32. *Chinnasami* v. *Harihar Bhadra*, ILR (1893) 16 Mad 380.
33. *Kailash Chandra* v. *Nandakumar*, AIR 1944 Cal 385.
34. *State* v. *Yashwant Rao*, 1978 CrLJ 1434 (Bom).
35. *Blackwood and Sons* v. *A.N. Parasuraman*, AIR 1959 Mad 410, 421.
36. *Darshan Singh* v. *Kuldip Singh*, AIR 1979 Punj & Hari 250.
37. *Jerbanoo* v. *Pootlamai*, AIR 1955 Bom 447.
38. *Satyacharan Das* v. *Hrishikesh Karar*, AIR 1959 Cal 795.
39. *Maneklal* v. *Jagdish*, (1970) 72 Bom LR 719.

(b) The Parsi Marriage and Divorce Act (III of 1936) relating to marriage and divorce among the Parsis.

(c) The Native Converts' Marriage Dissolution Act (XXI of 1866).

(d) The Indian Christian Marriage Act (XV of 1872).

(e) Dissolution of Muslim Marriage Act, 1939.

(f) Special Marriage Act, 1954.

(g) Hindu Marriage Act, 1955.

A judgement of a Matrimonial Court, decreeing divorce or nullity of marriage is binding as to the *status* of the parties concerned. It is conclusive upon all persons that the parties have been divorced and that they are no longer husband and wife.

Prior to the Hindu Marriage Act of 1955 a civil court, exercising its ordinary jurisdiction under Section 9, C.P.C., could entertain suits regarding matters connected with a marriage such as restitution or conjugal rights, or declaration that the marriage was null and void. In such cases the civil court could be considered as a court of matrimonial jurisdiction. But, after the Hindu Marriage Act all these questions are no longer triable by ordinary Civil Courts. The jurisdiction to entertain applications for restitution of conjugal rights, judicial separation, divorce, declaration of nullity, etc., are exclusively given to District Courts or Subordinate Courts which will now be courts of matrimonial jurisdiction when deciding such applications. In *Siddaiah* v. *Penchalamma,*[40] it was held that a decision of the courts under the Hindu Marriage Act would come within Section 41 and would be conclusive not only against the parties but against the whole world as it would be a judgement *in rem*.[41]

A decree of dissolution of marriage under the Madras Hindu (Bigamy Prevention and Divorce) Act, is a judgement *in rem*.[42]

A suit for separate maintenance was filed by the wife on the ground of cruelty and ill treatment, under Section 18 of the Hindu Adoptions and Maintenance Act. Pending that suit, the husband filed a petition under Section 9 of the Hindu Marriage Act, for restitution of conjugal rights. When the appeal against the decree of maintenance obtained by the wife, was pending, the petition of the husband for restitution of conjugal rights was dismissed, and no appeal was filed. When the wife applied for certified copies of the husband's petition and the order of its dismissal as additional evidence in the appeal, it was held that the order of dismissal of the petition for restitution of conjugal rights had become final and conclusive within the meaning of Section 41, that the certified copies thereof could be admitted as an additional piece of evidence and that it was immaterial that the decision of the matrimonial court was rendered during the pendency of appeal against the decree for maintenance.[43]

A judgment in a maintenance suit decides the right as between the parties and so cannot be treated as a judgement *in rem*; such judgement cannot be pleaded as a bar to a petition under Section 10 of the Hindu Marriage Act. On the other hand a judgement of the court under the Hindu Marriage Act being a judgement in the exercise of matrimonial jurisdiction would operate as a judgement *in rem* and binding not only the parties but against the whole word.[44] A finding on the question of adultery, in maintenance proceedings by the wife, does not operate as *res judicata* in the divorce proceedings started by the husband.[45] The wife obtained an order for maintenance in a civil court. Subsequently, the husband obtained a decree for dissolution for marriage on the ground of desertion, in a civil court. Then, the husband filed an application for cancellation of the maintenance order. It was held that such application cannot be granted because the ground of desertion in civil courts decree was not a 'decision' within the meaning of Section 127(2), Cr.P.C., and the plea of desertion had to be proved independently in the proceedings under Section 127(2), Cr.P.C.[46] Where a husband's petition for restitution of conjugal rights

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40. 1963 AP 158.
41. **See also** *Subas Manohar Pande* v. *Shyamrao Pande*, AIR 1971 Bom 183.
42. *Sunanda* v. *Subbarao*, AIR 1957 AP 424.
43. (1975) 88 Mad LW 445; *Survepalli Siddaiah* v. *Survepalli Penchalamma*, AIR 1963 AP 158; *Subas* v. *Manohar* AIR 1971 Bom 182.
44. *S. Siddaiah* v. *S. Penchalamma*, AIR 1963 AP 158.
45. *Champa Gouri* v. *Jamandas Anichand*, (1971) 1 APLJ 230.
46. *Ranjit Kumar Pandey* v. *Swaha Rani Pandey*, 1979 CrLJ 1301 (Cal).

was resisted by the wife on the ground of adultery and cruelty, it was held that the findings therein are relevant in the wife's petition for dissolution of marriage, though they do not operate as *res judicata*.[47] A decree of a civil court for divorce was held to be no bar for granting maintenance under Section 125 Cr.P.C.[48]

Section 41, *inter alia* provides that a final judgment of a competent court in the exercise of matrimonial jurisdiction is conclusive proof that the legal character which it confers or takes away, accrued or ceased at the time declared in the judgment for that purpose. But the judgment has to be of a competent court, *i.e.*, a court having jurisdiction over the parties and the subject matter. Even a judgment *in rem* is, therefore, open to attack on the grounds specified in Section 44 of the Evidence Act, namely, that it was delivered by a court not competent to deliver it, or was obtained by fraud or collusion, fraud in any case bearing on jurisdictional facts vitiates all judicial acts whether *in rem* or *in personam*.[49]

A judgment in a suit for restitution of conjugal rights is purely a suit between two persons, and such a judgment is not a judgment *in rem* within the meaning of this section.[50]

In a petition for maintenance by wife, a prior judgment in a petition for restitution of conjugal rights where it was held that the husband had contracted a second marriage, is admissible though it was not a judgment *in rem* and is binding on the parties.[51]

A judgment under Section 42 of the Specific Relief Act declaring the defendant as not the legally wedded wife of the plaintiff was held to be not relevant in the trial of the husband (plaintiff) for the offence of bigamy under Section 494, I.P.C., as the earlier judgment did not satisfy the ingredients of Section 41.[52]

Judgment of competent court exercising jurisdiction in matrimonial matters is a judgment *in rem*.[53]

The expressing in Section 41 "not as against any specified persons but absolutely" does not indicate that only the decision relating to *status* as a wife or husband could be treated as judgment *in rem* and not any finding relating to the right of the wife to reside separately and claim maintenance. Those words only mean that the finding is of such a nature that persons who are not parties to the proceeding are not entitled to challenge such findings. If the wife is held entitled to live separately in the proceeding for restitution of conjugal rights, it will amount to a declaration of *status* or legal character, as there is no difference between a decree or order granting judicial separation and the one which declares the right of the wife to live separately and claim maintenance.[54]

Where in a foreign judgment regarding divorce by mutual consent, the Court found that the grounds of divorce were not opposed to public policy in India and the judgment was pronounced by a Court of competent jurisdiction, it was held that presumptions as to conclusiveness of the judgment was available to the parties. The Court confirmed the same.[55]

6. ADMIRALITY JURISDICTION

Admiralty jurisdiction is conferred on several High Courts by Letters Patent. It is also conferred on Mofussil Courts by 12 & 13 Vic. c. 88. The decision of a Prize Court is conclusive upon all the world. A judgment delivered in an ordinary suit in an Admiralty Court is not a judgment *in rem* binding strangers.

Where the order in an admiralty suit emphatically stated that all the authorities concerned shall be bound by the order, it was an order *in rem* and findings in such order would be conclusive upon the world and the dispute in the suit could not be referred to arbitration by invoking arbitration clause in insurance cover of the vessel in question.[56]

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47. *Santhammal* v. *Thangaraj*, AIR 1975 Kant 23 (SB).
48. *Sukumar Dhibar* v. *Anjali Dasi (Smt.)*, 1983 CrLJ 36 (Cal).
49. *Satya* v. *Teja Singh*, AIR 1975 SC 105; **reversing** *Teja Singh* v. *Satya (Smt.)*, AIR 1971 Punj 80.
50. *Ma Po Khin* v. *Ma Shin*, ILR (1933) 11 Rang 198 : AIR 1933 Rang 250.
51. *Sangawwa* v. *Shankarappa*, AIR 1992 Kant 311.
52. 1970 Cut LJ 192.
53. *Suhas Manohar Pande* v. *Manohar Shamrao Pande*, AIR 1971 Bom 182; *Manku* v. *Krishte*, ILR 1967 Guj 1003.
54. (1975) 88 Mad WN 445; *Sunanda* v. *Subba Rao*, AIR 1957 AP 424; *Duggamma* v. *Ganeshayya*, AIR 1965 Mys 97.
55. *Roy Andre Sales de Andrade* v. *State of Goa*, 1996 AIHC 99 (para 4).
56. *Osprey Underwriting Agencies Ltd.* v. *O.N.G.C. Ltd.*, AIR 1999 Bom 173 (para 6).

7. INSOLVENCY JURISDICTION

The jurisdiction is conferred on the High Courts by the Presidency-Towns Insolvency Act (III of 1909) and on Mofussil Courts by the Provincial Insolvency Act (V of 1920). Orders passed in insolvency bind strangers as well.

In *Exparte Learoyd In re Foulds* (10 Ch D. 3) it was held that the adjudication that a person had committed the act of bankruptcy is conclusive under the English Bankruptcy Act. The Privy Council, in *Md. Siddique Yousuf* v. *Official Assignee of Calcutta*[57] overruling the decision in *Official Assignee Madras* v. *O.R.M.O.R.S. Firm*,[58] held that the principle *in Exparte Learoyd* would apply even to cases under the Presidency Towns Insolvency Act. The Privy Council observed: "No doubt it is anomalous that a decision affecting the right of a third party should be conclusively determined against him in his absence, and even without notice to him, but the words of the section and the importance of maintaining the status of the debtor as determined by an order of adjudication, and the necessity of securing the stability of the administration of the debtor's estate once his *status* has been fixed, have been justly held to outweigh the consideration of hardship to the private citizen. (Page 78 of 70 IA 93).

An adjudication of a person as an insolvent has the effect of taking away from that person his legal character of being not insolvent. Such order is covered by Section 41, when, on appeal, the order of adjudication is set aside the effect of the appellate court judgment is to declare that person to be entitled to the legal character of being not insolvent, and should be deemed to fall within the ambit of Section 41. It is, thus, a judgment *in rem* only in respect of matters before the insolvency court. Where the question was whether the gift by a person against whom insolvency proceedings have been instituted, was made with a view to defraud and delay the creditors, had not come up for adjudication before the insolvency court, the judgment of the insolvency court could not operate as a judgment *in rem* in that respect. The judgment was relevant only to show that the donor was not insolvent at the time the proceedings to adjudicate him insolvent took place. As the findings of an insolvency court, given six years after the gift was made, related to the time when the proceedings to adjudicate the donor as insolvent took place, and not to the state of affairs as they existed six years before that finding was given, they could not form a good basis for upsetting the finding of facts, of the courts below which ran contrary to such findings.[59]

The Madras High Court has in a Full Bench case held that the judgment of a Court exercising insolvency jurisdiction, admitting proof of an alleged debt of a creditor and declaring him to be a creditor in the insolvency, is not a judgment *in rem* since it neither confers upon nor takes away from him any "legal character", nor declares him "to be entitled to any specific thing, not as against any specified person but absolutely', within the meaning of this section.[60]

A debtor was adjudged as an insolvent, on an application by one of the creditors. It was held that it was not open to any other person to challenge the adjudication on the ground that the debt owing to the creditor on whose application the debtor was adjudicated insolvent was not genuine. The adjudication being a judgment *in rem* is final and binding on all.[61]

A judgment of a High Court, declaring a person to be a partner of an involvent firm would not operate as a judgment *in rem* under Section 41.[62] A decision rendered in a proceeding arising out of the creditors' suit cannot be brought in under this section.[63]

8. LEGAL CHARACTER

The expression "legal character" is not defined in this Act. The declaration of legal character imports a person's status which would be known to all the world, and is different from a declaration of a person's legal right; it is something more than the declaration of a mere right.[64]

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57. AIR 1943 PC 130 : 70 IA 93.

58. 1927 Mad 526.

59. *Amar Kaur* v. *Shiv Karan*, AIR 1965 Punj 206.

60. *Punjab National Bank* v. *Balikram*, AIR 1940 Cal 225, (1931) 54 Mad 601 FB.

61. *Bajirao, Bhawanrao* v. *Bansilal, Ganeshlal*, AIR 1963 Bom 212; **relying on** 1943 PC 130 : *Md. Siddique Yousuf* v. *Official Assignee, Calcutta*, 70 IA 93.

62. *Ibrahim Hazi Issac* v. *Md. Hazi Issac*, AIR 1951 Sau 37; In re : *Venkataramanayya*, AIR 1931 Mad 441 (SB); *Official Assignee of Madras* v. *Official Assignee of Rangoon*, AIR 1924 Mad 662.

63. *S. Gopala Krishna Iyer* v. *Subbaraya Iyer*, AIR 1972 Mad 269.

64. In re : *Venkataramanayya*, AIR 1931 Mad 441 (SB), *Official Assignee of Madras* v. *Official Assignee of Rangoon*, AIR 1924 Mad 662; *Ramakrishna* v. *Narayana*, ILR 39 Mad 80; *Gangadhar* v. *Umasoondery*, 7 WR 347; *Kanhya Lall* v. *Radha Churn*, (1867) 7 WR 338 (FB); *Sriram* v. *Prabhu Dayal*, AIR 1972 Raj 180.

Declaration that a person is the exclusive proprietor of a property and others have no share does not amount to a declaration of any party's "legal character" or "status" as against the entire world. It is only a decision about a mere right.[65]

Relevancy and effect of judgments, orders or decrees, other than those mentioned in Section 41.

S. 42. Judgments, orders or decrees other than those mentioned in Section 41, are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

ILLUSTRATION

A sues *B* for trespass on his land. *B* alleges the existence of a public right of way over the land, which *A* denies.

The existence of a decree in favour of the defendant, in a suit by *A* against *C* for a trespass on the same land, in which *C* alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

COMMENTS

1. PRINCIPLE AND SCOPE

Under this section judgments relating to matters of a public nature are declared relevant, whether between the same parties or not. It forms an exception to the general rule that no one shall be affected or prejudiced by judgments to which he is not a party or privy. The exception just stated is allowed in favour of verdicts, judgments, and other adjudications upon subjects of a public nature, such as customs, prescriptions, tolls, boundaries, between parishes, counties, or manors, rights of ferry, liabilities to repair roads, or seawalls, moduses, and the like. In all cases of this nature, as evidence of reputation will be admissible, adjudications—which for this purpose are regarded as a species of reputation—will also be received, and this, too, whether the parties in the second suit be those who litigated the first, or be utter strangers. The effect, however, of the adjudication, when admitted, will so far vary that, if the parties be the same in both suits, they will be bound by the previous judgment but, if the litigants in the second suit be strangers to the parties in the first the judgment, though admissible, will not be conclusive.[66]

Section 40 admits as evidence all judgments *inter partes* which would operate as *res judicata* in a second suit. Section 41 admits judgments *in rem* as evidence in all subsequent suit where the existence of the right is in issue, whether between the same parties or not. And this section admits all judgments not as *res judicata*, but as evidence, although they may not be between the same parties, provided they relate to matters of public nature relevant to the enquiry.[67]

"A judgment may be of two kinds. If it is a judgment *in rem*, that is a judgment of a court of competent jurisdiction determining the *status* of a person or thing, or the disposition of a thing (as distinct from a particular interest in it of a party to the litigation), it is conclusive of the facts or state of things actually decided or effected..... The conclusiveness of judgments *in rem* of the matters actually decided is against all persons, whether parties, privies or strangers to the decision.[68]

Other judgments have the effect that the parties to them, and their privies, are prevented from denying what the judgement itself establishes, and the grounds upon which it was founded. Save to prove their existence, date and consequences, such judgments are inadmissible for or against strangers (*i.e.* those which are not *in rem*. Commonly referred to as judgments *in personam* or judgments *inter partes*).

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65. *Banslal* v. *Joint Director of Consolidation*, 1968 All LJ 80.
66. TAYLOR, 12th End., S. 1683, p. 1058.
67. *Gujju Lall* v. *Fateh Lal*, ILR (1880) 6 Cal 171, FB.
68. *Lazarus Barlow* v. *Regent Estates Co. Ltd.*, (1949) 2 KB 465 CA.

The rule that a judgment in *personam* is inadmissible against strangers is subject to the following exceptions in addition to those already mentioned: (1) when the judgment determines a question of public right and is admissible as evidence or reputation; (2) in bankruptcy proceedings; (3) in administration proceedings; and (4) to an extent in patent actions."[69]

In PHIPSON ON EVIDENCE (15th Ed. (2000), para 38-82, p. 1045) it is observed: Judgments and verdicts upon public or general rights are not only conclusive between parties and privies, but *prima facie* evidence of the matter decided, between strangers or a party and a stranger. They are not, however, conclusive in the latter cases."

PHIPSON also states: "The rule is now established that, on questions of public or general, but not of private, interest, the verdict, judgment or order, even *inter alias*, of a competent tribunal whether superior court, duchy, manor or survey court, or statutory commission, is admissible, not, however, as evidence or any particular fact, but as an adjudication upon the state of facts and question of usage at the time."[70]

2. MATTERS OF PUBLIC NATURE

The word 'public nature' means such of those matters in which public are interested and it does not deal with a matter where individuals are interested. Matters like custom, regarding succession to the properties in a particular community.[71]

The rule that the judgment *in personam* is not admissible against strangers is subject to the exception when the judgment determines a question of public right and is admissible as evidence of reputation. The judgment relating to matters of public nature would only be relevant under this section not on the principle of *res judicata* but as evidence, whether it be between the same parties or not.[72]

The Privy Council observed: "Their Lordships are of opinion that, although the predecessor of the Raja was no party to that litigation, it was competent to use the judgment as evidence showing the rent paid for the possession at and prior to that date, now nearly eight years ago. Taken with the other evidence in the case the respondents have thus established possession at a uniform rent for so long a period as to lead to the inference that the tenure was and is of a permanent nature."[73]

The Calcutta High Court observed; "It is clear from the decision of the Privy Council in[74], that, under certain circumstances, and in certain cases, the judgment in a previous suit to which one of the parties in a subsequent suit is not a party may be admissible in evidence for certain purposes and with certain objections in the subsequent suit."[75]

The Privy Council referring to police orders made to prevent breaches of peace observed: "This necessarily makes them evidence of the following facts all of which appear from the orders themselves namely who the parties to the dispute were what the land in dispute was and who was entitled to retain possession..... But they are not otherwise admissible, unless they are made so by Section 13 of the Indian Evidence Act. Where a judgment is admissible, it is conclusive evidence for or against all persons, whether parties privies or strangers, of its own existence, date and legal effect of it, as distinguished from the accuracy of the decision rendered.[76]

The previous judgment is not admissible for the purpose of relying upon the appreciation of evidence, though it is admissible to show the parties and the decision.[77]

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69. HALSBURY'S LAWS OF ENGLAND, 4th Edn., Vol. 17 (para 194), page 141.
70. PHIPSON 15th Edn. (2000), para 35-42, page 855.
71. *Bai Baiji* v. *Bai Santok*, ILR (1894) 20 Bom 53 or a customary right in land tenures; *Dalgish* v. *Gazabtar Hussani*, 23 Cal 427 PC or a custom of pre-emption; *Collector of Gorakhpur* v. *Palak Dhari*, ILR (1889) 12 All 1 (FB) are matters of a public nature. **See also** *Ram Ranyan Chakrabarti* v. *Ramnarayan Singh*, 22 Cal 534 PC ancient possession).
72. *Collector of Gorakhpur* v. *Palak Dhari*, ILR (1889) 12 All 1 (FB).
73. *Ramranjan Chakerbaty* v. *Ramnarayan Singh*, 22 Cal 533 (PC).
74. ILR 22 Cal 533 (PC).
75. *Tepukhan* v. *Rajani Mohandas*, ILR (1898) 25 Cal 522 (FB).
76. *Dinomoni Chaudharani* v. *Brojomohini Chaudharani*, ILR 29 Cal 187 (PC).
77. *Kharkhan* v. *State of U.P.*, (1965) 2 SCJ 546, 549 : AIR 1965 SC 83.

The question whether a judgment *in personam* can have the force of a judgment *in rem* was dealt with in *Srinivas Iyengar* v. *Arayar Srinivas Iyengar*[78], it was observed: "Turning to the Evidence Act, I have already pointed out that Sections 41 and 42 draw a distinction between judgments *in rem* and judgments *in personam* and it seems to me to be clear from the sections that a judgment which does not fall within Section 41 can only be evidence but cannot be used for the purpose of preventing the other side from proving facts which he sets up. It is not open to import considerations as to convenience in dealing with matters which have been codified and dealt with by Evidence Act, however attractive the theory may be and however much one would like to have the principle embodied by the Legislature in the Codes. It is no doubt true that the decisions of this Court which adopt the view of BIGELOW as to judgments *in personam* creating an estoppel as against strangers."[79]

All judgments rendered in suits of representative character under Section 92, C.P.C. are judgments *in rem*, and they are of public nature[80] but not a judgment deciding whether a temple is a private or a public one and therefore in a case between a third party and one of the parties to earlier proceedings the said judgment can be treated as a precedent inasmuch as it decides the nature of the temple.[81] If a custom has been recognised by any judgment, it may be proved by the production of that judgment or a certified copy of it; and it would be relevant under this section as such custom or usage was recognised judicially, though, the judgment is not conclusive proof of the custom.[82] A decision as regards the existence or non-existence of a custom is a good piece of evidence in other cases.[83]

The Privy Council held: "When a custom or usage, whether in regard to a tenure or a contract or a family right is repeatedly brought to the notice of the Court of the country, the court may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It becomes in the end truly a matter of process and pleading."[84] In a later case, the Privy Council in *Mst. Subhani* v. *Nawab*[85] observed: "A judicial decision, though of comparatively recent date, may contain on its records, evidence of specific instances of succession by daughters in preference to collaterals, which are of sufficient antiquity to be of value in rebutting the presumption. In such a case, the value of the decision arises from the fact not that it is relevant under Secs. 13 and 42, Evidence Act, as forming in itself a 'transaction by which the custom in question was recognised, etc.' but that it contains, on its records, a number of specific instances relating to the relevant custom. To ignore such judicial decisions merely on the basis of the *riwaj-i-am*, would add greatly to the perplexities and difficulties of proving a custom."[86] Where an issue was finally determined at the highest level by the Privy Council, the same could not be re-examined though the plaintiff, not being a party to that proceeding, the same was not binding on him.[87]

Where the rights of the villagers of certain villages to graze their cattle in a particular disputed land were recognised by the order of a superintendent of the former Mandi estate during the settlement operations, it was held relevant for proving their customary right.[88]

It is not obligatory that a judgment, dealing with the question of custom, should have been pronounced before the commencement of any controversy now on hand, though the weight to be attached to it may be a different matter.[89]

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78. ILR (1910) 33 Mad 483.
79. **See also** *Secretary of State* v. *Syed Ahmad Badsha Sahib*, AIR 1921 Mad 248 (FB).
80. **See** cases dealt with under Sec. 41.
81. *K.M. Rathinam Nadar* v. *Arulmigu Hanumantharayar Bhajnai Madam*, 1996 AIHC 5469 (para 18) (Mad), **dissenting from** *Ramaji Batanji* v. *Manohar Chintaman*, AIR 1961 Bom 169.
82. *Raghunath* v. *Ram Pratap Ramchander*, AIR 1935 Sind 38; *Lachman Rai* v. *Akbar Khan*, ILR (1877) 1 All 440.
83. *Ram Kishore Jaiswal* v. *B. Kavindara Karayan*, AIR 1955 All 59; *Amarchand* v. *(Mst.) Shankari*, AIR 1956 Raj 51; *Maharaja of Kolhapur* v. *Sundaram Ayyar*, 1925 Mad 497; *Shimbunath* v. *Gayan Chand*, ILR (1894) 16 All 379.
84. *Ramarao* v. *Raja of Pittapur*, AIR 1918 PC 81 : 49 IA 148, 154.
85. AIR 1941 PC 21 : 68 IA 1.
86. **See also** *Amarchand* v. *Shankari*, AIR 1956 Raj 51; *Suganchand Bhai Ramchand* v. *Mangibai Gulabchand*, AIR 1942 Bom 185; *Baiji* v. *Bai Santok*, ILR 20 Bom 53; *Madhub Chander Nath Biswash* v. *Tomee Bewah*, (1867) 7 WR 210.
87. *V. Shankarayya* v. *N.S. Pattadadevaru*, AIR 1995 SC 2187 (para 9), **reversing** AIR 1976 Kant 103.
88. *Tula* v. *Sadh*, AIR 1962 HP 28.
89. *Amarchand* v. *(Mst.) Shankari*, AIR 1956 Raj 51.

A judgment not *inter partes*, though not coming within Sections 40 to 42, would be relevant for certain purposes under Section 13, where it is relied on to establish a right or custom which was previously created, claimed, modified, recognised, asserted or denied.[1]

Even uncontested judgments would be very good proof of any alleged custom, because it carries greater weight of the custom, and less probability to controvert it.[2]

Questions relating to Muslim Waqfs are matters of public nature within the meaning of Section 42.[3]

The Madras High Court, held that though a judgment is not *inter partes*, if it declares that a particular trust is not of public nature, but only a private trust, it is admissible under Section 42. It was observed: "Though the first defendant alone, among the present parties, was involved in that litigation and the plaintiff was not a party thereto, it should be deemed as if the first defendant represented the descendants of the founder when he contested the Endowments Board and wanted a decision that the trust was a private trust."[4]

Where the trustees of a temple obtained a decree against certain landowners, for recovering certain amounts as due to the temple on an alleged right, it was held that in other suits against other land owners in which the trustees claimed under the same right, the previous decrees are relevant as they were matters of public nature.[5]

The principle has been extended to cases where the fixation of value of the lands are in question. The value of the lands which are contiguous, and of similarly situated lands, when fixed in other judgments, has been held to be relevant as a good piece of evidence in other cases.[6]

Where in a land acquisition case, the High Court gave directions to the government, by quashing the previous order of the Government, and when the Government, without following the directions, gave a fresh notification for acquisition, it was held that the previous judgment of the High Court was admissible, as the public were interested in challenging the basis for the acquisition.[7]

Even compromise decrees have been held to be relevant.[8]

3. ADMISSIBILITY OF RECITALS

A judgment in a criminal case is not a matter of a public nature and is not admissible in evidence in civil proceedings under this section[9] but it still holds the field of proof by corroboration.[10] The recitals in an inquest report cannot by themselves be read as substantive evidence and cannot be admitted under Section 42.[11] Where discovery *panchnama* witnesses turned hostile, though admitted their signatures which were identified by the Police Officer who testified that they had signed over it in his presence, it was held that the order of the Court refusing to exhibit it on the ground of not proved was improper.[12]

A Coroner inquest which is aimed at inquiring into the cause of death of a person, whether, by accident, homicide or suicide, is only to satisfy the public conscience that an unnatural death was not hushed up, and it is not a judgment or even an opinion of the Coroner.[13]

Where a Sub-Divisional Officer ordered restoration of possession to an applicant under Section 12A of West Bengal Bargadars Act, for purpose of cultivation, it was held that the order was relevant only to

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1. *Special Land Acquisition Officer, Bombay* v. *Lakhamsi*, AIR 1960 Bom 78; *Mahabir Mahton* v. *Sonmati Kaur*, AIR 1964 Pat 66.
2. *Shamdass* v. *Moolo Bai*, AIR 1926 Lah 210; *Mariyam Sultan* v. *Karam Illahi*, AIR 1947 Peshawar 39.
3. *Misbdhuddin* v. *Vidya Sagar*, AIR 1935 Lah 64.
4. *Narayanaswami* v. *Balasundaram*, AIR 1953 Mad 750; **See also** *Secretary of State* v. *Syed Ahmed Badhsa Sahib*, AIR 1921 Mad 248 (FB).
5. *Umaswamy* v. *Appalu*, ILR 12 Mad 9.
6. *Collector of Bilaspur* v. *Lachhman*, AIR 1965 HP 18; *Madanmohan Burman* v. *Secretary of State*, 1925 Cal 481.
7. *Ram Prasad* v. *State of U.P.*, AIR 1988 All 309; for other cases under Land Acquisition see secs. 40 and 13.
8. *Abdul Karim* v. *Shiv Narain*, AIR 1952 Punj 356.
9. *Bishen Das* v. *Ram Labhaya*, (1915) PR No. 106 of 1915 : 32 IC 18.
10. *Sardar Prahlad Singh* v. *Syed Ali Musa Raza*, 1997 AIHC 3122 (para 16) (AP).
11. *Raghava Kurup* v. *State of Kerala*, AIR 1965 Ker 44.
12. *Koli Arshi Lila* v. *State of Gujarat*, 1999 Cr LJ 2595 (para 13) (Guj).
13. *Emperor* v. *Bhagwan Das*, AIR 1946 Bom 184; *Emperor* v. *Md. Yusuf*, AIR 1933 Bom 479.

the extent that, by virtue of that order, the applicant got restoration of possession, and it could not be used for the purpose of supporting a finding that he was a *bargadar*, on the basis of a recital therein.[14]

Judgments, etc., other than those mentioned in Sections 40 to 42, when relevant

S. 43. Judgments, orders or decrees, other than those mentioned in Sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this Act.

ILLUSTRATIONS

(a) *A* and *B* separately sue *C* for a libel which reflects upon each of them. *C* in each case says that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against *C* for damages on the ground that *C* failed to make out his justification. The fact is irrelevant as between *B* and *C*.

(b) *A* prosecutes *B* for adultery with *C*, *A*'s wife.

B denies that *C* is *A*'s wife, but the Court convicts *B* of adultery.

Afterwards, *C* is prosecuted for the bigamy in marrying *B* during *A*'s life-time. *C* says that she never was *A*'s wife.

The judgment against *B* is irrelevant as against *C*.

(c) *A* prosecutes *B* for stealing a cow from him. *B* is convicted.

A afterwards sues *C* for the cow, which *B* had sold to him before his conviction. As between *A* and *C*, the judgment against *B* is irrelevant.

(d) *A* has obtained a decree for the possession of land against *B*. *C*, *B*'s son, murders *A* in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

(e) *A* is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.

(f) *A* is tried for the murder of *B*. The fact that *B* prosecuted *A* for libel and that *A* was convicted and sentenced is relevant under Section 8 as showing the motive for the fact in issue.

SYNOPSIS

1. *Principle and Scope*	...	531	4. *Judgments regarding market value*	...	538
2. *Judgment in Criminal cases*	...	535	5. *Other cases*	...	539
3. *Judgment in Civil cases*	...	538			

COMMENTS

1. PRINCIPLE AND SCOPE

This section expressly contemplates cases in which judgments, which are not admissible under Section 40, 41 or 42, would be admissible under other sections of the Act. The cases contemplated by this section are those where a judgment is used not as *res judicata* or as evidence more or less binding upon an opponent by reason of the adjudication which it contains. But the cases referred to in this section are such as the section itself illustrates, *viz.*, when the fact of any particular judgment having been given is a matter to be proved in the case. As for instance, if '*A*' sued '*B*' for slander, in saying that he had been convicted of forgery and '*B*' justified upon the ground that the alleged slander was true, the conviction of '*A*' for forgery would be a fact to be proved by '*B*' like any other fact in the case, and quite irrespective

14. *Tarendra Nath Das* v. *Khirode Chandra Das*, ILR (1958) 2 Cal 480.

of whether '*A*' had been actually guilty of the forgery or not. This would be one of the many cases alluded to in this section.[15]

To have the effect of *res judicata*, a judgment *inter partes* alone can be admitted in evidence, but for other purposes where judgments are sought to be used to show the conduct of the parties, or show particular instances of the exercise of a right, or admissions made by ancestors, or how the property was dealt with previously, they may be used under Section 11 or 13 as exceptions recognised under this section, as relevant evidence. That is to say, their existence, though not their correctness, might be proved. Except where they are judgments *in rem* or where they relate to public matters, judgments not *inter partes* have been always held to be not *res judicata*, but they cannot be wholly excluded for other purposes insofar as they explain nature of possession, or throw light on the motives or conduct of parties or identify property.[16]

PHIPSON ON EVIDENCE, (15th Edn. (2000), Para 38-02, Page 987) states that "Judgments being public transactions of a solemn nature are presumed to be faithfully recorded. Every judgment is therefore, conclusive evidence for or against all persons (whether parties, privies or strangers) of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered. In other words, the law attributes unerring varity to the substantive, as opposed to the judicial, portions of the record."

It was observed: "Section 43 of the Indian Evidence Act declares that judgments, orders and decrees other than those mentioned in Sections 40, 41 and 42 are of themselves irrelevant, that is, in the sense that they can have any effect or operation mentioned in those recited sections *qua* judgments, orders and decrees, but I do not take this to make them absolutely inadmissible when they are the best evidence of something that may be prove *aliunde*".[17]

The Privy Council observed: "The Indian Evidence Act, does not make a finding of fact arrived at on the evidence before the court in one case, evidence of that fact in another case."[18]

It was held by the Privy Council that judgment was admissible under the provisions of Section 13 and Section 43 as establishing a particular transaction in which partibility of the Pandra estate was asserted and recognized by the Court. The reasons upon which the judgment is founded are not part of the transaction and cannot be so regarded nor can any finding of fact, there come to, other than the transaction itself, be relevant in another subsequent suit in a case in which the parties are different.[19]

It is not the correctness of the previous decision but the fact that there was a decision that is to be established by the production of the judgment under this section.[20]

SIR GEORGE RANKIN in *Maharaja Sir Kesho Prashad Singh* v. *Bahuria Mst. Bhagjoigna Kuer*[21] observed: "Whether based upon sound general principle or merely supported by reasons of convenience, the rule that so far as regards the truth of the matter decided a judgment is not admissible evidence against one who is a stranger to the suit, has long been accepted as a general rule in English law. Exceptions there are, but the general rule is not in doubt. A well-known statement of it was given by SIR WILLIAMS DE GREY (afterwards Lord WALSINGHAM) in *Duchess of Kingston's* case[22] and a striking instance of its application by the Board may be seen in *Natal Land and Colonisation Co.* v. *Good*[23]. That the same rule applies in India, though it is not expressly formulated in these terms, and may be seen from a reference to Section 43, Evidence Act, 1872, and the illustrations given thereunder."[24]

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15. *Gujju Lall* v. *Fatteh Lall*, ILR (1880) 6 Cal 171, 192 (FB). **See** *Secretary of State* v. *Syed Ahmed Badsha*, ILR (1921) 44 Mad 778, (FB); *Indar Singh* v. *Fateh Singh*, ILR (1920) 1 Lah 540.
16. *Lakshman* v. *Amrit*, ILR (1900) 24 Bom 591, 598, 599 : 2 Bom LR 386.
17. *Collector of Gorakhpur* v. *Palakdhari Singh*, ILR 12 All 1 (FB).
18. *Kumar Gopika Raman* v. *Atalsingh*, 56 IA 119, 125 : AIR 1929 PC 99.
19. *Govindanarayan* v. *Shyamlal*, AIR 1939 PC 89 : 58 IA 125, 136.
20. *Ram Ranjan* v. *Ram Narayan* (PC), (1894) 22 IA 60 : ILR 22 Cal 533; *Bhitoo Kunwar* v. *Kesho Prasad*, 19 All 277 (PC); *Dinomoni* v. *Brojo Mohini*, (1901) 29 IA 24: ILR 29 Cal 187 (PC); *Ramprakas* v. *Anand*, 43 Cal 707 (PC); *Kashinath* v. *Jagath Kishore*, 20 Cal WN 643 : 23 Cal LJ 583; *Tripura Seethapati* v. *Rokhan Venkanna*, 1922 Mad 71; *Natal Land Co.* v. *Good*, 16 WR 1086.
21. 1937 PC 69, 74.
22. (1776) 2 Howells State Trial 538.
23. (1868) 2 PC 121.
24. **See also** *Muneshwari* v. *Jugal Mohini Dasi*, AIR 1952 Cal 368; *Maroti* v. *Jaganuadhudas*, AIR 1939 Nag 72 : ILR (1940) Nag 699.

The judgment is not admissible to prove the truth of the fact which it states or the reasons given for arriving at a decision on a particular fact; however, if a right of a party has already been concluded by a previous judgment, that fact can be proved by the production of the judgment, as the existence of the judgment itself is relevant. Where a decree of the Court not relevant under Sections 40 to 42, was a fact in issue and, as a matter of fact, an issue was specifically raised about its existence and also its effect on the suit, it was held that the prior decree was relevant under Section 43.[25]

The existence of a judgment, its date or its legal consequence, as distinguished from the accuracy or truth of the decision rendered, can be proved by the production of the original record or of a certified copy of it as contemplated in Section 76 of the Evidence Act, and it would be conclusive evidence against all the world. But as to the recitals in a judgment, they are not admissible under this section, though they may be admissible under any other provision of the Evidence Act.[26]

The Privy Council has held that the findings in a civil proceeding are not binding in a subsequent prosecution founded upon the same or similar allegations.[27] Technically, it is inadmissible as it is not between the same parties, the parties in the prosecution being the State on the one hand, and the accused on the other, and in the civil suit the accused and some third party; but the substantial ground is that the issues in a civil and a criminal proceeding are not identical and the burden of proof rests in each case on different shoulders.[28]

This section contemplates cases in which judgments would be admissible either as facts in issue or as relevant fact under any other section of the Act. Thus a judgment is admissible to prove that a right was asserted or denied etc., as contemplated in Section 13 of the Act. The actual decision in a previous judgment however, cannot, be used as evidence for a decision on the points which are in issue in a different case, except as provided by Sections 40 to 42 of the Act.[29]

If the previous judgment deals with a right asserted or denied or recognized, it would be relevant under Section 43, but when it deals with a transaction consisting of certain facts it would be relevant under Section 13.[30] Where the claim was in regard to a customary right, it was held that the facts in the previous judgment would be relevant under Sections 13 and 43.[31]

Where the Deputy Registrar of Co-operative Societies gave a finding in his order about the liability of one A and in pursuance of it a bungalow belonging to A was attached and sold and in a subsequent suit filed by A's son for partition of joint family property and possession of his separate share, it was contended that the debt incurred by A was *avyavaharika* and in support of that contention the son sought to produce the order of the Deputy Registerar, it was held that the opinion in the order of the Deputy Registrar as to the nature of the liability of A could not be used as evidence, in the suit, to determine whether the debt was *avyavaharika* or not. The order was not admissible under Section 43 to prove the truth of the facts therein, but may be relevant to prove the existence of the judgment.[32]

Where the question was whether a trade mark is identical or deceptively similar to the trade mark of the opponent and when the opponent cited judgments in which parties, facts and trade marks were entirely different, it was held that such judgments or facts cannot be used against the applicant.[33] A party by filing a previous judgment cannot rely on admission of certain facts contained therein, in a subsequent suit.[34] A finding regarding the right in a previous suit not *inter partes* is not admissible in a subsequent

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25. *Hulasi* v. *Mohan*, ILR (1960) 10 Raj 94; **see also** *Maroti Laxman Goshti Lachhandas* v. *Jagganath Das*, AIR 1939 Nag 72.
26. *Tripurana Seethapati* v. *Rokkan Venkanna*, 42, MLJ 324 (FB) : AIR 1922 Mad 71; *Seethapathirao Dora* v. *Venkanna Dora*, ILR 45 Mad 332 (FB) : AIR 1922 Mad 71; *Trailokyanath Das* v. *Emperor*, ILR (1931) 59 Cal 136 : AIR 1932 Cal 293. *Raghunath Singh* v. *Emperor*, ILR (1935) 15 Pat 336; *Abdul Latif* v. *Abdul Hag*, 28 Cal WN 62 : AIR 1924 Cal 240; *Kashinath Pal* v. *Jagat Kishore*, 23 Cal LJ 583.
27. *Emperor* v. *Nazir Ahmad*, AIR 1945 PC 18.
28. *Gogun Chunder Ghose* v. *The Empress*, (1881) 6 Cal 247, 248.
29. *Ramadhar* v. *Janki Choudhary*, AIR 1956 Pat 49.
30. *Mahabir Mahtou* v. *Sonmati Kuer*, AIR 1964 Pat 66.
31. *Ramchandra Singh* v. *Partap Singh*, AIR 1965 Raj 217.
32. *S.M. Jakati* v. *Borkar*, AIR 1959 SC 282 : (1959) SCR 1384 at 1390.
33. *Prem-N-Mayor* v. *Registrar of Trade Marks*, AIR 1969 Cal 80.
34. *Sitlabakhsh Singh* v. *Surendra Bikram Singh*, AIR 1953 All 378; *Dundbahadur Singh* v. *Durga Prasad*, AIR 1953 Pat 346.

suit, as the right cannot be proved on the basis of such finding.[35] Judgments not *inter partes* do not come under Sections 40 to 42 and hence findings therein, about the title to and possession of property would be irrelevant in a suit for injuction restraining the defendant from interfering with plaintiff's possession of the property.[36]

2. JUDGMENT IN CRIMINAL CASES

A judgment in a criminal case cannot be received in a civil action to establish the truth of the facts upon which it is rendered. The judgment of a criminal court may be relevant only to show that there was a trial resulting in conviction or acquittal.[37] Where a plea of private defence was raised in another case, wherein a judgment was delivered it was held such judgment is not relevant where such plea did not give rise to or necessarily involve the same issue which required the same evidence for purpose of proof.[38]

Where in a proceeding for revocation of the grant of probate under Section 263, Succession Act, the question was whether the son of the testator murdered him, it was held that it cannot be assumed on the basis of a previous judgment of a Criminal Court convicting the son of the murder of his father and sentencing him to transportation for life, that the son was the murderer of the testator. The judgment of the Criminal Court is relevant only to show that there was such a trial resulting in the conviction and sentence of the son, it is not evidence of the fact that the son was the murderer of the testator, that question has to be decided on evidence.[39]

Decision of a Criminal Court cannot be relied on as one binding in civil action[40] but it still holds the field of proof by corroboration.[41] The finding in a Criminal Court that the decree holder did not obtain delivery of possession would not be binding upon the parties in the Civil Court.[42] A Criminal Court judgment was held admissible in evidence in the civil proceedings only for the purpose of showing that there was a criminal case with identical facts ending in an acquittal.[43]

Where a civil right was raised in a dispute before a Criminal Court, it was held that it would be proper for the Criminal Court to take the decree of a Civil Court into consideration as Section 43 makes the existence of the judgment relevant, if covered by any other section of the Evidence Act.[44]

Where there was a suit for damages for malacious prosecution, it was held that the earlier judgment of a Criminal Court discharging the accused/plaintiff cannot be used to prove the contents of the First Information Report and the findings are not admissible in evidence.[45] But the judgment is conclusive for the purpose of showing that the prosecution terminated in favour of the plaintiff.[46] In deciding a suit for damages arising from a malacious prosecution, the judge treated the judgment of the Magistrate and evidence given before the Magistrate, in the prosecution complained of, as evidence in the case. And looking at the judgment of the Magistrate, as being a record of the facts found, the Judge came to the conclusion that the plaintiff was not present at the time when the alleged offence was committed; and decreed the plaintiff's claim. It was held that it was not permissible to the Judge to utilize the judgment of the Magistrate in the way he did; and that this section or S. 13 or S. 11 did not apply to the case.[47] In a

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35. *Hira Lal* v. *Hari Narain*, 1964 All 302; *Khub Narain Missir* v. *Ramachandra Narain Dass*, AIR 1951 Pat 340
36. *Gopal Krishna Gupthan* v. *Ammalu Ammal*, AIR 1972 Ker 196.
37. *Anil Behari Ghosh* v. *Latikabala Dasi*, AIR 1955 SC 566; *Purnima Debya* v. *Nandalal*, AIR 1932 Pat 105; *Ramadhar Chaudhury* v. *Janaki Chaudhary*, 1956 Pat 49; *Onkarmal* v. *Banwarilal*, AIR 1962 Raj 127; *Raj Kumar Debi* v. *Bama Sundari Debi*, ILR (1896) 23 Cal 610 at 613; *Ramlal* v. *Tula Ram*, AIR (1881) 4 All 97.
38. *Chandra Bhal* v. *State of U.P.*, (1971) 3 SCC 983 : 1970 SCR (Cri) 387.
39. *Anil Behari Ghosh* v. *Latikabala Dassi (Smt.)*, AIR 1955 SC 566 : 1955 SCJ 578, 585
40. *Krishnan Asari* v. *Adaikalam*, AIR 1966 Mad 425. **See also** *S. Gurcharan Singh* v. *S. Kuldip Singh*, 1999 AIHC 4769 (para 17) (J&K).
41. *Sardar Prahlad Singh* v. *Syed Ali Musa Raza*, 1997 AIHC 3122 (para 16) (AP).
42. *Natulal Ramaprasad* v. *Balakrishna Jugal Kishore*, AIR 1955 Nag 269.
43. *Banta Singh* v. *National Coal Development Corpn.*, AIR 1968 Pat 300; *Perumal* v. *Devarajan*, AIR 1974 Mad 14.
44. *Varadaraja Chettiar* v. *Swami Maistry*, AIR 1948 Mad 49 : (1947) 2 MLJ 179; *Balakees* v. *K.C. Jacob*, (1964) 2 MLJ 583; *Midnapure Zamindari Co. Ltd.* v. *Naresh Narayan Roy*, AIR 1922 PC 241; *Jang Bahadur Singh* v. *Nazimul Haque*, 1947 Pat 245, *Raj Nandan Missir V. Cheddi Thakur*, AIR 1932 Pat 185.
45. *Sri Niwas Shukla* v. *Dinbsh Dal Dobey*, 1978 All LJ 1391; *Kutumba Rao* v. *P. Venkataramayya*, AIR 1951 Mad 344.
46. *Jogendra* v. *Lingaraj Patra*, AIR 1970 Ori 91; *Shubrati* v. *Shamsuddin*, AIR 1928 All 337; *Pedda Venkatapathi* v. *G. Balappa*, AIR 1933 Mad 429; *Kutumba Rao* v. *Venkataramayya*, AIR 1951 Mad 344.
47. *Gulabchand* v. *Chunilal*, (1907) 9 Bom LR 1134; *Onkarmal* v. *Banwari Lal*, AIR 1962 Raj 127.

suit for damages for malacious prosecution the result of the Criminal Court judgment in favour of the accused is relevant but the reasoning on which the order of acquittal is based would not be accepted as conclusive.[48]

Where a person was convicted by a Criminal Court under Section 304, Penal Code, for causing bodily injuries to his adoptive father who ultimately died of the injuries, it was held that in the subsequent proceedings for succession, the judgment of the Criminal Court is only relevant to show that there was a trial, resulting in conviction, but it is not evidence on the fact that the person was the murderer, that the Civil Court has to determine on evidence whether the offence falls under 304, Penal Code or under Section 299, and 300, Penal Code, and whether he was a murderer.[49] A judgment of acquittal is irrelevant in a civil suit based on the same cause of action, just as a judgment of conviction cannot, in a subsequent civil suit, be treated as evidence of facts on which the conviction is based.[50] The decision of a Magistrate in a proceeding under Section 145, Cr.P.C. in favour of the defendant on the question of possession is not binding on the civil court dealing with a suit for declaration of title and possession and it is not relevant under this section as the civil court is entitled to come to a different finding altogether.[51]

Where a prosecution for failure to furnish returns of turnover to the sales tax department, ended in acquittal it was held that judgment is not relevant for making a subsequent assessment.[52] Judgment of Criminal Court determining guilt or innocence of the driver of the vehicle is not binding on the claims tribunal under the Motor Vehicle's Act.[53] A conviction of a driver in a criminal case is relevant before the claims tribunal under this section only to show that the driver was convicted, though it is not conclusive.[54]

An admission in a criminal proceeding cannot be proved in a civil case by producing the Criminal Court judgment, as a Civil Court is bound to come to a decision by itself on the facts placed before it.[55]

Where a conviction is based on the plea of guilty by the accused, it was held that the judgment showing the plea is relevant in a subsequent suit which gave rise to a fact in issue or formed the subject-matter of the suit.[56]

A plea of *autrefois acquit* arises when a person is tried again for the same offence or on same facts for any other offence under conditions attracting Sections 236 and 237, Cr.P.C., but where there were two different trials for distinct offences arising out of different transactions, and the common object in both the cases was different, it was held that acquittal in one did not bar conviction in another, because the reasoning of a judgment of acquittal is not admissible as evidence.[57] Where an exporter of handloom cloth was charged for tampering with the bales of goods before loading and the case was split up into two cases, according to the two invoices, it was held that the judgment in the one case acquitting the accused is not admissible in the second case and the application for quashing the second proceedings is not maintainable.[58] A document containing a confession of an accused admitting misappropriation of sums of money with respect to three items, was produced in an earlier criminal case. It was found that the confession was not voluntary and in regard to two items the evidence was disbelieved and the accused was acquitted in respect of those two items, but was convicted in regard to the third item on the evidence. It was held by the Supreme Court, that the judgment in that case would be admissible in a subsequent case relating to misappropriation of the third item, to show what was the issue in question in that case and the decision thereof; that the documents containing confession was of little evidentiary value, and

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48. *Gobind Chandra* v. *Upendra Padhi*, AIR 1960 Ori 29.
49. *Biro* v. *Banta Singh*, AIR 1980 Punj 164.
50. *Onkarmal* v. *Banwarilal*, 1962 Raj 127.
51. *Mahabir Pandey* v. *Ramnarayan Singh*, AIR 1959 Pat 406.
52. *Macherlappa* v. *Govt. of A.P.*, AIR 1958 AP 371.
53. *Municipal Committee Jullunder City* v. *Romesh Saggi*, AIR 1970 Punj 137; *Prabhakar Babussa Chodankar* v. *Maria Victoria (Smt.)*, AIR 1977 Goa 15.
54. *Vinobabai* v. *K.S.R.T.C., Banagalore*, (1979) 1 Kant LJ 257; *Yogendra Paul* v. *Durgadass*, 1972 ACJ 483; *Radha Mohan* v. *Barealal*, 1972 All LJ 15.
55. *Dinomoni* v. *Brojo Mohini*, ILR 29 Cal 187 (PC); *Purnima Debya* v. *Nandalal*, AIR 1932 Pat 105; *Dund Bahadur Singh* v. *Durga Prasad*, AIR 1953 Pat 346; *Kesho Prasad* v. *Bhagjogna Kuer*, AIR 1937 PC 69; *Harihar Prasad* v. *Janak Dulari*, AIR 1941 Pat 118; *Mahabir Pandey* v. *Ramnarain Singh*, AIR 1959 Pat 406.
56. *B. Meenakshisundaram Chetty* v. *Kuttimalu*, ILR 1958 Ker 39.
57. *Kharkan* v. *State of U.P.*, AIR 1965 SC 83.
58. *S.P.E. Madras* v. *Sundara Velu*, AIR 1978 SC 1017.

could not form the sole basis for convicting the accused.[59] A judgment of a Criminal Court acquitting some of the accused who were separately tried for certain offences relating to the same transaction is not admissible in evidence in an appeal preferred by the other accused who were convicted by another Court for similar offences in respect of the same transaction as Section 43 does not make the earlier judgment admissible.[60]

3. JUDGMENT IN CIVIL CASES

The judgment of a Civil Court holding that a will was forged is not relevant under this section in a criminal case for the offence of forgery.[61]

Where an accused cut certain trees on the land which was with the usufructuary mortgagee and the trial court held that the mortgagor was entitled to the trees on redemption and the accused cut them to cause wrongful loss to the mortgagor and convicted the accused and when a revision against the conviction was pending, a Civil Court recognizing the right of the accused to cut the trees was brought to the notice of the Court, it was held that the Civil Court judgment should be admitted as additional evidence in the interest of the justice and the accused should be acquitted as even a *bona fide* claim of the right would rule out the criminal intention on his part.[62]

A judgment of a Civil Court in a title suit which is not final in the sense that it is pending second appeal, can be admitted in Criminal Proceedings as proof of fact of possession of disputed property. The provisions of Sections 40 to 43 only exclude judgments as pieces of conclusive evidence, but do not bar the admission of judgments as proof of the fact of litigation or its results and effects upon the parties which makes a certain course of conduct probable or improbable on the part of one of the parties.[63]

Where there was an order rejecting the claim to the property in a previous claim suit by the accused in a subsequent criminal case and it was used by the Magistrate to convict the accused, it was held that the use of the claim order by the Magistrate cannot be said to be unwarranted by law, as the fact of rejecting the claim may be relevant.[64] A judgment *in rem* in an earlier suit would be admissible in subsequent proceedings under this Section.[65] The existence of a judgment, not being a fact in issue, will not be relevant.[66] The judgment in the previous suit which was not *inter partes* cannot be relied in a subsequent suit.[67]

4. JUDGMENTS REGARDING MARKET VALUE

Judgments relating to market value of particular pieces of land, though they are judgments not *inter partes*, would be relevant if they relate to similarly situated properties and contain determinations of value on dates fairly proximate to the relevant date.[68]

At pages 2413 and 2414 in the above case, the Supreme Court observed: "It is apparent that Section 43 enacts that judgments other than those falling under sections 40 to 42 are irrelevant unless they fall under some other provision of the Evidence Act; and, even if they do fall under any such other provision, all that is relevant, under Section 43 of the Evidence Act, is the existence of such judgment, order, or decree provided it is a fact in issue, or is relevant under some other provision of this Act. An obvious instance of such other provision is a judgment falling under Section 13 of the Evidence Act. The Illustration to Section 13 of the Evidence Act indicates the kind of facts on which the existence of

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59. *Brijbasi Lal Shrivastava* v. *State of M.P.*, AIR 1979 SC 1080.

60. In re : *Bojjagani Moogadu*, In re, (1971) 1 An WR 316. **Also see** *Gopal* v. *State of Rajasthan*, 1997 Cr LJ 2162 (Raj).

61. (1982) 2 Chand LR (Cri) 250.

62. *Balakees* v. *K.C. Jacob*, (1964) 2 Mad LJ 583.

63. *Shiv Charan* v. *State*, AIR 1965 All 511.

64. *Haripanda* v. *State of Orissa*, AIR 1956 Ori 212.

65. *Gopi Kishan* v. *Bajrang Lal*, 1996 AIHC 4064 (para 15) (Raj).

66. *A. Munuswami* v. *R. Sethuraman*, AIR 1995 Mad 375 (paras 8 and 14), **relying on** *Keso Prasad* v. *Bhagjogna Kuer*, AIR 1937 PC 69.

67. *Gulabrao Maruti Bhagat* v. *Bhagwan Nana Bhagat*, 2001 AIHC 2146 (para 13) (Bom).

68. *City Improvement Trust* v. *Narayanaiah*, AIR 1976 SC 2403; **dissenting from** *Land Acquisition Officer* v. *Lakhamsi Ghelabhai*, 1960 Bom 78; *Mariam* v. *State of Kerala*, 1980 Ker 176 (DB); *State of UP* v. *Nathhoo*, AIR 1986 All 172; *Fulbhai* v. *A.S.L.A. Officer*, (1967) 8 Guj LR 37; *Collector Bilaspur* v. *Lachhman*, 1965 HP 18; *State of Bihar* v. *Musafir Thakur*, AIR 1984 Pat 40.

judgments may be relevant. In *Special Land Acquisition Officer, Bombay* v. *Lakhamsi Ghelabhai*, AIR 1960 Bom 78 SHELAT J., held that judgments not *inter partes*, relating to land acquired are not admissible merely because the land dealt with in the judgment was situated near the land of which the value is to be determined. It was held there that such judgments would fall neither under Section 11 nor under section Section 13 of the Evidence Act. Questions relating to value of particular pieces of land depend upon the evidence in the particular case in which those facts are proved. They embody findings or opinions relating to facts in issue, investigated in different cases. The existence of a judgment would not prove the value of some piece of land not dealt with at all in the judgment admitted in evidence. Even slight differences in situation can, sometimes, cause considerable differences in value. We do not think it necessary to take so restrictive a view of the provisions of sections 11 and 13 of the Evidence Act as to exclude such judgments altogether from evidence even when good grounds are made out for their admission. In *Khaja Fizuddin* v. *State of Andhra Pradesh*, CA No. 176 of 1962, decided on 10-4-1963 (SC), a bench of three Judges of this Court held such judgments to be relevant if they relate to similarly situated properties and contain determinations of value on dates fairly proximate to the relevant date in a case".

5. OTHER CASES

The order of mutation of a revenue officer and the judgment of the Civil Court are held to be relevant in a suit for redemption of property, under Sections 13 and 43 of the Evidence Act.[69]

Though the order in a maintenance proceeding is not relevant under sections 40, 41 and 42, it is relevant in a proceeding under the Hindu Marriage Act, to show the conduct of the husband towards the wife as it is relevant and admissible under Section 8.[70]

A judgment not *inter partes* in a suit where a right was asserted and recognised or denied was held admissible under this section in a subsequent proceeding.[71] A judgment upholding the right of the defendant as an adopted son is relevant though plaintiffs are not parties to that judgment.[72]

In a suit filed to set aside the order of the Commissioner of Religious Endornments, not recognizing the plaintiff as the hereditary trustee, it was held that a judgment in an earlier proceeding recognizing the plaintiff's father as hereditary trustee is relevant to prove usage of hereditary trusteeship.[73]

Findings given against the petitioner in the department inquiry are not relevant under Section 43 and cannot be used to show that no *prima facie* case is made out against him.[74]

Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved.

S. 44. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under Section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

SYNOPSIS

1. *General Principle* ... 519
2. *Court not competent to deliver it* ... 520
3. *Fraud or collusion* ... 522
4. *Cases other than fraud or collusion* ... 525

COMMENTS

1. GENERAL PRINCIPLE

This section states that any judgment, order or decree which is relevant under sections 40, 41 or 42 can still be shown by a party to it who was adversely affected by such judgment, decree or order, to have

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69. *State* v. *Thakur Dass*, (1969) 71 Punj LR 435.
70. *Shyam Chand* v. *Janki*, AIR 1966 HP 70.
71. *Ramdhan* v. *Purushottam*, AIR 1926 Nag 109.
72. *Ram Gopal* v. *Ram Kunwari*, ILR (1965) 15 Raj 529.
73. *V.T. Arunachalam* v. *Commr. H.R.&C.E.*, (1980) 1 Mad LJ 405.
74. *Jagdish Chandra Soni* v. *State of Rajasthan*, 1998 Cr LJ 1902 (para 10) (Raj). **relying on** *State of Bihar* v. *Radha Krishna Singh*, AIR 1983 SC 684 : (1983) 3 SCC 118.

been delivered by the Court not competent to deliver it, or it was obtained by fraud or collusion. The competency of the Court or fraud or collusion go to the root of the matter and vitiate the sanctity, finality and the binding nature of a judgment. Every species of judgment will be rendered inadmissible in evidence on proof being given that the Court which pronounced it had no jurisdiction.

Want of jurisdiction to entertain a suit or proceeding, or a judgment, order or decree obtained by fraud or collusion, whether such judgment was *in rem* or *in personam,* vitiates all judicial acts of the Court.[75]

This section applies to both civil and criminal proceedings.[76]

A judgment, coming within Section 41 of the Evidence Act, though *in rem,* is open to attack on the grounds specified in Section 44. Fraud in any case bearing on jurisdictional facts vitiates all judicial acts whether *in rem* or *in personam.*[77]

Section 44 does not apply to judgments admissible under Section 43 of the Act.[78]

Under Section 44 the principle applies only to judgments or decree or orders which are relevant under Sections 40, 41 or 42. A judgment appointing a guardian, and extending the minority of the ward, is somewhat analogus to those judgments *in rem* under Section 41; it is not a judgment in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction of the Court u/Section 41.

A decree passed by a competent Court can only be set aside on the ground of want of jurisdiction, collusion or fraud; otherwise it would stand.[79]

It is not necessary for the party against whom such a judgment, order or decree is sought to be used, to bring a separate suit to have set aside; it is open to such party suit in which such judgment order or decree is sought to be used against him, to show, if such be the case, that the judgment, order or decree relied upon by the other side was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.[80]

The section lays down not only a rule of law relating to evidence, but also a rule of procedure. There are many sections of this Act, such as Sections 66-73, 130, 135, 136 and 150, which relate more or less to matters of procedure.

A person can impeach a decree on the grounds mentioned in this section even if he was a party to the suit in which the decree was passed.[81]

The judgment or decree which the section allows a party to impeach on the ground of fraud must be one which has been proved by the adverse party.[82]

2. COURT NOT COMPETENT TO DELIVER IT

Every species of judgment will be rendered inadmissible in evidence on proof that the Court which pronounced it had no jurisdiction.

The "competency" of a Court and its "jurisdiction" are synonymous terms. They mean the right of a Court to adjudicate in a given matter. They do not mean, in a case where that right exists, the coming to a

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75. *Sumera* v. *Baijnath,* 1983 ALJ 921, 928.
76. *Bhagwan Das* v. *D D. Patel and Company,* AIR 1940 Bom 131; *Sita Devi* v. *Gopal Saran,* AIR 1928 Pat 375; *Ahmed Bhoy Habibhoi* v. *Vellebhoy Cassum Bhoy,* ILR (1882) 6 Bom 703; (a stranger can impeach the judgment *in rem* showing fraud); *Narmada Prasad* v. *State of V.P.,* 1956 VP 30; *Viswanathan* v. *Rukn-ul-Mulk Syed Abdul Wajid,* AIR 1963 SC 1; *Satya* v. *Teja Singh,* AIR 1975 SC 105; *Shah Gulam Ghous Mohiuddin* v. *Syed Shah Abdul Har Khamisul Qadri,* AIR 1959 AP 212.
77. *Satya* v. *Teja Singh,* AIR 1975 SC 105; *Viswanathan* v. *Rukn-ul-Mulk Syed Abdul Wajid,* AIR 1963 SC 1.
78. *Venkata Rangacharyulu* v. *Akkappa Rao,* AIR 1941 Mad 569.
79. *Newton Hickie* v. *Official Trustee of W.B.,* AIR 1954 Cal 506.
80. *Bansilal* v. *Dhapo,* ILR (1902) 24 All 242; *Rajib Panda* v. *Lakhan Sendh Mahapatra,* ILR (1899) 27 Cal 11, 20; *Bhagwandas Naraindas* v. *D D. Patel & Co.,* (1939) 42 Bom LR 23 : AIR 1940 Bom 131.
81. *Nachattar Singh* v. *Jagir Kaur,* AIR 1986 P&H 197; *Joginder Singh* v. *Nirmal Naini Mehta,* AIR 1986 Del 305.
82. A decree holder or one claiming through him can avoid the decree u/s. 44. *Ibne Hasan* v. *Hasina Bibi,* AIR 1984 All 216.

correct conclusion upon any question of law or fact arising in that matter.[83] The words "not competent" refer to a Court acting without jurisdiction.[84]

In STEPHEN'S DIGEST LAW OF EVIDENCE, in Art.46, it is stated that the rule of English Law corresponding to Section 44 of the Indian Evidence Act is stated to be that whenever a judgment is offered as evidence, the party against whom it is so offered may prove that the Court which gave it has no jurisdiction; the competency of a Court and its "jurisdiction" are thus synonymous terms; they mean the right of a Court to adjudicate in a given matter.[85]

JUSTICE VENKATARAMA IYYER in *Kiran Singh* v. *Chaman Paswan*,[86] observed: "It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, and that invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties.[87]

Either party or a stranger against whom a previous judgment is used in a subsequent suit may impeach it on the ground of want of jurisdiction. Any party to a suit or proceeding has a right to show that a judgment which is relevant under Section 41, was delivered by a Court not competent to deliver it or it was obtained by fraud or collusion.[88]

This right is available even to a stranger to the suit.

Section 44, has nothing to do with the competency of the former Court to try the subsequent suit, which is contemplated under Section 11, C.P.C. It is concerned only with the competency of the former Court to try the former suit.[89]

A defect in jurisdiction, whether it is territorial or pecuniary, or whether it is in respect of the subject-matters of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties, but this general rule is subject to certain exceptions, which are well-defined *viz.*, those contained in Section 11 of the Suits Valuation Act, and Section 21 of the Civil Procedure Code. It was observed by the Supreme Court: "With reference to objections relating to territorial jurisdiction, Section 21 of the Civil Procedure Code enacts that no objection to the place of suit should be allowed by an Appellate or Revisional Court, unless there was a consequent failure of justice. It is the same principle that has been adopted in Section 11 of the Suits Valuation Act with reference to pecuniary jurisdiction. The policy underlying Sections 21 and 99, C.P.C. and Section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a Court on the merits and judgments rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the Legislature has been to treat objections to jurisdiction, both territorial and pecuniary, as technical and not open to consideration by an Appellate Court, unless there has been a prejudice on the merits."[90]

The Supreme Court, in *Mohanlal Goenka* v. *Benoy Kishna Murkerjee*,[91] held that lack of territorial jurisdiction can be waived.[92]

In *Hiralal* v. *Sri Kalinath*[93] it was held that Section 44 has no application to the objection based on lack of territorial jurisdiction. No objection can be raised regarding want of territorial jurisdiction, in execution proceedings.[94]

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83. *Sardarmal* v. *Aranvayal Sabhapathy*, ILR (1896) 21 Bom 205.
84. *Ketliamma* v. *Kelappan*, ILR (1889) 12 Mad 228.
85. FIELD 9th Edn., Vol. 3, p. 2336.
86. AIR 1954 SC 340.
87. **See also** *Pantha Lakkunnummal Mother of Kunheema Umma* v. *Puthalath Bala Krishnan Nair*, AIR 1967 Ker 97.
88. *Munireddy* v. *Apparao*, (1973) 2 SCR 458; (1975) 1 SCC 120 : *Sathya* v. *Theja Singh*, AIR 1975 SC 105.
89. *Newton Hickie* v. *Official Trustee of WB*, AIR 1954 Cal 506.
90. *Kiran Singh* v. *Chaman Paswan*, AIR 1954 SC 340; *Beerappa* v. *Yeshwant Rao*, AIR 1972 Mys 338.
91. AIR 1953 SC 65.
92. *Bahrein Petroleum* v. *Pappu*, AIR 1966 SC 634; *Hiralal* v. *Kali Nath*, AIR 1962 SC 199 **confirming** *Hiralal* v. *Sri Kali Nath*, AIR 1955 All 569; *Beerappa* v. *Yeshwantrao*, AIR 1972 Mys 338.
93. AIR 1955 All 569.
94. *Hiralal* v. *Sri Kali Nath*, AIR 1955 All 569; *Gurbux Singh* v. *Brij Lal Chiranjilal*, AIR 1951 Pepsu 46.

There is essential distinction between inherent want of jurisdiction in a Court to entertain a cause and irregular exercise of it. Jurisdiction does not depend upon the correctness of the decision because the power to decide necessarily carries with it the power to decide rightly or wrongly. Incompetency of a Court or absence of jurisdiction has to be proved to avoid a judgment or decree. Even an erroneous decision on a question of law, operates as *res judicata* between the parties to it.[1]

Where there was no undervaluation or overvaluation, but the Court acted on the valuation given in the plaint, according to which the suit was not entertainable by that Court, and rendered a judgment, the judgment would be treated as a nullity.[2]

3. FRAUD OR COLLUSION

This section allows a party to prove fraud or collusion in order to avoid a judgment or order.[3]

Fraud contemplated in this section must be fraud practised in the court itself. Fraud is an extremely collateral act which vitiates the most solemn proceedings of courts of justice.[4]

It is always competent to any Court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud.[5]

For setting aside a decree on the ground of fraud, the fraud must be external and collateral to adjudication and must be of a person who secured the judgment.[6]

The Supreme Court, in *Satya* v. *Tejasingh*[7], reversing the decision in *Tejasingh* v. *Sathya*[8], held that a foreign decree of divorce obtained by the husband from the Nevada State Court in U.S.A., in the absence of the wife, without her submitting herself to its jurisdiction, will not be valid and binding in a criminal court proceedings, for maintenance u/Section 488, Cr.P.C. (old) in India. When it is found that such a decree was obtained by fraud or by making false representation as to the jurisdictional facts, the decree is open to collateral attack. But, when the validity of the decree, or competency of the Court, is not challenged, it would be binding.

The expressions 'fraud' or 'collusion' are not defined in the Act. But the Indian Contract Act, Section 17 defines 'fraud' and 'collusion'. Fraud or collusion, by themselves, do not make a judicial act void but it is voidable by the party who was defrauded or affected by collusion.

According to WHARTON'S, LAW LAXICON, collusion in relation to a judicial proceeding is a secret agreement between two or more persons that one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purposes.[9]

It is not permitted to show that the Court was mistaken, but it may be shown that it was misled by collusion of the parties or by party playing fraud against the other party. Where a judgment was allowed to be admitted in evidence against a stranger, he may avoid its effects by placing distinct proof that it was obtained by fraud or collusion.[10]

The decision given in a suit in which one person is authorised to represent others, is binding on all unless the decision can be shown as vitiated under Section 44. If however, they were not in fact represented then fraud or collusion need not be proved.[11]

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1. *Panthalakunammal Mother of Kunheema Umma* v. *Puthalath Balakrishna Nair*, AIR 1967 Ker 97.
2. *Rachappa Subrao* v. *Shidappa Venkatrao*, AIR 1918 PC 188; *Hiralal Patni* v. *Shri Kalinath*, AIR 1955 All 569.
3. *Siraj Fatma* v. *Mahmud Ali*, (1932) 54 All 646 (FB) : AIR 1932 All 293.
4. *Meadows* v. *Duchess of Kingston*, (1775) 2 Amb 750.
5. *Bhikaji* v. *Balvant*, (1927) 29 Bom LR 1046 : AIR 1927 Bom 510; *Paranjpe* v. *Kanade*, ILR (1882) 6 Bom 148, 153; *Mahomed Golab* v. *Mahomed Sulliman*, ILR (1894) 21 Cal 612.
6. *Papavinasham Subramaniam* v. *Daivani Nagaramma*, AIR 1963 Ker 26.
7. AIR 1975 SC 105.
8. AIR 1971 Punj 80.
9. *Lakshmi Narain* v. *Md. Shafi Bari*, AIR 1949 East Punj 141.
10. BEST ON EVIDENCE, 8th Edn., Sec. 595, P. 457; *Paranjee* v. *Kande*, ILR (1882) 6 Bom 148; *Gurdit Singh* v. *State of Punjab*, (1974) 2 SCC 260.
11. *Krishna Pillai* v. *Karthiyani Amma Sarasmm*, AIR 1969 Ker 26.

A party cannot be allowed to plead his own fraud or collusion for setting aside any judgment, order or decree.[12]

The Privy Council held that the party alleging fraud is bound to establish it by cogent evidence.[13]

LORD ATKIN observed: "Fraud, like any other charge of a criminal offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion and conjecture."[14]

A judgment or decree obtained by fraud upon a Court does not bind such court or any other, and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding.[15]

In applying this rule it matters not whether the impeached judgment has been pronounced by an inferior tribunal or by the highest Court of judicature in the realm; in all cases it is alike competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud.[16]

A court of inferior jurisdiction is competent to declare a decree of a superior Court to be a nullity on the ground of fraud, if otherwise it has jurisdiction to entertain the suit.[17]

It is always competent to any Court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud.[18]

A distinction exists between those cases in which the fraud is only attempted but not carried into effect and those in which it has actually been carried into effect. In the former case, a party attempting to commit fraud is not precluded from maintaining an action to set aside the fraudulent transaction; but in the latter case he is not allowed to take advantage of his own wrong and is precluded from maintaining an action to set aside the fraudulent transaction actually carried into effect.[19]

A judgment which was obtained by fraud can be challenged without setting aside the decree, and can be impeached collaterally by pleading fraud as a defence to an action. Section 44 is very wide and lays down not merely a rule of law relating to evidence but also a rule of procedure as to how the judgment should be impeached. The contention that a party may impeach a judgment on the ground of fraud under Section 44, only within a period of three years, as provided by Article 95 Limitation Act, is therefore not acceptable.[20]

The principle of *res judicata* under Section 11, C.P.C., is outside the region of fraud or collusion, which is contemplated under Section 44; Thus Section 44 is an exception to Section 11, C.P.C.[21] but the decision relied upon for invoking the plea of *res judicata* can be attacked on the ground that it was procured by practising fraud or collusion. That can be done otherwise than filing appeal. However, the ground of fraud for vacating judgment relied upon has to be extraneous to everything adjudicated upon in the judgment relied upon.[22]

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12. *Parameshwaran* v. *Aiyappan Pillai*, AIR 1959 Ker 206.
13. *Hansraj Gupta* v. *Dehradun Mussoorie Electric Tram Way Co. Ltd.*, AIR 1940 PC 98.
14. *A.L.N. Narayanan Chettiyar* v. *Official Assignee Rangoon*, AIR 1941 PC 93.
15. *The Queen* v. *Saddlers Company*, (1863) 10 HLC 404, 431.
16. *Nistarini Dassi* v. *Nundo Lall Bose*, (1899) 26 Cal 891, 908.
17. *Sarthakram Maiti* v. *Nundo Ram Maiti*, (1906) 11 CWN 579.
18. *Paranjpe* v. *Kanade*, ILR (1882) 6 Bom 148, 153; *Bhikaji* v. *Balvant*, ILR (1927) 29 Bom LR 1046; *Mahomed Golab* v. *Mahomed Sulliman*, ILR (1894) 21 Cal 612.
19. **See** *Goberdhan Singh* v. *Ritu Roy*, ILR (1896) 23 Cal 962; *Banka Behary Dass* v. *Raj Kumar Dass*, ILR (1899) 27 Cal 231; *Govinda Kuar* v. *Lala Kishun Prosad*, ILR (1900) 28 Cal 370; *Sham Lall Mitra* v. *Amarendra Nath Bose*, ILR (1895) 23 Cal 460; *Gram Panchayat, Naulakha* v. *Ujagar Singh*, AIR 2000 SC 3272 (paras 5-7).
20. *Bishunath Tewari* v. *Mirchi*, 1955 Pat 66; *Tribani Mishra* v. *Ramapujan Mishra*, AIR 1970 Pat 13; *Jatindra Nath Das* v. *Jadaram*, (1975) 2 Cal LJ 209 : 79 Cal WN 936.
21. *Vellappan* v. *Peter Thomas*, AIR 1979 Ker 194; *M.N. Paul* v. *State of Kerala*, AIR 1982 Ker 38, 40; **See also** *Radha* v. *Wajid Ali*, 36 IC 746 (Oudh); *Krishna Bhupati* v. *Ramamurthi*, ILR (1892) 16 M 198; *Laxmi Narain* v. *(Md.) Shafi*, AIR 1949 Punj 141; *Khrodh Chandra* v. *Banshidhar*, AIR 1978 Ori 111.
22. *Keepattel Bappu* v. *Kizhakke Valappil Muhammad*, AIR 1993 Ker 273 (paras 17, 18 and 32).

A party to a decree, or a person claiming through such party can under Section 44 be allowed to avoid the effect of the decree on the ground of fraud or collusion. Still, such decree will be relevant to support the plea of estoppel if the ingredients of estoppel are made out.[23]

The word 'fraud' in Section 44 means that the party against whom the decree is obtained is deliberately kept out of knowledge of the suit or by some means disabled from defending the same.[24]

A wife can file an application u/order 9, Rule 13, C.P.C., for setting aside an *ex parte* decree of dissolution of marriage by challenging the decree under the provisions of Section 44, on any of the grounds mentioned therein, even though the husband dies and such a suit is maintainable[25] but in a maintenance proceeding a husband cannot apply for leading evidence on the ground of fraud *viz.* the concealment of fact of gainful employment by wife. No dishonesty or deceit could be attributed to a helpless wife attracting the provisions of this Section.[26]

A certificate of sale obtained by fraud is vitiated and is not binding on the party; the sale can be attacked by a suit or in collateral proceedings by way of defence, on the ground of its being nullity due to fraud; such defence can be raised in a suit for possession by a purchaser at a sale under Section 44.[27] Even in execution matters, if it is shown that the order was made by mistake or fraud which affects the validity of the order under execution, rendering it ineffective. Section 44 applies and permits a person to lead evidence to show that the order is not binding.[28] Where an *ex parte* decree in the earlier title suit was obtained by the plaintiff in that suit in collusion with all the defendants in the said suit, it was held that the decree would not operate as *res judicata* in the subsequent title brought against the plaintiff in the earlier suit.[29] Where a suit was filed by the plaintiff for possession of the property, and the defendant claimed title under a decree passed in an earlier suit to which the plaintiff was a party, it was held that the plaintiff can challenge the decree as collusive under this section.[30] Where a claim suit was filed under order 21, Rule 63, C.P.C. (old) by a decree holder, it was held that the objector can attack the decree on the ground of fraud or collusion.[31]

A suit for setting aside a decree on the ground of fraud and for possession, was dismissed as time barred under Section 95 of the Limitation Act, though fraud was held to be proved. It was however held that, by virtue of Section 44 of the Evidence Act, the plaintiff could still avoid the fraudulent decree and that relief of setting aside the impugned decree may be ignored, and relief of possession can be granted.[32]

The Madras High Court held that Section 44 relates to procedure; that it does not confer any right on the party; that, if a judgment is sought to be relied upon in a proceeding, it is open to the party to contend that the judgment sought to be relied on was obtained by fraud; that this is far from saying that a Court has jurisdiction to set aside a decree under this section, at the instance of one of the parties to it saying that it was obtained by fraud; and that as application under Order 37, Rule 4 C.P.C., was filed by a respondent to set aside the decree dated 1-3-1972 that was dismissed on 24-9-1974, and that order was not appealed against or questioned, it had given finality to the decree, dated 1-3-1972; and thereafter the Civil Court had no jurisdiction to set aside a decree.[33]

Where plaintiffs in a suit against a minor colluded with the minor's natural father by paying some amount and obtained a decree in their favour, it was held that the decree in the earlier suit was vitiated by

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23. *Ibne Hasan* v. *Hasina Bibi*, AIR 1984 All 216; **overruling** *Sahib Rai* v. *Bahari Rai*, AIR 1927 All 494; *Chauhana* v. *Gaya Prasad*, AIR 1971 All 439.
24. *Haria* v. *Gaon Sabha of Dera Moad*, ILR (1972) 2 Del 964.
25. *Iraavva* v. *Shivappa Sidhalingappa Angadi*, AIR 1987 Kant 241.
26. *Asha Anil Deshmukh* v. *Anil Mahadeorao Deshmukh*, 1996 Cr LJ 2751 (paras 10-12) (Bom). **Distinguishing** *S P Chengalvaraya Naidu (dead) by L.R.s* v. *Jagannath (dead) by L.R.s*, AIR 1994 SC 853.
27. *Sukhisahu* v. *Prayag Shah*, AIR 1959 Pat 508.
28. *Shewa Lachha Banjar* v. *Bhawarilal Ganeshmal*, AIR 1973 Bom 139; *Joginder Singh* v. *Niramal Naini Mehra*, AIR 1986 Del 305.
29. *Khirod Chandra Mohanty* v. *Bashidhar Khatua*, AIR 1978 Ori 111.
30. *Nachhittar Singh* v. *Jagir Kaur*, AIR 1986 P&H 197.
31. *Vijaya Lakshmamma* v. *Y Padmanabham*, AIR 1955 AP 112; **see contra** - *Nawab Syed Md Hashimali Khan* v. *Hamdi Begum*, AIR 1942 Cal 180
32. *Ekawari* v. *Jadunandan Kamat*, AIR 1974 Pat 191.
33. *Thigarajan* v. *Md. Umar Sait*, AIR 1978 Mad 223.

collusion and can be set aside u s.44 of the Act.[34] In cases where an inference of fraud or collusion can be drawn from the negligence or gross negligence of the next friend of a minor, it would be permissible for the minor to avoid the judgment or the decree passed in the earlier proceeding by invoking Section 44 without taking resort to a separate suit for setting aside the decree or the judgment.[35]

Where both parties to a suit practise fraud on the Court and obtain a collusive decree, it is not open to either of them to impeach the judgment of the Court on the ground that it was collusively procurred.[36]

Where a compromise decree was passed in an appeal, according to which a religious trust was created on the basis of a deed, it was held that when two views were possible regarding the construction of the deed and the concerned decree was based upon one view, it could not be challenged in a subsequent suit on the ground of collusion or fraud.[37]

The party playing fraud on the Court is liable to be thrown out at any stage and the decree so obtained is vitiated by fraud.[38]

4. CASES OTHER THAN FRAUD OR COLLUSION

The principle of this section cannot be extended to other grounds like misrepresentation or undue influence, but only applies to grounds like fraud or collusion, as mentioned in this section.[39] Though under Section 44, the party is entitled to show that the judgment was obtained by fraud, it is not open to him to plead that the compromise on which the judgment was based was vitiated by a mutual mistake as to a material fact.[40]

In *Talluri Venkata Sheshayya* v. *Thati Konda Kotiswar Rao*[41], after referring to two earlier cases in *Lalla Sheo Churnlal* v. *Ramnandan Dubey*,[42] and *Pamayyah* v. *Rajam Viranna*,[43] the Privy Council observed: "Their Lordships are not concerned to discuss the question of the validity of these decisions, or the exlusive distinction between negligence and gross negligence, as they are satisfied that the principle involved in these cases is not applicable to such cases as the present one. The protection of minors against the negligent actings of their guardians is a special one..... The provisions of Section 11, C.P.C., are mandatory and the ordinary litigant, who claims under one of the parties to the former suit, can only avoid its provisions by taking advantage of Section 44, Evidence Act, which defines with precision, the grounds of such avoidance as fraud or collusion. It is not for the Court to treat negligence, or gross negligence as fraud or collusion, unless fraud or collusion, is the proper inference from the facts." They further observed: "The Subordinate Judge's finding of gross negligence is very far from a finding of intentional suppression of the document, which would amount to want of *bona fides*, or collusion, or of such intentional suppression of the plaintiff's evidence before the High Court. In their Lordships' opinion, there is no evidence in this suit which establishes either want of *bona fides* or collusion on the part of the plaintiffs in the 1891 suit, and, accordingly, the appellants have failed to show that the decisions in the 1891 suit are not binding on them as *res judicata*."

In *Kari Bapana* v. *Sunkari Erramma*[44] it was held that the principle under Section 44 can be extended to cases of gross negligence; that view cannot be held to be correct in view of the above decision of the Privy Council.

A distinction has to be borne in mind between a right of a party other than a minor in any proceeding to question the validity of a judgment and the right of a minor on attaining majority to set aside the decree passed against him on the ground of gross negligence of the guardian. In the former case the party

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34. *Channayya Basayya Renukanath* v. *Shekharayya*, (1962) 2 Mys LJ 84.
35. *Asharfi Lal* v. *Koili*, AIR 1995 SC 1440 (paras 14 and 15), **reversing** the WP No. 8876 of 1971, Dt. 23-2-1982 (All).
36. *Shripadgouda Venkagouda* v. *Govindgouda Narayangouda*, ILR (1941) Bom 160 : (1940) 42 Bom LR 1185. **See** *Parameswearn* v. *Aiyappan Pillai*, AIR 1959 Ker 206.
37. *Jadu Gopal Chakravarty (dead) His L.Rs.* v. *Pannalal Bhowmick*, AIR 1978 SC 1329.
38. *S.P. Chengalvaraya Naidu* v. *Jagannath*, AIR 1994 SC 853 (paras 7 and 8).
39. *Krishna Subala Bose* v. *Dhanapati Dutta*, AIR 1957 Cal 59; *Pandrangi Lingeswara Rao* v. *D. Venkata Subbarao*, (1966) 2 An WR 144.
40. *Krishna Sobala Bose* v. *Dhanapati Dutta*, AIR 1957 Cal 59.
41. AIR 1937 PC 1 : 64 IA 17.
42. ILR 22 Cal 8.
43. AIR 1922 Mad 273.
44. 45 MLJ 324.

cannot show that any judgment is vitiated by gross negligence unless fraud or collusion is the proper inference from the facts.[45] Section 44 does not affect the right of a minor to set aside the decree by an independent suit on the ground of gross negligence or fraud of guardian. Such a suit exists independently of the provisions of the Evidence Act.[46]

In an application in a Revenue Court, a guardian of certain minors raised a contention regarding the question of proprietary title to the lands and he was directed to institute a suit in a Civil Court; but he failed to file the suit. There upon the Revenue Court decided the question against the minors. One of the minors, after attaining majority, filed a suit for declaration of title, and for possession without praying for the avoidance of the order of the Revenue Court. The two lower Courts held that fraud or collusion was not established, but there was gross negligence on the part of the guardian in not filing the suit as direcd by the Revenue Court, and thus decreed the suit. The Full Bench of the Allahabad High Court, held that the right of a minor to avoid a decree on the ground of negligence of his guardian is a well established rule of common law and is therefore, a substantive right, and that this section does not prevent a minor from adducing evidence of negligence of his guardian, if he has a substantive right to prove such negligence and thereby avoid the judgment. It does not enumerate and exhaust the grounds upon which a decree or order may be attacked.[47] This section is only permissive. It allows a party to avoid a judgment, but does not destroy his substantive right which exists independently of the Evidence Act. Thus, the right of a minor to challenge a decree on the ground of the negligence of the guardian is not taken away.[48] A decree passed against a minor can be avoided by him, on his attaining majority, on the ground of gross negligence of the party of his next friend or guardian *ad litem*, by bringing a subsequent suit even if he has not succeeded in proving fraud or collusion on the part of such next friend or guardian.[49]

However, a Full Bench of the Bombay High Court has held that gross negligence, apart from fraud or collusion, on the part of the next friend or guardian *ad litem*, does not afford the basis of a suit to set aside a decree obtained against a minor.[50]

It is submitted that the view of the various High Courts other than Bombay and Rajasthan that Section 44 does not affect the right of a minor to sue to set aside a decree on attaining majority on the ground of gross negligence on the part of the guardian is to be preferred.

A Court cannot pass a decree unless the minor is represented by a guardian.[51]

OPINIONS OF THIRD PERSONS, WHEN RELEVANT

Opinions of experts.

S. 45. When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts.

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45. *Talluri Venkata Sheshayya* v. *Thati Konda Kotiswar Rao*, 64 IA 17 : AIR 1937 PC 1.
46. *Venkatappa Naik* v. *Subba Naik*, ILR (1905) 29 Mad 179; *Mahesh Chandra Bayan* v. *Manindra Nath Das*, ILR (1941) 1 Cal 477 : AIR 1941 Cal 401.
47. *Siraj Fatima* v. *Mahmood Ali*, AIR 1932 All 293 : (1932) 54 All 646 (FB); *Dwarika Halwai* v. *Sitla Prasad*, AIR 1940 All 256; *Desari Venkanna* v. *Desari*, AIR 1980 NOC 82 (AP); *Chunduru Pundayyah* v. *Rajan Viranna*, ILR 45 Mad 425 : AIR 1922 Mad 273; *Narayanan* v. *Gopalan*, AIR 1960 Ker 367; *Kamakshya* v. *Baldeo*, AIR 1950 Pat 97 (FB); *Iftekhar* v. *Beant*, AIR 1946 Lah 233 (FB); *Egappa* v. *Ramanathan*, AIR 1942 Mad 384; *Chunduru* v. *Rajam*, AIR 1922 Mad 273.
48. *Mahesh Chandra* v. *Mahindranath Das*, ILR (1941) 1 Cal 477 : AIR 1941 Cal 401; *Iftekhar* v. *Beant*, AIR 1946 Lah 233 (FB).
49. *Punnayah* v. *Viranna*, (1921) 45 Mad 425; *Ganganand Singh* v. *Maharaja Sir Rameshwar Singh Bahadur*, (1927) 6 Pat 388 : AIR 1927 Pat 271; *Mathura Singh* v. *Rama Rudra Prasad Sinha*, (1935) 14 Pat 824 : AIR 1936 Pat 231; *Kamakshya N. Singh* v. *Baldeo*, AIR 1950 Pat 97 : ILR (1948) 27 Pat 441 (FB); *Narayan Namboodripad* v. *Gopalan Nair*, AIR 1960 Ker 367; *Kothandarama Gramani* v. *Sellammal*, AIR 1959 Mad 524; *Venkamma* v. *Venkamma*, (1970) 2 An LT 70, 76.
50. *Krishnadas Padmanabhrao* v. *Vithoba Annappa*, 1939 Bom 340, 41 Bom LR 59 (FB); **See also** *State* v. *Rao Dhir Singh*, AIR 1972 Raj 241.
51. *Venkanna* v. *Venkamma*, (1979) 2 Andh.LT 70, 76. **See also** *Mathura Singh* v. *Ram Rudra Prashad*, AIR 1936 Pat 231, 238; *Narayanan* v. *Gopalan*, AIR 1960 Ker 367; *Kamkalshya* v. *Baldeo*, AIR 1950 Pat 97 (FB); *Iftekhar* v. *Beant*, AIR 1946 Lah 233 (FB); *Egappa* v. *Ramanathan*, AIR 1942 Mad 384; *Chunduru* v. *Rajam*, AIR 1922 Mad 273.

Such persons are called experts.

ILLUSTRATIONS

(a) The question is, whether the death of *A* was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which *A* is supposed to have died, are relevant.

(b) The question is, whether *A*, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by *A* commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether a certain document was written by *A*. Another document is produced which is proved or admitted to have been written by *A*.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

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COMMENTS

1. PRINCIPLE AND SCOPE

This section is an exception to the rule as regards the exclusion of opinion evidence. Opinions of experts are relevant upon a point of (a) foreign law, (b) science, (c) art, (d) identity of handwriting, and (e) finger impressions.

It is "a general rule that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject-matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance. In other words, this is so when it so far partakes of the character of a science or art as to require a course of previous habit or study to obtain a competent knowledge of its nature."[1]

Both under this section and S. 47 the evidence is of an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience.

In either case the Court must satisfy itself by such means as are open that the opinion may be acted upon.[2]

PHIPSON ON EVIDENCE (15th Edn. (2000), P. 921 Para 37-09) states as follows : "Even at common law the opinions of skilled witnesses are admissible wherever the subject is one upon which competency to form an opinion can only be acquired by a course of special study or experience. The terms on which expert evidence is admissible is governed in civil cases by the Civil Evidence Act, 1972 and the CPR (Civil Procedure Rules)."

At [page 962, para 37-46, 15th Edn. (2000)] PHIPSON states: "Though the expert must be "skilled", by special study or experience, the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility..... Equally, one can acquire experts knowledge in a particular sphere through repeated contact with it in the course of one's work, notwithstanding that the expertise is derived from experience and not from formal training".

HALSBURY observes[3] Courts frequently have to decide upon matters requiring specialised knowledge and, in appropriate cases, a party will need to call an expert or experts in support of his case. When such a person is called as a witness in civil proceedings, his opinion is admissible on any relevant matter, including an issue in the proceedings, on which he is qualified to give expert evidence.

In *Sitaram Nai* v. *Puranmal Sonar*,[4] the Supreme Court explained the meaning of the term "opinion" in this connection. The Court said that it was laid down in *Dolgobinda* v. *Nimai Charan Misra*,[5] that what is relevant is the opinion expressed by conduct and opinion means something more than mere relating of gossip or of hearsay; it means judgement or belief, that is, a belief or conviction resulting from what one thinks on a particular question. The section does not make the evidence of mere general reputation admissible as proof of relationship. It is the conduct or outward behaviour which must be proved in the manner laid down in Section 60.

If the subject under investigation does not require specialist knowledge, expert evidence will generally be excluded.[6] Where corroborated evidence of the eye-witnesses to the stabbing incident was available, failure of the prosecution in seeking the opinion of the medical witness regarding the use of a particular weapons in the stabbing was not fatal.[7]

The opinions of skilled witnesses cannot be received when the inquiry relates to a subject which does not require any peculiar habits or course of study to qualify a man to understand it[8], *e.g.*, similarly of fraudulent trademark.[9] In all other cases witnesses must speak only of facts and not of opinion or inferences.[10]

The Court is bound to defer to the opinion of an expert where skill and experience alone render a person a competent judge. In the case of an expert witness, there exists the tendency to support the view which is favourable to the side which employs him, so that it is difficult to get from him an independent

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1. TAYLOR, 12th Edn., s.1418, p. 902.
2. *Fakhruddin* v. *State of M.P.*, AIR 1967 SC 1326.
3. 4th Ed. Vol. 17, page 61 (para 83).
4. AIR 1985 Ori 171 at 176.
5. AIR 1959 SC 914.
6. *United States Shipping Board* v. *The St. Albans*, (1931) AC 632, (PC).
7. *Prem Chand* v. *State*, 1996 Cr LJ 1217 (para 22) (Del).The Court **referred to** *Ilam Singh* v. *State of U.P.*, (1976) 4 SCC 355 : 1976 Cr LJ 1883.
8. *Ibid.* S. 1419, p. 902.
9. *Swadeshi Mills Company Limited* v. *Juggi Lal*, ILR (1926) 49 All 92.
10. *Babuli* v. *State of Orissa*, AIR 1974 SC 775.

opinion. An expert may revise his opinion if he finds cogent reason, and his evidence need not be disbelieved on this ground.[11]

The Court cannot substitute its own opinion for that of an expert.[12]

The word 'science' occurring in Section 45 includes experts in typewriters whose evidence is admissible under Section 45.[13]

2. EXPERT

An 'Expert' witness is one who has devoted time and study to a special branch of learning, and thus is specially skilled on those points on which he is asked to state his opinion. His evidence on such points is admissible, to enable the tribunal to come to a satisfactory conclusion.[14] The opinion of the expert is only opinion evidence. It does not help the Court in interpretation.[15] The Court is not bound to follow it blindly. The expert cannot act as a judge or jury and the final decision is to be made by the judge.[16]

An expert, in order to be competent as a witness, need not have acquired his knowledge professionally. It is sufficient so far as the admissibility of the evidence goes, if he has acquired special experience therein.[17] However, the expert must show that he is skilled and has adequate knowledge of the subject.[18]

All persons who practise a business or profession which requires them to possess a certain knowledge of the matter in hand are experts, so far as expertness is required. It is the duty of the judge to decide whether the skill of any person in the matter on which evidence of his opinion is offered, is sufficient to entitle him to be considered as an expert. Opinion (prediction as to duration of pregnancy) of an experienced obstetrician cannot be rejected merely because she is not specialised in gynaecology.[19]

It is not an inflexible principle that a person can never acquire special experience and be an expert merely on the basis of a correspondence course, even after passing an examination from a recognised institution. Whether a particular person should be treated as an expert is, in the ultimate analysis, a question of fact to be determined on a consideration of all the circumstances relating to the acquisition of special experience by a person claiming to be an expert.[20]

One who has acquired special knowledge and skill in any science is an expert. His opinion, based on observations or experiments, is relevant in cases where questions relating to his science arise.[21]

A party seeking to adduce evidence of a person under Section 45 should, in the first instance, show to the court from the evidence of such witness, that the witness is specially skilled in the particular science and then only such witness is called an *expert*.[22]

It is the duty of an expert to furnish the judges with the necessary criteria for testing the accuracy of his conclusions, so as to enable the judge to form his own independent judgment by application of the criteria to the facts proved in evidence.[23]

Where the prosecutrix, the victim of rape was dumb, evidence of the Principal, Government Residential School for Deaf as her interpreter was an expert evidence and her testimony with the help of

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11. *Subodh Kumar* v. *Soshi Kumar*, AIR 1958 Cal 264.
12. *T. Veerabhadrappa* v. *Ministry of Mines & Steel, New Delhi*, AIR 1998 Kant 412 (para 9). **Also see** *Bomma Naicken* v. *Chinna Gounder*, AIR 1998 Mad 375 (paras 4, 8 and 9).
13. *State* v. *S.J. Choudhary*, 1996 Cr LJ 1713 (paras 15, 17 and 18) (SC) : AIR 1996 SC 1491 **overruling** *Hanumant* v. *State of Madhya Pradesh*, AIR 1952 SC 343 : 1952 SCR 1091 and **reversing** Cri Revn No. 105 of 1987 (Del).
14. POWELL, 10th Edn., p. 39
15. *Forest Range Officer* v. *P. Mohammed Ali*, AIR 1994 SC 120 (para 8).
16. *Law Society of India* v. *Fertilizers & Chemicals Travancore Ltd.*, AIR 1994 Ker 308 (paras 185 and 186).
17. *Collector, Jabalpur* v. *A.Y. Jahagir Khan*, AIR 1971 MP 32. **See also** *Huding Singh* v. *State*, 1995 Cr LJ 1128 (para 8) (Ori); *State of H.P.* v. *Jai Lal*, 1999 Cr LJ 4294 (para 20) (SC) : AIR 1999 SC 3318.
18. *State of H.P.* v. *Jai Lal*, 1999 Cr LJ 4294 (paras 17, 18 and 20) (SC) : AIR 1999 SC 3318.
19. *Miglani* v. *Miglani*, AIR 1979 SC 879; **See** *Chatt Ram* v. *State of Haryana*, AIR 1979 SC 1890 (generally on the meaning of expert).
20. *Pannalal* v. *State*, ILR (1960) 10 Raj 1191.
21. *A. Nagi Reddi* v. *State*, (1968) 1 Andh. W.R. 178.
22. *Central Excise Dept.* v. *Somasundaram*, 1980 Cr LJ 533 (Kar).
23. *Sri Sundari Davi* v. *Ganghram*, 1979 All LJ 38.

such interpreter can be relied upon.[24] It was held that the Senior Scientific Assistant (Chemistry), Central Forensic Science Laboratory, though he does not fall in the category of officers mentioned in Section 293, Cr.P.C. is an expert in science and his opinion would be a relevant piece of evidence.[25]

An Excise Inspector who had put in twenty one years of service, had tested countless samples of liquor, and whose competence to test the contents and strength of seized liquor had not been questioned at all, was an expert within the meaning of this section.[26] If the Excise Inspector did not state how long he had been in service and how many samples he had tested, or about his qualification and experience in testing, he cannot be treated as an expert u/s. 45, and his evidence cannot be relied upon.[27]

In re.: *Govinda Reddy*,[28] it was held that 25 years experience in photography is enough to call a person an expert.

Microscopic evidence cannot be interfered with only because some further superior method was not adopted.[29]

Architects may be experts for the purpose of designing and building a house, but they are not experts for the purpose of giving opinion as to what would be the cost of construction in a particular year, without any data about the prices of material and wages prevalent in that particular year.[30]

Where in a case of corruption it was alleged that fraud was committed on large scale by officers of Irrigation Department in carrying out the jungle clearance work, the departmental engineer, entrusted with the job of assisting the investigating agency, could be called an "expert" in view of special knowledge acquired by him while in service.[31]

The advice given by nautical assessors is expert evidence and is admissible in Admiralty Courts on all issues of fact about seamanship.[32] The decision of the case, however, rests entirely with the Court, and even in purely nautical matters, the Court is not bound to follow the advice of assessors; but, on questions of nautical science and skill, great attention must obviously be paid to the opinion of assessors, since they are the only source of information on these points, and some reasons should be given for disregarding them.[33]

On the question whether 'fel' is a textile fabric or not, the opinion of the Indian Standards Institute is important and has to be preferred to the opinion of the traders in the affidavits filed by the petitioner.[34]

The evidence of a sub-inspector that particular words used in a slip of paper were code words for particular figures used in recording betting transactions in American futures was held not relevant u/s. 45, as he did not claim to be an *expert* having special means of knowledge of the meaning of those words.[35]

In regard to the proof of wills, expert's opinions on handwriting is relevant for the court to come to its own conclusion.[36]

Whether a book advocating the use of cocaine tended to deprave and corrupt has been held to be a technical matter, entitling medical men to speak.[37]

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24. *Public Prosecutor, A.P. High Court* v. *Lingisetty Sreenu*, 1997 Cr LJ 4003 (AP).
25. *Amarjit Singh* v. *State (Delhi Administration)*, 1995 Cr LJ 1623 (paras 18 and 19) (Del).
26. *S.C. Batra* v. *State of U.P.*, AIR 1974 SC 639.
27. *Pitambar* v. *State*, 1975 Cr LJ 948 (All). **See also** *M. Shafi Goroo* v. *State*, 2000 Cr LJ 2172 (para 12) (Del)
28. AIR 1958 Mys 150.
29. *Ramanathan* v. *State of T.N.*, 1978 Cr LJ 1137 : AIR 1978 SC 1204.
30. *Diwanchand* v. *Tirathram*, AIR 1972 Del 41; *Amar Nath* v. *Union of India*, 1975 Raj LR 38 (Del).
31. *M.S. Reddy* v. *State Inspector of Police, A.C.B., Nellore*, 1993 Cr LJ 558 (para 48) (AP).
32. THE CLAN LEMONT, (1946) 79 LLYOD LR 521 at p. 524.
33. *Asiatic S.N. Co.* v. *Arabinda*, AIR 1959 SC 597.
34. *Porritts & Spencer (Asia) Ltd.* v. *Union of India*, ILR (1980) 2 Delhi 1173.
35. *Harakchand Radhakishen* v. *State*, AIR 1954 MB 145.
36. *Girija Kuer* v. *Ambika Devi*, 1978 Hindu LR 61.
37. *R* v. *Skirving*, (1985) 2 All ER 705; **See** All ER Annual Review 1985 at p. 157. On shifting of expert evidence in personal injury cases **See** *Sulivan* v. *West Yorkshire Passenger Transport Executive*, (1985) 2 All ER 134; (medical opinion preferred as against eye-witnesses); *Purushottam* v. *M.P.*, AIR 1980 SC 1873; *M.D. Jadav* v. *Maharashtra*, AIR 1976 SC 2327; (medical report as charred bodies found **reliable**).

The opinion of an expert was not allowed to be rejected only because the sample taken was less than the statutory requirement, because it was otherwise sufficient for test purposes.[38]

3. EXPERTS' EVIDENCE

The expert evidence has two aspects, the **data evidence** and the **opinion evidence.** While it is undoubtedly true that the data evidence cannot be rejected if it is inconsistent to oral evidence but the opinion evidence is only an inference drawn from the data and would not get precedence over the direct eye-witness testimony unless of course the inconsistency between the two is so great as to obviously falsify the oral evidence.[39] The expert evidence is a weak type of evidence and the Courts do not consider it conclusive. It is, therefore, not safe to rely upon it without seeking independent and reliable corroboration.[40] Once the expert's opinion is accepted by the Court, it ceased to be the opinion of the expert and becomes the opinion of the Court.[41]

4. FOREIGN LAW

Foreign law is law which is not in force in India. Expert evidence cannot be admitted where a particular law is the law of the land. "The Shiah law on marriage is the law of the land and is in force in India. It can by no means be called foreign law, nor is such law a science or art within the meaning of that section (Section 45). It is the duty of Courts themselves to interpret the law of the land and apply it, and not to depend on the opinion of witnesses, howsoever learned they may be. It would be dangerous to delegate their duty to witnesses produced by either party. Foreign law, on the other hand, is a question of fact with which Courts in India are not supposed to be conversant. Opinions of experts on foreign law are, therefore, allowed to be admitted".[42]

The law in England as to the opinion of an expert on foreign law is stated by PHIPSON[43] as follows:—

"In civil cases it is now enacted that it is unnecessary that the witness be a practitioner of the system of law as to which he is to give expert testimony. He may be an academic lawyer or indeed be in any other way "appropriately qualified". This provision has not narrowed the range of experts whose testimony the Courts will accept in civil cases to which the general law otherwise applies. In all cases, the expert may be either a professional lawyer or a person *peritus virtute officii, i.e.,* the holder of an official position which requires and therefore implies legal knowledge. Even in cases, other than those governed by the Civil Evidence Act, 1972, there is wide scope; and it is thought that evidence is admissible from any person who from his profession or business has had peculiar means of becoming acquainted with the law in question". The author gives a number of instances where opinion on foreign law was accepted.

PHIPSON[44] further states: "Experts on the subject may refer to Codes and precedents in support of their views; and the passages cited will then be treated as part of their testimony".

5. SCIENCE OR ART

These words include all subjects on which a course of special study or experience is necessary to the formation of an opinion.[45]

The study of certain customs and manners of tribes and castes, of the areas occupied by them, and of other connected matters, comes within the meaning of "science or art" in this section. The words "science or art" are to be broadly construed, the term "science" not being limited to the higher sciences, and the term "art" not being limited to fine arts, but having its original sense of handicraft, carried

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38. *Kisan* v. *State of Maharashtra,* AIR 1979 SC 1824.
39. *Arshad* v. *State of A.P.,* 1996 Cr LJ 2893 (para 34) (AP).
40. *S. Gopal Reddy* v. *State of A.P.,* AIR 1996 SC 2184 (para 27), **following** *Magan Bihari Lal* v. *State of Punjab,* AIR 1977 SC 1091 at p. 1093.
41. *Manorama Devi* v. *Suresh,* 1999 AIHC 3433 (para 36) (MP).
42. *Aziz Bano* v. *Mohammad Ibrahim Hussain,* AIR 1925 All 720 : ILR (1925) 47 All 823, 835.
43. 15th Edn. (2000), para 37-57, pages 974-975.
44. 15th Edn. (2000), para 37-58, pages 976.
45. STEPHEN'S DIGEST, 12th Edn., (1946) Art. 49.

beyond the sphere of common pursuits of life into that of "artistic" and "scientific" action. The tests which may be applied in determining whether a particular question is one of scientific nature and, consequently, whether skilled witnesses may pass their opinions upon it are: Is the subject-matter of enquiry such that inexperienced men are unlikely to prove capable of forming a correct judgment upon it without the assistance of experts; that is, does it so far partake of the character of a science or art as to require a course of previous habit or study in order to obtain a competent knowledge of its nature? Books dealing with customs and manners of different castes and tribes are admissible in evidence to prove them.[46]

Where experts are called to pronounce their opinions on scientific questions, they may refresh their memory by referring to professional treatises. The word "science" is comprehensive enough to include the opinion of an expert in footprint.[47]

Exceptional cases cited in treatises cannot overrule clear evidence before the Court[48].

The following instances of expert opinion on science and art are given in PHIPSON ON EVIDENCE[49] :

"The opinions of medical men (under which term unqualified practitioners, hospital students, and dressers have occasionally been permitted to testify, but the evidence of a research student in taxicology is not admissible on a point of medicine) are admissible upon questions within their own provinces—*e.g.* insanity, the causes of diseases or death, the effects of poisons, the consequences of wounds, the conditions of gestation, the effect of hospitals upon the health of neighbourhood; medical ethics; those of actuaries, or accountants familiar with the business of life insurance, as to the average duration of life with respect to the value of annuities; those of naturalists as to the ability of fish to overcome obstacles in a river; those of an expert in forestry as to the probable object with which certain plantations had been laid out; and so with other branches of science. The opinions of artists, art critics, museum officials, dealers and restorers, are admissible as to the genuineness or merit of a work of art; those of engineers as to the cause of obstruction to a harbour; those of engravers as to the impressions from a seal, or the probability that a will was written over erased pencil marks; those of officers of a fire brigade as to the cause of a fire; those of military men as to a question of military practice; those of post-office clerks as to postmarks; those of shipbuilders, marine surveyors and engineers as to the strength and construction of a ship; and, when the Court is not sitting with assessors, those of nautical men as to the proper navigation of a vessel."

6. IDENTITY OF HANDWRITING

Sections 45 and 47 of the Evidence Act prescribe the method by which signature can be proved. Under Section 45, opinion of the handwriting expert is relevant, while under Section 47 the opinion of any person acquainted with the handwriting of the person who is alleged to have signed the document, is admissible. It is only if the Court is satisfied that the circumstances irresistibly lead to the inference that the person must have signed the document in question, it can legitimately arrive at a conclusion.[50] There can be other modes through which handwriting can be established, *e.g.* if a letter is seized from the possession of '*A*' and the letter contains the name of sender as well as the name of sendee and if such sendee happens to be '*A*' himself, those circumstances even without resorting to the modes indicated in Sections 45 and 47, would be sufficient to draw an inference that the author or even scribe of that letter is the sender and 'A' is the sendee of it.[51]

Both under this section and Section 47, the evidence is of an opinion, in the former by a scientific comparision and in the latter on the basis of familiarity resulting from frequent observations and experience.

Science of identification of handwriting is an imperfect one and courts must be wary in placing implicit reliance on the opinion of a handwriting expert.[52]

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46. *Mahadeo* v. *Vyankammabai*, 1947 Nag 781 : AIR 1948 Nag 287.
47. *Basudeo Gir* v. *State*, AIR 1959 Pat 534.
48. *Miglani* v. *Miglani*, AIR 1979 SC 879.
49. 15th Edn. (2000), pages 970-971, paras 37-54.
50. *Baru Ram* v. *Prasanni*, AIR 1959 SC 93.
51. *Gulzar Ali* v. *State of H.P.*, (1998) 2 SCC 192 : 1998 SCC (Cri) 605.
52. *State of Maharashtra* v. *Sukhdeo Singh*, AIR 1992 SC 2100.

"Experts may give their opinions upon the genuineness of a disputed handwriting, whether ancient or modern, after having compared it with specimens proved to the satisfaction of the judge to be genuine; and they may also, without such comparison, but from their own general knowledge of the subject, give their opinion as to whether the handwriting is a feigned or natural hand. So their opinions are admissible as to the probable date of an ancient writing; or as to whether interlineations were written contemporaneously with the rest of a document."[53]

It is necessary that for the admission of evidence of a handwriting expert the writing with which the comparision is made should be admitted or proved beyond doubt to be that of the person alleged. Mere variation in the appearance of the signatures or handwriting does not disprove the authenticity of the signature or handwriting, because a fine or a stub pen, haste or deliberation, good or bad health, sitting or standing position, drunken or sober state of a person may radically change the appearance or quality of writing. Dissimilarity between the admitted impression of the accused and that on the document due to difference in ink and angle of the impression was held to be superfluous and not of positive impact.[54]

Typewriting also falls within the meaning of the word 'handwriting', hence the opinion of the typewriter expert is admissible in evidence.[55]

The expert opinion on handwriting can raise a suspicion as to the genuineness of a document but it is of no weight unless confirmed by other evidence. The expert must, in addition to lapse of time, take all the above factors into consideration before expressing his final opinion with regard to the signature on a disputed document.[56]

No adverse inference can be drawn from the fact that the opinion of the handwriting expert has not been obtained[57] but where other witnesses also fail to identify the signature of the accused, conviction cannot be based on the testimony of the solitary witness.[58]

If the cross-examining counsel, after putting a paper into the hands of a witness, merely askes him some questions as to its general nature or identity, his adversary will have no right to see the document, but, if the paper be used to refresh the memory of the witness, or if any question be put respecting its contents, or as to the handwriting in which it is written, a sight of the document may then be demanded by the opposite counsel.[59]

When the handwriting or documents relied upon by the prosecution was proved to be that of the accused by the expert's opinion, and the persons acquainted with the writing of the accused, and the court itself found a large measure of similarity between the signature of the accused on the documents in question and his admitted signatures, it was held that the conviction could be sustained under the Prevention of Corruption Act.[60]

The evidence of a handwriting expert, unlike that of a finger print expert is generally of a frail character and its fallibilities have quite often been noticed. The court should, therefore, be wary of attaching too much weight to the evidence of handwriting expert. Conclusions based upon mere comparison of handwriting must at best be indecisive and must yield to the positive evidence in the case.[61] It is a rule of law that it is extremely unsafe to base a conviction upon the opinion of handwriting expert without substantial corroboration, because comparison of handwriting as a mode of proof is always hazardous and inconclusive and by its very nature weak and infirm.[62] The opinion of a

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53. PHIPSON ON EVIDENCE, 15th Edn. (2000), para 37-56, page 973..

54. *Arjan Singh* v. *Hazara Singh*, AIR 1979 SC 1236.

55. *State* v. *S.J. Choudhary*, 1996 Cr LJ 1713 (paras 15, 17 and 18) (SC), **overruling** *Hanumant* v. *State of Madhya Pradesh*, AIR 1952 SC 343 : 1952 SCR 1091 and **reversing** Cri Revn No. 105 of 1987 (Del).

56. *Govardhan Das* v. *Ahmadi Begum*, (1953) Hyd 140 : AIR 1953 Hyd 181.

57. *Srichand* v. *State of Maharashtra*, AIR 1967 SC 450.

58. *State of Haryana* v. *Parmanand*, 1995 Cr LJ 396 (para 13) (P&H).

59. TAYLOR, 12th Edn., S. 1452, p. 925; *Jarat Kumari Dassi* v. *Bissessur Dutt*, ILR (1911) 39 Cal 245.

60. *Ram Pyarelal* v. *State of Bihar*, AIR 1980 SC 1523.

61. *Bhagwan Kuar* v. *M.K. Sharma*, AIR 1973 SC 1346; *Kishore Chandra* v. *Babu Ganesh Prasad*, AIR 1954 SC 316; *Kameswar Rao* v. *Swhyanarayana Rao*, AIR 1962 AP 178; *Annapurnamma* v. *Saukara Rao*, AIR 1960 AP 359.

62. *Sudhindra Nath Dutt* v. *The King*, AIR 1952 Cal 422; *Magan Biharilal* v. *State of Punjab*, AIR 1977 SC 1091, **followed in** *S. Gopal Reddy* v. *State of A.P.*, 1996 Cr LJ 3235 (para 27) (SC); *Chandreshwar Singh* v. *Ramchandra Singh*, AIR 1973 Pat 215; *K. Malaiah* v. *State of Mysore*, AIR 1956 Mys 9; *Ishwari Prasad* v. *Md. Isa*, AIR 1963 SC 1728; *Ram Chandra* v. *State*, AIR 1957 SC 381; *Shashi Kumar* v. *Subodh Kumar*, AIR 1964 SC 529; *Public*

handwriting expert, given in evidence, is no less fallible than any other expert's opinion, but such opinion is worthy of acceptance if there is internal or external evidence relating to the writing in question supporting the expert's view. The question in each case falls for determination on the Court's appreciation of the evidence.[63] It is not safe to treat expert evidence as to handwriting as sufficient basis for conviction; it may be relied upon, along with other various items of external and internal evidence relating to the documents in question.[64] The expert's evidence as to handwriting is opinion evidence and it can rarely, if ever, take the place of substantive evidence. Before acting on such evidence, it is usual to see if it is corroborated either by clear, direct evidence or by circumstantial evidence. Where the question was whether the will was executed on the date on which it was purported to have been executed and there were no suspicious circumstances attached to the will, it was held that the mere opinion of the handwriting expert that it was executed much later could not override the positive evidence of the attesting witness, especially when the former had not applied any chemical tests which, according to his own opinion, were essential.[65] Opinion of handwriting expert is not sufficient by itself to prove genuineness of handwriting, unless there is substantial corroboration by other evidence.[66] It may be hazardous to base a conviction solely on the opinion of handwriting expert, as the science of identification of handwriting is not so perfect. In appropriate cases, corroboration may be sought, although there is no rule of law, or rule of prudence which has crystallised into a rule of law, that opinion evidence must never be acted upon unless substantially corroborated.[67] However, the Supreme Court held that there was no rule of law, nor any rule of prudence which has crystalised into a rule of law, that opinion evidence of a handwriting expert must never be acted upon unless substantially corroborated.[68] The opinion of the handwriting expert is not conclusive but is in the nature of opinion evidence. It is, therefore, clear that a conclusion cannot be based entirely on evidence of a handwriting expert; there must be independent evidence or other cogent circumstantial evidence.[69] A conviction cannot be based upon the opinion of the handwriting experts, without corroboration, because comparison of handwriting as a mode of proof is hazardous and inconclusive, unless it is corroborated by other evidence.[70] The Court can act on the opinion of handwriting expert without corroboration.[71] But handwriting must be proved beyond a reasonable doubt and not merely on a balance of probabilities as in civil cases.[72] In cases where the reasons for the opinion are convincing, and there is no reliable evidence throwing a doubt, the uncorroborated testimony of a handwriting expert may be accepted. There cannot be any inflexible rule on a matter which, in the ultimate analysis, is no more than a question of testimonial weight.[73] An expert's opinion can be accepted without corroboration if it is well reasoned and acceptable.[74]

Though the opinion of a handwriting expert on the question of the handwriting of a person is relevant it is not conclusive and the handwriting of the person can be proved by other means also.[75]

Prosecutor, AP v. *P.P. Reddy*, 1978 Mad LJ (Cri) 574; *Issar Nonia* v. *Karinan Pandey*, AIR 1958 Pat 353; *V.S. Abdul Sattar* v. *Supdt. of Police, Cochin*, 1987 Cr LJ 1670; *Vandavasi Karthikeya* v. *S. Kamalamma*, AIR 1994 AP 102 (para 29).

63. *Ram Narain* v. *State of UP*, AIR 1973 SC 2200; *Fakhruddin* v. *State of MP*, AIR 1967 SC 1326; *Tul Mohan Ram* v. *State*, 1981 Cr LJ (NOC) 223.
64. *Ramachandra* v. *State of U.P.*, AIR 1957 SC 381; *Ablayanand Misra* v. *State of Bihar*, AIR 1959 Pat 328; *Kameshwarnath* v. *State*, 1957 Cr LJ 276; *Sriramulu Naidu* v. *State*, 1962—1 An LT 57; *Baidyanath Gosh* v. *Smt. Shefali Gosh*, (1962) 1 Cr LJ 812.
65. *Shashikumar Banarjee* v. *Subhodkumar Banarjee*, AIR 1964 SC 529; *Siddheswar Prasad Singh* v. *Bhaba Sundari*, AIR 1978 Cal 4; *Sher Bahadur* v. *State of Bihar*, (1967) 2 SCWR 829.
66. *Gotta Sriramulu Naido* v. *State*, (1962) 1 A.L.T. 57.
67. *B.K. Kutti* v. *State*, 1984 Cr LJ 1289; *Guta Sriramulu Naidu* v. *State of A.P.*, 1963 : 2 CrLJ 546 : (1962) : 1 An LT 57.
68. AIR *Murarilal* v. *State of M.P.*, 1980 SC 531.
69. *Altaf Hussain* v. *Nasreen Zohra*, AIR 1978 All 515; *Sunil Kumar Singh* v. *L.I.C. of India*, AIR 1976 Cal 224; *Natabar Behera* v. *Balakrishna Das*, AIR 1987 Ori 7.
70. *Maundra Chandra Lala* v. *Mahalukshmi Bank*, 1945 PC 105; *Sudendranath* v. *King*, AIR 1953 Cal 422; *Ramchandra* v. *State of U.P.*, AIR 1957 SC 381; *Ishwari Prasad Mishra* v. *Mohammad*, AIR 1963 SC 1728. (handwriting experts, opinion can never be conclusive because it is, after all, opinion evidence).
71. *Murari Lal* v. *State of M.P.*, AIR 1980 SC 531 at 536.
72. *R* v. *Ewing*, (1983) 2 All ER 645, noted All ER Annual Rev. 1983 at 196.
73. *Murarilal* v. *State of M.P.*, AIR 1980 SC 531.
74. 1978 All Cr Cases 223.
75. *State of Gujarat* v. *Vinaya Chandra*, AIR 1967 SC 778; *Sridhar Jena* v. *State*, (1970) 36 Cut. LT 1251; *T. Subbiah* v. *Ramaswamy*, AIR 1970 Mad 85; *Jogendra Prasad* v. *Joy Kanta Roy*, AIR 1971 Ass 168.

Where an expert opinion is given, the Court must see for itself and, with the assistance of the expert, come to its own conclusion whether it can safely be held that the two writings are by the same person. This is not to say that the Court must play the role of an expert, but to say that the Court may accept the fact proved only when it has satisfied itself on its observation that it is safe to accept the opinion of the expert or the witness.[76] Before forming an opinion about the genuineness of handwriting, the Court must consider the evidence of the expert and the opinion of a person familiar with the handwriting of the alleged writer of it.[77] It is unsafe for the court to rely entirely on personal comparison of the disputed signatures with the admitted signatures.[78] Evidence of handwriting expert has to be accepted after exercising great caution, and the court is given power to compare the handwritings on the questioned documents and come to its own finding, irrespective of the report given by the expert.[79] As the opinion of handwriting expert is not conclusive, the court, as a matter of prudence and caution, should hesitate or be slow to base its findings solely on such expert's opinion.[80] If the judge is not conversant with the language of the document, it is undesirable of a judge deciding the question of genuineness of the writing on his own inspection of the documents.[81] It was not advisable for the Disciplinary Committee of the Bar Council to base its conclusion purely on the basis of its own comparison of the handwriting, especially when the matter related to a charge of professional misconduct which is quasi-criminal in nature requiring proof beyond reasonable doubt.[82] Section 45 and Section 73 are not bar to a judge comparing the admitted signatures with the disputed signatures.[83] The Court can, when unaided by an expert, compare the handwritings in the disputed documents and the admitted document, with the assistance of lawyers appearing in the case.[84]

The difficulty is that expert evidence on handwriting is of a class by itself and, basically, unlike the other expert evidence, such as, on poisons or blood or finger print. Even when it comes from the best and most experienced handwriting expert, it does not carry that degree of absolute or relative certainty as the other types of experts' evidence. Though there is nothing wrong in the Court basing its conviction on the expert's evidence alone in certain cases, it is not safe to rely in every case.[85]

Where the Court's opinion agreed with the expert as to handwriting, a conviction was upheld.[86] The conviction of a guard for forging a railway receipt, only on the evidence of handwriting expert was set aside.[87]

Proof of handwriting by an expert is no proof of the facts in the document.[88] Proof of handwriting is not tantamount to correctness of contents.[89]

A handwriting expert is, after all, a witness of a particular party, who cannot be compelled to choose a witness according to the dictation of the opposite party.[90]

The evidence of the witnesses on oath that the signatures were written in their presence by the signatory, should be given preference to the opinion of the expert.[91]

The Court can direct an accused to give his specimen handwriting for purpose of establishing the same after comparison with the disputed signature, by the handwriting expert. The power can be

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76. *Fakhruddin* v. *State of M.P.*, AIR 1967 SC 1326.
77. *Jogendra Prasad Singh* v. *Joy Kanta Roy*, AIR 1971 Assam 168.
78. *Saurendra Mohan Basu* v. *Saroj Ranjan Sarkar*, AIR 1961 Cal 461 (FB); *Major Stanley Hugh Barker* v. *Patricia May Barker*, AIR 1955 MB 103 (FB); *O. Bharathan* v. *K. Sudhakaran*, AIR 1996 SC 1140 (paras 18-22), **relying on** *State (Delhi Administrative)* v. *Pali Ram*, AIR 1979 SC 14 and **reversing** EP No. 4 of 1991, Dt. 10-8-1992 (Ker).
79. *Pranendra Mohandas* v. *Central Bank of India*, AIR 1978 Cal 55.
80. *Alavddin* v. *Sishir Kumar Datta*, AIR 1989 Gau 42.
81. *Cabestine Silva Bai* v. *Josephine*, AIR 1956 Mad 566.
82. *Prahlad Saran Gupta* v. *Bar Council of India*, AIR 1997 SC 1338, **relying on** *State* v. *Paliram*, AIR 1979 SC 14.
83. *Bisseswar Poddar* v. *Nabadwip Chandra Poddar*, AIR 1961 Cal 300.
84. *Bhupendra Narain Mandal* v. *Narayinlal Das*, AIR 1965 Pat 332.
85. *State of M.P.* v. *Dhananlal Moriji*, (1961) 2 Cr LJ 238 MP.
86. *Ram Pyarelal* v. *State of Bihar*, AIR 1980 SC 1523.
87. *Magan Bihari Lal* v. *Punjab*, AIR 1977 SC 1091.
88. *Ramji Dayawala and Sons Pvt. Ltd.* v. *Invest Import*, AIR 1981 SC 2085.
89. *Ramji Dayawala Sons* v. *Invest Import*, AIR 1981 SC 2095.
90. ILR (1968) 1 Mad 805.
91. *Govardhan Das* v. *Ahmadi Begum*, AIR 1953 Hyd 181. **See also** *Satrangi Lal* v. *State of Haryana*, 1995 Cr LJ 969 (para 22) (P&H).

exercised *suo motu* or on application of a party.[1] Where specimen of handwriting were obtained under the directions of the SDM who was neither conducting the enquiry nor was the trial fixed before him and there was no evidence to show that the accused gave the specimen voluntarily, such a lacuna affects the relevancy of the evidence of the expert and in the circumstances the specimen could not be said to mean to assist the "Court to form its opinion" as envisaged by Section 45.[2]

In obtaining a specimen handwriting, as far as possible the same type of paper, the same colour of ink and the same kind of medium as were used in the disputed handwriting should be used.[3] It would not be desirable to allow the disputed document to be handed over to the expert at a place outside the court. It may be proper and desirable to have the documents examined by the expert in the court itself, and/or he may be permitted to take photographic copies of the document, so as to ensure the safety of the document, or for preventing it from being tampered with.[4]

A clever forger will try to give the forged signature as much resemblance as possible to a genuine signature. But, the personal characteristics of the writing or signature of a particular individual are often an unfailing guide in determining the question of genuineness of writing; and it is often a difficult work for a stranger or for a forger to reproduce faithfully all such characteristics in the writings forged by him.[5]

Merely considering similarities between disputed and admitted handwriting, without comparing the dissimilarities, is not sufficient for the Court, for convicting an accused.[6] In examining the disputed documents, the true test is not the extent of the similarities observed when compared with genuine documents, as forged documents usually are good imitations of genuine documents, but the nature and extent of the dissimilarities noticed. It is that difference which exposes the true character of the documents in question.[7] Where there were consistent dissimilarities in the general features of the disputed handwriting and the admitted signature and handwriting, opinion of the expert that the disputed handwriting tallied with the specimen handwriting could not be sustained.[8] It is well-known that the handwriting experts need plenty of comparative material before they can reach a conclusion. For better appreciation, the signatures have to be magnified to an equal extent, superimposed and lines drawn to find out the angles, to measure the lengths of the various strokes, to find their taperings, and so on.[9]

A person who is not well versed in a particular language cannot testify as an expert as to handwriting.[10] Where the expert is not acquainted with the language of the script and is not competent to understand it, still his opinion is admissible, and it will be given due weight if it is confirmed by direct evidence of persons who had actually seen the signing of the document.[11]

Where the alleged admitted signature is not proved to be that of the accused and if it is compared with the disputed signatures by an expert it is of no value as it would not connect the accused person with the crime.[12] Any comparison of a disputed handwriting must be done when there is admitted or proved handwriting; otherwise it would be a case of a blind leading the blind.[13]

After a severe attack of malaria or some virulent disease, the patient may recover within a week, and there may be tremor in his hand, as compared to the signature which he may have made a week or 10

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1. *State* v. *Paliram*, AIR 1979 SC 14; *State of Mysore* v. *C.V. Gopala Raj*, AIR 1954 Mys 117, *Guru Nanak Construction Company* v. *Jai Bharat Steel Rolling Mills*, ILR (1977) 1 Punj 565; **Contra**:—*Babubhai* v. *Ishwarlal Devchand*, AIR 1975 Guj 96; *Kumaran Nair* v. *Bhargavi*, 1988, Cr LJ 1000; (husband denying his signature on a letter).
2. *Amarjit Singh* v. *State of Punjab*, (1998) 8 SCC 613 : 1998 SCC (Cri) 1609.
3. *Abdul Gani* v. *Devi Lal*, AIR 1960 Raj 77 : (1960) 10 Raj 152.
4. *Doraiswamy Gounder* v. *Prayaammal*, AIR 1976 Mad 66.
5. *Bisseswar Poddar* v. *Nabadwip Chandra Poddar*, AIR 1961 Cal 300.
6. (1962) 40 Mys LJ 880.
7. *Raviappa* v. *Nilakant Rao*, AIR 1962 Mys 53; *Ambal Bagyan* v. *Ramayya Padayachi*, AIR 1955 Mad 88.
8. *Bhargav K. Salunkhe* v. *State of Maharashtra*, 1996 Cr LJ 1228 (paras 10 and 11) (Bom), **relying on** *Magan Bihari Lal* v. *State of Punjab*, AIR 1977 SC 1091 : 1977 Cr LJ 711.
9. *Chakrapani Jagannath Prasad* v. *Chandoo Sahadeo*, AIR 1959 MP 84.
10. *Gulabchand* v. *Satya*, AIR 1983 All 54.
11. *Parbathi Sham Achary* v. *Mansidevi (Smt.)*, AIR 1977 Ori 139.
12. *State of Rajasthan* v. *Dr. Sharma*, 1983 Cr LJ 858.
13. *Vembu Ammal* v. *Esakki Pillai*, AIR 1949 Mad 419; *State of Bihar* v. *Kailashprasad*, AIR 1961 Pat 451.

days prior to the illness. Such facts also should be taken into consideration by the handwriting experts before expressing their final opinion.[14]

The comparison of handwriting is not a perfect science. Deviations in signature can arise due to natural variations and various other causes. Therefore, it would not be safe to rely solely on the testimony of the handwriting expert.[15]

Where there is overwhelmning evidence in proof of the handwriting, the opinion of the expert to the contrary is of no value.[16] Where the question was whether a pronote was forged, it was held that expert opinion could not prevail over the evidence of eye-witnesses.[17]

Though an expert's opinion is not substantive evidence, the request of a party to a suit to send the document for his opinion on the handwriting, cannot always be rejected on the ground of risk in parting with the document, if the expert is a Government Expert of State Forensic Science Laboratory.[18]

When the opinion of one expert was given, no useful purpose would be served in obtaining a second expert's opinion, as both the opinions are mere opinions and, at the most, one opinion may whittle down the former one. It is necessary for the court to come to its conclusion by comparing the handwritings.[19]

The proof of genuineness of a document is proof of the authorship of the document, and is proof of a fact like that of any other fact. It may be proof of handwriting, or the contents, or of the signature by one of the modes provided in Sections 45 and 47 of the Evidence Act. It may also be proved by internal evidence afforded by the contents of the document. The last mode of proof by the contents may be of considerable value where the disputed document purports to be a link in a chain of correspondence, some links which are proved to the satisfaction of the court; in such a situation, the person who is the recipient of the document, be it either a letter or a telegram, would be in a reasonably good position, both with reference to his prior knowledge of the writing or the signature of the alleged sender, limited though it may be, as also his knowledge of the subject matter of the chain of correspondence, to speak to its authorship.[20]

When the expert was not having special qualifications to give an opinion on the handwriting, and the books alleged to be forged were not produced before the court, to enable to form its own opinion, it was held that the accused was entitled to acquittal.[21]

Opinion sent by a handwriting expert cannot be admissible unless he is examined as a witness and he subjects himself to cross-examination.[22]

Where the disputed signatures appear to belong to a class different from the group of admitted signatures, it is certainly one of those cases where expert evidence would be of great help.[23]

In regard to the genuineness of documents, where questions of handwriting or thumb mark are in dispute, it was held that the correct opinion as to the genuineness of a signature or thumb mark could only be formed after it had been examined by the expert.[24]

The opinion of the handwriting expert can be sought for determining the age of the disputed handwriting.[25] Where it was alleged by the drawer that his cheque book was stolen by the complainant and his signature was forged by him but the cheque was dishonoured not on the ground that the signature did not match but on the ground of insufficiency of funds and the established circumstantial evidence was so patent that it led to only one conclusion that the signature on the cheque was not forged, there was

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14. *Goverdhan Das* v. *Ahmadi Begum*, AIR 1953 Hyd 181.
15. *Veenu Handa* v. *Narinder Kumar Handa*, AIR 1984 Punj &H 99; *Piara Singh* v. *Jagtarsingh*, AIR 1987 Punj &H 93.
16. *Banarsi Stores* v. *President of Union of India*, AIR 1953 All 318.
17. *Brij Basi* v. *Moti Ram*, AIR 1982 All 323.
18. (1975) 88 Mad LW 71.
19. *Girija Kuer* v. *Ambika Devi*, 1978 Hindu LR 61 : 1978 2 APLJ (HC) 403.
20. *Mobarik Ali Ahmed* v. *State of Bombay*, AIR 1957 SC 857.
21. *Sripada Sinai Duclo* v. *State*, 1976 CrLJ 145 (Goa).
22. *Parvat Vedu Patil* v. *Sukder Shivram Patil*, AIR 1956 Bom 617. **See also** *State of Maharashtra* v. *Damu Gopinath Shinde*, 2000 Cr LJ 2301 (paras 40 and 41) (SC) : AIR 2000 SC 1691.
23. *Venkataswami* v. *Lakshminaraina Chetty*, AIR 1959 AP 204.
24. *Amarsingh* v. *Gangoo*, AIR 1956 Bhopal 6.
25. *Uppu Jhansi Lakshmi Bai* v. *J. Venkateswara Rao*, AIR 1994 AP 90 (paras 7 and 8), **relying on** *Shashi Kumar Banerjee* v. *Subodh Kumar Banerjee*, AIR 1964 SC 529, at 537.

no need for an opinion of a handwriting expert.[26] In another case of dishonour of cheques dismissal of application for sending the disputed cheques to handwriting and fingerprint experts pending for the past two years at the belated stage of trial was upheld[27] but where the accused denied the selling of adulterated eatables and alleged that the Food Inspector had forged the signature purported to be that of the accused on the documents on which the prosecution relied in support of its allegations, it was held to be improper to refuse to send the documents for comparison to handwriting expert.[28] Admittance of the execution of a document cannot be the sole ground to reject the application for reference of the document to the handwriting expert.[29]

7. FINGER PRINT

Science of identifying thumb impression is an exact science and does not admit of any mistake or doubt.[30] The identification of finger impressions with the aid of a good magnifying glass is not difficult, particularly when the photographs of latent and patent impressions are pasted side by side, as the science of comparison of finger prints has developed to a stage of exactitude.[31]

Where an expert had given no reasons in support of his opinion, nor was it shown that he possessed special skill, knowledge and experience in the science of identification of finger prints, the Supreme Court did not consider it safe to rely upon his opinion, even if it was supposed to be admissible under Section 45 (identification of finger prints).[32]

A majority of finger prints found at a crime scene or on crime articles are partially smudged, and it is for the experienced and skilled finger print expert to say whether a mark is usable as finger print evidence; similarly, it is for a competent techinician to examine them and to give his opinion whether the identity can be established, and, if so, whether that can be done on eight or even less identical characteristics in an appropriate case.[33] The genuineness or otherwise of a signature or thumb mark can be formed only after it has been examined by an expert[34] and the thumb impression on the document in question cannot be compared by the Court itself.[35]

The court should examine the expert as to how much experience he has had by way of comparison of finger prints, as to how much literature on the subject he had studied; if the finger prints are clear enough, the court must verify the evidence of the expert by examining the finger prints with a magnifying glass, as to the similarities and dissimilarities afforded by the finger prints, before coming to a conclusion.[36] The court cannot delegate its authority to the expert, but has to satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself as to the value of any other evidence. Though the evidence of a handwriting expert is frequently found to be faulty, the evidence of a thumb impression expert is more reliable, because with regard to finger prints, it has never been found that two finger prints are identical in all respects.[37]

In *State* v. *Parameshwaran*,[38] it was held that the practice of taking the thumb impressions of an accused under the direction of the court, and using it against him is in strict compliance with Section 45.

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26. *L.C. Goyal* v. *Suresh Joshi*, AIR 1998 SC 2222 (para 5).

27. *K. Lakshmanan* v. *S. Kevichandran*, 2001 Cr LJ 1549 (para 10) (Mad). Application to appoint handwriting expert only at appellate stage and that too after a period of 10 years from date of filing appeal, rejected. *Girish Vinayakrao Naik* v. *S. Shangramappa Kkandala*, AIR 2001 Kant 210 (para 4).

28. *Kadambala Gopala Krishna* v. *State of A.P.*, 2000 Cr LJ 797 (paras 6 and 7) (AP).

29. *Resina Balakrishnan* v. *State Bank of Travancore*, 2001 AIHC 4085 (Kant).

30. *Jaspal Singh* v. *State of Punjab*, AIR 1979 SC 1708; *Nasib Singh* v. *State of Punjab*, ILR (1974) 1 Punj 285; *Hukum Singh* v. *Udham Kaur*, (1969) 71 Punj LR 908; *P.M. Veeravu* v. *Kunju Moideen*, 1996 AIHC 3847 (para 5) (Ker).

31. In re : *Govinda Reddy*, AIR 1958 Mys 150.

32. *Mahmood* v. *State of U.P.*, AIR 1976 SC 69, 73; *Md. Ekramul Haq* v. *State of West Bengal*, AIR 1959 SC 488.

33. *Mohanlal* v. *Ajit Singh*, AIR 1978 SC 1183.

34. *Amarsingh* v. *Gangoo*, AIR 1956 Bhopal 16.

35. *Inum Beevi* v. *K.S. Syed Ahamad Kabir*, 2001 AIHC 756 (para 19) (Mad) ; AIR 2001 NOC 25 (Mad).

36. *Bhaluka Behara* v. *State*, AIR 1957 Ori 172.

37. *Golam Rahman* v. *King*, AIR 1950 Cal 66; (**explaining** *Harendranath* v. *Emperor*, AIR 1931 Cal 441; *Baluka Behara* v. *State*, AIR 1957 Ori 172.)

38. (1952) Tra & Co. 482 (FB); **reversing** 1950 Tra & Co. 5.

illus. (c) and Section 73 of the Evidence Act. Also Section 5 of the identification of Prisoners Act 33/1920. Act 33/1920 authorised taking impression in court for purpose of comparison.[39]

The court will not send a document in its custody to the expert for the examination, but can allow the finger print expert to examine the document in the court and to have photographic copies of the same for his investigation.[40]

The Supreme Court held that it would be highly unsafe to convict on a capital charge without any independent corroboration of the opinion of the finger print expert.[41] The court must satisfy itself about the correctness of the conclusions by comparisons of the prints; it cannot be laid down as a rule of law that it is unsafe to have conviction on the uncorroboratd testimony of a finger print expert. The true law is one of caution.[42]

Where the finger print expert fails to give reasons for his opinion, in his certificate, but has given reasons at the time of the examination in court, and when they are not challenged in the cross-examination, his evidence was held to be admissible.[43] Setting out the reasons at length, in the report by the finger print expert, will help to clarify his ideas and would furnish a valuable guide to the parties and to the court in testing the value to be attached to the opinion. It would also be fair to the persons against whom the opinions are to be used, that the reasons for that opinion are definitely expressed.[44] It is the duty of the finger print expert to explain how he came to the conclusion. It is the duty of the court to scrutinise the evidence or make a comparison of the impressions personally. The *ipse dixit* of the expert should not be accepted and acted upon. It is not the moral conviction which the expert has that matters. He must rule out the possibility of all reasonable doubts about the identity of the impressions.[45] The testimony of the Director of Finger Prints Bureau, which was supported by cogent and correct reasons, can be accepted in preference to that of a private expert.[46]

The court is bound to summon the expert if the accused files an application for his examination; if no such application is filed, the grievance of the accused about the report of the expert being used without his examination in court has no substance.[47]

MARSHALL HONTS, in his Treatise "FROM EVIDENCE TO PROOF" (pages 275-287) points out some important points to be noted for purpose of appreciation of finger prints expert's evidence:—

1. No two prints, whether made by different persons or by different fingers of the same person, have ever been found identical.
2. The patterns of friction ridge on the inside of the palms or fingers, toes or bottoms remain unchanged as to the basic pattern until the body decomposes after the death. Growth of the body increases the size of the print.
3. The friction ridges—lines roughly parallel to each other produce eight basic patterns:— plain-arch, tented arch, radial loop, ulnar loop, plain whorl, double loop, central pocket loop and accidental.
4. When non-porous object is touched or gripped with sufficient pressure, this film transferred to the object in the exact pattern of the friction ridges. The film residue is called a latent finger print and may be deposited on metal, glass, wood, finished leather, plastic, soap, cheese, butter, china, apples, paper and almost any non-porous substance.

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39. **See also** *King-Emperor* v. *Kiran Bala Dassi*, AIR 1926 Cal 531; *Emperor* v. *Virammal*, AIR 1923 Mad 178; *Public Prosecutor* v. *Kanda Swami*, AIR 1927 Mad 696; *Emperor* v. *Ramarao*, AIR 1932 Bom 406; *Gulam Rehaman* v. *King*, AIR 1950 Cal 66; *Sheo Karain* v. *Rawat*, AIR 1986 P&H 174.
40. *Ta Narisimhan* v. *Narayand Chbttiar*, (1968) 2 Mad LJ 48.
41. *Mahmood* v. *State of U.P.*, AIR 1976 SC 69.
42. *State of M.P.* v. *Sitaram*, 1978 MPLJ 197 : 1978 Cr LJ 1220; *State* v. *Karu Gope*, AIR 1954 Pat 131; *Golam Rehaman* v. *King*, AIR 1950 Cal 66; *Emperor* v. *Faker Muhammed*, ILR 60 Bom 187; **differing from** *Jassa Ram* v. *Crown*, ILR 4 Lah 236.
43. *State of M.P.* v. *Sitaram*, 1970 Mad LJ (Cri) 161 (Mys).
44. *State* v. *Karu Gope*, AIR 1954 Pat 131.
45. In re : *Godavarthi Bashyakaracharyulu*, AIR 1960 AP. 164.
46. (1974) 1 Cr LJ 45 (Punj).
47. *Phoolkumar* v. *Delhi Administration*, AIR 1975 SC 905.

Under this section, the reasons as well as the question given by a finger print expert, as to the identity of a palm impression, are admissible in evidence.[48]

In *R.* v. *Court*,[49] finger prints on the windscreen of a car were treated as insufficient evidence of the possession of the car.

Where photographs of impression of fingerprints taken earlier were not enough to enable the expert to come to any definite conclusion and their photographs were taken for the second time, raising suspicion about the photographs taken for the second time without cross-examining the photographer, was held to be not proper.[50] No sanctity can be attached to the evidence of the fingerprint expert where the chance fingerprints found at the scene of offence, were developed and photographed, without examining the photographer and filing of the photographs and evidence to show that the fingerprints of the accused were taken before a Magistrate.[51]

8. FOOT PRINT

The Supreme Court in *Pritam Singh* v. *State of Punjab*[52] observed: "The science of identification of footprints is no doubt a rudimentary science, and much reliance cannot be placed on the result of such identification. Evidence relating to footprints, if found satisfactory, may be used only to reinforce the conclusions as to the identity of a culprit already arrived at on the basis of other evidence.[53] The track evidence, however, can be relied upon as a circumstance which, along with other circumstances, would point to the identity of the culprit, though by itself, it would not be enough to carry conviction in the mind of the court".[54]

In a murder case, before relying on the opinion of the expert as to footprints found near the corpse of the deceased, as conclusive evidence against the accused, the Judge should form his opinion with regard to the identity of the footprints found near the corpse with the foodprint of the accused.[55]

Section 45 does not include footprints within its ambit, as it does the finger impressions. Notwithstanding this omission, the evidence of footprint expert has been admitted with the qualification that there should be other evidence to bring home the charge to the accused. The rule on the point is that the opinion of the foot print expert would not by itself suffice to base conviction on, and the rule has been applied to the testimony of other experts including experts on fingerprints.[56]

HORWILL J., of the Madras High Court observed: "The opinion of a footprint expert is not admissible as evidence. If the court is to make any use at all of footprint impressions, it must be satisfied, from a comparison of the various footprints, that they are those of the persons whose the expert says they are. The value of evidence with regard to footprints is obviously very much less trustworthy than evidence with regard to fingerprints..... With regard to footprints, on the other hand, it would seem from the evidence and from what we have been able to read from DR. HANS GROSS'S book ON CRIMINAL INVESTIGATION, that one can only compare with the general shape of footprints found, with the shape of impressions taken from the feet of the person suspected; even in this limited comparison, one has not the same certainty as one would have in comparing fingerprints, because foot impressions vary considerably according to the circumstances under which they are made. Foot prints made when a person is walking slowly or fast, or running slowly or fast, or jumping, all create differences, which are material. Moreover, a footprint taken after a person has walked a considerable distance, as was the case here when the murder was committed, is larger than a footprint taken when a person has been at rest, as was the case when

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48. *Emperor* v. *Babulal Behari*, (1928) 30 Bom LR 312 : AIR 1928 Bom 158 : ILR 52 Bom 223; *Bhaluka Behara* v. *State*, AIR 1957 Ori 172 : ILR 1957 Cut 200 (thumb impression of one was disputed by the other. The court was competent to ask for specimen impressions for self-comparison); *Sheo Narain* v. *Rahat*, AIR 1986 P&H 174.
49. (1960) 44 Cr App R. 242.
50. *Ammini* v. *State of Kerala*, AIR 1998 SC 260 : 1998 Cr LJ 481 (para 18) (SC).
51. *Manepalli Anjaneyulu* v. *State of A.P.*, 1999 Cr LJ 4375 (para 31) (AP).
52. AIR 1956 SC 415. **Also see** *Mohd. Aman* v. *State of Rajasthan*, AIR 1997 SC 2960 : 1997 Cr LJ 3567.
53. *Mohd. Aman* v. *State of Rajasthan*, AIR 1997 SC 2960 : 1997 Cr LJ 3567.
54. *Bhulakiram Koiri* v. *State*, ILR (1969) 1 Cal 39 : 1970 Cr LJ 403; *State* v. *Sankariya*, ILR (1976) 26 Raj 696 : 1977 CrLJ 684; *Basudeo Gir* v. *State*, AIR 1959 Pat 534.
55. *Fakir Chand* v. *State*, AIR 1955 MB 119 : 1955 CrLJ 1073 (FB); *Fakir Chand Nandram* v. *State*, AIR 1950 MB 76; In re : *Pullayya*, AIR 1941 Mad 88; In re : *Goomayan*, 1942 Mad 452 (2).
56. *Ganesh Gogoi* v. *State*, AIR 1955 Assam 51.

footprints were taken from the various persons in the sub-jail, including some of the accused and p.w. 10"... The learned judge then referred to John Adam's Translation of DR. HANS GROSS'S book at p. 532 which is as follows:— "Much prudence must here be exercised (in taking measurements) and nothing undertaken which shows no chances of success. On the one hand, the foot itself varies considerably, *e.g.*, it is much smaller in cold weather or after a long march; on the other hand, it is difficult to measure, inasmuch as it is not a regular body and must be measured differently according to the parts dealt with.[57]

T.P. NAIK J., of M.P. High Court in *Surajpal Singh* v. *State of M.P.*[58] explaining the decision of the Supreme Court in *Pritam Singh* v. *State of Punjab*[59] observed: "It was however, unfortunate that it was not brought to the notice of the Court (SC) that the identification of persons from footprints has many facets and that all these facets could not be clubbed together and science of identification from footprints dubbed as rudimentary science. The judge considered in detail the subject of footprints in the light of various authorities and observed that the knowledge of footprints has been systematised all over the world and the matter is therefore undoubtedly a science and the opinion of a person specially skilled in it is relevant under Section 45.

In the above case, disputed footprints in blood near a dead body and going towards the bathroom, were compared with those of the accused taken in printers ink. The expert gave evidence giving points of nine similarities in respect of the right foot and ten in respect of the left foot; and three dissimilarities only in each case and explained the dissimilarities with reference to the different densities of blood and ink. It was held that the comparison stood the test well and under the circumstances these foot impressions in blood near the place of incident, were proved to be those of the accused. But on other facts the High Court acquitted the accused.

Where the incident took place in a ploughed field and many people had visited the sight before the arrival of the investigating officer and it was not explained whether the accused was given to wear the seized footwears when specimen moulds were prepared or not, no reliance could be placed on the result of identification.[60]

9. TRACKER DOG

In *Abdul Razak Murtaza Dafadar* v. *State of Maharashtra*[61]; the Supreme Court has expressed the opinion that in the present state of scientific knowledge, evidence of dog-tracking, even if admissible, is not ordinarily of much weight. The South African appellate decision can regard such evidence as unreliable.[62]

Evidence of tracker dog is of little importance. No adverse inference can be drawn against the prosecution simply because the tracker was not examined by the prosecutor.[63] However, it was observed that in construing the words 'science or art' a static view can no longer be tenable since expert testimony on subjects like telephony, psychiatry, identification of foot marks and tracker evidence is now admitted.[64]

Tracker dog's evidence must pass the test of scrutiny and reliability as in the case of any other evidence.[65] Genuineness of dog tracking evidence need not necessarily be tested in the restricted terms of availability or non-availability of a drawn *panchnama* supported by the testimony of the dog handler.[66] Where in a case of murder, the dogs of the police dog squad pointed towards the husband of

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57. In re : *Parambhan Mamadu*, AIR 1951 Mad 737.
58. 1972 Cr LJ 1668
59. AIR 1956 SC 415.
60. *Niranjan Lal* v. *State of Haryana*, 1995 Cr LJ 248 (para 17) (P&H), **relying on** *Chandran Surendran* v. *State of Kerala*, (1990) 3 Rec Cri R 644 : 1990 Cr LJ 2296.
61. AIR 1970 SC 283.
62. *R* v. *Tupedo*, 1960 AC 58. Such Evidnce was however received in *Scotland Paterson* v. *Nixon*, 1960 SC (J) 42, in *Northern Ireland R.* v. *Montgomery*, 1966 NI 120 and in *New Zealand R.* v. *Lindsay*, 1970 NTLR 1002. (It would however be necessary for evidence about the training skill and habits of the dog and its handler.)
63. *Ramla* v. *State*, ILR (1962) 12 Raj 144 : (1963) 1 CrLJ 387.
64. *Chhat Ram* v. *State of Haryana*, ILR (1975) 1 Punj 327.
65. *Babu Magbul Shaikh* v. *State of Maharashtra*, 1993 Cr LJ 2808 (Bom). **See also** *Bhadran* v. *State of Kerala*, 1995 Cr LJ 676 (para 24) (Ker).
66. *Ashok Gavade* v. *State of Goa*, 1995 Cr LJ 943 (para 33) (Bom), **distinguishing** *Abdul Razak Murtaza Dafadar* v. *State of Maharashtra*, AIR 1970 SC 283 : 1970 Cr LJ 373.

the victim, it was held to be not a circumstance which could exclude the possibility of guilt of any other person other than that of the accused or be compatible only with the hypothesis of the guilt of the accused/husband.[67]

10. TYPEWRITTEN DOCUMENTS

The Supreme Court observed that the High Court rightly held that an opinion of experts on a typed document namely, that a particular letter was typed on a particular machine, does not fall within the ambit of Section 45 and is inadmissible. They observed that this view of the High Court was not contested before them.[68]

Explaining the above Supreme Court case, the Punjab High Court held that whatever may have been the state of law in earlier times, in construing the words *'science or art'* in Section 45, a static view can no longer be tenable since expert testimony on subjects like telephony, psychiatry, identification of footmarks and trackers evidence is now admitted. There is no reason not to accept expert testimony in regard to printed or type-script words.[69]

The Supreme Court has observed that there has been rapid development in the field of Forensic Science and the question whether the opinion of an expert in regard to type script falls within Section 45 has to be decided, as *Hanumantha's* case was decided only by three Judges.[70]

Opinion of a person, who claimed to be an expert on typewritten documents, to prove that two different documents were typed on the same typewriter is not admissible under this section. Such a person cannot also be permitted to point out the similarities between the documents in respect of their typing or the defects which might enable the court to come to a conclusion as to whether the documents were or were not typed on the same typewriter. It is not permissible for a court to compare photographic enlargements and measurements of the letters in two documents and to arrive at a conclusion as to whether they were typed on the same typewriter or not.[71]

11. BALLISTIC EXPERT

Where the opinion is given by the ballistic expert after conducting all necessary tests, and there is no reason to distrust his opinion, it can be accepted.[72] Where the ballistic expert stated that he came to the conclusion that the fired cartridges could not have been fired through any other firearm except the firearm recovered, because every firing pin, scrape, and breach face mark has its own individuality, it was held that the evidence of the expert could be relied upon in convicting the accused when such testimony corroborated the evidence of the eye-witnesses.[73] Where the prosecution case was that the accused shot the deceased with a gun, and there were infirmities in the evidence, and when it was suggested, whether the injuries were caused by the rifle, it was held that it was only the evidence of a ballistic expert which could settle the controversy as to whether a gun or rifle was used and whether it was used at a close range as suggested in the evidence.[74]

Where the firearms expert compared the markings on the bullet under a microscope, but had not taken the photographs, it was held that his evidence could not be rejected for mere failure to take photographs.[75] Where the ballistic expert did not take photographs of empty cartridges recovered from the scene of occurrence and did not take photographs of the test, cartridges, and he failed to state the

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67. *Surinder Pal Jain* v. *Delhi Administration*, 1993 Cr LJ 1871 (para 33) (SC).
68. *Hanumanth Govind* v. *State of M.P.*, AIR 1952 SC 343 : 1952 SCR 1091 at 1110. **Also see** *Retnakumar* v. *The Registrar, High Court of Kerala*, 1994 Cr LJ NOC 262 (Ker).
69. *Chhat Ram* v. *State of Haryana*, ILR (1975) 1 Punj 327.
70. *State* v. *S.J. Choudhary*, AIR 1990 SC 1050.
71. *Chelaji Gomaji* v. *Jashodharabai*, (1958) 60 Bom LR 251; *Emperor* v. *Jhabwala*, ILR (1933) 55 All 1040.
72. *Kalva* v. *State of U.P.*, AIR 1958 SC 180, *Kishore* v. *State*, 1967 Cr LJ 1155; *Patra Bahale alias Kishan* v. *State*, (1969) 35 Cut LT 258; 1980 Raj C 355. **See also** *Surat Singh* v. *State*, 1995 Cr LJ 3189 (para 16) (Del); *Bhola Singh* v. *State of Punjab*, AIR 1994 SC 137 (para 7).
73. *Kartarsingh* v. *State of Punjab*, AIR 1977 SC 349. **See also** *Bhola Singh* v. *State of Punjab*, 1993 Cr LJ 3904 (para 7) (SC); *Yashpal* v. *State of Rajasthan*, 1995 Cr LJ 2038 (Raj).
74. *Mohinder Singh* v. *State*, AIR 1953 SC 415. **See also** *Ganpat Ram* v. *State of Rajasthan*, 1995 Cr LJ 1466 (para 31) (Raj).
75. *Ramanathan* v. *State*, 1978 SCC 1204 : 1978 Cr LJ 1137 : 1978 Cr LR (SC) 318, **followed in** *S.G. Gundegowda* v. *State*, 1996 Cr LJ 852 (para 29) (Kant).

points of similarity between the two, it was held that, in the circumstances, the opinion given by the expert was not sufficient to establish conclusively that the empty cartridges recovered from the scene of occurrence were fired from the gun recovered from the possession of the accused.[76]

It is the duty of the ballistic expert, when deposing in court about his examination of the gun and the cartridge, to satisfy the court that he has been careful in carrying out the necessary tests before giving his opinion as given in his report. When he was not cross-examined, it must be assumed that the method of examination by the expert was no longer open to doubt.[77] Where neither the accused made request for the cross-examination of the ballistic expert nor the Court found it necessary to summon him, the report of the expert was held admissible in evidence without calling him as witness.[78]

When the opinion of the ballistic expert was found to be dogmatic, rather than explanatory, and the gun, before being sent to him, was kept in police custody for a long period of more than two months, it was held that the evidence of the ballistic expert was unreliable.[79]

Where a pistol which was alleged to have been used by the accused, and the two bullets extracted from the bodies of the victims, were sent to a ballistic expert, and they were not examined by him and the prosecution did not obtain the opinion of the expert, it was held by the Supreme Court that the non-obtaining of the opinion of the ballistic expert could not shake the prosecution case in view of the other evidence in record[80] but the seizure of empty cartridges, in the absence of ballistic expert report was held to be inconsequential.[81]

Where it was found that the exit wound was not only smaller in dimension than the entry wound and was also smaller in dimension than the size of the cartridge, it was held that the injuries could not be gun shot wounds.[82]

The Supreme Court, relying on TAYLOR'S MEDICAL JURISPRUDENCE (10th Edn., Vol. 1, p. 441) observed: "It is impossible to state rules as to the precise distance from which it is possible to produce marks of burning, for this depends on the quantity and nature of the powder, the method of charging and the nature of weapon. It is unusual, however, to get marks of burning beyond a yard, or a yard and half, with a shot gun, or at more than half a yard with a revolver."[83] Where the skin around the entry wounds had blackened, it indicated that it was a close range firing.[84]

Shots discharged from a smooth-bore fire arm scatter over an area that increases roughly according to the distance of the target from the gun. And the missiles do not bear the individual characteristics of the barrel as in the case of rifle arch. The pellets from a shot gun, though they can be weighed, measured and subject to chemical analysis, would not establish the identity of the gun. But the bullets from a firearm can be identified with the help of microscopic examination and expert's opinion.[85]

It cannot be laid down as a general proposition that, in every case where a fire-arm is alleged to have been used by an accused person, in addition to the direct evidence, prosecution must lead the evidence of a ballistic expert, however good the direct evidence may be and though, on the record, there may be no reason to doubt the said direct evidence.[86]

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76. ***Hanuman*** **v.** ***State,*** 1974 Raj LW 159.

77. *State of Bihar* v. *Hanuman Koeri,* 1971 Cr LJ 187 (Pat); *Kalva* v. *State,* AIR 1958 SC 180.

78. ***Balak Ram*** **v.** ***State of Maharashtra,*** 1994 Cr LJ 2451 (para 25) (Raj).

79. ***Santokh Singh*** **v.** ***State of M.P.,*** 1988 Cr LJ 1583 (MP).

80. ***Chatar Singh*** **v.** ***State of Haryana,*** AIR 1976 SC 2474.

81. *Bhani Ram* v. *State of Rajasthan,* 1995 Cr LJ 3165 (para 22) (Raj). **See also** *Sukhwant Singh* v. *State of Punjab,* AIR 1995 SC 1601 (para 20).

82. ***Salim Zia*** **v.** ***State,*** AIR 1979 SC 391.

83. ***Santa Singh*** **v.** ***State,*** AIR 1956 SC 526.

84. *Bhupendrasinh A. Chudasama* v. *State of Gujarat,* AIR 1997 SC 3790 : 1998 Cr LJ 57.

85. In re : *Kodur Thimgyya,* AIR 1957 AP 758; In re : *Balija,* AIR 1941 Mad 88; *Fakir Muhammed* v. *Emperor,* AIR 1936 Bom 151.

86. *Gurucharan Singh* v. *State of Punjab,* AIR 1963 SC 340; *Kartik Harijan* v. *State of Orissa,* 1995 Cr LJ 2019 (para 9) (Ori); *Mohan Singh* v. *Punjab,* AIR 1975 SC 2161 (where the technical evidence was full of doubts); *Ram Narayan* v. *Punjab,* AIR 1975 SC 1727 (where ballistic evidence was against the prosecution case).

It is not possible to come to a conclusion about the injury caused by gun fire by merely looking at the description of the injuries or even the photographs given by the doctors, without actually seeing the injury.[87]

An opinion of a doctor who has no elementary knowledge of ballistics and fire-arms would not be helpful in distinguishing and interpreting firearms injuries.[88]

Where the injuries were caused by pellets resulting in the death, and the question was as to the range of shot and spread of the pellets, the opinion of the ballistic expert is important particularly when the gun firing the fatal shot has not been recovered[89].

The evidence of ballistic expert, even if it is based on the conclusions reached by him on experiments made by him, may not be conclusive in nature. It is nevertheless an important piece of evidence and as opinion evidence must be acted upon if the court is satisfied about it.

It was held by the Mysore High Court that no one, whatever may be his special skill in ballistic forensics, can assert beyond doubt that the pellets found on a person who was the target of a gun shot, came out of a particular gun.[90] Where reliable eye-witnesses testify definitely to the rifle with which the accused shot the deceased, inability of the ballistic expert to connect the two fragments of the bullet with the rifle cannot necessarily lead to the inference that the bullet was not fired from the rifle.[91]

Where the seals were found to be intact, delay of one month in sending the gun to the ballistic expert for examination was inconsequential.[92]

12. WORKABILITY OF WEAPON

Mere recovery of guns from the accused does not connect them with crime. Report from the ballistic expert as to the gun being in working condition is the condition precedent.[93] Where the Double Barrel Gun, found in the possession of accused without a licence to possess the same, was of a type that it could be fired by first filling it with gun powder, no evidence of expert on armourer was necessary to find out whether it was in working condition. Evidence of a Police Officer who is trained in handling of guns would be sufficient to prove that its mechanism was in order.[94] It is not always necessary for an armourer, who had special training in firearms, to test-fire a rifle to find out its firing capability.[95] It was held by the Supreme Court that the police personnel are competent to test the workability of a weapon. However, where the weapon allegedly used in committing of the offence was neither sent to the ballistic experts nor was tested by the police personnel himself, the accused was held entitled to benefit of doubt.[96]

13. MEDICAL OPINION

Medical evidence is hardly conclusive and decisive, because it is primarily an evidence of opinion and not of fact. To rely upon the findings of the medical person who conducted the post-mortem and the chemical analyst as decisive of the matter is to render the other evidence entirely fruitless. The Court has to consider not merely medical evidence but also the other evidence and circumstances appearing on the point.[97] The doctor's evidence can never be absolutely certain on the point of time so far as duration of

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87. *Mohan* v. *State*, AIR 1975 SC 2161.
88. *Mohan* v. *State*, AIR 1975 SC 2161.
89. *A. Nagi Reddi* v. *State*, (1968) 1 And WR 178.
90. In re : *Lagama Appayya Naik*, 1966 Cr LJ 483.
91. *State* v. *Ram Singh*, 1973 Cr LJ 150.
92. *S.G. Gundegowda* v. *State*, 1996 Cr LJ 852 (para 28) (Kant).
93. *Lakhasingh* v. *State*, 1994 Cr LJ 2952 (para 26) (Raj).
94. *Jarnail Singh* v. *State of Punjab*, AIR 1999 SC 321 : 1999 Cr LJ 453, at p. 454.
95. *Sukhpal* v. *State of Haryana*, AIR 1995 SC 578 (para 4).
96. *Manoj Kumar Achhelal Brahman* v. *State of Gujarat*, (1998) 2 SCC 354 : 1998 SCC (Cri) 636.
97. *Arunkumar Banarjee* v. *State*, AIR 1962 SC 504; **relying on** *Stephen Seneviratne* v. *King*, AIR 1936 PC 289; *Anant Chintaman Lagu* v. *State of Bombay*, AIR 1960 SC 500; *Chacko Mathai* v. *State*, AIR 1964 Ker 222; *Mani Ram* v. *State of Rajasthan*, 1993 Cr LJ 2530 (para 6) (SC) : AIR 1993 SC 2453.

injuries are concerned.[1] Medical evidence is not sacrosant and the Court can seek explanation from the concerned physician by summoning him in the witness-box.[2]

Medical opinion pointing out to alternative possibilities cannot be accepted as conclusive.[3]

Where there is inconsistency between the testimony of eye-witnesses and the medical evidence, it is no ground to discard the testimony of the eye-witnesses.[4] Where the direct evidence about assault by a particular person is satisfactory and reliable, medical evidence cannot override that because the latter is hypothetical.[5] Where the evidence of the prosecutrix, the victim of rape, was otherwise trustworthy and cogent, the opinion of the doctor that no rape was committed could not override the same.[6] Where there was a discrepancy of some hours between the opinion of the doctor and the version of the prosecution, about the time of commission of rape, it was futile for the Courts to make a detailed research on the point, and the opinion of the doctor should not have been disbelieved on that ground alone, as the doctor is in a better position to depose about the medico-legal aspects of the offence.[7]

Where there was inconsistency between the evidence of medical expert and that of the eye-witnesses relating to the distance from which gun shots were fired, it was of no significance, as other evidence was available to show that the death was caused by gun shot injury.[8] But where the expert evidence regarding the distance from which the gun was fired at was at variance with direct evidence which was beyond doubt it was held that the inconsistency carried no weight.[9] Where the expert did not express a definite opinion regarding the distance from which the shot was fired, plea of discrepancy between the medical evidence and the occular version regarding the distance was untenable.[10]

Where the husband alleged that the respondent wife was pregnant at the time of the marriage, the testimony of the doctor who was an expert in mid-wifery, but had not specialised in gynaecology, can be accepted and declaration of marriage as void, can be granted.[11]

The High Court should not substitute its opinion as to the murder weapon for that of the expert.[12] The Court should not substitute its opinion for that of the doctor regarding the nature of injuries and cause of death unless there is something inherently defective in the opinion.[13] Where the finding of the High Court was that a male is presumed to be taller than a female and, therefore, he could not have shot a female from below upwards but there was no evidence to show that the victim was shorter than the accused, it was held that the High Court was not justified in invoking such unsustainable presumption and formulate a theory on the strength thereof.[14] Where the medical opinion was that seventeen incised wounds could not be caused on the victim's body by a single blow, the finding of the High Court that there were more than one assailant with sharp cutting weapons was not baseless or perverse.[15]

The opinion of the autopsy surgeon suggesting that the death might be suicidal is an ambivalent piece of evidence and can be used only as a piece of supportive evidence.[16]

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1. *Ram Swaroop* v. *State of U.P.*, 2000 Cr LJ 808 (para 11) (SC) : AIR 2000 SC 715.
2. *Archana Devi* v. *Kaji Majibur Rahaman*, AIR 1996 Cal 118 (para 3), **relying on** *Octovious Steel and Co.* v. *The Endogram Tea Co. Ltd.*, AIR 1980 Cal 78.
3. *State of U.P.* v. *Krishnagopal*, AIR 1988 SC 2154.
4. *Solanki Chimanbhai* v. *State of Gujarat*, AIR 1983 SC 484 : 1983 Cr LJ 822; *Basappa Bhimappa* v. *State*, 1961 Mys 21; *Salimzia* v. *U.P.*, AIR 1979 SC 391 : (1979) 2 SCR 394; *Sardul Singh* v. *State of Punjab*, 1994 Cr LJ 626 (para 6) : AIR 1994 SC 672; *Suraj Pal* v. *State of U.P.*, 1994 Cr LJ 928 (para 6) : AIR 1994 SC 748; *V. Viswambharan* v. *State of Kerala*, 1994 Cr LJ 1522 (paras 21 and 22) (Ker).
5. *Punjab Singh* v. *State of Haryana*, AIR 1984 SC 1233. **Also see** *Darshan Singh* v. *State of Haryana*, AIR 1997 SC 364; *State of Maharashtra* v. *Datta Maruti Salagar*, 1998 Cr LJ 3756 (para 8) (Bom).
6. *Ranjit Hazarika* v. *State of Assam*, (1998) 8 SCC 635 : 1998 SCC (Cri) 1725.
7. *Pratap Misra* v. *State of Punjab*, AIR 1977 SC 1307.
8. *State of U.P.* v. *Sughar Singh*, AIR 1978 SC 191.
9. *Karnail Singh* v. *State of Punjab*, 1971 SC 2119; *Lakhbir Singh* v. *State of Punjab*, 1994 Cr LJ 1374 (para 7) : AIR 1994 SC 1029.
10. *Nisar Ahmad Fajmohmed Kaji* v. *State of Gujarat*, (1998) 9 SCC 23 : 1998 SCC (Cri) 967.
11. *Baldev Raj Miglani* v. *Urmila Kumari*, AIR 1979 SC 879.
12. *State of U.P.* v. *Shanker*, AIR 1981 SC 897.
13. *Matabhai Nagarbhai Raval* v. *State of Gujarat*, AIR 1992 SC 2186.
14. *State of M.P.* v. *Udai Singh*, AIR 1998 SC 198.
15. *Omwati* v. *Mahendra Singh*, AIR 1998 SC 249 : 1998 Cr LJ 401. **Also see** *Sail Singh* v. *Mohinder Pal*, 1998 SCC (Cri) 383; *State of Bihar* v. *Ram Padarath Singh*, AIR 1998 SC 2606.
16. *Digambar Gope* v. *State of W.B.*, 1997 Cr LJ 2072 (Cal).

Doctor's evidence has to be appreciated like that of any other witness.[17]

The medical expert is not a witness of fact; his evidence is really of an advisory character given in the form of an opinion, on the facts submitted to him, and it is not to be given by reference to the facts collected independently by himself.[18]

Weapon must be shown to the expert, so as to enable him to comment whether all or any of the wounds would have been caused with it.[19]

A certificate of a doctor cannot be admitted in evidence unless the doctor is examined as a witness.[20]

The doctor's opinion in the form of a reply to certain written queries made by the Police officer cannot be accepted if the opinion was given without any reasons.[21]

Where the medical evidence falsifies both the defence and prosecution versions, it was held that the conviction was not sustainable.[22]

The medical evidence has never been considered to be substantive evidence, but has been considered as only corroborative evidence. A medical person cannot be allowed to give his opinion on matters which are within the province of the Courts to decide.[23]

Where a doctor gave an opinion that the burn injuries on the deceased were superficial, and were 40% on the person, and were the cause of the death, without mentioning the material on which he based his opinion, and when he did not further state before the Court about the material on which he had based his opinion, it was held that such opinion cannot be relied on and the accused cannot be convicted for murder[24] but where the opinion of the doctor was that the injuries in the nature of abrasions, contusions and lacerated wounds were ante-mortem injuries and that burn injuries were post-mortem injuries which could not be dislodged in the cross-examination, his opinion that the cause of death was asphyxia due to throttling, could be safely accepted. The dead body having not been referred to certain pathological test would not create any doubt regarding the doctor's opinion.[25]

In appropriate cases on a consideration of the nature of injuries and other relevant evidence, the Court can come to its own conclusion if the medical evidence is deficient.[26] Where the doctor found no other injury on the body of the deceased except small abrasions of varying sizes on the neck and fracture of hyoid bone, it was held that the deceased died due to throttling and not hanging.[27]

A medical certificate cannot be questioned on the ground that the doctor did not mention the condition of the patient as to whether he was able to move or not.[28]

When a doctor was examined as witness, his evidence has to be appreciated like that of any other witness. There is no presumption that a doctor is always a witness of truth.[29]

Where the opinions of authors were neither shown to have been given with regard to circumstances exactly similar to those in the particular case before the Court, nor were they put to a medical witness, it is not a satisfactory way of disposing of the evidence of the witness by discrediting it on the ground that

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17. *Mayur Panabhai Shah* v. *State of Gujarat*, AIR 1983 SC 66. **Also see** *Rakad Singh* v. *State of M.P.*, 1994 Cr LJ 494 (para 6) (MP).
18. ***Sunilchandra Roy*** **v.** ***State***, AIR 1954 Cal 305; ***Rama*** **v.** ***State***, AIR 1969 Goa 116.
19. *Ishwar Singh* v. *State of U.P.*, AIR 1976 SC 2423. **See also** *K. Mallikarjuna* v. *State of A.P.*, 1995 Cr LJ 3100 (para 52) (AP). For evidence of age by radiological test **see** *Jaya Mala* v. *Home Secy. Govt of J&K*, AIR 1982 SC 1297.
20. ***Balaram*** **v.** ***Rukmannamma***, 1953 Hyd 209.
21. ***Palaniswamy Vaiyapuri*** **v.** ***State***, AIR 1968 Bom 127 (DB).
22. ***Milkiyatsingh*** **v.** ***State of Rajasthan***, AIR 1981 SC 1579.
23. *Vinodkumar* v. *State of M.P.*, 1987 CrLJ 1541; **see** Section 3 under the Head Appreciation of Experts Evidence.
24. 1979 Bom Cr 507.
25. ***Sk. Usman Raheman*** **v.** ***State of Maharashtra***, 2000 Cr LJ 3301 (para 18) (Bom).
26. *Union Territory of Mizoram* v. *Vanlallawama Alias Lalwma*, 1977 CrLJ 1831; **following** *Brij Bushan* v. *State of U.P.*, 1957 CrLJ 591 : AIR 1957 SC 474.
27. *Neerukonda Parabrahma Murthy* v. *State of A.P.*, (1997) 11 SCC 408 : 1997 SCC (Cri) 672
28. ***Nityananda*** **v.** ***Sipra***, AIR 1986 Ori 102.
29. ***Mayur Pannabhai Shah*** **v.** ***State of Gujarat***, AIR 1983 SC 66.

the doctor was a comparatively young man and his statements did not accord with the opinions expressed in the books.[30]

The medical opinion on non-medical matters would be only an opinion and need not necessarily be correct.[31]

In a case of ghastly murder of wife and the husband pleading insanity, the medical expert opinion should such as would assist the Court in coming to the correct conclusion as to the plea.[32] Where the accused were alleged to have assaulted the deceased with *lathis* and pushed him into a dry well but the medical evidence showed that there was possibility of all the injuries being caused by a fall into the well where there were pebbles and stones, the accused were acquitted.[33] Where the dead body with a ligature mark around the neck was found on the cot and not hanging, suicide theory was totally not maintainable.[34] The statement about the date of expiry given by the manufacturer on the drug is a statement about a future occurrence and cannot be treated as an opinion under Section 45 as the same is not relevant under some other provision of the Evidence Act.[35] It has been held that in medico-legal cases when a victim is brought to hospital, it is the duty of the medical officers on duty to note down whether the assailant was a known or unknown person though they are not expected to note down his name.[36]

Also see Eye-witness, under Section 3.

14. POST-MORTEM REPORT

Sufficient weightage should be given to the doctor who had conducted the post-mortem, as compared to the statements found in the text books, but giving weightage does not *ipso facto* mean that each and every statement made by a medical witness should be accepted on its face value even when it is self-contradictory or disagrees with the statements in the authoritative text books without assigning any reasons.[37]

Where there is a regular form prescribed for a medical report in respect of a post-mortem case, the doctor has to give a definite opinion as to the cause of death, and though the medical officer, does not suspect the death to be caused by any poison, he is not at liberty to destroy the viscera until he finally hears from the investigating officer that the viscera might be destroyed.[38]

As the post-mortem report is not substantive evidence, the court can come to an independent conclusion, from other evidence, without medical evidence.[39]

It is the duty of the doctor, in a suspected case of infanticide, to record in the post-mortem report, the data for arriving at the two main conclusions germane to such a case, *viz.*, that the child was born alive and that it met with a violent death later.[40]

When the post-mortem report is more favourable to the accused and where there are discrepencies between the medical evidence and the inquest report, the benefit of discrepencies should be given to the accused, by accepting the post-mortem report, instead of the inquest report.[41]

Merely because a post-mortem certificate is obtained from the custody of the Government Hospital, its genuineness is not automatically proved. Non-examination of its author would be fatal to the

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30. *Bhagwan Das* v. *State of Rajasthan*, AIR 1957 SC 589; **relying on** *Sunderlal* v. *State*, AIR 1954 SC 28; *Chudimal Jain* v. *State of Orissa*, (1984) 58 Cut LT 81.
31. *Chacko Mathai* v. *State of Kerala*, AIR 1964 Ker 222.
32. *Shaik Ahmad* v. *State of A.P.*, 1996 Cr LJ 2582 (para 10) (AP).
33. *Govind Narain* v. *State of Rajasthan*, 1993 Cr LJ 2598 (para 16) (SC).
34. *Ram Kumar Madhusudan Pathak* v. *State of Gujarat*, AIR 1998 SC 2732.
35. *Dueful Laboratory* v. *State of Rajasthan*, 1998 Cr LJ 4534 (para 36) (Raj).
36. *Basheer* v. *State*, 1993 Cr LJ 2173 (para 4) (Mad).
37. *Mohd Zahid* v. *State of T.N.*, 1999 Cr LJ 3699 (para 24) (SC) : AIR 1999 SC 2416. **See also** *Vijay Singh* v. *State of M.P.*, 2000 Cr LJ 650 (para 22) (MP).
38. *State of Maharashtra* v. *Mangalya Dhavu Kongil*, AIR 1972 SC 1797.
39. *Hadi Kisan* v. *State of Orissa*, AIR 1966 Ori 21.
40. *Vidhyamati* v. *State*, 1951 HP 82.
41. *Maula Bux* v. *State of Rajasthan*, (1983) 1 SCC 379; *Chudiamal Jain* v. *State of Orissa*, (1984) 58 Cut LT 81.

prosecution case.[42] No doubt it is the duty of the prosecution to prove the post-mortem findings in murder cases by examining the doctor who conducted the autopsy. Absence of such a proof is a drawback for the prosecution but the same was not fatal in the instant case as the accused had admitted that the death of the decease was a case of homicide.[43] Where the evidence showed that the accused stabbed the deceased on his chest and dragged the knife downward as a result of which the intestines of the victim came out of his abdomen with bleeding and the said injury was the immediate cause of his death, in the circumstances it was held that it could not be said that the nature of injury was not proved as no measurement thereof was mentioned in the post-mortem report.[44]

The Supreme Court observed: "To rely upon the findings of the medical person who conducted the post-mortem, and of the chemical analyst, as decisive of the matter is to render the other evidence entirely fruitless. While the circumstances often speak with unerring certainty, the autopsy and the chemical analysis taken by themselves may be most misleading".[45] Mere presence of ligature mark is not sufficient to prove death by strangulation. Evidence as to the effects of violence in underlying tissues is necessary.[46]

Where the accused confessed to have killed his wife by strangulation and cut off her head but the post-mortem report mentioned haemorrhage by cutting off the head to be the cause of death without pointing out any supporting symptom, it was held that in the circumstances of the case non-mention of strangulation in the post-mortem report did not falsify the confessional statement.[47] Where the post-mortem report stated that the death was homicidal and not suicidal, the Supreme Court cannot take a different view.[48]

15. SEROLOGIST'S REPORT

Where Forensic Science Laboratory report in respect to blood stains found on the weapon of the offence was not put to the accused in his statements under Section 313, Cr.P.C. and he was not given an opportunity to explain, the same could not be used against him.[49] Where the serologist's report stated that the blood on the two items of clothes was human blood and the items belonged to the accused, they connect him with crime.[50] Where the serologist and the Chemical Examiner found that the *chadar* (sheet) recovered at the instance of the accused, was stained with human blood, the fact that with lapse of time the classification of blood could not be determined, was not sufficient to give any benefit to the accused.[51] Where the serologist who superimposed the skull of the deceased, opined that it was of an adult human female of a certain age and the same corroborated by other evidence, it was sufficient to establish her identity.[52]

16. TIME OF DEATH

The process of digestion is not uniform in every human being; it varies from individual to individual. The degree of digestion of the contents, however, cannot always be relied upon, in determining the time of death, inasmuch as the power of digestion may remain in abeyance for a long time, as mentioned in MODI'S MEDICAL JURISPRUDENCE, in states of privation, shock and coma.[53]

It would be hazardous to draw any precise inference about the time of death, on the basis of the appearance or disappearance of *rigor mortis* in a dead body. During winter season, especially in a frost, it is slow in disappearing.[54] Regarding the time of death, the opinion of the doctor who conducted the post-mortem examination is to be preferred to the opinion of the expert based on *rigor mortis* as the former

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42. *Kota Peda Nagesh* v. *State of A.P.*, 1999 Cr LJ 2051 (para 16) (AP).
43. *State of U.P.* v. *Lakhmi*, AIR 1998 SC 1007 : 1998 Cr LJ 1411.
44. *Selvaraj* v. *State of T.N.*, (1998) 9 SCC 308 : 1998 SCC (Cri) 1009.
45. *Anant Chintaman Lagu* v. *State of Bombay*, AIR 1960 SC 500.
46. *Subhash Chand* v. *State of H.P.*, 1995 Cr LJ 3460 (para 21) (HP).
47. *Vinayak Shivajirao Pol* v. *State of Maharashtra*, AIR 1998 SC 1096 : 1998 Cr LJ 1558.
48. *Najjam Faraghi* v. *State of W.B.*, AIR 1998 SC 682 : 1998 Cr LJ 866.
49. *Dhula* v. *State of Rajasthan*, 1997 Cr LJ 609 (Raj).
50. *Boddu Murali* v. *State*, 1993 Cr LJ 2077 (para 14) (AP).
51. *Gura Singh* v. *State of Rajasthan*, 2001 Cr LJ 487 (para 20) (SC).
52. *State of Karnataka* v. *Bhoja Poojari*, (1997) 11 SCC 537.
53. *Aziz Khan* v. *State of Bihar*, AIR 1964 Pat 158; *Dhanna* v. *Kalyan Chand*, AIR 1951 Raj 37.
54. *State of Mysore* v. *Dyavegowda*, AIR 1962 Mys 124.

takes into consideration the post-mortem report, notes on post-mortem report and also the *rigor mortis*, lividity, coolness and report of the injuries found on the person of the deceased, provided there is no evidence that he had deliberately given a wrong opinion.[55]

For fixing the probable time of death, the court cannot usurp the function of a medical expert, and it has to rely on materials supplied to it by the medical expert.[56] Where the medical evidence showed that the intestine of deceased was full of faecal matter and the accused contended that the victim's death had occurred at 6.00 a.m. and not at 3.30 p.m., since the victim was ill and all the while he was lying on the bed and there was no evidence to show the time of his last meal, the medical evidence was held not to support his contention, otherwise the dead body would not have been kept in the house upto 4 p.m.[57]

17. INJURY

Where a particular weapon is stated to be responsible for a certain injury, the Court should specifically call upon the medical witness to explain whether or not that weapon could cause the injury in question.[58]

The duty of the doctor is only to describe the wound. It is for the court to decide whether it is simple or grievous.[59]

Where the expert who has not seen the injuries, but by mere by looking at the description or dimensions of the injuries noted by other doctors, or even the photographs, stated that the injuries on the victim were probably caused by one gun fire only, it would be unsafe to place reliance on his opinion.[60] Where one doctor had actually examined the accused and noted the injuries himself and the other doctor gave his opinion on the basis of the injury report and the X-ray report even without looking at the X-ray plate, the opinion of the former was relied on.[61]

18. POISON

Where the medical evidence was that the death was due to poisoning, and it was not challenged, it was held enough to conclude that the death was by poisoning.[62]

19. LOSS OF EXPECTATION OF LIFE

Where an injured person sued, claiming damages for loss of expectation of life, while medical evidence is necessary to show that the injury has shortened his normal expectation of life, some caution may be necessary before accepting such medical evidence.[63]

20. AGE

When the report of the doctor as to the age of a girl was not placed before the Court, the affidavit by another person refering to that report was held not admissible in proof of the contents of the report.[64]

Positive evidence furnished by birth register, by members of the family, with regard to the age, will have preference over the opinion of the doctor; but, if the evi-dence is wholly unsatisfactory, and if the ossification test in the case is complete, such test can be accepted as a surer ground for determination of age[65]; but where the entry in the school register does not appear to be genuine, the medical evidence will

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55. *Tanvıben Pankajkumar Divetia* v. *State of Gujarat*, AIR 1997 SC 2193 : 1997 Cr LJ 2535.
56. *Gambhir* v. *State of Maharashtra*, AIR 1982 SC 1157.
57. *Mohan Singh* v. *State of U.P.*, 1998 SCC (Cri) 389.
58. *Tahasildar Singh* v. *State*, AIR 1958 All 255.
59. *State of Mysore* v. *Narayanappa*, (1970) 2 Mys LJ 402.
60. *Mohan Singh* v. *State of Punjab*, AIR 1975 SC 2161.
61. *Tanvıben Pankajkumar Divetia* v. *State of Gujarat*, AIR 1997 SC 2193 : 1997 Cr LJ 2535.
62. *State of Orissa* v. *Kaushalya Devi*, AIR 1965 Ori 38.
63. *Vinodkumar* v. *Ved Mitra*, AIR 1970 MP 172.
64. *Md. Ikram Hussain* v. *State of U.P.*, AIR 1964 SC 1625.
65. *Alekh Prasad* v. *State*, 1964 CrLJ 102 (Ori); *Bishwanath Ghosh* v. *State*, AIR 1957 Cal 589; *Anam Swain* v. *State*, 1924 Ori 33; *Puran Singh* v. *State of Rajasthan*, 1985 CrLJ NOC 54 (Raj); *Kishorilal Raghbir Dass* v. *State*, AIR 1957 Punj 78; *Kamakshya Prasad* v. *State*, AIR 1957 Assam 39; *Anita* v. *Atal Bihari*, 1993 Cr LJ 549 (para 5) (MP); *Jitmohan Lohar* v. *State*, 1997 Cr LJ 2842 (para 6) (Ori); *S.K. Belal* v. *State of Orissa*, 1994 Cr LJ 467 (Ori).

prevail over it.[66] Ossification test to determine the age of a person is not conclusive.[67] Rejection of the High School certificate produced to prove the age of the petitioner on the assertion of the Principal that the relevant records were missing and that of the certificate from the doctor issued after the ossification test for want of examination of the doctor, was held to be improper.[68]

Doctor's certificate as to age is no proof as to the age.[69]

If the opinion of a doctor as to the age of a person, is based on radiological test, the margin of error is two years on either side.[70] However, such a margin cannot be given when there is otherwise conclusive and decisive evidence as to the age of a person.[71] The opinion of the Radiologist cannot be preferred to the positive evidence of the entry of date of birth made in the Register of Births and Deaths immediately after two months of the date of birth of the accused.[72]

Opinion of a medical expert, basing on physical examination, and not by conducting radiological examination is of little value.[73]

A doctor's opinion as to age based on his or her height, weight and teeth does not amount to legal proof of the age of a person.[74]

Doctor's opinion, basing on probability and physical examination, is of little value.[75]

Test of epiphysis, on basis of fusing, being a scientific test, would be acceptable, to show the age.[76]

Mere presence of 28 teeth, and hair in arm pits or on the pubic region, could as well be present in a girl about the age of 16. The evidence of medical officer, if to be relied on, should bring out technical and scientific knowledge to bear upon the matter. Certificate given on examination of weight, height, breast, teeth *etc.*, is worthless, to show the age.[77]

The High Court held that a girl was over 18 years of age, relying on a medical report of a doctor who examined the girl though that report was not before them. The Supreme Court held that the report was mere *hearsay* evidence and, as such, was not admissible; that in order to prove the age of the person, the primary document, *viz.*, the medical certificate, should have been produced and, in the absence of the primary document as to the age of the person concerned, the decision of the High Court on the basis of inadmissible *hearsay* evidence was not correct. Though a reference to the medical certificate was made in the affidavit of the father and the statement of the police officer, it was only hearsay and not admissible according to the Evidence Act, in proof the contents of the medical certificate.[78]

21. PATERNITY

See commentary on Section 112.

The value of the blood group test is limited. It may exclude a certain individual as the possible father of a child, but cannot positively establish the paternity.[79]

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66. *Sunil Kumar* v. *State of U.P.*, 2000 Cr LJ 4687 (para 9) (All), **following** *Brij Mohan Singh* v. *Priya Brat Narain Singh*, AIR 1965 SC 282 and *Pankaj Kumar Tripathi* v. *State of U.P.*, 1998 (2) JTC 965 (All).
67. *Prem Chand* v. *State of H.P.*, 2000 Cr LJ 951 (para 24) (HP), **relying on** *Shree Kant Shekhari* v. *State of H.P.*, 1999 (1) Sim LJ 470. **See also** *Ram Deo Chauhan* v. *State of Assam*, 2001 Cr LJ 2902 (para 43) (SC) : AIR 2001 SC 2231.
68. *Haribans Singh* v. *State of Bihar*, 1997 AIHC 2028 (para 4) (Pat).
69. *State of H.P.* v. *Kala*, AIR 1957 HP 42.
70. *Jayamala* v. *Secy. to Govt. of J&K*, 1982 CrLJ 1717 : AIR 1982 SC 1297.
71. *Abdul Razzak* v. *State*, 2000 Cr LJ 3921 (para 14) (All).
72. *Anita* v. *Atal Bihari*, 1993 Cr LJ 549 (para 5) (MP).
73. 1964 Cr LJ 204 (Punj). **See also** *Kamal Kishore* v. *State of H.P.*, 2000 Cr LJ 2292 (para 15) (SC) : AIR 2000 SC 1920.
74. *Emperor* v. *Qudrat*, ILR 1939 All 871 : AIR 1939 All 708.
75. *State* v. *Babulal*, AIR 1965 Raj 90.
76. *Raunki Saroop* v. *State*, AIR 1970 Punj 450.
77. *Mohmad Husain* v. *State*, ILR (1957) 7 Raj 440; *Emperor* v. *Qudrat*, AIR 1939 All 708 : ILR 1939 All 871; *Liamayum* v. *Manipur Administration*, AIR 1962 Mani 5; *Anam Swain* v. *State*, AIR 1954 Ori 38; *Md. Syedol Ariffin* v. *Yeoh Ooi Gark*, AIR 1916 PC 242.
78. *Md. Ikram Hussain* v. *State of U.P.*, AIR 1964 SC 1625.
79. *Subbayya Gounder* v. *B. Subramaniyam*, AIR 1959 Mad 396.

22. MENTAL STATE

Where the Medical Officer gives an opinion as to the mental condition of the accused on a particular date, basing on the testimony of witnesses as to the acts of the accused, that evidence cannot be treated as an expert opinion, and it is only his presumption.[80]

Absence of medical opinion, regarding the mental state of the person who gave the dying declaration is not always *fatal* to its reliability.[81]

PHIPSON ON EVIDENCE,[82] observes: "*A* is charged with murder; defence; insanity. A medical witness who has personally examined *A* may give his opinion that he is, or is not, insane; or, that the insanity from which *A* suffered was of a kind that usually prevents people from judging between right and wrong".

23. MEDICAL CERTIFICATE

Medical certificates as to the nature of injuries and the nature of the incapacity incurred by a person, though relevant u/ Section 45, must be duly proved as provided in Section 60 of the Act, by the evidence of the person who has given that opinion.[83] A medical leave certificate cannot be questioned on the ground that it did not mention the condition of the patient in detail such as whether he was able to move or not.[84]

It is common knowledge that the certificates issued by medical practitioners are often untrue, and that such certificates are issued for the mere asking, and on the payment of some nominal charges. Yet, it would not be correct to say that no medical certificate can be relied upon unless the doctor is examined, as there cannot be a general presumption that all medical certificates are false. If the other side challenges the veracity of the certificate, then the party producing it has to prove the correctness of the statement made therein. In the absence of any challenge, it should be accepted as correct.[85]

Where there was no opinion of the doctor that the injuries in question could be possible during the commission of the alleged offence of rape, conviction could not be sustained.[86] Where the Government doctor examining a victim of rape gave certificate of commission of rape on her but turned hostile during trial and tried to protect the accused, a serious view of his conduct, which amounted to perjury, was taken and the concerned authorities were recommended to take appropriate disciplinary action against him.[87] Where allegedly knife and *lathi* blows were delivered on the person of the deceased but the doctor specifically stated to have found only cut injuries on the body of the deceased, only the accused delivering the knife blow could be convicted and not others.[88]

Rejection of medical certificate on the ground that it was on a plain piece of paper and not on a printed form was held to be not proper when it was shown that the printed forms were in short supply in the Government hospitals in the particular district.[89]

24. PUBLIC ANALYST

The conclusion of the Central Food Laboratory is final and conclusive of the facts stated therein and not the opinion expressed therein.[90] The report of a public analyst under the Prevention of Food Adulteration Act given after following the procedure prescribed, was held as *per se* evidence.[91]

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80. *State* v. *Jose Gospar Noronha*, AIR 1971 Goa 3.
81. *Mahammed Azeesuddin* v. *State of A.P.*, AIR 1985 CrLJ 336 (AP-DB).
82. 13th Edn (paras 27-52), page 587.
83. *Municipal Corporation of Ahamadabad* v. *Gandhi Shantilal*, AIR 1961 Guj 196.
84. *Nityananda* v. *Sipra*, AIR 1986 Ori 102 (seeking adjournment on medical basis).
85. *Navnitlal* v. *Hasmukhlal*, AIR 1988 Guj 34.
86. *Sanya* v. *State of Orissa*, 1993 Cr LJ 2784 (para 10) (Ori).
87. *S. Krishna* v. *State of Kerala*, 1998 Cr LJ 785 (para 9) (Kant).
88. *Kanhaisingh Nayak* v. *State*, 1993 Cr LJ 2812 (para 7) (Ori).
89. *Ammini* v. *State of Kerala*, AIR 1998 SC 260 : 1998 Cr LJ 481 (para 17) (SC).
90. *Nagar Mahapalika, Kanpur* v. *Ram Nivas*, AIR 1964 All 349; *M.A. Thomas* v. *P.J. Abraham*, AIR 1969 Ker 146.
91. *Municipal Committee* v. *Basakhi Ram*, 64 Punj LR 949; *Municipal Committee Ambala* v. *Basakhi Ram*, AIR 1963 Punj 17; *State of Gujarat* v. *Shantaben*, AIR 1964 Guj 136; *State* v. *Dineshkumar*, 1986 CrLJ 1527 (Del); *Public Prosecutor* v. *Malla Rama Rao*, 1970 CrLJ 275 (AP).

Report of public analyst is not admissible without oral testimony of analyst.[1] If the admission of the report of the expert is not objected to, the party must be said to have waived proof of it, and not its relevance.[2] Opinion of the analyst, given as 10 carat contents of gold, without the necessary data of the tests of gold, is of no use and cannot be considered relevant.[3]

The report of the analyst is not conclusive; and, on the request of the prosecution or the defence, the Court has to summon the analyst.[4]

In regard to the cases under the Prevention of Food Adulteration Act, it was held that it was not possible to lay down any hard and fast rule as to what particulars should be shown in the analyst's report, as the same may vary in each case. While it may be necessary to give the data regarding the proportion of the component parts in commodities like milk, ghee *etc.*, the position may be different where the articles sold may be mis-branded or one entirely different from what they purported to be. Under the Food Adulteration Act, the Public Analyst (in the case which came up before Kerala High Court) stated that it was not "Thuvaraparippu" but Lac Dhal, and that the conclusion was arrived at as a result of microscopic examination. It was contended that it was not possible to ascertain from the certificate what the characteristics noticed by the Analyst were, and that it ought not to be relied upon; that criticism was not unfounded, and in view of the fact that the transaction was more than two years old, permission to examine the Analyst was not considered to be necessary and the accused was acquitted. It is clear from the above observation that a clear indication of the date on which the finding of the Analyst was given is necessary and that in the absence of the date, the report of the Analyst cannot be relied on.[5]

Where Freezing Point Test was recognised as a reliable method for proving addition of water to milk and the Public Analyst exposed his superficial knowledge of the subject as an expert, his testimony as an expert was not reliable.[6] It has been held that the report of unqualified Public Analyst is not admissible in evidence as a report of a Public Analyst but is admissible as a report of an expert under this section.[7]

25. CHEMICAL EXAMINER

It was held by the Supreme Court, that there was nothing wrong, in the ordinary circumstances, in taking the reports of the Chemical Examiner and Serologist without examining them as witnesses.[8] Report of a Chemical Examiner is admissible in evidence, though he is not examined.[9] Where the accused persons did not exercise their option of summoning the chemical examiner, the order admitting his report was held to be proper.[10] The report of the Chemical Examiner is admissible in eivdence, in view of Section 293(4) Cr.P.C., and it prevails over Section 45, of the Evidence Act.[11]

Deputy Director of Health Services and the Chemist are experts; they record their opinion on the scientific point involved, and it would be admissible when they are examined as witnesses.[12]

Blood stained earth found at the place of occurrence is invariably sent for chemical analysis. If it is not sent it is open to the defence to rely on the omission[13].

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1. *Raj Kishen* v. *State*, AIR 1960 All 460; *Drugs Inspector* v. *Chimanlal & Co.*, AIR 1968 MP 238 (FB); *Soleman* v. *R.* AIR 1943 Bom 445.
2. *Bommidala Poorhaish* v. *Union of India*, AIR 1967 AP 338.
3. *Assistant Collector of Customs* v. *Pratap Rao*, 1972 CrLJ 1135.
4. *M.A. Thomas* v. *P.J. Abraham*, AIR 1969 Kerala 146.
5. *City Corp. of Trivandrum* v. *T.R. Reddiyar*, (1963) 1 CrLJ 123 (Ker); *City Corp. of Trivandrum* v. *Antony*, (1963) 1 CrLJ 124 (Ker) (case of milk); **see also** *Deendayal* v. *State*, AIR 1956 All 520; *State* v. *Sahati Ram*, 1958 All 34; *Municipal Board, Kanpur* v. *Badlool*, AIR 1960 All 504; *Gurcharan Das* v. *State*, AIR 1957 Punj 109 (cases of adulteration of milk and pepper); *Newby* v. *Sims*, (1894) 1 Qu B 478 (Rum-hot drink); *Fortune* v. *Hanson*, (1896) 1 Qu B 202 (milk).
6. *Dilip Singh* v. *State of Rajasthan*, 1997 Cr LJ 2461 (Raj).
7. *Prabhudayal Agarwala* v. *State of Orissa*, 1994 Cr LJ NOC 242 (Ori).
8. *Thulsiram* v. *State*, AIR 1954 SC 1; *Shatrughan* v. *State of M.P.*, 1993 Cr LJ 120 (para 10) (MP).
9. *State of Orissa* v. *Kaushalyadevi*, AIR 1965 Ori 38; *Bhaskaran* v. *State of Kerala*, ILR (1967) 1 Ker 467.
10. *Parshotam Lal* v. *State*, 2001 Cr LJ 3378 (para 44) (J&K).
11. *Bhagawan Dass* v. *State of Punjab*, 1982 CrLJ 2138 (P&H).
12. *Madan Mohan* v. *State*, 1958 CrLJ 574.
13. *Lakshmi Singh* v. *State of Bihar*, AIR 1976 SC 2263.

It is the duty of the prosecution to examine the Chemical Examiner who gave the report.[14]

Where the report of the Chemical Examiner was given without factual date and the reasons for his opinion, it had no evidentiary value.[15] Where the samples of the seized contraband remained with the police officer for three days without being noted down any where in the records and thereafter it was sent to chemical analyser, there being no satisfactory explanation to exclude possibility of tampering during the period, the certificate of the expert that the samples contained heroin must be discarded.[16]

The opinion of an experienced Chemical Examiner of the Customs Department is relevant u/Section 45, and his certificate in respect of primary gold is to be given due weight, though it did not contain particulars of the test conducted by him.[17]

Conviction based on the basis of observation of a Magistrate that the substance was opium, without any report of the chemical analysis or the opinion of the expert, is illegal.[18]

The facts of the case before the Bombay High Court, were that certain samples were seized by the Prohibition Department and sent to the chemical analyser and also to the Principal, Poddar Medical College, Bombay. The contention of the accused was that the substance that was seized was *angurasava*, a medical preparation with *ayurvedic* ingredient which generates general alcohol. The question was whether it was a prohibited substance under the Bombay Prohibition Act. Section 24-A of that Act declares that certain preparations specified therein are outside the scope of the Prohibition Act. The Principal of the Medical College stated in his report that it was very difficult to give any definite opinion in the matter. The Chemical Analyser stated in his certificate that no *alkaloidal* ingredient or metallic poison was detected. Dealing with the case, CHANDRACHUD J., (as he then was) held that the prosecution must establish that the liquid was not of a description mentioned in Section 24-A; that Section 129-B of the Prohibition Act was to do away with a settled rule of law that a certificate is not evidence, unless the person who has given the certificate is examined as a witness, that a certificate is nothing more than a mere opinion of the person who purports to have issued it, and opinion is not relevant until the person who has given the opinion is brought before the Court and is subjected to the test of cross-examination. The certificate of the Principal shows that it was not possible for him to find out the *herbal drugs*; the certificate of the analyser would not inspire confidence because he merely recorded his negative opinion, thus the prosecution failed.[19]

Where the Chemical Examiner reported that chemical and microscopical tests of the seized '*salwar*' of the prosecutrix revealed the presence of semen/human spermatozoa, it was held that even in the absence of proof that the said spermatozoa was that of the accused, such a report was a strong corroborative piece of evidence.[20] Where the colour of the substance seized under the ND & PS Act was mentioned by the seizing party to be white but the chemical examiner mentioned it to be grey and the evidence showed the samples to have been received by him in a sealed, intact and in a fit condition for testing, notwithstanding the difference in colour his opinion was held to be not assailable.[21]

Drug offences.—In view of the considerable use of offences concerning drugs like heroin, the need for assistance of the scientist has increased. The precise identification of drugs can be made by '*organic mass spectro meter*'.

26. GOLDSMITH

The opinion of a goldsmith can be relied upon, "They are able to find out whether a piece of metal is gold or not, by the colour of the streak produced by rubbing on a touchstone, though their assessment of purity may not be exact".

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14. In re : *Marudai*, AIR 1960 Mad 370.
15. *Suleman Usman* v. *State of Gujarat*, AIR 1961 Guj 120.
16. *Modh. Hussain B. Ramzan* v. *State of Maharashtra*, 1994 Cr LJ 1020 (para 9) (Bom).
17. *M.G. Venugopalan* v. *Edayil Veettil Govindan*, 1976 CrLJ 165 (Ker).
18. *Ramapuram Amyana* v. *State of A.P.*, (1962) 1 Andh LT 116. **See also** *Bisam Harijan* v. *The State of Orissa*, 1994 Cr LJ NOC 350 (Ori); *Debu* v. *State*, 1996 Cr LJ 1902 (para 3) (Ori).
19. *State of Bombay* v. *Bhausa Hanmantsa Pawar*, AIR 1962 Bom 229.
20. *Madan Lal* v. *State of J&K*, (1997) 7 SCC 677 : 1997 SCC (Cri) 1151.
21. *Jagdish Budhroji Purohit* v. *State of Maharashtra*, (1998) 7 SCC 270 : 1998 SCC (Cri) 1578.

Where a goldsmith tested the metal bars seized, on a touch stone and certified the metal as gold, his testimony cannot be brushed aside on the ground that scientific tests were not carried out.[22]

27. HAIR

From the microscopic examination of the hair, it is possible to say whether they are of the same or of different colours or sizes, and the examination may help in deciding where the hairs come from.[23]

The science of comparison of hair has not attained a degree of perfection like that of finger prints.[24]

28. TRADE MARK

The opinion of a registrar of trade marks having expert knowledge in the matter of trade marks regarding the similarity between two trade marks should not be disturbed lightly.[25]

29. LIQUOR

An Excise Inspector who is well experienced, having acquired sufficient knowledge in respect of illicit liquor and fermented wash, can be treated as expert for identification of fermented wash or liquor.[26]

If an Excise Inspector's training or length of service when he had direct connection with the testing of liquor, is not proved, he cannot be treated as an expert on it.[27] If the Excise Inspector did not state how long he had been in service, and how many samples he had tested, or about his qualification and experience in testing, he cannot be treated as an expert under Section 45, and his evidence cannot be relied on.[28] Where the Excise Inspector, by mere visual observation, finds the liquid to contain a certain percentage of alcohol, and there is nothing to show that he received any training to test the liquid, it was held that, in the absence of any scientific evidence to show that the liquid was illicit liquor, the accused could not be convicted.[29]

30. FERTILIZER

An Agricultural Extension Officer of *Panchayat Samithy*, who is required to deal with the supply of fertilizers to cultivators and explain how it should be used by the farmers, can be treated as an expert on fertilizers, under Section 45.[30]

31. MARKET VALUE

The evidence of a person having special knowledge of the market value of land, not by profession but by experience, may be admitted as an expert evidence.[31]

In cases of land acquisition, opinion of expert is often valuable, and sometimes necessary, for the determination of the market value.[32] Where the experts inspected the property to determine its market value in 1990 whereas the material year for its determination was 1972, their evidence could not be taken into consideration.[33] Where the expert relied upon certain sale transactions which were neither proved nor their copies produced and report based on such transactions was prepared after seven years from the

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22. *Assistant Collector of Central Excise* v. *Sayed Mohammed*, **reversing** AIR 1983 SC 168; *VPS Mohammed* v. *Asst. Collector Central Excise*, 1973 CrLJ 1551 (Har); *Abdul Rahman* v. *State of Mysore*, 1972 CrLJ 406; *Supt. of Central Excise* v. *U.N. Malaviya*, (1968) 1 Mys LJ 17; *M.G. Venugopalan* v. *Edayil Veettil*, 1976 CrLJ 165.
23. *Kanbi Karsan Jadav* v. *State of Gujarat*, AIR 1966 SC 821 : (1963) 2 SCJ 364.
24. *Himangshu Pahri* v. *State*, 1986 CrLJ 622.
25. *K.R. Chinna Krishna Chettiar* v. *Ambal & Co.*, AIR 1970 SC 146.
26. In re : *Oli*, 1976 CrLJ 1339 (Mad).
27. *State of Haryana* v. *Radheyshyam*, 1977 CrLJ 528 (P&H).
28. *Pitambar* v. *State*, 1975 CrLJ 948 (All).
29. *State* v. *Sanwalram*, 1971 CrLJ 200 (Raj); *State* v. *Madhukar*, AIR 1967 Bom 61; *Ram Autar* v. *State of U.P.*, 1973 CrLJ 1096 (regarding possession of charas).
30. *Fatehal* v. *State of Rajasthan*, 1978 CrLJ (NOC) 146 : 1977 Raj LW 89.
31. *Collector of Jabalpur* v. *Nawab Ahmed*, AIR 1971 MP 32.
32. *State of Kerala* v. *Mariyamma*, AIR 1969 Ker 265.
33. *Special Land Acquisition Officer, Bombay* v. *Vishanji Virji Mepani*, AIR 1996 Bom 366 (para 22)

notification which was not explained, it was held that the report lacked objectivity and professional skill and could not be relied upon.[34]

Market value determined on the basis of sale deeds in registration office, is not admissible in evidence unless sale deeds are produced in the Court. Moreso, when no witness who collected information from the Sub-Registrar no the Tahsildar who issued the certificate was examined in the Court. Only the opinion of the expert has evidentiary value and of non-else.[35]

32. CROP VALUATION

The crop valuation expert's report cannot be accepted without corroboration, or without the expert deposing about the basis for his valuation.[36]

33. LABOURERS

The evidence of labourers who did certain work, as to the number of labourers who did the work, being about the facts seen by them, cannot be discarded and such evidence is not opinion evidence of an expert.[37]

34. OBSCENITY

Whether a book is obscene, depends on the interpretation of Section 292, of the Penal Code, and not on expert evidence, and the Court has to form its opinion independently.[38]

35. REVENUE STAMP

Where there was direct evidence that the pronote of 1936 was executed, affixed with stamps and signed by the executant and, on the other side, there was evidence of the expert who at that time was an Assistant Master of the Security Printing Press, stating that such stamps were not issued before 1939, but he refused to disclose, under the colour of privilege, as to what were the characteristics of such stamps which distinguished them from others, it was held that the evidence of the expert became of very doubtful utility and should not be accepted.[39]

36. GAZETTE

The statement contained in a gazette can be taken into account to discover the historical material contained therein and the facts stated therein is evidence under Section 45 and the Court may, in conjunction with other evidence and circumstances, take into consideration in adjudging the dispute in question, though it may not be treated as conclusive evidence.[40]

37. PAPER

Under Section 45, when the Court has to form an opinion upon a scientific point, the opinion on that point, of persons specially skilled in such science, is a relevant fact. The evidence as to whether a paper which contains incriminating material against the accused has been torn out from another copy is an information connected with forensic science. In such cases, opinion of expert in that science is necessary.[41]

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34. *State of Goa* v. *Desiderio Menezes*, 1996 AIHC 3177 (para 18) (Bom). **See also** *Govt. of Goa* v. *Jagannath Vamon Khalap*, 1996 AIHC 3258 (para 17) (Bom).
35. *Shyamlal Agarwal* v. *Govt. of India*, 1998 AIHC 578 (para 9) (MP).
36. *Mariappa Thevar* v. *Kaliammal*, AIR 1971 Mad 198.
37. *Abdulla* v. *State*, 1977 CrLJ 1835.
38. *Ranjit* v. *State of Maharashtra*, AIR 1965 SC 881.
39. *Ijjat Ali Talukdar* v. *Emperor*, ILR (1960) 2 All 277.
40. *Bala Shankar Maha Shankar Bhattjee* v. *Charity Commissioner, Gujarat*, AIR 1995 SC 167 (para 22).
41. *Parag* v. *State of Rajasthan*, 1981 CrLJ 1244 (Raj).

38. DUTY TO EXAMINE AN EXPERT

There is no inflexible rule that, in every case where an accused is charged with murder caused by a lethal weapon, the prosecution can succeed in proving the charge only if an expert is examined. It is possible to finalise cases where the direct evidence is of such an unimpeachable character, and the nature of injuries disclosed by the post-mortem notes is so clearly consistent with the direct evidence, that the examination of a ballistic expert may not be regarded as essential. Where the direct evidence is not satisfactory, and where the injuries are alleged to have been caused with a gun, and *prima facie*, they appear to have been inflicted by a rifle, undoubtedly, the apparent inconsistency can be cured or oral evidence can be corroborated by leading the evidence of a ballistic expert. On facts, it was held that the failure of the prosecution to examine a ballistic expert has not introduced serious infirmity in the prosecution case.[42] When direct evidence is led and accepted, it is hardly necessary to consider the expert's opinion, though direct evidence can be appreciated in the light of the expert opinion.[43] Where a document was written in the presence of witnesses, and they were examined with reference to the document, it is admissible. When such direct evidence is available, the evidence of any other kind is rendered unnecessary; in such cases handwriting expert's opinion is not required.[44]

There is nothing in the Bombay Prevention of Gambling Act (4 of 1887), to suggest that, in order to prove that the articles seized are "instruments of gambling", it is the duty of the prosecution to examine an expert in each and every case of gambling where instruments of gambling are seized.[45] The H.P. High Court has held that the report signed by the Junior Scientific Officer regarding the article recovered being *charas*, could not form the basis of conviction unless the signatory is examined.[46]

It is not necessary to examine the handwriting expert in every case of disputed handwriting.[47] Where the defendant neither included the name of the handwriting expert in his list of witnesses nor was the expert summoned at any stage of his evidence and the expert was not shown to have made comparison of the disputed documents and the signature with standard ones and made his opinion, his application for producing the handwriting expert after his evidence was closed was rightly rejected.[48]

When the dissimilarities in the signature or the handwriting between the disputed and the admitted ones are apparent, there is no necessity for the opinion of the handwriting expert.[49] Examination of handwriting expert is not necessary in every case of disputed writing, and no adverse inference can be drawn for not obtaining the expert's opinion.[50]

39. CONFLICT BETWEEN TWO EXPERTS

The Courts should not leave the question undecided merely because two doctors differ. Where they differ, the Court should rely on the evidence of the one who had superior qualifications and experience in the particular branch of medical science.[51] Where the opinion of the doctor who examined the deceased, immediately after the incident, and also conducted the post-mortem, was that the injury was caused by a sharp cutting weapon, there was no evidence that the doctor had reason to act in an unfair manner, and where the Board of Doctors constituted subsequently were unable to give opinion about the nature of the weapon, it was held that the negative evidence of the Medical Board cannot efface the positive evidence of the doctor.[52] Where a doctor who first examined the prosecutrix gave a clear opinion that it was a case of rape, and later she was examined by another doctor who stated that no opinion can be given, it was

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42. *Gurcharan Singh* v. *State of Punjab*, AIR 1963 SC 340; *State of Rajasthan* v. *Jawan Singh*, 1971 CrLJ 1656 (Raj).
43. *S.K. Ghosh* v. *Vice-Chancellor, Utkal University*, AIR 1952 Ori 1; *Gotham Construction Co.* v. *Amulya Krishna Ghose*, AIR 1968 Cal 91.
44. *State of Gujarat* v. *Vinayachandra*, AIR 1967 SC 778; *Fakhruddin* v. *State of M.P.*, AIR 1967 SC 1326; *State of Assam* v. *Upendranath Rajkhowa*, 1975 CrLJ 354 (Gau).
45. *State of Gujarat* v. *Jagan Bhai Bhagwan Bhai*, AIR 1966 SC 1633.
46. *State of H.P.* v. *Edward Samual Chareton*, 2001 Cr LJ 1356 (para 16) (HP).
47. In re : *Basaraja Swami*, AIR 1967 Mys 210.
48. *Prahlad Ram* v. *O.B.C.*, 1999 AIHC 2737 (paras 5 and 6) (Raj).
49. *K. Jagan Mohan Rao* v. *K. Swarup*, (1972) 2 Mad LJ 77.
50. *Srichand K. Khetwani* v. *State of Maharashtra*, AIR 1967 SC 450.
51. *Mahendra Manilal* v. *Sushila Mahendra*, AIR 1965 SC 364.
52. *Munir Ahmad* v. *State of Rajasthan*, AIR 1989 SC 705.

held that the first doctor's opinion was to be preferred.[53] Where the doctor who examined the victim before her death found only four injuries on her body while the doctor who conducted the autopsy found six injuries, it was held that it was likely that the doctor who examined her while she was alive did not examine her thoroughly keeping her modesty in view.[54]

When there is a difference of opinion between the reports of Chemical Examiner and the Imperial Serologist, it is the duty of the prosecution to explain the difference and the mere production of the reports does not, under the circumstances, prove anything which can weigh against the accused.[55]

When there is conflict of opinions between two experts, much reliance cannot be placed, the reason being that such experts operating would normally support their respective pay-masters. Thus, all the attending circumstances have to be kept in mind, before the opinion testimony of any such expert can be accepted.[56]

As a general proposition it may be true that when the doctor has expressed two views, the one that is favourable to the accused must be taken into account. But medical evidence cannot be considered in isolation as it is based on inferences drawn from various facts present. Hence, his evidence must be taken in conjunction with all the circumstantial evidence on record.[57] Where there was a conflict of opinion between two medical witnesses, it was held that the opinion of the medical witness which supports the direct evidence is ordinarily to be accepted.[58]

Where there is a positive assertion by one expert that the signature on the will is that of the testator, and another expert casts certain doubts, and there is no positive inference by him that the signature is not genuine, it was held that the opinion of the first expert is to be accepted.[59] In a case of conflict of opinions of two handwriting experts, the opinion of the expert regarding whom the Court in one of its earlier decisions had held that he was not a competent expert in respect of handwriting and fingerprints, was rejected.[60]

Where there was a conflict between the contents of the inquest report and the Medical Evidence, it was held that the Medical Evidence should normally prevail.[61]

Where a medical witness stated that the injuries found on the deceased were homicidal, and when his attention was not drawn in the cross-examination to the passages from Modi's Medical Jurisprudence, it was held that it would not be fair to reject his opinion merely because there is another body of medical opinion which is not proved to be on identical facts or data.[62]

Medical Evidence of a doctor who treated the testatix in her last illness, on the question of her state of mind, is to be preferred to the Medical Evidence of a doctor who did not treat her.[63]

40. CONFLICT BETWEEN EXPERT AND OTHER WITNESS

Where the medical report did not specify, the number of persons who committed the rape, it was held the doctor cannot be found fault with, and the evidence of the prosecutrix that she was raped by the accused persons one after the other can be accepted.[64]

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53. *Chvdiamat Jain* v. *State of Orissa,* 1982 Raj Cr Cases 294.
54. *Sukhpal* v. *State of M.P.,* AIR 1997 SC 468. **See also** *State Govt. of N.C.T. of Delhi* v. *Sunil,* 2001 Cr LJ 504 (para 8) (SC).
55. *Tulsiram Kanu* v. *State,* AIR 1954 SC 1 : 1954 CrLJ 225.
56. *Moharsingh* v. *Dindayal,* AIR 1974 Punj 302. Conflict between opinions of Govt. and non-Govt. examiners, held, former more reliable, *Raj Mohammad* v. *State of H.P.,* 1995 Cr LJ 810 (para 17) (HP).
57. *State of T.N.* v. *P. Muniappan,* AIR 1998 SC 504 : 1998 Cr LJ 694.
58. *Piara Singh* v. *State of Punjab,* AIR 1977 SC 2274; *Purna Palai* v. *State,* 1987 Cr LJ 1406.
59. *Manorama Srivastava (Smt.)* v. *Saroj Srivastava (Smt.),* 1989 All 17.
60. *Kumar Sales Corporation, New Delhi* v. *Ajit Singh,* 2000 AIHC 1876 (para 8) (Del), **relying on** *Lalit Popli* v. *Union of India,* (1998) 75 DLT 269.
61. (1984) 54 Cut LT 81.
62. *Bhagwandas* v. *State of Rajasthan,* AIR 1957 SC 589; *Sunderlal* v. *State of M.P.,* AIR 1954 SC 28; *Badsha* v. *State,* 1965 Mah LJ (notes 90).
63. *Ryali Kameshwara Rao* v. *Suryaprakash Rao,* AIR 1962 AP 178.
64. *Balwant Singh* v. *State of Punjab,* AIR 1987 SC. 1080.

Where there was the opinion of radiologist, and the other evidence was a birth register, school admission register and the evidence of the girl's father as to the age of the girl, it was held that the other evidence is to be preferred to the radiologist's opinion, because, owing to the variations in climatic, dietetic, hereditary and other factors affecting the people of the different States in India, it cannot reasonably be expected to formulate a uniform standard for the determination of the age by the extent of ossification and the unifying of epiphysis in the bones.[65]

Where the statement of a doctor was hypothetical, and he gave his own experience of cases, his opinion cannot be allowed to outweigh the testimony of disinterested eye-witnesses.[66] The opinion of a medical officer is, at best, an opinion, and cannot be taken as contradicting the positive evidence of the witnesses regarding the fact that the deceased took his last meal at about 4 p.m. and he was stabbed at 5 p.m.[67] In a case of accident, the question was whether it was due to the workmen having been under the influence of drink. There was detection of liquor in the stomach of the deceased, in the post-mortem and by the chemical examiner, it was held that such opinion was not enough to outweigh the evidence of eye-witnesses.[68] Evidence of expert cannot outweigh direct evidence.[69] Where there is a conflict between Medical Evidence and the oral testimony of the witnesses, the oral evidence can be accepted where such evidence is beyond reproach, and creates confidence in Court, and there is no reason for the false implication of any accused. Where the evidence is not of that character, and the Medical Evidence is not open to any doubt, it would be safe to accept Medical Evidence.[70] There is no invariable rule that the expert opinion has to be given preference over the direct testimony. Courts are not debarred from relying on direct evidence of unerring nature, in preference to the doctor's opinion. In that case, the doctor's opinion was that injuries were due to collapse of mud and brick wall. But the direct evidence negatived the very existence of such wall.[71]

Where the Medical Evidence ruled out all possibility that injuries could take place in the manner alleged by the prosecution, such evidence was important in assessing the testimony of eye-witnesses.[72] Where the medical report showed that there were four different injuries on the deceased, but the eye-witness stated that the assailant had given only one blow with a lathi, which would not explain the multiple injuries found by the doctor, the natural conclusion should be that the alleged eye-witness had not seen the occurrence.[73]

Where there was inconsistency between the medical and eye-witnesses' evidence, it was held that the conviction of the accused was unsustainable; as he was entitled to the benefit of doubt.[74]

In a trial for murder involving a charred body, the Medical Evidence did not show any injuries in the post-mortem certificate, which was issued by a doctor, but, in the inquest report, there was mention of incised injuries on some parts of the charred body. Their measurements were also given in the inquest report. The Supreme Court having repelled the contention that the doctor who performed the post-mortem examination could not have seen the injuries as the body was charred, held that the evidence of the doctor showed that, though some parts of the body were completely charred, it was possible to see and measure the incised injuries on the body, that even the *panchas* were able to see injuries on the bodies, and so, the inquest report containing such measurements could not be held to be unreliable.[75]

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65. *Chathu* v. *Govidan Kutty*, AIR 1958 Ker 121 : 1958 CrLJ 637. **Overruled** on another point in *Varadarajan* v. *State of Madras*, AIR 1965 SC 942.
66. *Erramreddi Papaanna* In re, 1957 Andh LT 341; *Sarbeshar Malik* v. *State*, 1986 CrLJ 1721. **See also** *S G Gundegowda* v. *State*, 1996 Cr LJ 852 (para 27) (Kant); *Mangal Singh* v. *State of Punjab*, 1996 Cr LJ 3258 (para 12) (P&H); *Nafe Singh* v. *State of Haryana*, 1996 AIHC 3825 (para 14) (P&H).
67. *Basappa Bhimappa* v. *State*, AIR 1961 Mys 21; *Inder Narayan* v. *Rupnarain*, AIR 1965 MP 107; *Salmizia* v. *State of U.P.*, AIR 1979 SC 391.
68. *Ladi Jaganatham* v. *Smt. Padmabati*, AIR 1962 Ori 7.
69. *Dulal Chandra Adak* v. *Gunadhar Patra*, AIR 1998 Cal 150 (para 5).
70. *Thakur* v. *State*, AIR 1955 All 189; *Bhagaban Barik* v. *State*, (1961) 27 Cut LT 116.
71. 1973 Cut LR (Cri) 254.
72. In re : *Madivaliappa Channappa*, AIR 1966 Mys 142.
73. *Golappa Avana* v. *State*, 1968 CrLJ 929 : AIR 1968 Goa 72. **See also** In re : *Madivalappa*, 1966 CrLJ 672 : AIR 1966 Mys 142.
74. *Aminchand* v. *State of H.P.*, 1985 CrLJ 1450.
75. *M.D. Jadav* v. *State of Mah*; AIR 1976 SC 2327.

Inconsistency between testimony of eye-witness and medical-witness is no ground to discard testimony of eye-witnesses.[76] Medical evidence can be used to repel the testimony of eye-witnesses only if it is so conclusive as to rule out even the possibility of the eye-witness version to be true.[77] Where the opinion of the doctor was that the injury in question could not be caused by the '*ranpi*' but the unimpeachable evidence of the eye-witnesses was that the said injury was caused by the same weapon, it was held that in such circumstances, the medical opinion could not nullify the evidence of the eye-witnesses.[78] Where it was established that the eye-witness and the deceased were travelling in the same rickshaw and the witness stated that the victim sustained gunshot injury in the back while the medical evidence showed injury in victim's chest, it was held that in the circumstances, the High Court had rightly pointed out that the witness having seen the exit wound on the back of the victim bleeding, thought that he was hit in the back.[79]

It is not a universal principle supported by any authority that where there is a variance between the account given by the eye-witnesses and the medical evidence, the evidence of eye-witnesses must prevail.[80] Where the evidence of the eye-witnesses was that the victims were unconscious as a result of injury and the medical evidence said that they were conscious, there could not be said to be any inconsistency in both the versions merely on this ground because the victims might have gained consciousness by the time of medical examination.[81]

Where there was inconsistency between ocular and Medical Evidence, conviction cannot be based on such evidence and the accused is to be given benefit of doubt.[82]

41. VALUE

An expert is a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the judge the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions.[83]

The Court is bound to defer to the opinion of an expert where skill and experience alone render a person a competent judge. In the case of an expert witness there exists the tendency to support the view which is favourable to the side which employs him so that it is difficult to get from him an independent opinion. An expert may revise his opinion if he finds cogent reason and his evidence need not be disbelieved on this ground.[84]

The Supreme Court has laid down that, although the approach has to be one of caution, there is no rule of law that the evidence of an expert can not be acted upon unless substantially corroborated.[85]

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76. *Solanki Chimanbhai Ukabhia* v. *State of Gujarat*, AIR 1983 SC 484.
77. *State of U.P.* v. *Harban Sahai*, (1998) 6 SCC 50 : 1998 SCC (Cri) 1412.
78. *Prem* v. *Daula*, AIR 1997 SC 715 : 1997 Cr LJ 838. Minor inconsistency between medical evidence and ocular evidence, ocular evidence cannot be rejected, *Anwar* v. *State of Haryana*, (1997) 9 SCC 766 : 1997 SCC (Cri) 762. Court has to come to its own conclusion, *Jamunabai* v. *Surendrakumar*, AIR 1995 MP 274 (para 15).
79. *Surendra Narain* v. *State of U.P.*, AIR 1998 SC 192 : 1998 Cr LJ 359; *Adya Singh* v. *State of Bihar*, AIR 1998 SC 3011; *State of Bihar* v. *Ram Padarath Singh*, AIR 1998 SC 2606; *Surjan Mahto* v. *State of Bihar*, 1998 SCC (Cri) 886.
80. *Chiguripati Suryanarayana* v. *State of A.P.*, 1999 Cr LJ 1201, 1205 (AP).
81. *Ramkishore Patel* v. *State of A.P.*, 1997 Cr LJ 207 (SC). For inconsistency between the evidence of eye-witnesses and that of the doctor, see *Periasami* v. *State of T.N.*, 1997 Cr LJ 219 (SC).
82. *Mohar Singh* v. *State of Punjab*, AIR 1981 SC 1578.
83. *State of H.P.* v. *Jai Lal*, 1999 Cr LJ 4294 (paras 17, 18 and 20) (SC) : AIR 1999 SC 3318.
84. *Subodh Kumar* v. *Soshi Kumar*, AIR 1958 Cal 264.
85. *Muralilal* v. *State of M.P.*, AIR 1980 SC 531; Citing LORD PRESIDENT COOPER in *Deeci* v. *Edinburgh Magistrate*, (1953) SC (Scotland) 34 on the importance of expert evidence, and *Ram Chandra* v. *State of U.P.*, AIR 1957 SC 381; *Fakhruddin* v. *State of M.P.*, AIR 1967 SC 1326 : 1967 CrLJ 1197.

The Court can refuse to place any reliance on the opinion of an expert which is unsupported by any reasons.[86]

The competency of an expert should be established, and he should be subjected to cross-examination. Expert's opinion is not straight away admissible without examining him.[87]

If evidence of an expert is to be discarded passages from books relied on and sought to discredit his opinion should be put to him in the cross-examination.[88]

It is not permissible for a Court to substitute its own opinion to the opinion of an expert.[89] The Court cannot act as an expert by comparing the signature with the admitted one and record its findings on its own view, without taking the assistance of any expert or other material evidence provided under Section 47.[90] Where the doctor had not given his opinion regarding the nature of injury, the Court could not substitute its own opinion by usurping the functions of an expert.[91] Substitution of an opinion given by an expert by its own conclusions by the High Court is illegal.[92]

Once it becomes clear that the doctor's evidence does not go against the prosecution case that the injuries were caused on the body of the deceased by one shot from a pistol used by the accused, the absence of the ballistic expert's evidence cannot be a reason to doubt the testimony of the eye-witnesses.[93]

A medical witness who performs a post-mortem examination is a witness of fact, though he also gives an opinion on certain aspects of the case. The value of medical witness is not merely a check upon the testimony of the eye-witnesses; it is also independent testimony, because it may establish certain facts quite apart from the other oral evidence.[94]

It was held that where expert's evidence about the distance from where the gun was fired was at variance with direct testimony which was beyond doubt, the direct testimony carries weight.[95]

Where the expert gave the opinion that the dissimilarities between alleged forged lottery ticket and the genuine one are due to natural variations, and his opinion as to the difference in ink was not based on chemical examination of ink, it was held that even the expert's opinion, if admissible, is not a safe basis for finding out the offence of forgery.[96]

Where the writing on the documents relied on by the prosecution was proved to be that of the accused, not only by the expert but also by persons acquainted with the writing of the accused, and on observation by the Court, it found similarity between the disputed and the admitted handwritings, it was held that the conviction can be sustained under the Prevention of Corruption Act.[97] Evidence of handwriting expert is only corroborative of other evidence of the point at issue.[98] Where evidence of a handwriting expert is unreliable correction based on his opinion is unsustainable.[99] The general features of a handwriting, such as skill, slant, pen-pressure, spacing, etc., cannot constitute sufficient material for establishing the identity. What is required is that peculiar individual writing habits or idiosyncracies, and the presence or absence of the same in two sets of writings is a feature which is of decisive importance. A single dissimilarity can outweigh a large number of similarities. Where the handwriting expert was unable to make out any distinctive characteristics, or any other material on the basis of which the identity

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86. *Haji Md. Ekramulhaq* v. *State of West Bengal*, AIR 1959 SC 488; *State of V.P.* v. *Krishna Nand*, AIR 1953 Vin Pra 21; *State* v. *Kanhu Chand Barik*, 1983 CrLJ 133 (Ori).
87. *Balakrishna Das Agarwal* v. *Radhadevi Smt.*, AIR 1989 All 133.
88. *Krishan Lal* v. *M.C.D.*, 1985 CrLJ 285 (Del).
89. *State of U.P.* v. *Shanker*, AIR 1981 SC 897.
90. *P. Aswathamma* v. *Hotel Sathyaprakash*, 2000 AIHC 4519 (paras 17 and 19) (Kant).
91. *Babloo* v. *State of M.P.*, 1995 Cr LJ 3534 (para 15) (MP), **relying on** *Gambhir* v. *State of Maharashtra*, AIR 1982 SC 1157 : 1982 Cr LJ 1243 (para 30).
92. *State of U.P.* v. *Shanker*, AIR 1981 SC 897.
93. *Shambhoo* v. *State of U.P.*, 1963 ISCJ 315.
94. *Nagindrabala Mitra (Smt.)* v. *Sunil Chandra Roy*, AIR 1960 SC 706.
95. *Karnail Singh* v. *State of Punjab*, AIR 1971 SC 2119; expert evidence was not permitted to be led where other evidence was already there. *Bai Shanta* v. *Union of India*, 2001 Cr LJ 2152 (para 11) (Guj).
96. *Chatt Ram* v. *State of Haryana*, AIR 1979 SC 1890.
97. *Ram Pyrelal* v. *State of Bihar*, AIR 1980 SC 1523.
98. *Kanailal Shaw* v. *Calcutta Credit Corp. Ltd.*, ILR (1971) 1 Cal. 103.
99. *Kanchan Singh* v. *State of Gujarat*, AIR 1979 SC 1011.

could be held to be duly made out, the expert's testimony did not warrant the conclusion that it was the accused who made the writings on the documents in question.[1]

Acquittal of an accused because of the absence of the expert's opinion to prove that the offending books of the accused were reproductions of the book printed and published by the complainant, for the infringement of the copyright, was held unjustified.[2]

The report of an expert by itself is not evidence unless he is produced in Court and his evidence is tested by cross-examination.[3]

Expert's evidence is not conclusive.[4] It is the duty of the Court to come to a conclusion on a question of fact, after considering the entire evidence including that of the expert; the expert's evidence is only a piece of evidence and is not conclusive.[5]

The expert's opinion does not take away the common man's judgment, as they have a right to think and judge things from day to day experience.[6]

The Court cannot reach a conclusion solely on the evidence of the expert who visited the premises immediately after the occurrence in a mine, where the prosecution had failed to establish that the respondents had not taken all necessary steps and precautions as contemplated under the Mining Rules.[7]

The Court is not bound to accept the testimony of an expert in every case.[8]

The object of expert evidence is to assist the Court in forming its own opinions. One of the two ways in which the honesty of an expert can be tested, is to consider the number of instances in which he has given opinions contrary to the opinions of those who consult him.[9]

Where the handwriting expert had hardly done any work as an expert after 1950, and exceeded the limits as an expert and supported the appellant in matters which were not within his province, it was held that his testimony should be rejected.[10]

Opinion of an handwriting expert is not inadmissible merely because, it was also based on certain unadmitted writings.[11]

Where a bus conductor was charged for forging bus warrants to have pecuniary advantage, when there was no evidence that the accused himself used the bus warrants, and he was not found to be in exclusive possession of the bus warrant register, it was held that the evidence of the handwriting expert, when not corroborated by other evidence, cannot be the base for conviction.[12]

When an expert gives an opinion, he must place before the Court all the materials which induce him to come to the conclusion, so that the Court, although not an expert, may from its own judgment on those materials.[13] Observation of the High Court that "there is a natural tendency on the part of an expert witness to support the view of the person who called him" cannot be down-staged, for, many so-called experts have been shown to be remunerated witnesses making themselves available on hire to pledge their oath in favour of the party paying them.[14]

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1. *Jiwan Prakash Pandurang Mokashe* v. *State of Mah.*, ILR 1974 Bom 337.
2. *Govt. of W.B.* v. *Nityagopal Basak*, 1985 CrLJ 202 (Cal).
3. *Bhoore Singh* v. *Karansingh*, AIR 1935 All 142 : 37 CrLJ 117 (SB); *Perumal* v. *S.I. Railway Co. Ltd.*, ILR 1937 Mad 407; *Ahmedabad Municipalty* v. *Shantilal*, AIR 1961 Guj 196.
4. *Kamla Kanwar (Smt.)* v. *Ratanlal*, AIR 1971 All 304; *Devi Prasad* v. *State*, AIR 1967 All 64; *Ishwari Prasad Misra* v. *Md. Isa*, AIR 1963 SC 1728; *Nagappa Chandappa* v. *Nannibu*, AIR 1960 Mys 220.
5. *G. Husseniah Naidu* v. *B. Yerriah*, AIR 1954 Andh 39.
6. *Husan Ali* v. *Ganganath*, AIR 1956 Assam 15.
7. *State of Mysore* v. *Sarangapani Modaliar*, AIR 1960 Mys 245.
8. *Madanlal* v. *Amarchand*, AIR 1950 Ajmer 68.
9. *Devi Prasad* v. *State*, AIR 1967 All 64.
10. *Laxmi Chand Khajuria* v. *Ishroo Devi Smt.*, AIR 1977 SC 1694.
11. *Saleem-ud-din* v. *State*, AIR (1971) 1 Del 432.
12. (1985) 2 Ori LR 100.
13. *Ajitrij Shivprasad* v. *Bai Vasumati*, AIR 1969 Guj 48; *Javitri Devi Alias Shanti* v. *State*, ILR (1956) 6 Raj 1027; *Premshankar Mishra* v. *State*, 1957 CrLJ 108.
14. *Gulzar Ali* v. *State of H.P.*, (1998) 2 SCC 192 : 1998 SCC (Cri) 605.

Where the report of the expert was put to the accused during his examination under Section 313, Cr.P.C., non-furnishing of the details contained in the report to the accused was not fatal to the prosecution case[15] but where the expert evidence was based on notes prepared in the exercise of the official duty whose copies were not supplied to the defence, such notes could not be relied upon.[16] Where the proof of signature was necessary to determine the controversy, application for comparison of signature by the expert cannot be disallowed on the ground of delay.[17]

42. MODERN SCIENTIFIC METHODS OF EVIDENCE

Modern Scientific methods have made revolutionary changes in the field of Expert Evidence. Some of them are given below:

See Valedictory address delivered by Hon'ble Sri. M. JAGANNADHA RAO, Chief Justice, Kerala on 2-10-1992 at the Forensic Laboratory, Trivandrum.[18]

(a) Blood Groups: See Commentary under Section 112.

(b) Blood Stains: The ABC system has been in use for grouping blood stains. Other techniques are Electrophoresis and isoelectric focussing—Apart from blood, semen and saliva samples are also being identified.

A recent technique known as 'DNA finger printing' gives to all intents and purposes accurate evidence of identity by a comparison of samples of organic material taken from a person. It can be used to identify suspects of crime where the perpetrator has left traces of organic material. The new test does not indicate a suspect; it can be applied only to a suspect already indicated otherwise. One can easily imagine a bank of test results being built up in a criminal records office.

(c) Blood or Urine or Breath Test for determining the alcohol content in the blood.—It is an offence to drive with a blood alcohol level of over a particular level. Sophisticated systems have now been invented. At present the most common method is the use of breath analysers. The person concerned is asked to stand in front of a machine and breathe out twice into it. The machine operates and brings out a piece of paper indicating the extent of intoxication. This is widely used for Motor Vehicle offences.

Stop watches and speedometers are used to find out the speed of a vehicle at a given time. In *Castle* v. *Cross*,[19] it was held that in the absence of evidence to the contrary the Courts will presume that stop watches and speedometers and traffic lights were in order at the relevant time.

43. AUTOMATIC PHOTOGRAPHS

The leading case on the use of automatic photographs is the *Statue of Liberty* case,[20] where a film recorded by a radar apparatus on a ship was used in a case of collision between two ships in the river Thames. It was observed in that case that if a tape-recorder were admissible a photograph taken by a radar instrument is equally admissible. The law is bound to take cognizance of the fact that mechanical means replace human effort. The case in *R* v. *Maqsood Ali*,[21] a case relating to tape recorder was relied on *R* v. *Dodson*,[22] was a case of attempted armed robbery where photographs were taken by a secret camera. It was held the photographs were relevant as to whether an offence was committed and who committed it. The jury could look into the photographs and decide whether they are of the accused. Regard must be had to the quality of the photographs, and to the change in the appearance of the accused between the time of the photograph and the time of the trial.

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15. *Raveendran* v. *State of Kerala*, 1994 Cr LJ 3562 (para 5) (Ker).
16. *Vithal Mahadev Patil* v. *State*, 1996 Cr LJ 1796 (para 11) (Kant).
17. *Hariharan* v. *Rajendran*, 2000 AIHC 4559 (para 5) (Ker).
18. Published in (1993) 1 KLJ 19 (Journals).
19. (1984) 1 WLR 1372.
20. (1968) 1 WLR 739.
21. (1965) 3 WLR 229.
22. (1984) 1 WLR 971.

Supplementary evidence of identifying witnesses is admissible. If supplementary evidence is given care must be taken in selecting an identifying witness whose acquaintance with the defendant does not stem from previous brushes with the law.[23]

44. COMPUTERS

In England under the Civil Evidence Act, 1968, it is provided that a statement provided by a computer is admissible subject to strict conditions to ensure that the information is reliable. In *Myers* v. *D P P* [24] it was held that a written record made by an unidentifiable workman of the engine and *chassis* number of a car by *mers* film was inadmissible in evidence. To get over the decision the Criminal Law Evidence Act, 1965 was passed for admitting evidence that would otherwise be excluded as *hearsay* subject to certain conditions. See J.C. SMITH on admissibility of statement by computer—1981 Cr Law R. 387 In *R* v. *Wood*,[25] LORD LANE C.J. observed: "The computer was rightly described as a tool. It did not contribute its own knowledge. It merely did sophisticated calculation which could have been done normally by the chemist and was in fact done by the chemist using a computer programme by Mr. Kalbe whom the crown called as a witness. The fact that the efficiency of evidence is dependent on more then one person does not make any difference in kind".

See also the Information Technology Act, 2000, S. 92, Sch. II.

45. TAPE RECORDER

There is no difference in principle between a tape-recording and a photograph provided the voice is properly identified[26]. In that case the recording was imperfect as street noises were also got recorded in the tape, not all that was said by the accused was distinguishable. It was held the tape record was inadmissible (Contra *R.* v. *Robson*,[27] where conversation was sufficiently audible and hence held admissible). Where there is a possibility of interference by the police it is not admissible.

However statements recorded without the speaker's knowledge and intention were held to have been made orally and not in a 'document' *Ventouris* v. *Mountain (No. 2)*.[28]

46. VIDEO TAPE—TELEVISION LINK

In *Garcim* v. *Amerind Investment Advisers Ltd.*, it was proposed that a witness in New York may be examined on oath in New York with counsel in London examining him by a video link. It was held that as the evidence of a witness abroad recorded in video tape was admissible as a 'document'. The transmission of such evidence by video link could be received.[29]

47. PSYCHIATRISTS—PSYCHOLOGISTS

In a number of cases psychiatrists or psychologists are being called to give evidence for the defence in criminal cases. Where the defence is that an accused is to be acquitted or given a reduced sentence on ground of insanity or *non-insane metabolism* evidence of a psychiatrist has been admitted. The expert should not however usurp the role of the judge and the jury. A doctor evidence that A was not mentally disordered but none the less he did not form any intent to commit murder was held inadmissible-1972 (56) Crl. App. R. 268. The evidence of psychologists is also admissible to assess the evidence of a witness *e.g.* that a witness was hysterical at the time of assault and was therefore incapable of giving reliable testimony.[30] Normally a psychologist's evidence is relevant as to the personality of a person and his mental make up. But as to how an ordinary person not suffering from any mental illness is likely to

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23. *Fowden* v. *White*, (1982) Cr LR 588; See article of D.J. BIRCH in 1984 Cr. Law Review pp. 489-90.
24. 1965 AC 1001.
25. (1982) 76 Cr App R 23.
26. *R* v. *Maqsud Ali*, (1965) 2 All ER 464.
27. (1992) 2 All ER.
28. THE ITALIA EXPRESS, (1992) 3 All ER 414.
29. See EVIDENCE ON TELEVISION, (1992) 108 LQR, P. 561 by MARTIN DOCK RAY; COURTS ON TELEVISION, (1988) Vol. 51 MODERN LAW REVIEW, p. 593.
30. *Tooley*, 1965 AC 595.

react to stresses and strains of life, such evidence is not admissible.[31] In *Lowery* v. *The Queen*[32] the Privy Council had to deal with a case of murder committed by one of the two accused without apparent motive each alleging that the other was responsible for the killing. The evidence of a psychologist that one of them was immature whereas the other was agressive and the former would have been likely to be led by the latter was held admissible.

Before ordering a child to be examined by a psychiatrist, the consent of the Court should be obtained as the very examination by a psychiatrist may have an adverse effect on the child.[33]

48. TRUTH DRUG

Statements made under the influence of truth drug have generally been held not admissible.[34]

49. HYPNOTISM

Hypnotic sleep has by some scientists been said to be a condition in which the subject will give truthful answers. This method is applicable only to those susceptible to hypnotic influence. It is doubtful whether courts at the present stage of development of hypnotism would accept the evidence obtained by hypnotism.

In *R.* v. *Ward*,[35] the English Court of Appeal has laid down certain important propositions as to expert evidence collected by the prosecution for its own purpose and the disclosure thereof to the defence. The accused in this case (a lady) was convicted of the offence of causing an explosion likely to endanger life. The following propositions were laid down by the court:

(i) that the duty of forensic scientists to act in the cause of justice and not in the interests of the prosecution should be spelled out;

(ii) that there was a positive duty on expert scientific witnesses to disclose to those instructing them the records of all relevant tests, etc., and on the prosecution to make full and proper enquiries of forensic scientists and to make the resulting information known to the defence; and

(iii) that if in a criminal case the prosecution wished to claim public interest immunity for documents helpful to the defence; the prosecution was obliged to give notice to the defence of the asserted right to withhold the documents so that, if necessary, the Court could be asked to rule on the legitimacy of the claim. (From PROF P.M. BAKSHRS' LEGAL JOTTINGS, Vol. 1 No. 4 Law India page 9).

Facts bearing upon opinions of experts.

S. 46. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

ILLUSTRATIONS

(a) The question is, whether *A* was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(b) The question is, whether an obstruction to a harbour is caused by a certain sea-wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea-wall, began to be obstructed at about the same time, is relevant.

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31. *R* v. *Turner*, (1975) 1 All ER 70.
32. (1973) 3 All ER 662.
33. In re : *S an infant*, (1970) 1 All ER 107.
34. *Meetion* v. *H.M. Advocate*, 1970 JC 1.
35. THE TIMES, 8 June 1992.

COMMENTS

1. PRINCIPLE AND SCOPE

In matters where the opinion of the expert is relevant, any other fact which supports or is inconsistent with that opinion, though not otherwise relevant, is relevant.

This principle is in a way contained in Section 11 of the Act, wherein it is stated that facts, not otherwise relevant, are relevant, provided they are inconsistent with any fact in issue or relevant fact; or, if by themselves, or in connection with other facts, they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. This section is confined to the opinions of experts, which subject is elaborately dealt with under Section 45.

The opinion of an expert is open to corroboration or rebuttal. The illustrations indicate that, for this purpose, *res inter alias acta* is receivable.

An exception to the general rule, which lays down that evidence of collateral facts cannot be received, arises "where the question is a matter of science, and where the facts proved, though not directly in issue, tend to illustrate the opinions of scientific witnesses. Thus, where the point in dispute was, whether a sea-wall had caused the choking up of a harbour, and engineers were called to give their opinions as to the effect of the wall, proof that other harbours on the same coast, where there were no embankments, had begun to be choked up about the same time as the harbour in question, was admitted, as such evidence served to elucidate the reasoning of the skilled witnesses.[36]

In action against the owner of a vessel for running down a tug, the opinion of a marine insurance agent, who had examined the vessel and was called on behalf of the defendants, having been given to show how the collision occurred; the fact that, though the tug was insured in the witness's office, he had advised its owners not to sue the vessel, is admissible as strong corroboration of the truth of the opinion.[37]

The question being whether A died of strychnine poisoning, experts who have given their opinions as to the symptoms of such poisoning, and the A's death was caused thereby, may support such opinions by proof that other persons who were admittedly poisoned by strychnine had exhibited similar symptoms to A's, and experts whose opinion was that A had, on the contrary, died from ordinary tetanus, may prove that other persons who admittedly died from the latter cause had exhibited symptoms like A's.[38]

Opinion as to handwriting, when relevant.

S. 47. When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

***Explanation.*—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.**

ILLUSTRATION

The question is, whether a given letter is in the handwriting of *A*, a merchant in London.

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36. TAYLOR, 12th Edn., s.337, p. 234: *Folkes* v. *Chadd*, (1782) 3 Doug 157. See generally *Murarilal* v. *State of M P*, AIR 1980 SC 531 at 535. (Illustration (b) is based on this).
37. *Stephenson* v. *Tyne Commrs.*, (1869) 17 WR 590, cited in PHIPSON ON EVIDENCE, 13th Edn., p. 589 (para 27-57).
38. *R* v. *Palmer*, STEPH HIST CR LAW, Vol. III p. 389, cited in PHIPSON ON EVIDENCE, 13th Edn, p. 590 (para 27-58). (Illustration (a) is based on this).

B is a merchant in Calcutta, who has written letters addressed to *A* and received letters purporting to be written by him. *C* is *B*'s clerk, whose duty it was to examine and file *B*'s correspondence. *D* is *B*'s broker, to whom *B* habitually submitted the letters purporting to be written by *A* for the purpose of advising him thereon.

The opinions of *B*, *C* and *D* on the question whether the letter is in the handwriting of *A* are relevant, though neither *B*, *C* nor *D* ever saw *A* write.

SYNOPSIS

1. *Principle and scope*	... 566	4. *Value of Evidence under this section*	... 569
2. *Written or signed*	... 567	5. *Has seen the person writing*	... 570
3. *Acquainted with the handwriting*	... 567	6. *Habitually [Explanation]*	... 570

COMMENTS

1. PRINCIPLE AND SCOPE

This section indicates one of the methods of proving handwriting. The handwriting of a person may be proved in the following ways:—

(1) By the evidence of the writer himself;

(2) By the evidence of a person who has seen the person, whose handwriting is in question, write.[39]

(3) By the evidence of a person acquainted with such handwriting, either by receiving letters purporting to be written by the person in answer to documents written by the witness, or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

(4) By the evidence of an expert in comparing handwriting. The Court must satisfy itself by such means as are open to it that the opinion may be acted upon.[40]

(5) By the Court comparing the document in question with any others proved to the satisfaction of the Court to be genuine.

(6) The Court may also direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words alleged to have been written by such person.[41]

In HALSBURY'S LAWS OF ENGLAND 4th Ed., Vol. 17, Page 66, Para 89, it is observed: "A person's handwriting may be proved by the opinion of witnesses who are acquainted with it (Proof in a criminal case may be made in the same way as in a civil case). The knowledge necessary for this purpose may have been acquired by the witness at any time[42], having (1) seen the party write, or (2) received communications purporting to come from him[43], in answer to those addressed to him by the witness, or (3) observed documents purporting to be in the party's handwriting in the ordinary course of business.[44] Knowledge, however, acquired before or during the trial by a non-expert witness, for the express purpose of qualifying him to prove the party's handwriting at the trial, will not suffice to make the evidence admissible[45]. Testimony thus admitted is considered to be primary and not secondary in its nature, and so will not be excluded, even though better evidence of the handwriting in question is available.[46] While

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39. In the matter of a First Grade Pleader, (1914) PR No. 18 of 1915 (Civil).
40. *Fakhruddin* v. *State of M.P.*, AIR 1967 SC 1326.
41. *Barindra Kumer* v. *Emperor*, ILR 37 Cal 467, 502; *Pulin Behari* v. *King-Emperor*, 16 Cal WN 1105; **see also** *Ganpatrao Khanderao* v. *Vasantarao Ganapatrao*, AIR 1932 Bom 558; *Khijiruddin* v. *Emperor*, ILR 53 Cal 372; *Sarojini* v. *Haridas*, 26 Cal WN 113 : AIR 1922 Cal 12.
42. There must have been sufficient opportunity to acquire a knowledge of the handwriting in order to make the evidence admissible: *R.* v. *O'Brien*, (1911) 7 Cr App Rep 29, CCA; *Pitre* v. *R.* (1933) 1 DLR 417. **See also** *Burr* v. *Harper*, (1816) Holt NP 420, and *Warren* v. *Anderson*, (1839) 8 Scott 384.
43. *Harrington* v. *Fry*, (1824) IC & P 289, and **see** *Gould* v. *Jones*, (1762) 1 Wm Bl 384.
44. *Doe d Mudd* v. *Suckermore*, (1836) 5 A & E 703 at 730, 731; Re : *Clarence Hotel, Ilfracombe, Ltd.*, (1999) 54 Sol Jo 117; *R* v. *O'Brien*, (1911) 7 Cr App Rep 29, CCA.
45. *R.* v. *Crouch*, (1850) 4 Cox CC 163; *Stranger* v. *Searle*, (1793) 1 Esp 13; *R* v. *Richard*, (1918) 119 LT 192 CCA.
46. *Lucas* v. *Williams & Sons*, (1892) 2 QB 113 at 116, CA, per LORD ESHER MR.

evidence of opinion or belief is admitted for the purpose of proving handwriting, where direct evidence of one who was present when the document was written is not available,[47] and familiarity with the handwriting in question may be slight[48] an opinion based on mere inference is insufficient.[49]

It has long been recognised in England as well as in this country that any writing may be proved by the opinion of any person who is acquainted with the handwriting of the person alleged to have written the document and that one of the ways in which the knowledge of a person's handwriting may be acquired is by the witness having seen, in the ordinary course of business, documents which on evidence direct or circumstantial are proved to have been written by such person.[50]

Besides the above methods, the Supreme Court has held that by internal evidence afforded by the contents of the document, the document can be proved. Where the disputed document was a link in a chain of correspondence, the person who is the recipient of the document, would reasonably, be in a good position, both with reference to his prior knowledge of the writing or the signature of the alleged sender, as also his knowledge of the subject of the chain of correspondence, to speak to its authorship.[51]

Opinion as to handwriting is hearsay and becomes relevant only if the conditions laid down in the Section 47 are first proved.[52]

2. WRITTEN OR SIGNED

This section presupposes that the document in question must either be written or signed by a person. The word 'signed' is understood as signature of the individual in the normal sense. Any form in which a person affixes his name, with intent that it shall be treated as his signature, is sufficient. A name may be signed by a mark. Initials were also held to amount to a sufficient signature.

Signing includes signature by stamping.[53]

A document wholly in the handwriting of a party is said to be an autograph or holograph; where it is in the handwriting of another person, and is only signed by the party, the signature may be called "*onomastic*"; where it is signed by a cross or other symbol, it is "symbolic".[54]

3. ACQUAINTED WITH THE HANDWRITING

Under this section, when the court has to form an opinion as to the handwriting of a person, the opinion of a person acquainted with the handwriting of such person is admissible. Before such admission of evidence, one has to prove that the witness is acquainted with the handwriting of such person which is in question.[55] It is not correct to say that when a handwriting expert is not examined, the court is not justified in relying upon the evidence as to handwriting coming from a person who was not only competent, but also appeared to be correct in saying that the handwriting was in the handwriting of a

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47. **See** *Sayer* v. *Glossop*, (1848) 2 Exch 499; *Wright* v. *Cobb*, (1885) 1 TLR 555, DC; *Carey* v. *Pitt*, (1797) Peake Add Cas 130; *Butchelor* v. *Honeywood*, (1799) 2 Esp 715; *Greaves* v. *Hunter*, (1826) 2 C&P 477; *Drew* v. *Prior*, (1843) 5 M & Gr 264; *Chant* v. *Brown*, (1852) 9 Hare 790; *Smith* v. *Sainsbury*, (1832) 5 C&P 196; *Doe d Mudd* v. *Suckermore*, (1837) 5 Ad & El 703.
48. It is sufficient if the witness has acted on letters received from the person whose handwriting is in dispute; *Harrington* v. *Fry*, (1824) 1 C&P 289; *Tharpe* v. *Gisburne*, (1825) 2 C&P 21; *R* v. *Slaney*, (1823) 5 C&P 213; *Murieta* v. *Wolfhagen*, (1849) 2 Car & Kir 744; *Ovenston* v. *Wilson*, (1845) 2 Car & Kir 1. A signature may be proved by a witness who has only seen the surname written on some other occasion; *Lewis* v. *Sapio*, (1827) Mood & M 39, **disapproving** *Powell* v. *Ford*, (1817) 2 Stark 164; *Willman* v. *Worrall*, (1838) 8 C&P 380; *cf. Eagleton and Coventry* v. *Kington*, (1803) 8 Ves 438 at 476; *R* v. *Crouch*, (1850) 4 Cox CC 163 (constable and prisoner).
49. *Mandas da Costa* v. *Pym*, (1797) Peake Add Cas 144. A witness who bases his belief as to handwriting, on the contents of a paper and on other circumstances, may be asked what those circumstances are : *R* v. *Murphy and Douglas*, (1837) 8 C&P 297.
50. *Bhupendra Narain Mandal* v. *Ek Narain Lal Das*, AIR 1965 Pat 332.
51. *Mobarik Ali Ahmad* v. *State of Bombay*, AIR 1957 SC 857.
52. *Rahim Khan* v. *Khurshid Ahmed*, AIR 1975 SC 290.
53. *Shyamsunder* v. *Krupasindhu*, (1962) Cut 501.
54. BEST 12th Edn., S. 232, p. 217.
55. *Rahim Khan* v. *Khurshid Ahmed*, AIR 1975 SC 290; *Venkatachala* v. *B.N. Thimma Jamma*, AIR 1959 SC 443 (Signature in a will); *Baru Ram* v. *Smt. Prasanni*, AIR 1959 SC 93 : 1959 SCR 1403; *Bhupendra* v. *Eknarain*, AIR 1965 Pat 332; *Jasoda* v. *Janak*, AIR 1925 Pat 787.

particular person.[56] Even the opinion evidence of a non-expert becomes good evidence to go by, if the acquaintance of such witness with the signature of the executant is proved within the meaning of Section 47, Explanation.[57]

The evidence of handwriting expert and of persons acquainted with the handwriting is relevant under Sections 45 and 47 of the Act, though the evidence in both cases is an opinion.[58]

Examination of a person acquainted with the handwriting of the executant is necessary when secondary evidence was allowed to prove the existence or contents of a lost document.[59] When the expert is unable to give a definite opinion about the disputed handwriting in a document, the evidence of the witnesses who are familiar with the handwriting of the accused cannot be rejected.[60] The wife can be regarded as a person acquainted with the handwriting of her husband, where a letter written by her husband to another woman acknowledging marital relationship with her is in question.[61]

Evidence as to handwriting of a witness who did not say he was familiar with the handwriting in question was rejected.[62]

In order, that the evidence of a non-expert witness as to the handwriting may be admissible under Section 47, it must be established that he is familiar or acquainted with that person's handwriting, though it may not be necessary to establish in the first instance as to how the witness became acquainted with such handwriting.[63]

"The witness need not state in the first instance how he knows the handwriting, since it is duty of the opposite party to explore on cross-examination the source of the knowledge, if he is dissatisfied with the testimony as it stands. It is within the power of the presiding judge and also it may be desirable to permit the opposing advocate to intervene and cross-examine so that the court may at that stage be in a position to come to a definite conclusion on adequate material as to the proof of the handwriting.[64]

See contra *Hardevi* v. *State*, 1969 All 423 in which it was held that the cross-examiner is not obliged to prove the witness's lack of acquaintance with the handwriting.

Where the witness did not state straightaway that the signatures on the document in dispute were those of the defendant, but proceeded to compare them with those in his own Bahi Account, it was held that the witness cannot be said as a person acquainted with the handwriting of the executent but attempted to play the role of an expert and, as such, his evidence must be rejected.[65]

Where an injury report of a doctor was sought to be proved by a pharmacist claiming to be acquainted with the doctor's writing, and when no single question was put in cross-examination to the pharmacist to assail his assertion and the doctor was not available to give evidence, it was held that the injury report can be proved by the pharmacist, and it is also admissible as the report bore the thumb impression of the complainant who testified about his medical examination.[66] The evidence of a Head-Master of a school where the deceased had studied, and the evidence of the father, were held sufficient to prove the letters in question which were written by the deceased.[67]

A person who knows the initials of a person signing a document is competent to swear to the document.[68] The mere fact that the handwriting of the accused has been identified and proved by a policeman is no ground to cast aside his evidence which is relevant under Section 47.[69] The person who

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56. *Tarini Kumar Pande* v. *State*, AIR 1960 Cal 318.
57. *Dalim Kumar Sain* v. *Nandarani Dassi (Smt.)*, AIR 1970 Cal 292, 209.
58. *Ala Uddin* v. *Sishir Kumar Dutta*, AIR 1989 Gauh 42.
59. *Akshyanarayn Praharaj* v. *Mahesar Bag*, AIR 1958 Ori 207.
60. *Ranjit Sinha* v. *State*, AIR 1963 Pat 262.
61. *Shankeappa* v. *Sushilabai*, AIR 1984 Kant 112.
62. *Rahim Khan* v. *Khurshid Ahmed*, AIR 1975 SC 290.
63. *Umaro Chand* v. *Inder Chand*, ILR (1971) 21 Raj 823; *Shankerappa* v. *Sushilabai*, AIR 1984 Kant 112.
64. *Pusaram* v. *Manmal*, AIR 1955 Raj 186 : ILR (1951) 1 Raj 761; *Jagadish Das* v. *Emperor*, AIR 1938 Pat 497; *Shanker Rao Gangadhar* v. *Ramji Harjivan*, AIR 28 Bom 58; *Pusaram* v. *Manmal*, AIR 1952 Raj 102.
65. *Rajmal* v. *Islam Mahomed*, AIR 1958 Raj 6.
66. *Rameshwar Prasad Srivastava* v. *State of U.P.*, 1984 CrLJ 996 (All).
67. *Chodimal Jain* v. *State of Orissa*, (1984) 57 Cut LT 81.
68. 1964 Mad WN 356 : 1966 Mad LW (Cri) 217.
69. *Mahendra Singh* v. *Manipur State*, 1952 CrLJ 1518.

is accustomed to see the handwriting of the accused is a competent witness u/Section 47.[70] Where the Secretary (Medical), Delhi Administration, sanctioned the prosecution of an accused under the prevention of Food Adulteration Act, 1954, it was held that any person in that office, doing official acts regularly in discharge of official duties, can prove the sanction and the signature of the Secretary.[71] Opinions of persons well acquainted with the accused's handwriting, because of contact in the official work, are relevant, to identify, the accused's handwriting.[72]

An employee claiming to know the Director's signature admitted to his colleagues that certain signatures were those of the Director; it was held that he was not a competent witness to prove the signature as he was not personally acquainted with it.[73] The fact of a person receiving a letter purporting to be in reply to a letter, would be relevant under Sections 7 and 11 of the Evidence Act, but he cannot prove the handwriting of the person who wrote the reply under Section 47, as he has not seen that person write, nor has he received any communications in answer to the letters written by him in the ordinary course of business.[74]

Where the public prosecutor was ignorant of the requirements of Section 47 to prove the handwriting or the signature of the accused and therefore, he did not put any question to the prosecution witness to establish that he was familiar with the handwriting of the accused, but that omission was made good by the cross-examination of the witness and by other evidence on record, it was held that the handwriting or signature could be held to be proved.[75] The sanction for prosecution unless proved as per requirements of the Ss. 47 and 67, it cannot be termed as proved. Mere statement that the sanction was signed by the authorised person without any evidence as to the acquaintance with the signature and contents thereof, the document as such cannot be said to proved.[76]

A creditor who had himself seen the debtor writing the disputed signatures on the credit memos, was held to be a person acquainted with the handwriting, and the creditor may prove the handwriting without subjecting it to expert opinion.[77] In this category may be included cases where a person, having custody of family records, obtains familiarity with the handwriting of persons who are dead and gone.[78] In a case, one of the plaintiffs stated that the entry in an account book was in the handwriting of a *Munim* in the employment of the plaintiff's predecessors in interest and that he was acquainted with the handwriting of the said *Munim*. In the cross-examination, it was brought out that the witness was born 19 years after the death of the alleged writer; and the account book was found about 4 years before the witness gave the evidence. It was held that it could not be said that the witness was acquainted with the handwriting of the writer by the third mode provided by the section, namely, the documents purporting to be written by the *Munim* being habitually submitted to the witness in the ordinary course of business.[79]

4. VALUE OF EVIDENCE UNDER THIS SECTION

The Privy Council has held that comparison of writings is deemed a mode of ascertaining the truth, but it ought to be used with very great caution, 'especially when unskilled witnesses are called to make the comparison'.[80]

The opinion, based on the acquaintance with the handwriting, can be accepted, but the accepatability depends upon the facts of each case. Evidence of a person who is not an expert, is a weak form of evidence.[81]

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70. In re : *Mahalingayya Muddayya Pujari,* AIR 1959 Mys 185; *Akshya Narayan* v. *Maheshwar Bag,* 1958 Ori 207.
71. *State* v. *Brij Mohan,* 1985 Raj LR 204; *State of Bihar* v. *Ghulam Sarwar,* AIR 1965 Pat 393; (case of an assistant proving the Deputy Secretary's signature) In re : *Basaarajaswami,* AIR 1967 Mys 210; (witness proving the signature of his superior).
72. *State* v. *Tribikaram Bohidar,* (1971) 37 Cul LT 714 : 1971 WLN 408 (Raj).
73. *Kanai Lal Sham* v. *Culcutta Credit Corporation Ltd.,* ILR (1971) 1 Cal 103.
74. *Prathap Singh* v. *State,* AIR 1955 Sau 68.
75. *Neelakantan Nair* v. *State,* ILR (1972) 1 Ker 589.
76. *State of M.P.* v. *Param,* 1997 AIHC 4150 (paras 3-5) Vol. 6 (MP), **relying on** *Sait Tarajee Khimchand* v. *Yelamarti Satyam,* AIR 1971 SC 1865 and *Suresh H. Rajput* v. *Bhartiben Pravinbhai Soni,* 1996 Cr LJ 1621 : AIR 1996 SC 2883.
77. *Girja Prasad Sharma* v. *Sardarlabh Singh,* AIR 1977 Pat 241.
78. *Pusaram* v. *Manmal,* ILR (1951) 1 Raj 764.
79. *Pusaram* v. *Manmal,* AIR 1955 Raj 186.
80. *Prasad* v. *Anatharam,* 8 BLR 490, 502 (PC).
81. *K. Sivam Achani* v. *State,* (1985) 2 Crimes 288 (Ker).

Expert opinion is of little value when there is reliable evidence of the witnesses acquainted with the signature of a person when the signature is disputed.[82]

Section 47, deals only with the admissiblity of a variety of opinion evidence and not with its value. In a case covered by this provision, the value of the opinion, unlike that of the expert, depends upon the familiarity which a witness had acquired with the writing of another, about which the opinion is expressed, and not upon the reasons which he can advance in support of the opinion.[83]

Much reliance cannot be placed on the evidence of a non-expert witness who had seen the executant sign only once or twice about the identification of the executant's signature which had been subscribed before the witness was born.[84]

5. HAS SEEN THE PERSON WRITING

A witness ignorant of English Language is competent to prove by saying that he has seen the defendant signing the promissory note which was written in English.[85]

The fact that neither the tenant nor the scribe of the rent deeds (impugned documents) was produced in the Court is not material. A person's deposition as to their execution is sufficient, if he was present when the rent notes were executed.[86]

6. HABITUALLY [EXPLANATION]

This word means 'usually', 'generally', or according to custom. It does not refer to the frequency of the occasions but rather to the invariability of the practice. A record-keeper, who in the course of his official duty has to file papers sent to him, is competent to testify to the handwriting of a person whose papers are so filed, though the number of such papers may not be numerically great.[87]

The Nagpur High Court held that identification of handwriting from a single letter received is not sufficient, as it would not come within, the word 'habitually'.[88] In the case of a clerk who was examined to prove the letters written by the principal, it was held that, as there was no evidence that the letters written by the principal were in the ordinary course of the business habitually submitted to the clerk, the clerk cannot be said to be acquainted with the handwriting of the principal.[89]

Treasury officials to whom bills signed by a particular officer are habitually submitted in the ordinary course of business, are competent witnesses to say that the disputed signatures purported to be of that officer.[90]

Opinion as to digital signature when relevant.

[91][S. 47-A. When the Court has to form an opinion as to the digital signature of any person, the opinion of the Certifying Authority which has issued the Digital Signature Certificate is a relevant fact.]

COMMENTS

1. THE INFORMATION TECHNOLOGY ACT, 2000 OPINION AS TO DIGITAL SIGNATURE

This new section added by the Information Technology Act provides for relevancy of the expert opinion as to the digital signature of any person. When the Court is forming its opinion about a digital signature, the opinion of the certifying authority, as provided under S. 24 of the said Act, which has issued the Digital Signature Certificate is a relevant fact.

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82. *Ramanlal Rathi* v. *State*, AIR 1951 Cal 305.
83. *Devi Prasad* v. *State*, AIR 1967 All 64.
84. *Dhani Bhai* v. *Neem Kanwar*, AIR 1972 Raj 9, 14
85. *Bhanuwarlal Tatar* v. *Ahmed Khan*, AIR 1977 Gau 27.
86. *Hafiz Abdul Basit* v. *Hafiz Ahmad Mian*, AIR 1973 Del 280.
87. *Emperor* v. *Ponde, (No. 2)*, (1925) 27 Bom LR 1031.
88. *Hemraj* v. *Ramcharan*, AIR 1934 Nag 204.
89. *Hardevi Malkani (Miss.)* v. *State*, AIR 1969 All 423.
90. (1972) 1 Cut LR (Cri) 442 (Ori).
91. Ins. by The Information Technology Act, 2000, S. 92 & Sch. (w.e.f. 17-10-2000).

Opinion as to existence of right or custom, when relevant.

S. 48. When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

***Explanation.*—The expression "general custom or right" includes customs or rights common to any considerable class of persons.**

ILLUSTRATION

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

SYNOPSIS

1. *Principle* ... 571
2. *Custom* ... 571
3. *Likely to know* ... 573
4. *Wilson's manual* ... 574
5. *Riwaj-i-am* ... 574

COMMENTS

1. PRINCIPLE

This section deals with the opinion as to the existence of a general custom or right when the Court has to form its opinion as to its existence. The explanation states that customs and rights common to any considerable class of persons would also come within the expression 'general custom or right'.

Opinions of persons who are in a position to know of the existence of a custom or usage in their locality are admissible.[92]

This section read with Section 60, requires that the person who holds the opinion should be called as a witness.[93]

Customary right, may be proved as provided in Sections 13, 32(4), 43 and 48 of the Evidence Act.[94]

Section 32 Cl(4) also deals with the opinion of persons as to the existence of a public right or custom, or matters of public or general interest. The difference between this Section and Section 32(4) is that under Section 32(4), such statements of opinion must have been made by a person who is dead or cannot be found etc., whereas this section does not so require, as it is the opinion of a living person who would state his opinion before the court. This section deals with a general custom or right, whereas the expression used in Section 32(4) is 'public right or custom'.

The section deals with oral evidence given in Court by the person expressing the opinion. Section 13 applies to all rights and customs, public or private, and refers to specified facts which may be given in evidence.

2. CUSTOM

As to 'custom', see comment on Section 13.

'Custom' is an unwritten law established by usage. 'Custom' should be distinguished from 'usage'. 'Usage' is a fact and 'custom' is a law. There can be usage without custom, but not custom without usage.

The word 'general' is an equivalent of the term 'public'. Under the explanation it is stated that the expression 'general custom or right' includes customs or rights common to any considerable class of persons.

The Explanation indicates that private rights are excluded from the operation of the section. Such rights must be proved by facts such as acts of ownership.

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92. *Adivalu Kirubiyugothi Fathima* v. *Hassan Islamail*, 1997 AIHC 1818 (para 4) (Ker).
93. *Amina Khatun* v. *Khalil-ur-Rahman Khan*, (1933) 8 Luck 445 : 1933 Oudh 246.
94. *Ramachandra Singh* v. *Pratapsingh*, AIR 1965 Raj 217.

Mere user of a customary right of easement is not sufficient. A customary right differs from customary easement. To prove a customary right recognisition by the community also is necessary.[1]

A plaintiff who sets up a prescriptive right cannot succeed on the basis of a customary right. Customary rights are public rights annexed to the place in general.

One of the modes of proving a custom is through the opinion of a person likely to know its existence. His personal knowledge is only relevant for determining the weight to be attached to his evidence.[2]

Where the question was as to inheritance in tribal families, it was held that a tribal or family custom, excluding a daughter or sister from inheritance in favour of collaterals, irrespective of the character of the property, whether, it is ancestral or self-acquired, may be proved by general evidence as to its existence by members of the tribe or the family who would naturally be congnizant of its existence and its exercise without controversy, and no specific instances need be proved. Evidence of opinion of persons who would be likely to know of its existence, if it existed, is to be given.[3]

The question of private customary divorce among *Jat Sikhs* of Punjab arose before the High Court of Delhi. The Court said[4] : "The witness must be a person likely to know of the custom. His testimony must be based upon personal knowledge. The weight of his evidence would naturally depend upon his position and character and of persons on whose statements he formed his opinion, but he cannot be confined to instances in which he had personally known the usage or custom being exercised as a matter of fact. The Court cited the following observation of the Privy Council.[5] A tribal or family custom excluding a daughter or sister from inheritance in favour of collaterals may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence and its exercise without controversy. No specific instances need be proved." Reference was also made to[6], in which it was held by the Privy Council that the opinion of a witness as to the existence of a family custom based upon information derived from deceased persons is relevant. See further *Munshi Das* v. *Mal Singh*[7], where evidence of opinion was held not satisfactory.

The Supreme Court, dealing with a custom governing succession to the office of *Mahant*, held that the evidence of a solitary witness on behalf of the plaintiff, claiming to be present at the initiation of the plaintiff as a *Chela* of the deceased *Mahant*, was neither trustworthy nor sufficient, as one of the factors of substratum of the custom was absent, and so, the plaintiff could not claim to be installed as *Mahant*.[8]

It is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidence.[9]

A living person deposing as a witness may give his opinion on a family custom and may state how he derived that information from a deceased person; but it must be the expression of his independent opinion though based on *hearsay* and not a repetition of *hearsay*. The weight to be attached to such evidence would depend upon the position and character of the witness and of the persons on whose statements he formed his opinion.[10]

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1. *Radhakrishna (Smt.)* v. *Tukaram Pundalik*, AIR 1991 Bom 119.
2. *Balwinder Singh* v. *Smt. Gurpal Kaur*, AIR 1985 Del 14; *Subhani* v. *Nawab*, AIR 1941 PC 21 : 68 IA 1; *Ramachandra Singh* v. *Pratapsingh*, AIR 1965 Raj 217.
3. *Ahmad Khan* v. *Channi Bibi*, AIR 1925 PC 267 : 6 Lah 502 : 52 IA 379; *Thunthi* v. *Dhani Ram*, AIR 1953 HP 66; *Md. Alam* v. *Hafizan*, AIR 1934 Lah 351; *Bai Baiji* v. *Bhai Santok*, ILR 20 Bom 53; *Bajrangi* v. *Monokarnika* AIR 30 All 1 : 35 IAI.
4. *Balwinder Singh* v. *Gurpal Kaur*, AIR 1985 Del. 14.
5. *Ahmad Khan* v. *Channi Bibi*, AIR 1925 PC 267.
6. *Gururadhwaja Pd.* v. *S.P. Singh*, (1900) 10 Mad LJ 267.
7. AIR 1977 SC 2002.
8. *Munshi Dass* v. *Mal Singh*, AIR 1977 SC 2002.
9. *Collector of Madurai* v. *Muthu Ramalinga Jhevar*, 12 MIA 397; *Harpershad* v. *Sheodayal*, 3 IA 259; *Ramalakshmi Ammal* v. *Shivanantha*, 14 Moo. IA 570.
10. *Gururadh Waja* v. *Superundh Waja* (PC), ILR 23 All 37 : 27 IA 238, 251; *Daniraiji* v. *V.M. Chandra Prabha*, AIR 1971 Guj 188.

3. LIKELY TO KNOW

Personal knowledge about the facts is not necessary; however, such a witness should possess sufficient experience which would go to suggest that he is 'likely to know' of the existence of the custom sought to be proved by him. A mere *ipse dixit* of the witness is not admissible and relevant under the Evidence Act and would not carry any evidentiary value.[11] Mere expression of opinion in regard to a custom is of no value unless the persons expressing the opinion are persons who would be likely to know of its existence if it existed. Where the witness did not point out that he was satisfied in regard to such custom, namely, the exercise of right of pre-emption, it was held that he was not likely to know of the existence of any custom of pre-emption, and so his evidence was worthless.[12] Regarding the custom of adoption in Punjab (Sind) it was held that opinion evidence of witnesses was admissible.[13] Regarding the custom and usage in a particular locality, the opinion of a document writer who writes sale deeds or other documents in respect of such custom or usage, was held admissible. A person, who had been in the habit of writing out deeds of sale, or one who had been seeing transfers frequently made, would certainly be in a position to give his opinion whether there was a custom or usage in that particular locality.[14]

The witness in question should, however, possess experiential qualification before his evidence gathers any credibility. If he fails in having this qualification he should show on what grounds his opinion is based. But if his opinion is not based on reliable information, his mere repetition of *hearsay* would not carry any weight.[15]

Uniformity of practice in a family for some generations, in respect of certain matters have necessarily to be proved so that the practice 'fructified into maturity'.[16]

Opinion of the witnesses in respect of crediting certain amount to charities and temples in the account books of the Chettiyar Firms, and the right claimed by the managers of the temples demanding payment on the basis of those credit entries, were held inadmissible.[17] The relevance of the opinion of the members of the Bar relating to a particular custom of Muslims adopting some customs of Hindus was held to be doubtful.[18] Where the question was in respect of a right to take water for irrigation from the springs in certain villages, the owners of the land of some other villages adduced evidence about their right basing on long user; it was held that the custom was not established by the other set of villages.[19]

The evidence that is contemplated under this section is admissible to prove, as well as to disprove, the general right or custom.

Judicial decisions recognising customs are relevant evidence[20]. When a custom has been repeatedly brought to the notice of the Courts and has been recognised by them regularly in a series of cases, it attains the force of law.[21] Any decision of a Court regarding the existence or non-existence of a custom is good evidence in other cases.[22]

Where there was no entry showing that the land was recorded as *puratan patita*, in favour of the villagers, but there was a record of rights, it was held that, on the opinion evidence, a presumption in favour of immemorial user can be drawn.[23]

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11. *Dani Raiji* v. *Vahuji Maharaj*, AIR 1971 Guj 188.
12. *Ram Singh* v. *Jit Ram*, AIR 1954 HP 20.
13. ILR 1959 Punj 1285.
14. *Sariatullah* v. *Prannath*, ILR (1898) 26 Cal 184.
15. *Daniraiji Vrajlalji* v. *V.M. Chandraprabha*, AIR 1971 Guj 188.
16. *Abbas Ali* v. *Md. Shah*, AIR 1951 M.B. 92.
17. *Soonirani* v. *Alagu Nachiyar Koil*, AIR 1938 P.C. 259.
18. *Advocate General of Bombay* v. *Gimbabai*, ILR 41 Bom 181.
19. 1974 J&K L.R. 462.
20. *Tulshiram* v. *Chunilal*, (1940) Nag 149.
21. *Suganchand Bhikamchand* v. *Mangibai Gulabchand*, ILR (1941) 44 Bom LR 358 : ILR (1942) Bom 467.
22. *Ram Kishore* v. *B. Kavindra Narain*, AIR 1955 All 59. **See also** *Adivalu Kirubiyugothi Fathima* v. *Hassan Ismail*, 1997 AIHC 1818 (para 4) (Ker).
23. ILR 1973 Cut 1080.

4. WILSON'S MANUAL

Answers to the questions in WILSON'S MANUAL as to the Customary Law were held to be admissible under Section 48, being the opinion as to the existence of a general custom or right of persons who would be likely to know of its existence, if it existed.[24]

5. *RIWAJ-I-AM*

The Privy Council held that the general custom of Punjab is that a daughter excludes collaterals in succession to self-acquired property of her father. And it is for the collaterals to prove variation of the custom by reason of a special custom excluding the daughters. The Privy Council refered to SIR. WILLIAM RATTIGAN'S DIGEST OF CUSTOMARY LAW, wherein it was stated that, in regard to the self-acquired property of the father, the daughter is preferred to collaterals.[25]

The Supreme Court has held that where there is a conflict between RATTIGAN'S DIGEST OF CUSTOMARY LAW, and *Riwaj-I-Am*, the latter would prevail.[26]

The answers to questions contained in Riwaj-I-Am are admissible under Section 48, being the opinion as to the existence of general custom or right, of a person who would be likely to know of its existence, if it existed.[27]

Opinion as to usages, tenets, *etc.*, when relevant.

S. 49. When the Court has to form an opinion as to—

the usages, and tenets of any body of men or family,

the constitution and government of religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people,

the opinions of persons having special means of knowledge thereon, are relevant facts.

SYNOPSIS

1. *Principle and Scope* ... 574
2. *'Special Means of Knowledge'* ... 575
3. *Meaning of a word* ... 576
4. *Usages* ... 576
5. *Tenets* ... 576

COMMENTS

1. PRINCIPLE AND SCOPE

This section enumerates certain kinds of matters which can be proved by the opinion of persons having special means of knowledge, when the Court has to form an opinion about them. Those matters are: (1) usages and tenets of any body of men; (2) usages and tenets of a family; (3) constitution and government of any religious or charitable foundation; (4) meaning of words or terms used in particular districts; (5) meaning of words or terms used by particular class of people.

"Such persons are, so to speak, the repositories of customary law, just as the text books are the repositories of the general law."[28]

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24. *Subhani* v. *Nawab*, 68 IA 1 : AIR 1941 PC 21.
25. *Subhani* v. *Nawab*, 68 IA 1 : AIR 1941 PC 21, **see also** *Gopal Singh* v. *Ujagar Singh*, AIR 1954 SC 579; *Salig Ram* v. *Maya Devi*, AIR 1955 SC 266; (Saraswat Brahmins of Gurudaspur District) (RATTIGAN'S DIGEST has been accepted as a book of unquarter of authority in Punjab).
26. *Kehar Singh* v. *Dewan Singh*, AIR 1966 SC 1555.
27. *Bawa Singh* v. *Taro*, 1951 Punj 239. (**See also** cases under the head *Wazib-ul-Arz* and *Riwaj-i-Am* in Commentary on Section 35; **See also** cases under Sections 13, and 35 under the heads *Riwaz-i-Am*, *Wajib-ul-Arz* etc
28. *Jugmohandas Mangaldas* v. *Mangaldas Nathubhoy*, ILR (1886) 10 Bom 528, 543.

2. 'SPECIAL MEANS OF KNOWLEDGE'

All that is meant by this expression is that the person must have had opportunities for acquiring knowledge of a usage or custom, and that he had acquired the necessary knowledge.[29]

The Privy Council observed: "By S. 49, when the Court has to form an opinion on (*inter alia*) the usages of any family, the opinions of persons having special means of knowledge thereon are also relevant. But by S. 60, if oral evidence refers to an opinion, or the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds. Their Lordships think that it is admissible evidence for a living witness to state his opinion on the existence of a family custom, and to state, as the grounds of that opinion, information derived from deceased persons, and the weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has formed his opinion. But it must be the expression of independent opinion based on ***hearsay***, and not mere repetition of ***hearsay***."[30]

Where a sister claimed the inherent self-acquired property of her brother under a special custom, evidence as to its existence by the members of the family or the tribe, who would naturally be cognizant of its existence and its exercise without any controversy was held admissible.[31]

The expression 'special means of knowledge' does not necessarily mean that the person giving evidence should himself engage in particular business, or that he himself should be a member of a particular class of people; it is sufficient that he has special means of knowledge regarding the meaning of the words or terms used in a particular district, or by a particular class of people. It would also be reasonable for the court to presume that the police Sub-Inspector in-charge of gambling in a particular area has special means of knowledge regarding the words used by the gamblers.[32]

Inference drawn by a particular witness is inadmissible. Under the Bombay Prevention of Gambling Act, it was held that it was open to the police officer to explain the expressions or words used for gambling purposes and to explain its meaning, provided that he had special means of explaining that expression. But an inference drawn from what he had seen or heard cannot be deposed to.[33]

The evidence of a Sub-Inspector that particular words used on a slip were code-words for particular figures cannot be received under this section, as he did not claim to be an expert having special knowledge of the meaning of the words in betting transactions in American futures.[34]

Though the Sub-Inspector had not said in the chief-examination that he has special means of knowledge, or how he acquired special means of knowledge, it would not go against the admissibility of his evidence under this section, as it is open to the accused to show, in the cross-examination, that the Sub-Inspector has no special means of knowledge and therefore his evidence will not have any value.[35]

A contrary opinion was expressed on the above aspect by the same High Court, holding that the prosecution has to prove that the person has special means of knowledge before it adduces opinion evidence, in order to make it relevant under Section 49, that the opinion does not become relevant if special knowledge had not been proved: and that it is not for the defence to put questions to show that the witness had no special means of knowledge.[36]

The custom of adoption of a son of a cousin-sister was held prevailing in Punjab Jind district.[37]

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29. ***Garusadhwaja* v. *Saparandhwaja*,** ILR 23 All 37 : 27 IA 238.
30. **See also** *Tulasiram Das* v. *Ramprasanna Das*, AIR 1956 Ori. 41; *Pratap Chandra* v. *Jagdish Chandra*, AIR 1925 Cal 116; ***Chandra Choor Doo* v. *Biphuti*,** AIR 1945 Pat 211.
31. ***Ahmad Khan* v. *Channi Bibi*,** AIR 1925 PC 267 : 52 IA 379.
32. *Kanubhai Prabhudas* v. *State of Gujarat*, (1963) 2 Cr LJ 87, **relying on** *Bibhbati Devi* v. *Ramendra Narayan Roy*, AIR 1947 PC 19; ***Harilal Gordhan* v. *Emperor*,** AIR 1937 Bom 385.
33. *Charan Misri* v. *State*, (1963) 1 Cr LJ 666 (Guj).
34. *Harak Chand Radhakishan* v. ***State***, 1954 Cr LJ 1347 : 1954 MB 145.
35. *Kanubhai Prabhudas* v. *State of Gujarat*, (1963) 2 Cr LJ 87.
36. *Govindalal Bhikhabhai* v. *State of Gujarat*, 1966 Cr LJ 830 : ILR 1965 Guj 901.
37. ILR 1959 Punj 1285.

On the question of a family custom of primogeniture, it was held that though two branches of the same family were having the custom of primogeniture, the third branch cannot rely on such custom unless it is proved by cogent evidence.[38]

The use of the word 'persons having special means of knowledge' would indicate that the opinions of living persons are relevant. It does not deal with statements of dead persons, which subject is dealt with in Section 32.[39]

The Privy Council observed: "A third feature of the suit has reference to the method of trial, the learned District Judge having been persuaded that the mode by which a British Indian Court ascertains the Mahomedan law is by taking evidence.[40]

The authority of SULAIMAN J. to the contrary[41] was cited to him, but he wrongly considered that S. 49 of the Evidence Act was applicable to the ascertainment of the law. He seems also to have relied on the old practice of obtaining the opinions of *pandits* on questions of Hindu law and the reference made thereto in *Collector of Madras* v. *Mutnu Ramalinga Sathupathy*.[42] No great harm, as it happened, was done by the admission of this class of evidence, as the witnesses made reference to authoritative texts in a short and sensible manner. But it would not be tolerable that a Hindu or a Muslim in a British Indian Court should be put to the expense of proving by expert witnesses the legal principles applicable to his case, and it would introduce great confusion into the practice of the Courts if decisions upon Hindu or Muslim law were to depend on the evidence given in a particular case, the credibility of the expert witnesses, and so forth. The Muslim law is not the common law of India. British India has no common law in the sense of law applicable *prima facie* to every one, unless it be in the statutory codes, *e.g.*, Contract Act, Transfer of Property Act. But the Muslim law is under legislative enactments applied by British Indian Courts to certain classes of matters and to certain classes of people as part of the law of the land which the Courts administer as being within their own knowledge and competence. The system of "expert advisers" (*muftis*, *maulavis* or, in the case of Hindu law, *pandits*) had its day, but has long been abandoned, though the opinions given by such advisers may still be cited from the reports. Custom, in variance of the general law, is matter of evidence, but not the law itself. Their Lordships desire to adopt the observations of SULAIMAN J. in the case referred to.[43] It is the duty of the courts themselves to interpret the law of the land and to apply it, and not to depend on the opinion of witnesses howsoever learned they may be. It would be dangerous to delegate their duty to witnesses produced by either party. Foreign law, on the other hand, is a question of fact with which courts in British India are not supposed to be conversant. Opinions of experts on foreign law are, therefore, allowed to be admitted."[44]

3. MEANING OF A WORD

In a country like India where there are so many different languages, while rendering justice, the court may consult a dictionary as to the meaning of a word.[45]

Evidence relating to works that are technical is also admissible under this section.

4. USAGES

These will include usages of trade, agriculture, mercantile usage and any usage common to a body of men or family. Usages of a family will include, for instance, the custom of primogeniture, or any peculiar course of descent.

5. TENETS

This will include any opinion, principle, dogma, or doctrine which is held or maintained by a body of men. It will apply to religion, politics, science, *etc.*

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38. *Kameshwar Prasad Singh* v. *Mithilesh Kishori Devi*, AIR 1964 Pat 150.
39. *Prabhu Narain Singh* v. *Jithendra Mohan Singh*, AIR 1948 Oudh 307; *Pratap* v. *Jagdish*, 1925 Cal 116.
40. *Masjid Shahid Ganj* v. *Shiromani Gurdwara Prabhandhak Committee*, AIR 1940 PC 116 at pp. 259-261 : 67 IA 251.
41. *Aziz Bano* v. *Muhammad Ibrahim Husain*, ILR 47 All 827, 835.
42. 12 MIA 397, 436-439.
43. 47 All 823, 835.
44. *Kandam Soren* v. *Jitan Hembrom*, AIR 1973 Pat 206.
45. *Beja* v. *Emperor*, AIR 1914 Lah 539 (2) : 16 CLJ 33 (Punj).

Opinion on relationship, when relevant.

S. 50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:

Provided **that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act (IV of 1869), or in prosecutions under Sections 494, 495, 497 or 498 of the Indian Penal Code (XLV of 1860).**

ILLUSTRATIONS

(a) The question is, whether *A* and *B* were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(b) The question is, whether *A* was the legitimate son of *B*.

The fact that *A* was always treated as such by members of the family, is relevant.

SYNOPSIS

1. *Principle and Scope* ... 577
2. *Opinion expressed by conduct* ... 577
3. *Special means of knowledge* ... 580
4. *Existence of relationship* ... 581
   - *(a) Marriage* ... 581
   - *(b) Adoption* ... 582
   - *(c) Relationship as son and daughter* ... 582
   - *(d) Joint family* ... 583
   - *(e) Mahantship* ... 583
   - *(f) Other relationship* ... 583
   - *(g) Legitimacy* ... 583
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5. *Sections 50 and 32(5)* ... 584
6. *Such opinion not sufficient to prove marriage under statutory provisions [Proviso]* ... 584

COMMENTS

1. PRINCIPLE AND SCOPE

This section states that when the court has to form an opinion as to the relationship of one person to another, the opinion expressed by conduct by any person who, as a member of the family, or otherwise, has special means of knowledge on the subject, is relevant as to the existence of such relationship.

Two things are necessary to make the evidence of a witness relevant under this section:—

(1) the witness must have special means of knowledge with regard to existence of the disputed relationship, either as a member of a family, or otherwise; and

(2) the witness must depose to his own conduct towards the person whose relationship is in dispute;[1]

The opinion may be of a member of the family or an outsider, but he must have special means of knowledge.

The provisions of this section are in accordance with the English Law.

However, general reputation which is admissible according to English Law, to prove relationship, is not admissible under this Section. Thus, the scope of this section appears to be more restricted.[2]

2. OPINION EXPRESSED BY CONDUCT

Opinion means something more than mere retelling of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question. Now, the

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1. *Maghi Singh* v. *Harnam Kaur*, 1979 Hindu LR 189.
2. *Lakshmi Reddi* v. *Venkata Reddi*, AIR 1937 PC 201; *Ramadhar Chaudhary* v. *Janki Chaudry*, AIR 1956 Pat 49; *Kunjilal* v. *Subalal*, AIR 1952 M.B. 12; *Gopalrao Shakarrao* v. *Sampatrao*, 1962 MP LJ (notes) 147; *Chandulal* v. *Bibi Khatemonnessa*, AIR 1943 Cal 76; *Balaram Das* v. *Jayakrushna Das*, AIR 1972 Ori 141.

"belief" or conviction may manifest itself in conduct, or behaviour, which indicates the existence of the belief or opinion.[3]

The Supreme Court in *Dologobinda Paricha* v. *Nimai Charan Misra*[4] approving the views expressed by TAYLOR ON EVIDENCE 8th Edn., Section 584, observed:— "The essential requirements of Section 50 are:— (1) There must be a case where the court has to form an opinion as to the relationship of one person to another; (2) in such a case, the opinion, expressed by conduct, as to the existence of such relationship is a relevant fact; (3) but the person whose opinion expressed by conduct is relevant must be a person who, as a member of the family, or otherwise, has special means of knowledge on the particular subject of relationship. In other words the person must fulfil the conditions laid down in the latter part of the section. If the person fulfils that condition, then what is relevant is his opinion expressed by conduct. Opinion means something more than mere retelling of gossip or of *hearsay*; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question. Now the 'belief' or conviction may manifest itself in conduct or behaviour which indicates the existence of the belief or opinion. What the Section says is that such conduct or outward behaviour, as evidence of the opinion held, is relevant and may, therefore, be proved. We are of the view that the true scope and effect of Section 50 of the Evidence Act had been correctly and succintly put in the following observation made in *Chandulal Agarwala* v. *Khalilar Rahman*[5]. "It is only 'opinion as expressed by conduct' which is made relevant. This is how the conduct comes in. The offered item of evidence is 'the conduct', but what is made admissible in evidence is 'the opinion', the opinion as expressed by such conduct. The offered item of evidence thus only moves the court to an intermediate decision; its immediate effect is only to move the court to see if this conduct establishes any opinion of the person, whose conduct is in evidence, as to the relationship in question. In order to enable the court to infer the 'opinion', the conduct must be of a tenor which cannot well be supposed to have been willed without the inner existence of the 'opinion'.

When the conduct is of such a tenor, the Court, only gets a relevant piece of evidence, namely, the opinion of a person. It still remains for the Court to weigh such evidence and come to it own opinion as to the *factum probandum* "as to the relationship in question." We also accept as correct the view that Section 50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship.[6] It was further observed: "Such conduct or outward behaviour must be proved in the manner laid down in Section 60; if the conduct relates to something which can be seen, it must be proved by the person who saw it; if it is something which can be heard, then it must be proved by the person who heard it, and so on. The conduct must be of the person who fulfils the essential conditions of Section 50, and it must be proved in the manner laid down in the provisions relating to proof. It appears to us that the portion of Section 60, which provides that the person who holds an opinion must be called to prove his opinion does not necessarily delimit the scope of Section 50, in the sense that opinion expressed by conduct must be proved only by the person whose conduct expresses the opinion. Conduct, as an external perceptible fact, may be proved either by the testimony of the person himself whose opinion is evidence under Section 50, or by some other person acquainted with the facts which express such opinion; and as the testimony must relate to external facts which constitute conduct and is given by persons personally acquainted with such facts, the testimony is in each case direct within the meaning of Section 60. This, in our opinion, is the true inter-relation between Section 50 and Section 60 of the Evidence Act.....While we agree that Section 50 affords an exceptional way of proving a relationship, and by no means prevents any person from stating a fact, of which he or she has special means of knowledge, we do not agree with HUTCHINS J when he says[7] that the Section seems to imply that the person whose opinion is a relevant fact cannot be called to state his own opinion as expressed by his conduct and that his conduct may be proved by others only when he is dead or cannot be called. We do not think that Section 50 puts any such limitation."

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3. *Dolgobinda* v. *Nimai Charan*, AIR 1959 SC 914. Such opinion can be substantiated by the person holding the opinion or by the evidence of any other person. *Champa Devi* v. *M.S. Singh*, AIR 1981 Pat 103.
4. 1960 SCJ 879 : AIR 1959 SC 914, **followed in** *Surendra Singh* v. *Ramdayal Sao*, 1996 AIHC 5522 (paras 5 and 6) (Pat).
5. ILR (1942) 2 Cal 299, 309.
6. *Lakshmi Reddi* v. *Venkata Reddi*, AIR 1937 P.C. 201.
7. *Queen Empress* v. *Subbarayan*, ILR (1885) 9 Mad 9, 11.

The above proposition that the conduct or outward behaviour must be proved in the manner laid down in Section 60 was followed in.[8]

In *Sitaram Nai* v. *Puranmal Sonal*[9] the Supreme Court explained the meaning of the term "opinion" in this connection. The court said that it was laid down in *Dolgobinda Parich* v. *Nimai Charan Misra*[10] that, what is relevant is the opinion expressed by conduct, and opinion means something more than mere relating of gossip or of *hearsay*; it means judgment or belief, that is, a belief or conviction resulting from what one thinks on a particular question. The section does not make the evidence of mere general reputation admissible as a proof of relationship. It is the conduct or outward behaviour which must be proved in the manner laid down in Section 60.

A member of the family can speak, in the witness box, of what he has been told and what he has learned about his own ancestors, provided what he says is an expression of his own independent opinion (even though it is based on *hearsay* derived from deceased, not living, persons), and is not merely a repetition of the *hearsay* opinion of others, and provided the opinion is expressed by conduct. His sources of information and the time at which he acquired the knowledge (for example, whether before the dispute or not) would affect its weight but not its admissibility.[11]

The expression 'opinion expressed by conduct' means a conduct which is expression in outward behaviour of the opinion entertained as to relationship.[12]

The two illustrations under this section amply explain the true scope and extent of this section.

It is only "opinion as expressed by conduct" which is made relevant under Section 50; the opinion as to the existence of such relationship and not 'the opinion as to such relationships' that is to be proved. The persons whose opinion is made evidence by this section must be shown to have special means of knowledge on the subject.[13]

A Full Bench of the Punjab High Court, in *Amarsingh* v. *Chhajusingh*[14] (majority view) held that the witness appearing in Court need not, in all cases, confine his testimony to his own conduct as expressive of his own opinion, with regard to the existence of the disputed relationship; he may extend it to the conduct of others. What is relevant under Section 50, and can be proved, is conduct or outward behaviour of the person who has special means of knowledge; the opinion which that person holds is merely the outflow of his conduct; thus, material evidence is of conduct, which can be of the witness himself or of another person regarding whose conduct the witness has deposed; it is from the conduct, as established on evidence, that the court has to form its opinion as to relationship; it is not necessary that the person whose conduct leads to opinion, relevant under Section 50, must appear as a witness, or that he must be dead before someone else can prove that conduct in terms of Section 50.

Evidence of general reputation, which is a cumulation of perception testimonies, heard and gathered and reduced to an assertion to court, is not admissible, but the opinion or belief of a person, specially competent in this respect, as expressed by his conduct in outward behaviour, is relevant. It is this conduct which can be tendered in evidence, and the Court is to examine whether such conduct is based on the opinion held by the person[15]. The word 'conduct' is not necessarily limited to the conduct of the relations of the person, whose relationship is in dispute, but is wide enough to include the conduct of the witness who was giving his opinion about the existence of such relationship.[16]

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8. *Fulkalia (Smt.)* v. *Nathu Ram*, AIR 1960 Pat 480; *Ramadhar Chaudhary* v. *Janki Chaudhary*, AIR 1956 Pat 49; *Bhogal* v. *Bibi Nabihan*, AIR 1963 Pat 450; *Balaram Das* v. *Jayakrushna Das*, AIR 1972 Ori 141; *Virsa Singh* v. *Biswanath*, AIR 1971 Punj 362; *Shanker Lal* v. *Vijai Shanker Shukla*, AIR 1968 All 58; *Ganeshnarayan Singh* v. *Jadunandan Singh*, AIR 1969 Pat 82; *Md. Ayub Khan* v. *Abdus Samad Khan*, 1969 B.L.J.R. 932; *Ajaib Singh* v. *Mann Singh*, (1968) 70 Punj LR 83; *Sitaram Nai* v. *Puranmar Sonal*, AIR 1985 Ori 171.
9. AIR 1985 SC 171 at 176.
10. AIR 1959 SC 914.
11. *Sitaji* v. *Bijendra Narain*, AIR 1954 SC 601; *Ramadhar* v. *Janki*, AIR 1956 Pat 49.
12. *Ramadhar Chaudhary* v. *Janki Chaudhary*, 1956 Pat 49; *Natabar Parchha* v. *Nimai Charan Misra*, AIR 1952 Ori 75; *Chunna Kumar* v. *Mukat Behari*, AIR 1934 All 117; *Chandulal* v. *Bibi Khatemonnessa*, 1943 Cal 76.
13. *Kariappa* v. *N. Jayamma*, (1966) 1 Mys. LJ 235.
14. AIR 1973 Pun 213.
15. *Chandu Lal Agarwala* v. *Khalilar Rahman*, ILR (1942) 2 Cal 299.
16. *Nidhiram* v. *Munej*, ILR (1954) Cut 547; *Sm. Fulkalia* v. *Nathuram*, ILR (1960) Pat 891 : AIR 1960 Pat 480; *Shriram Sardarmal* v. *Gourishankar*, AIR 1961 Bom 136.

The opinion which is relevant under Section 50 is "Opinion expressed by conduct which is expression in outward behaviour of the opinion entertained as to relationship."[17]

Conduct, as an external perceptible fact, may be proved by testimony of the person himself whose opinion is evidenced under Section 50 or by some other person acquainted with the facts which express such opinion. It is not necessary that in every instance where a witness proves relationship, he must also prove exhaustively all the instances of the family conduct, in support of that relationship. The devolution of family property is often a very valuable evidence of conduct within the meaning of Section 50.[18]

The conduct of a deceased offering '*neonda*' at the time of the marriage of his brother's daughter falls within the purview of Section 50, as the evidence of conduct showing relationship is relevant.[19]

The Evidence Act does not contain any provision making the evidence of general reputation admissible as proof of relationship.[20]

What is made admissible in evidence under Section 50 is an opinion. In order to enable the Court to infer the opinion, the conduct must be of a tenor which cannot well be supposed to have been willed without the inner existence of the opinion. The conduct must be proved in accordance with the law relating to proof. Section 50 deals with the relevancy of a particular fact, and it is only 'opinion as expressed by the conduct' as to relationship of one person to another, which is made relevant. This section, to some extent, allows evidence somewhat akin to 'reputation evidence'.[21]

Opinions to the existence of a relationship between the deceased and his grandfather is not opinion expressed by conduct and is not admissible under this section.[22] The witness must also testify that he had special means of knowledge as to the existence of the relationship, when he expresses the opinion by conduct.[23]

3. SPECIAL MEANS OF KNOWLEDGE

When oral evidence is adduced to establish relationship, it must be of an opinion given by any person having special means of knowledge as a member of the family, or otherwise.[24] The opinion of *Karna Garu* as to relationship was admitted because he was holding high respect in the family for fifty years.[25]

Where the plaintiff proved the entire genealogy though he had no personal knowledge of every step in the sense that he did not know each one of the persons named by him, the Supreme Court held that personal knowledge was not necessary in such cases; that what is true about a member of a family is also true of a person, though not a member of the family, who has a special means of knowledge about the relationship of the parties; but it should be an expression, based on his own independent opinion, though it is based on *hearsay* derived from the deceased, and that opinion must be expressed by conduct. The words 'or, otherwise' contemplate such a case.[26] Where in a suit for partition the plaintiff claimed to be the daughter of one of the head members of the genealogical branches of the parties and the evidence of the witnesses was based on relationship and knowledge and if the plaintiff's claim was allowed the shares of the witnesses in the suit property was to be proportionately minimised, her claim was entitled to

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17. *Ramadhar* v. *Janaki*, AIR 1956 Pat 49.
18. *Bhogal Paswan* v. *Bibi Nabihan*, AIR 1963 Pat 450; **see also** *Seshammal* v. *Kup Panaiyyangar*, AIR 1926 Mad 475; *Bhogal Paswan* v. *Bibi Nabihan*, AIR 1963 Pat 450; *Brundebon Barbal* v. *Sasimani Bewa*, (1973) 1 Cut. W.R. 402.
19. *Nikka Singh* v. *Nachhattar Singh*, (1980) 2 Punj. LR 308.
20. *Lakshmi Reddy* v. *Venkata Reddi*, AIR 1937 PC 201; *Kunjilal* v. *Subalal*, AIR 1952 MB 12; *Shivalal* v. *Jootha*, AIR 1952 Raj 167; *Bishwanath Gosain* v. *Dulhin Lal Muni*, AIR 1968 Pat 481; *Dolgobinda Paricha* v. *Nimai Charan Misra*, AIR 1959 SC 914; *Balaram* v. *Jayakrushna* AIR 1971 Ori 141.
21. *Bhagawathi Ummini* v. *Raman Kutti*, AIR 1976 Ker 34.
22. *Dukh Haran Triwari* v. *Dulhin Bihasa Kuer*, AIR 1963 Pat 390.
23. *Gurubari Debi* v. *Sokuri Debi*, ILR 1966 Cut 193.
24. *Baruni Behera* v. *Padan Behera*, AIR 1987 Ori 187.
25. *Gobinda Das* v. *B. Rout*, AIR 1958 NOC 154 (Ori).
26. *Sitaji* v. *Bijendra Narain*, AIR 1954 SC 601; *Ramadhar* v. *Janki*, AIR 1956 Pat 49; *Natabar* v. *Mimai Charan Misra*, AIR 1952 Ori 75; *Kunjilal* v. *Subhalal*, AIR 1952 MB 12; *Shivolal* v. *Jootha*, AIR 1952 Raj 167; *Lakshmi Chand* v. *Anandi*, AIR 1933 All 130.

be allowed.[27] In the absence of some special circumstances under which the co-villager and the neighbour of the owner of the land could form the opinion about family relationship of the members of the owner of the land their evidence was not sufficient to infer their family relationship specially when they had no relationship with the family of the owner of the land.[28]

The person expressing an opinion should state his source of information and the time at which he acquired the knowledge, to show that he had special means of knowledge.

The special means of knowledge which the section speaks of are means which the person whose opinion is sought to be proved must have. The language of the section does not warrant the interpretation that such means must be had by the witness who proves the opinion in question.

4. EXISTENCE OF RELATIONSHIP

The expression 'existence of any relationship' in this clause includes any statement which implies non-existence of such relationship between two persons.[29] Evidence of concubinage is evidence of non-existence of relationship of marriage and is admissible under Section 50.[30]

(a) Marriage.—Where the evidence is that a man and a woman were treated as husband and wife for a number of years, a presumption can be drawn that they were lawfully married. But, this presumption from long cohabitation, is rebuttable.[31] Where a man and woman were recognized by all persons concerned as man and wife, and they were so described in certain documents, and their daughters were married respectably as in the case of legitimate children, it was held that the facts afforded a strong presumption in favour of the validity of the marriage[32] and examination of the family members or persons having special knowledge about their relationship was not necessary.[33] Where a woman had lived for a number of years in close association with a man, and had children who were acknowledged by the man as born to him, and the villagers also treated them as wife and husband, it was held that there was a presumption of legitimacy, because vice and immorality are not usually attributed to such association.[34] Where there was a *Nika* marriage with a testator who later executed a will but did not mention the wife's name, it was held that the circumstances of omission of the wife's name was a piece of evidence against the marriage.[35] The evidence showing that the couple was living as husband and wife was held sufficient, notwithstanding the absence of evidence regarding the performance of *sampradhan* and *Saptapadi*.[36]

The evidence of friends and neighbours of the parties can be received showing the reputation and treatment as to how a man and woman conducted themselves as husband and wife.[37]

In proof of marriage under the Hindu Marriage Act, reputation and conduct is receivable under Section 50.[38]

The mere fact that there was an earlier marriage subsisting cannot be considered sufficient to rebut the presumption of a marriage arising out of long cohabitation and repute. However, if there is a statute such as Madras Bigamy Prevention Act, or the Hindu Marriage Act, a second marriage cannot be presumed from long cohabitation and repute, as such a marriage cannot be recognised in law.[39] Where a woman on the death of the husband, remarried another person in the same family, it was held that the

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27. *Gourhari Das* v. *Santilata Singh*, AIR 1999 Ori 61 (paras 12 and 13).
28. *Sankhali Dhal* v. *Nilamani Dei*, AIR 1994 Ori 298 (para 11).
29. *Ramadhar Chaudhury* v. *Janki Chaudhury*, 1956 Pat 49; *Suba Raut* v. *Dindayal Chaudhury*, AIR 1941 Pat 205; (this view may not be correct in view of AIR 1959 SC 914).
30. *Subarna* v. *Arjuno*, AIR 1951 Ori 337.
31. *Gokuel Chand* v. *Parvin Kumari*, AIR 1952 SC 231 : 1952 SCR 825; *S. Sethurathnam* v. *Lucy Basrora*, (1977) 2 M.L.J. 141 : 1977 Hind LR 566; *Ningu Vithu Bamani* v. *Sadashiv Ningu Bamani*, AIR 1987 Bom 27; (if children have been born, presumption is in favour of their legitimacy).
32. *Moujilal* v. *Chandrabati Kumari*, ILR 38 Cal 700 (P.C.).
33. *Milkhi Ram* v. *Milkhi Ram*, AIR 1996 HP 116 (para 15).
34. *Shivalingiah* v. *Chowdamma*, AIR 1956 Mys 17.
35. *Hazi Saboo Siddick* v. *Ayesha Bai*, ILR 27 Bom 485 (PC).
36. *Sadhumandal* v. *Sarathi Balamandal*, 1985 Cr LJ 979 (Cal).
37. 1970 Kashmir LJ 78.
38. *Shankerappa* v. *Sushilabhai*, AIR 1984 Kant 112; *Neelakantappa* v. *Amabamma*, ILR 1985 Kant. 3969; (1986) 1 Kant. L.J. 41.
39. *Raghuvir Kumar (minor) by next friend and mother Kamla Kumari* v. *Shanmughavadivu (Smt.)*, AIR 1971 Mad 330

burden lay heavily upon the defendants who challenged the validity of the marriage, to prove that there had been no marriage in law.[40] Where the first marriage of a person was admitted, and the witness did not depose as to the *factum* of the second marriage or that he and another were living as man and wife, it was held that the evidence of the witness fell short of the requirement under Section 50, as he did not have special means of knowledge.[41]

Where the eye-witnesses depose as to the performance of the marriage between the parties, the conduct evidence under Section 50 may not be necessary.[42]

Opinion expressed by conduct of persons who had special means of knowledge may be sufficient to prove the fact of marriage in the proceedings under Section 488, Cr. P.C.[43]

Opinion as to relationship under the main part of Section 50, does apply in considering the question in proceedings under Section 125, Cr. P.C., as to the existence of the relationship of marriage between the parties. Any person who, as a member of the family, or otherwise, has a special means of knowledge regarding the subject of relationship of husband and wife between two persons can speak in such proceedings.[44]

(b) Adoption.—In regard to an ancient adoption, evidence that the boy was treated for a long time as the adopted son at a time when there was no controversy, is sufficient to prove the adoption, although evidence of actual giving and taking is not forthcoming.[45] The evidence of a farm-servant who was present as a conch-blower, as to the adoption ceremony and as to the fact of A's calling B as his father and B's wife as his mother, was held admissible in evidence in regard to the question whether or not A was the adopted son of B, in a partition suit.[46] For establishing that the plaintiff's husband A, was the son of the defendant's father B, the testimony of the plaintiff's elder brother who gave her in marriage to A and of B's family-barber, was held admissible to prove the relationship.[47] Regarding proof of adoption, the evidence of a relative or an immediate neighbour of the adoptive parents, that they heard A addressing the parents as father and mother is relevant, as the opinion is expressed by conduct and they had special means of knowledge of knowing as to the existence of relationship.[48] Where the question was whether M was the adopted son of B, a document executed by the widow of B stating that B had taken M in adoption during his life time was held admissible under Section 50.[49]

Where a witness stated simply that A was the son of B and that A and B used to treat each other as father and son, was held not admissible, as it was not an opinion expressed by conduct.[50]

(c) Relationship as son and daughter.—The question was whether A was the son of B, and whether B was the daughter of C and D, another daughter of C and D, against her own interest, made an admission that A was the son of B who was her sister; it was held that the evidence was admissible under Section 21 as an admission and also under Section 50, as the daughter was admittedly a member of the family who had special means of knowledge.[51] Where the plaintiff stated, in her evidence, that her grandmother was saying that the plaintiff was the daughter of the house, it was held that to that extent, her evidence was relevant under Section 50.[52]

In a case where the dispute was whether A was the daughter of B, the opinion expressed by a third person C, who attended the marriage of A at which B acted as *Kanyakarta*, was held inadmissible for the

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40. *Rewa Widow of Dhoudusingh* v. *Galharsingh*, AIR 1961 MP 164.
41. *Laxmi Sahuani* v. *Maheshwar Sahu*, AIR 1985 Ori 11.
42. *Veikuntam Manikyamma* v. *Puppala*, AIR 1971 Ori 49.
43. *K.J.B. David* v. *Nilamoni Devi*, AIR 1953 Ori 10; *Venajakshamma (Smt.)* v. *P. Gopalakrishna*, AIR 1970 Mys 305; *Mohit Kumar Mukherjee* v. *Hera Mukherjee*, 1981 Cr LJ (NOC) 48 (Cal). **See also** *Ajay Chandrakar* v. *Ushabai*, 2000 AIHC 1292 (para 5) (MP) : AIR 2000 NOC 32 (MP).
44. *Neelakantappa* v. *Ambamma*, (1986) 1 Kant. LJ 41 : ILR 1985 Kant 3969.
45. *Balinki Padhano* v. *Gopal Krishna Padhano*, AIR 1964 Ori 117.
46. *Jaghabandhu Senapathy* v. *Bhagu Senapathy*, AIR 1974 Ori 120.
47. *Mahadeo Mahapatra* v. *Sora Dibya* AIR 1973 Ori 1; **relied on** *Ulla Dei* v. *Malli Bewa*, (1967) 33 Cut LT 740.
48. *Jankhi Bewa* v. *Chandra Majhi*, (1973) 39 Cut. LJ 635.
49. *Manraj* v. *Rameshwar*, 1969 Raj L.W. 507.
50. *Ajaib Singh* v. *Mann Singh*, (1968) 70 Pun. LR 83.
51. (1959) 1 Ori. J.D. 352.
52. *Jyotirmoyee Debi* v. *Durgadas Banerjee*, AIR 1976 Cal 238.

reason that the single occasion as spoken to by C could not be taken to establish the special means of knowledge of relationship.[53]

(d) Joint family.—Section 50 can be applied to prove that a person is a member of a Hindu Joint Family, but the opinion of witnesses must be expressed by conduct as to the existence of such relationship and the witness must have special means of knowledge on the subject.[54] Where the plaintiff claimed share in the joint family of the defendant who denied the plaintiff's paternity but the marriage between the plaintiff's mother and the defendant was not disproved and the school records of the plaintiff showed the defendant's name as father, it was held that the opinion of the Headmaster of the school who produced the school records was relevant in deciding the relationship between the parties.[55]

In a suit for partition, it is open to the plaintiffs to give evidence regarding the jointness of the parties if such evidence fulfils the condition of Section 50, as an expression of opinion by conduct.[56]

(e) Mahantship.—In the case of a person claiming Mahanthship, evidence of a solitary witness claiming to have been present at the initiation of the plaintiff as a *Chela* of the deceased *Mahanth* was held to be neither trustworthy nor sufficient, as he had no special means of knowledge about the custom of succession to *Mahanth*.[57]

(f) Other relationship.—A nephew of *D* deposed that *T* addressed *D* as "*Phuphar*", and that *D* himself told him that *T's* father was his wife's brother. Regarding the relationship between *T* and *D*, which was in dispute, it was held that the opinion of the nephew of *D*, supported by *T's* conduct, is relevant under Section 50.[58] Evidence of a witness that he was a cousin of the plaintiff's father, and he accompanied the *barat* of the marriage of the plaintiff's father was held admissible as opinion on relationship expressed by conduct.[59]

Oral evidence of a witness, who has no special means of knowledge and whose evidence is of the nature of *hearsay*, about the name of the grandfather of the deceased, is not opinion expressed by conduct as to the existence of relationship between the deceased and his grandfather.[60]

(g) Legitimacy.—Evidence of a person's wife and his brothers, acknowledging the defendant in a suit as the legitimate son and his mother as the legitimate wife was held admissible.[61]

Law presumes in favour of marriage and against concubinage. Long cohabitation raises a rebuttable presumption of wedlock. Where the father and son filed a suit and, in the plaint, father described the son without stating as to whether the son was an illegitimate son, it amounts to an acknowledgement that the son was legitimate. That the defendants did not challenge the legitimacy is an important circumstance in favour of the legitimacy of the son. In a subsequent title suit, the father and another son described that son as illegitimate. It was held that the statement in the subsequent title suit is also admissible, but it would not outweigh the acknowledgement of legitimacy made in the earlier suit. Acknowledgement and repudiation of legitimacy, both being conduct, are admissible in evidence under Section 50.[62]

But acknowledgement, where there is proof of the fact that there was no marriage, would not be of any use.[63]

(h) Pedigree.—On a question of pedigree, family conduct is admissible to prove relationship; and the treatment of friends and neighbours may be received as presumptive proof of marriage. The opinion on behalf of a family, regarding relationship, may be inferred from the family conduct, *e.g.*, distribution of family property; tacit recognition of relations. While, there is no doubt that a mere opinion about relationship, based on general repute, and not supported by conduct, will not be admissible under Section 50 of the Evidence Act, it is not necessary that, in every instance where a witness proves relationship, he

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53. *Ulla Dei* v. *Malli Bewa*, ILR 1967 Cut 430.
54. *Shriram Sardarmal* v. *Gourishankar*, AIR 1961 Bom 136.
55. *M B. Gangadharappa* v. *Bommagondappa*, 1999 AIHC 2512 (paras 7 and 8) (Kant).
56. *Ramesh Sao* v. *Kamala Sao*, AIR 1969 Pat 329.
57. *Munshidas* v. *Malsingh*, AIR 1977 SC 2002.
58. *Ajmer Singh* v. *Jangir Singh*, AIR 1952 Pepsu 76.
59. *Gurvek Singh* v. *Balbir Singh*, 1977 Cur LJ (Civil) 256 (Punj).
60. *Dukh Haran Tiwari* v. *Dulhin Bihasa Kuer*, AIR 1963 Pat 390.
61. *Shivlingiah* v. *Chowdamma*, AIR 1956 Mys 17.
62. *Sheodhar Prasad* v. *Jagdhar Prasad Singh*, AIR 1964 Pat 316.
63. *Mohabbat Ali Khan* v. *Md. Ibrahim Khan*, AIR 1929 PC 135; *Habibur* v. *Altaf*, AIR 1922 PC 159.

must also prove exhaustively all the instance, of family conduct in support of that relationship. The *quantum* of evidence must necessarily vary with the facts of each case.[64]

5. SECTIONS 50 AND 32(5)

A statement of a witness on the question of relationship may be admissible either under Section 32(5) or under this section. Where the witness has heard the existence of relationship from persons who had special means of knowledge, and the statements were made before the dispute arose, then it is admissible under Section 32(5). Where the witness gives his opinion as to the relationship, though after the dispute has arisen, it is admissible under this section if he, as a member of the family, or otherwise, has special means of knowledge, and the opinion is expressed by conduct.

A statement made by persons not having special means of knowledge though not admissible under Section 50 may be relevant under Section 32(5) of the Act, provided the witness states that he had the information from a deceased person, long before the dispute.[65]

Where the plaintiff claimed certain property of 'K' on the basis of inheritance but the proof adduced of his relationship was of general reputation, and was not in accordance with Section 32(5) or in accordance with Section 50, it was held that, in the absence of any express provision in the Act, making the evidence of general reputation admissible as proof of relationship, the evidence could not be accepted.[66]

A member of a family can depose as to what he has been told about his ancestors, provided what he says is an expression of his own independent opinion, based on information derived from deceased persons, and the opinion is expressed by conduct, *i.e.*, offering of *Fatheha*, etc.[67] It is necessary for a witness on the question of pedigree, to say, that he heard the relationship from a deceased person, so as to fulfil the conditions of Section 32(5). However it is permissible, in limited cases where the witness had no direct knowledge about the relationship by blood, to give evidence of statements ascertained by him from other persons about such relationship.[68] According to Section 50, a person, as a member of a family, or any other person having special means of knowledge of the relationship, can express his opinion by his conduct. Under Section 32(5) of the Evidence Act, in limited cases, a witness having no direct knowledge about the relationship by blood, can give evidence of the statements which he got from other persons about such relationship. The only qualification is that such statements which he heard from others must have been made before the dispute arose.[69]

6. SUCH OPINION NOT SUFFICIENT TO PROVE MARRIAGE UNDER STATUTORY PROVISIONS [PROVISO]

The proviso indicates that opinion on relationship cannot be sufficient to prove a marriage, in proceedings under the Indian Divorce Act, or in prosecutions for bigamy, adultery and enticing away a married woman. In such cases, the fact of the marriage must be strictly proved in the regular way.[70] In a case, where the charge is commission of adultery, the prosecution has to prove independently the marriage of the individual concerned.[71] Where the parties to a second marriage are Hindus, when the ceremony of *Saptapadi* is not proved, no presumption can be drawn that all ceremonies must have been performed from the mere presence of a priest. For the offence of bigamy the second marriage must be clearly proved under the proviso.[72] Evidence of relationship is not sufficient, without proof of second marriage, to warrant a conviction for the offence of bigamy under Section 194, Indian Penal Code.[73]

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64. *Natabar Parichha* v. *Nirmi Charan Misra*, AIR 1952 Ori 75.
65. *Bujhawan Singh* v. *Shyama Devi*, AIR 1964 Pat 301.
66. *Abdul Rahman* v. *Alima Khatun*, (1980) 1 Cal LJ 403 : 84 Cal WN 539.
67. *Dawood Bibi* v. *Abu Bakker*, AIR 1972 Mad 228.
68. *Chunna Kunwar* v. *Lala Mukat Beharilal*, AIR 1934 All 117.
69. *Sheojee Tiwary* v. *Prema Kuer*, AIR 1964 Pat 187.
70. *Empress* v. *Putambur Singh*, ILR (1879) 5 Cal 566, FB; *Wadhwa* v. *Fatteh Muhammad*, (1893) PR No. 5 of 1894 (CR).
71. (1961) 2 Guj L.R. 256.
72. *Phankari* v. *State*, AIR 1965 J.K. 105; *Sivarams Suppu* v. *State*, 1962 Ker LT 487.
73. 1955 Raj LW 504.

For an offence under Section 497 or 498, Indian Penal Code, the marriage between the complainant and the woman involved must be proved clearly.[74]

The proviso to Section 50 does not make the opinion evidence relating to marriage either irrelevant or inadmissible. The only effect is that in a prosecution under Section 494, I.P.C., the *factum* of marriage cannot be held proved on opinion evidence.[75]

Under the proviso, the principles which govern the proof of first marriage also govern the proof of second marriage, which has to be established in the case of offence of bigamy.[76]

Section 125, Cr. P.C. would not come within the ambit of the proviso to Section 50 of the Evidence Act. The proviso to Section 50 was held not applicable to contempt proceedings in a case where a wife obtained an injunction against the husband from entering into a second marriage, and contempt proceedings were initiated for the disobedience of the order.[77]

Grounds of opinion, when relevant.

S. 51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

ILLUSTRATION

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

COMMENTS

1. PRINCIPLE AND SCOPE

Where the opinion of an expert is receivable, the grounds or reasoning upon which such opinion is based may also be inquired into. Opinion is no evidence, unless the reason is assigned for such opinion. The correctness of the opinion can be estimated better in many instances when the reasons upon which it is based are known. If the reasons are frivolous or inconclusive, the opinion is worth nothing. An Excise Inspector is an expert on the question whether a certain liquid is illicit liquor or not; but, before he is in a position to give such opinion as an expert, he has to examine it and has also to furnish the data on which his opinion is based. His bald statement that the contents of the bottles were illicit liquor is not sufficient to prove that fact.[78] Though, Excise Inspectors may be treated as experts in their own branch, and they may be able to distinguish liquors, it is the duty of the court to ascertain from them the grounds on which their opinion is based, in order to come to its own conclusion as to the correctness or otherwise of the opinion given by them.[79] In a case of offence of forgery where the opinion of a handwriting expert was relied on, it was held that the reasons or the ground for the opinion had to be given to the accused.[80] A report of a Government analyst is not admissible unless he is examined. It is highly desirable that his report should contain full and complete reasons and take the place of evidence which he would give if he is called to court as a witness; then only it becomes relevant under this section.[81]

CHARACTER WHEN RELEVANT

In civil cases character to prove conduct imputed, irrelevant.

S. 52. In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

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74. *Chandra Bhahadur* v. *State of Sikkim*, 1978 Cr LJ 942 (Sik).
75. *Rabindra Kumar Bhattachari* v. *Smt. Prathiva Bhattacharjee*, 1970 Cr. LJ 838 : AIR 1970 Tripura 30.
76. *Mutyala Pardeshi* v. *Subbalakshmi*, 1962 A.P. 311.
77. *Bhonrilal* v. *Kaushaliya*, AIR 1970 Raj 83.
78. *Gobardhan* v. *State*, AIR 1959 All 53; *Ramkaran Singh* v. *Emperor*, AIR 1935 Nag 13; *Titli* v. *Alfred Robert Jones*, AIR 1934 All 273.
79. *Paltu Matabadal* v. *State of M.P.*, AIR 1961 MP 5; *Ramkaran Singh* v. *Emperor*, AIR 1935 Nag 13; *Gobardhan* v. *State*, AIR 1959 All 53.
80. *Himatlal Ratilal* v. *State of Gujarat*, 1971 Cr LJ 165 (Guj).
81. *Gajarani* v. *Emperor*, AIR 1933 All 394; *Drugs Inspector, M.P.* v. *Chimanlal and Co.*, 1968 MP 238 (FB). *(U/ Drugs Act)*, 1968 Cr LJ 1561 (FB).

COMMENTS

1. PRINCIPLE

In civil cases, evidence of the character of any party to the suit, to prove the probability or improbability of any conduct imputed to him, is irrelevant.

"In respect of the character of a party, two distinctions must be drawn, namely, between the cases when the character is in issue or is not in issue, and when the cause is civil or criminal. When a party's general character it itself in issue, whether in a civil or criminal proceeding, proof must necessarily be received of what that general character is, or is not. But when general character is not in issue, but is tendered in support of some other issue, it is, as a general rule, excluded. So, in civil proceedings, evidence of character to prove conduct imputed is declared by the Act to be irrelevant (s. 52). The two exceptions to this rule are, that, in civil proceedings, evidence of character as affecting damages, is admissible (s. 55); and in criminal proceedings...the fact that the person accused is of a good character, is relevant, but the fact that he has a bad character is, except in certain specified cases, irrelevant (ss. 53 and 54)".[82]

The general exclusion of character evidence is based on grounds of public policy and fairness, since its admission would surprise and prejudice the parties by raking up the whole of their careers, which they could not possibly come into court prepared to defend.[83] The business of the Court is to try the case, and not the man; and a very bad man may have a very righteous cause.[84]

In HALSBURY 4th Edn., Vol. 17, Para 50, Page 38, it is observed: "When a party's character, which in this context means his reputation, is not directly in issue in the proceedings, but evidence of it is tendered in proof of some other fact, it is generally excluded."[85]

In HALSBURY 4th Edn., Vol. 17, Para-52, Page-38, it is observed: "In certain circumstances, evidence of reputation is admissible for the purpose of establishing a person's good or bad character. The admission of evidence of reputation is now largely confined to defamation actions, where what is relevant will depend upon the terms of the pleadings. Where damages are at large, the bad character of the plaintiff in such actions may be proved in chief, in mitigation of damages, irrespective of the right to cross-examine. In general, in civil cases, evidence as to character and reputation is not admissible to bolster a party's case, although it may certainly be relevant in cross-examination, for example, as to credibility."

In BEST ON EVIDENCE (8th Ed., Section 251, P. 241) it is stated that the exclusion of evidence of character mentioned in this section is based on the principle of law, that the evidence adduced should be alike, directed and confined to the matters which are in dispute, or which form the subject matter of the investigation.

In BEST ON EVIDENCE (8th Ed., Section 256, P. 245) it is stated further: "To admit character evidence in every case, or to reject it in every case, would be equally *fatal* to justice; that to draw a line or to define with precision where it ought to be received and where it ought to be rejected, is as embarrassing a problem as any Legislature can be called upon to solve."

The general rule is that the evidence as to the character of a person is irrelevant in a civil case.[86]

In a suit, the contention was that certain pronotes had been obtained from the insolvent while he was under the influence of drink, and it was found to be baseless. It was held in that case, that mere general bad character of the insolvent would be quite irrelevant in a civil case for proving want of consideration for the pronotes.[87]

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82. WOODROFFE AND AMEER ALI'S EVIDENCE, 10th Edn., Vol. II, P. 718.
83. *Queen* v. *Rowton*, (1865) 34 LJ (MC) 57.
84. WIGMORE, 135.
85. *Narracott* v. *Narracott and Hesketh*, (1864) 33 LJPM & A 61 at 62. In general, evidence cannot be led in chief to bolster up the credibility of witnesses: **see** *R V Turner* (1975) 1 All ER 70 at 75 : (1975) 2 WLR 56, 61, CA, per LAWTON LJ; **cf.** *Lowery V R* (1974) AC 85 : (1973) 3 All ER 662, PC.
86. *Jagannath Prasad* v. *Ram Chandran*, AIR 1952 All 408.
87. *Abdul Shakur* v. *Kotwaleswar Prasad*, AIR 1958 All 54 **reversed** on another point in *Official Receiver* v. *Abdul Shakoor*, AIR 1965 SC 920; **See also** *Debendra Chandra Mondal* v. *Ratan Mitra*, AIR 1984 Cal 316.

Where a first wife filed a suit for maintenance, the husband in his written statement made some allegations of unchastity against the second wife, that suit was dismissed as not maintainable. Later, a daughter filed a suit for declaration of title, raising a question whether the second wife was unchaste; when the previous written statement in the maintenance suit was sought to be filed to show that the second wife was unchaste, it was held that the character of the second wife was not relevant in the title suit.[88]

In this section the expression 'the character of any person concerned' is used. Therefore, it may appear to include persons who are called as witnesses, but the content of the section refers only to the parties to the proceedings.

This section has no bearing on a case where the veracity of a witness is in question. This is governed by Section 146, under which a witness can be cross-examined to shake his credit, by injuring his character. Character evidence may not be relevant to decide an issue, in a case, but cross-examining counsel is given liberty under this section, for the purpose of shaking the credit of a witness, to put questions to him affecting his character. Section 155 prescribes the manner of impeaching the credit of a witness. Sections 52 and 155 deal with different matters. Section 52 prohibits character evidence in regard to the subject matter of the suit. Section 155 cannot, therefore, be construed as an exception to Section 52.[89]

Section 52 excludes evidence of character from being given only for the purpose of rendering probable or improbable any conduct imputed to the party. But, when the facts which are relevant otherwise than for the purpose of showing character are proved, and those facts raise inferences concerning the character of a party to the suit, such facts become relevant not only to prove the facts for which they were directly tendered, but also for the purpsoe of showing the character of the party concerned. In such a case it is open to the court to form its own conclusion as to the character of the party, and as to the effect of such character on the conduct imputed to the party.[90]

2. CHARACTER

Explanation to Section 55 states that "In Sections 52, 53, 54 and 55 the word 'character' includes both reputation and disposition; but except as provided in Section 54, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition was shown."

'Character' is a combination of the peculiar qualities impressed by nature or by habit of the person, which distinguish him from others.[91]

The evidence of character relates either (a) to character of witnesses, or (b) to character of parties. Character of a witness affects his credit and is always material, as it helps the court to come to the conclusion whether his evidence should be treated as trustworthy. Questions touching the character of a witness are allowed to be put to a witness who comes to give evidence in a case.

STEPHEN in his introduction (pp. 167, 168) observes: "Evidence of character is, generally speaking a makeweight, though there are two classes of cases in which it is highly important: (1) Where conduct is equivocal, or even presumably criminal. In this case, evidence of character may explain conduct and rebut the presumptions which it might raise in the absence of any such evidence. A man is found in possession of stolen goods. He says he found them and took charge of them to give them to the owner. If he is a man of very high character this may be believed. (2) When a charge rests on the direct testimony of a single witness and on the bare denial of it by the person charged. A man is accused of an indecent assault by a woman with whom he was accidentally left alone. He denies it. Here a high character for morality on the part of the accused would be of great importance."[92]

In criminal cases, previous good character relevant.

S. 53. In criminal proceedings, the fact that the person accused is of a good character, is relevant.

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88. *Lakshmamma* v. *E. China Appayya*, (1970) 2 And. W.R. 94.
89. *Guntaka Hussenaiah* v. *Busetti Yerraiah*, AIR 1954 Andhra 39.
90. NORTON, 230.
91. WEBSTER.
92. **See also commentary to the explanation** in Section 155.

COMMENTS

1. PRINCIPLE

The principle upon which good character may be proved is that it affords a presumption against the commission of crime. Thsi presumption arises from the improbability, as a general rule as proved by common observation and experience, that a man who has uniformly pursued an honest and upright course of conduct will depart from it and do an act so inconsistent with it. Such a person may be overcome by temptation and fall into crime, and cases of that kind often occur; but they are exceptions. The rule is otherwise; the influence of this presumption from character will necessarily vary according to the circumstances of different cases.[93] Character evidence is a very weak evidence; it cannot outweigh positive evidence in regard to the guilt of a person.[94]

In a case the appellant was convicted for a criminal breach of trust under Section 409, Penal Code, and for conspiracy under Section 120-B, Penal Code. In order to show the good character of the appellant, before the trial court, two great men of our country Sri Sreeprakasha and Jawaharlal Nehru were examined on behalf of the defence. Dealing with the relevancy of good character in the criminal proceedings SUBBARAO. J., on behalf of the Bench of the Supreme Court held that the evidence of those witnesses for the defence established that, in their opinion, the accused was a man of intergrity, sincerety and simplicity; that the question is as to the evidentiary value of good character of an accused in a criminal case. The relevant provisions are in Section 53 and explanation to Section 55 of the Evidence Act; it is clear from the said provisions that the evidence of general reputation and general disposition, is relevant in a criminal proceeding under the Indian Evidence Act, unlike in England, evidence can be given both of general character and general disposition; disposition means the inherent qualities of a person; reputation means the general credit of the person amongst the public. There is real distinction between reputation and disposition; a man may be reputed to be a good man, but in reality he may have bad disposition. The value of evidence as regards disposition of a person depends not only upon the witnesses' perspicacity but also on their opportunities to observe a person, as well as a person's cleverness to hide his real traits; but a disposition of a man may be made up of many traits, some good and some bad, and only evidence in regard to a particular trait with which the witness is familiar would be of some use....But, in any case, the character evidence is a very weak evidence; it can not outweigh the positive evidence in regard to the guilt of the person. It may be useful in doubtful cases to tilt the balance in favour of the accused, or it may also afford a back ground for appreciating his reaction in a given situation. It must give place to acceptable positive evidence. The opinion expressed by the witnesses does credit to the accused; but, in our view, in the face of the positive evidence, we have already considered, it cannot turn the scale in his favour."[95]

This section is based on the English Law.

STEPHEN in "GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND" states: "Though general evidence of bad character is not admitted against the prisoner, general evidence of good character is always admitted in his favour. This would, no doubt, be an inconsistency, justifiable or atleast intelligible, on the ground of the humanity of English Law, if such evidence was not often of great importance as tending to explain conduct."[96]

In HALSBURY 4th Edn. Vol. 17, Para-51, page-38 it is stated: "It is not in general permissible, in a criminal case, for the prosecution to adduce evidence that the accused either bears a bad general reputation in the community, or has a natural disposition to commit crimes of the class charged.[97]

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93. WIGMORE 123. Affidavit of a senior lawyer certifying previous good character of accused, an Assistant Public Prosecutor, of no use in circumstances of case. *Kasam Abdulla Hafiz* v. *State of Maharashtra*, AIR 1998 SC 1451 : 1998 Cr LJ 1422.
94. *Bhagwan Swarup* v. *State of Maharashtra*, AIR 1965 SC 682. **Also see** *Uday Kumar* v. *State of Karnataka*, 1998 Cr LJ 4622 (SC).
95. *Bhagawan Swaroop* v. *State of Maharashtra*, AIR 1965 SC 682.
96. Cited in FIELD'S LAW OF EVIDENCE, 11th Edn., Vol. 3, P. 2570.
97. *R* v. *Butterwasser*, (1948) 1 KB 4 : (1947) 2 All ER 415, CCA; *R* v. *Rowton*, (1865) 34 LJMC 57; *R* v. *Cole*, (1810) Judge's Note printed in (1946) KB at 544.

The accused nevertheless, is permitted to adduce or give evidence of his good reputation (See CRIMINAL LAW, Vol. II, para. 368), and if he thus puts his character in issue, the prosecution may attack it.[1]

PHIPSON (13th Edn., page 236, paras 13-07) states: "In all truly criminal trials, however, the defence is entitled to lead evidence of the good character of the defendant, subject to the right of the prosecution to call evidence in rebuttal."

PHIPSON (15th Edn. (2000), page 237, paras : 17-04) states further: "Although, as a matter of decision, *Rowton* was concerned only with evidence in rebuttal, it laid down general rules with regard to the admissibility of evidence of the accused's good character, rules which have never been expressly doubted and which have, from time to time, been explicitly applied or endorsed.[2] The principle emerging from that case may be summarised as follows:

(i) The character witness called on behalf of the accused can give evidence of the general reputation of the accused for good character, but not of his individual opinion as to the accused's disposition.[3]

(ii) As the best character is often the least talked about, the witness may even give negative, instead of affirmative, evidence on the subject. "The testimony of a witness that he has never heard anything against the accused in relation to the particular element of character is admissible and even cogent testimony on the point."

(iii) Such a witness may not be examined in chief as to particular facts.

(iv) The character proved must be of the specific kind impeached, *e.g.*, honesty where dishonesty is charged, good character in other respects being irrelevant.[4]

PHIPSON ON EVIDENCE (13th Edn., page 240, paras : 13-12) further states: "Good character is not a defence, for no-one would then be convicted, as everyone starts with a good character. The defendant is, however, entitled to rely on the fact that he is of previous good character as making it less likely that he would have committed the offence. If there is any room for doubt, his good character may be thrown in the scales in his favour". The rules set out here have not always been strictly observed, and at times considerable latitude has been allowed to the defence, particularly in regard to allowing character witnesses to testify as to their own opinion of the accused's character (*i.e.* disposition). The old rules were however recently reaffirmed.[5]

PHIPSON ON EVIDENCE (13th Edn. page 241, paras : 13-14) again states: "The accused was enabled to give evidence on his own behalf by Section 1 of the Criminal Evidence Act, 1897." Section 1(*f*)(*ii*) of that Act makes provision for the consequences for the parties if the accused "has personally or by his advocate.....gives evidence of his good character; This clearly envisages that the accused might himself give such evidence."

The fact that the accused is of good character is relavent in weighing the probabilities in a doubtful case, but it can be dispensed with in cases where the prosecution case has not been proved.[6]

Previous bad character not relevant, except in reply.

S. 54. In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

***Explanation 1.*—This section does not apply to cases in which the bad character of any person is itself a fact in issue.**

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1. **See** CRIMINAL LAW, Vol. II (paras 369, 388) *et seq.*
2. 1865 Le & Ca 520 : 34 L.J.M.C.
3. Accused may equally elicit such evidence from a prosecution witness, *R.* v. *Shrimpton*, (1851) 3 C.&K. 373, CCR.
4. A good example is *R.* v. *Shrimpton*, (1851) 3 C.&K. 373 CCR. **See also** *R.* v. *Turner*, (1817) 32 St. Tr. 957, 1007-1008.
5. *R* v. *Redgrave* (1981) Crim. L.R. 556 (CA) (discussed post 13-15).
6. *Data Xivae Naigue Desai* v. *State*, AIR 1967 Goa 4 (FB).

***Explanation 2.*—A previous conviction is relevant as evidence of bad character.**

SYNOPSIS

1. *Principle* ... 590
2. *'Unless evidence has been given that he has a good character'* ... 592
3. *Bad character, a fact in issue [Explanation 1]* ... 592
4. *Previous conviction relevant as evidence of bad character [Explanation 2]* ... 594

COMMENTS

1. PRINCIPLE

Evidence of bad character of an accused person (of whose good character evidence has not been given) is not relevant under this section, for the purpose of raising a general inference that the accused is likely to have committed the offence charged. Such evidence is irrelevant and cannot be legally admitted in evidence whether elicited by the prosecution or by the defence.[7] In criminal cases bad character of the accused is irrelevant unless evidence was given that he has a good character.[8]

The Supreme Court has held that, in the Indian system of Law, an accused starts with a presumption of innocence; his bad character is not relevant, unless he gives evidence of good character in which case, by way of rebuttal, evidence of bad character may be adduced.[9]

The description of the accused as a law-breaker amounts to evidence of character. The Supreme Court excluded it.[10]

A man's guilt is to be established by proof of the facts alleged, and not by proof of his character; such evidence might create prejudice but not lead a step towards substantiation of guilt.[11]

Where the accused caused the death of a person, when he tried to rape her; it was held that she was entitled for an acquittal as she had every right to save her honour even by causing death, under self defence, and her alleged immoral character is of no consequence.[12]

HALSBURY[13] has observed: "It is not, in general, permissible, in a criminal case, for the prosecution to adduce evidence that the accused either bears a bad general reputation in the community, or has a natural disposition to commit crimes of the class charged. The accused, nevertheless, is permitted to adduce or give evidence of his good reputation; and if he thus puts his character in issue, the prosecution may attack it".

If a man has been punished for his previous crime, it is manifestly unfair that in every future trial (upon charges of which he may of course be quite innocent) his whole past career should be raked up.[14]

In criminal cases, to prove that the defendant committed the crime charged, evidence may not be given either that he: (1) bore a bad reputation in the community or (2) has a disposition to commit crime of that kind, or (3) had no other occasions committed particular acts of the same class evincing such a disposition.[15]

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7. *M. Myin* v. *King Emperor*, (1908) 5 LBR 4; *Emperor* v. *Gangaram*, (1920) 22 Bom LR 1274.
8. *Ramlakhan Singh* v. *State of U.P.*, AIR 1977 SC 1936; *Shyama Charan Sriramsaran* v. *State*, AIR 1969 All 61; *Eswarappa* v. *State of Karnataka*, (1977) 1 Kant. LJ 52; *Chacko* v. *State*, 1970 Ker LT 358 : 1970 Ker. L.J. 193; *Indernath Guha* v. *State*, (1979) 83 Cal. W.N. 248 : (1979) 1 Cal. L.J. 119.
9. *Ramlakhan Singh* v. *State of U.P.*, AIR 1977 SC 1936.
10. *Ram Lakhan* v. *U.P.*, AIR 1977 SC 1936.
11. *Amrita Lal Hazra* v. *Emperor*, ILR (1915) 42 Cal 957.
12. *State of Orissa* v. *Nirupama Panda*, 1989 Cr LJ 621 (Ori).
13. 4th Edn., Vol. 17 (para 51), Page, 38.
14. PHIPSON 13th Edn. (para 13-07).
15. PHIPSON 13th Edn. (para 13-07).

At common law, evidence in rebutted must be of the same kind and subject to the same limits as that to which it is an answer, *i.e.*, it must not relate to specific instances and must relate to the general reputation of the accused.[16]

Where the bad character of the accused is not in issue, the constant reference to the accused as a *goonda*, is entirely irrelevant, and if it is allowed, it is bound to adversly affect the accused so far as the charge against him is concerned.[17] In a criminal proceeding, the fact that the accused person had a bad character is irrelevant unless evidence has been given that he has a good character in which case it becomes relevant. Thus evidence suggestive of the accused's bad character is not admissible. To call an accused a *goonda* or a rough person is surely prejudicing the jury against him. If the Court pointedly drew the attention of the jury in summing up the case at more than one place that the accused was a *goonda* the jury's verdict is vitiated.[18]

The history sheet of an accused person, kept in the police station, is not admissible in proof of a man's character, as it is based on *hearsay*.[19]

The court has a paramount duty to see that inadmissible evidence, especially about the previous bad character of the accused in a criminal case, is not brought out, even though, the defence lawyer may have overlooked the rule of evidence on the subject.[20]

The prohibition does not, in any way, affect evidence which is required to prove a motive for the crime or which is otherwise relevant.[21]

The Privy Council dealt with a case where a couple was tried and found guilty of the murder of an infant child whose body was found buried in their garden. There was no evidence that either the husband or the wife had killed the child. Before the trial Court, evidence of finding bodies other than the body of the child was given besides the evidence of others who had entrusted their children to that couple in the past and the children were not thereafter heard of. The Privy Council observed: "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible, if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."[22]

The decision in *Makin's* case was reaffirmed by the House of Lords in *Harris* v. *Director of Public Prosecutions*.[23]

In *Sardul Singh* v. *State of Bombay*[24] while accepting the principle in *Makin's* case, the Supreme Court observed: "It is well-settled that the evidence in rebuttal of a very likely and probable defence on the question of intention can be let in by the prosecution as part of its case. To anticipate a likely defence in such a case, and to give evidence in rebuttal of such defence, is in substance nothing more than the letting in of the evidence by the prosecution of the requisite criminal intention beyond reasonable doubt".

Makin's case was followed by LORD SUMMER in *Thompson* v. *R*,[25]; by LORD GODDARD in *R* v. *Sims*,[26] by VISCOUNT SIMON in *Harris* v. *D.P.P.*[27].

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16. PHIPSON 13th Edn. (para 13-17).
17. *Nimoo Pal Mujumdar* v. *State*, 1955 Cal 559.
18. *Babulal* v. *State*, AIR 1959 Cal 693.
19. *Kamal Kanto* v. *State*, AIR 1959 Cal. 342.
20. *Kandur Kasta* v. *State*, (1962)28 Cut. L.T. 185.
21. *Jagwa Dhanuk* v. *King-Emperor*, ILR (1925) 5 Pat 63.
22. *Makin* v. *Attorney General New South Wales*, (1894) A.C. 57, **approving** of the decision in *Reg* v. *Geering*, (1849) 18 L.J.M.C. 215; *Reg.* v. *Grey*, (1866) 4 F&F 1102.
23. (1952) 1 All ELR 1044 : AIR 1952 AC 694.
24. AIR 1957 SC 747 : 1957 SCJ 780, 801.
25. 1918 AC 232.
26. (1946) 1 KB 531, 537.
27. (1952) AC 694.

A was a salt agent, and *B* was his employee, who was entrusted with the duty of allotting the appropriate quantity of salt to each retail dealer. *B* was convicted for contravention of the Salt Act, where *A* was convicted for abetting *B*; evidence was let in to show that *A* knew about *B's* illegal transaction and connived with *B*. The Privy Council held that such evidence was relevant, both on the principal charge as well as the charge of abetting, in view of Section 14 or 15 of the Act, because it showed an intention to aid the commission of the offence and an intentional omission to put a stop to an illegal practice.[28]

Where an objection was taken that the evidence of bad character was allowed in evidence to the prejudice of the accused, it was held by the Supreme Court, that the evidence which disclosed certain unpleasant things about the accused in the past, was examined by the Courts below, in order to ascertain the motive for the murder, and not for the purpose of determining whether the accused were persons of bad character likely to commit murder.[29]

Where the question was about the dishonest intention of the accused, it was held that the previous judgment convicting the accused for the same offence is relevant and admissible to prove such an intention.[30]

The Bombay High Court in *Lakshmandas* v. *State*[31], held "*Prima facie* Section 54, cannot be given overriding effect; the section itself is not so worded as to be directly contradictory to Sections 7, 8, 9, 11, 14 and 15. What is made inadmissible is the evidence of bad character.....If the evidence of bad character is relevant under Section 14 or Section 15, merely because it might show previous misconduct of the accused, it is not inadmissible because of Section 54. In other words Section 54, would not control the other sections".

If evidence is otherwise relevant, it is not rendered inadmissible under this section, merely because it shows bad character or the commission of offence other than the offence with which the accused is charged.[32]

It was held, in a criminal case of defamation, that the accused, apart from denying or attempting to justify the alleged imputation, was entitled to rebut the complainant's case when the imputation was likely to harm his reputation; he could do that by showing that the complainant's reputation. in view of certain acts of omission or commission, was already at a low ebb; he was also entitled to show that the complaint was not *bona fide*.[33]

2. 'UNLESS EVIDENCE HAS BEEN GIVEN THAT HE HAS A GOOD CHARACTER'

Where the accused has attempted to show his good character in his own aid under the preceding section., the prosecution may in rebuttal offer evidence of his bad character. The accused, by going into his own character, gives a challenge to the prosecution. The prosecution, therefore, is at liberty to rebut his claim that he has a good character; otherwise the court would be misled.

3. BAD CHARACTER, A FACT IN ISSUE [EXPLANATION 1]

The explanation states that this section does not apply to cases in which the bad character of any person is itself a fact in issue.[34]

Evidence of reputation or disposition must be confined to the particular traits which the charge is concerned about. Thus, it would be useless to offer evidence of a prisoner's reputation for honesty on a charge of cruelty, or of his mild disposition on a charge of theft. Reputation for honesty would be relevant on a charge of theft, and a merciful disposition on a charge of cruelty.[35]

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28. *Srinivasa Mall* v. *Emperor*, AIR 1947 PC 135.
29. *Mangal Singh* v. *State of Madhya Bharath*, AIR 1957 SC 199.
30. *Mohan Singh* v. *Gopal Singh*, AIR 1961 Mani 43 : (1961) 2 Cr LJ 787.
31. AIR 1968 Bom 400.
32. *Saroj Kumar Chakrabarti* v. *Emperor*, ILR (1932) 59 Cal 1361 : AIR 1932 Cal 474.
33. *Munnalal* v. *D.P. Singh*, AIR 1950 All 455.
34. *Khilawan* v. *Emperor*, 29 Cr. LJ 1009 : AIR 1928 Oudh 430. **See also** *Prithvi Singh* v. *State of U.P.*, 2001 Cr LJ 4424 (paras 5 and 6) (All).
35. NORTON, 234.

In *Noor Mohammad* v. *King*[36] following *Makin's* case[37] it was held that "Before an issue can be said to be raised, which will permit the introduction of evidence obviously prejudicial to the accused, it must have been raised in substance, and the issue so raised must be one to which the prejudicial evidence is relevant.....The prosecution cannot credit the accused with fancy defence, in order to rebut them at the outset with some damning piece of prejudice. If the evidence of bad character is introduced in order to establish a relevant fact which cannot be proved *aliunde*, then the evidence is admissible.[38]

In cases of binding over proceedings for keeping good behaviour under sec 109, and 110, Cr.P.C., and in proceedings for the offences of dacoity u/Section 400, 401, Indian Penal Code, the bad character of the person involved would be a fact in issue.

In case of binding over proceedings u/Section 109, 110, Cr.P.C., the fact that a person is a habitual offender under Section 117, Cr.P.C. (old) (present Section 116) has to be proved. The general reputation of the person involved in such proceedings under Section 110, Cr.P.C. can be allowed.[39]

In a charge under Section 400, I.P.C., it must be established:

(1) That there was a gang associated for the purpose of habitually committing dacoity; and

(2) that the accused belonged to the gang, that is to say, the association of the accused with the gang was not casual but was intended to be habitual, Hence 'habit' is a fact in issue, to be proved for the purpose of establishing both the aforesaid ingredients of the offence. As habit is equivalent to character, it may be reasonably said that the character of an accused is itself a fact in issue for proving the charge under Section 400, I.P.C. The explanations 1 and 2 to Section 54 of the Evidence Act are attracted, and previous convictions, not only in respect of dacoities but also in respect of other offences such as theft, burglarly and other offences under Section 109 and 110, Cr.P.C., may be admissible.[40]

The observation that under Sections 400 and 401, Indian Penal Code, the character of an accused itself is a fact in issue for proving a charge under Section 400, was not accepted by the Gujarat High Court.[41]

In cases under Sections 400 and 401, Indian Penal Code, general bad character of accused is not a fact in issue. The fact in issue in a case under Section 401, Indian Penal Code, is a particular trait of bad character, *viz.* association for the purpose of habitually committing offences of robbery or theft; evidence can be given of that particular trait of bad character, but not of general bad character. In such cases, evidence cannot be given that the accused is a murderer or an immoral person or a cheat.[42]

In *Bonai* v. *Emperor*,[43] the evidence of previous conviction was admitted in a trial for the offence under Section 401, IPC, as evidence of habit and not as evidence of character, because in such cases habit has to be proved.[44]

It is submitted that the latter view is correct.

At the trial of the accused for committing or conspiring to commit a dacoity, it was sought to be proved by the prosecution that some of the accused were closely associated with the approver, and the object of that association had been the commission of thefts and other discreditable acts. It was held that the evidence was irrelevant either (a) to show the bad character of the accused; or (b) under S. 14 to show the existence of relevant state of mind, since a tendency to commit theft does not throw any light on the existence of an intention to commit or to conspire to commit a particular dacoity; or (c) under S.

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36. 1949 P.C. 161.
37. 1894 A.C. 57.
38. **See also** *Gopal* v. *The Crown*, AIR 1950 HP 18.
39. In re : *Perne Maila Rai*, AIR 1938 Mad 591.
40. *Bhima Shaw* v. *State*, AIR 1956 Ori 177.
41. *Bai Chaturi* v. *State*, AIR 1960 Guj 5.
42. *Bai Chaturi* v. *State*, AIR 1960 Guj 5; **relying on** *Bhona* v. *Emperor*, ILR 38 Cal 408; *Emperor* v. *Thukaram Malhari*, 14 Bom LR 373; *Mothiram Hari* v. *Emperor*, AIR 1925 Bom 195.
43. ILR 38 Cal 408.
44. *Emperor* v. *Thukaram Malhari*, 14 Bom LR 373; *Moti Ram Hari* v. *Emperor*, AIR 1925 Bom 195, and *Bai Chaturi* v. *State*, AIR 1960 Guj 5, the same reasoning was adopted.

11 to show the nature and character of the association[45] for association for the purpose of committing petty thefts does not render probable the existence of a conspiracy to commit dacoity. For what it is worth, the evidence is admissible to show close association with the approver and thus to support his statement that a conspiracy existed in fact.

In cases of defamation, which is an offence under Section 499, Indian Penal Code, the Patna High Court held that reputation was not at all a necessary fact to be proved in a charge under Section 500, Indian Penal Code, and hence it did not become a fact in issue; the accused is not entitled to ask questions in general, concerning the character or reputation of the complainant, so as to show that it was already of such a type that the news item or correspondence complained of could not lower it further and hence the publication by the editor did not bring him within the mischief of Section 500, I.P.C.[46]

4. PREVIOUS CONVICTION RELEVANT AS EVIDENCE OF BAD CHARACTER [EXPLANATION 2]

A previous conviction is not admissible in evidence against the accused, except where he is liable to enhanced punishment under S. 75 of the Indian Penal Code, on account of previous conviction, or unless evidence of good character be given, in which case the fact that the accused has been previously convicted of an offence is admissible as evidence of bad character.[47]

A previous conviction may also be relevant under S. 8 as showing motive. It may also become relevant within the meaning of S. 14, Explanation 2, when the existence of any state of mind, or body, or bodily feeling, is in issue or relevant.[48] It may also be relevant under S. 43, See illustration (e).

The A.P. High Court has held that only after conviction of the accused, the charge for the previous conviction has to be framed for giving enhanced punishment. In such cases, the prosecution has to prove the previous conviction of the accused. The trial judge may, at his discretion, proceed or refrain from proceeding, with the trial on the charge of previous conviction.[49]

But, in assessing punishment, the Court may take into consideration the accused's character and antecedents or the state of crime in the country or locality.[50]

Character as affecting damages.

S. 55. In civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

***Explanation.*—In Sections 52, 53, 54 and 55, the word "character" includes both reputation and disposition; but, except as provided in Section 54, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.**

COMMENTS

1. PRINCIPLE AND SCOPE

This section states that the character of any person is relevant when it affects the amount of damages which he ought to receive. This section applies only to civil cases. In this connection, see Section 12, which states that in suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is also relevant. So, in all cases where the Court is to determine the *quantum* of damages, evidence of character would become relevant. Thus Section 55 is a corollary to Section 12 in cases where damages are claimed. It is in civil cases, where the

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45. *Emperor* v. *Wahiduddin (No. 1)*, (1929) 32 Bom LR 324, 54 Bom 524.
46. *Devbrata Shastry* v. *Krishna Ballabh*, AIR 1954 Pat 84.
47. *Emperor* v. *Duming*, (1903) 5 Bom LR 1034; *Teka Ahir* v. *The King Emperor*, (1920) 5 Cr LJ 706.
48. *Emperor* v. *Alloomiya*, (1903) 5 Bom LR 805 : ILR 28 Bom 129;
49. In re : *Kamya*, AIR 1960 A.P. 490.
50. *King-Emperor* v. *Nga Ba Shein*, (1928) 6 Ran 391, FB.

question of amount of damages to be awarded to the plaintiff arises, that the character of the plaintiff becomes relevant.[51]

In civil cases, good character, being presumed, may not be proved in aggravation of damages, but bad character is admissible in mitigation of damages, provided that it would not, if pleaded, amount to a justification. For example, in cases of defamation, the general bad reputation of the plaintiff may be proved. In cases of breach of promise of marriage, the plaintiff's general character for immorality is relevant. In cases of seduction, evidence of the general character for immorality on the part of the person seduced is relevant. The argument in favour of considering reputation is that the person should not be paid for the loss of that which he never had.

In actions for defamation, the fact that the plaintiff is shown to have bad reputation which can not be made worse is no answer, except to prove mitigation of damages.

2. EVIDENCE AS TO CHARACTER [EXPLANATION]

The word 'character' includes both reputation and disposition. 'Reputation' means what is thought of a person by others, and is constituted by public opinion. 'Disposition' respects the whole frame and texture of the mind. It comprehends the springs and motives of actions. 'Temper' influences the action of the moment, 'disposition' is permanent and settled; 'temper' may be transitory and fluctuating. It is possible, and not infrequent, to have a good disposition with a bad temper, and *vice versa*.[52]

In WEBSTER'S DICTIONARY, the meaning of the word 'character' is given as the peculiar qualities impressed by nature or by habit on the person, which distinguish him from others; these constitute his real character. The qualities which he is supposed to possess constitute his estimated character or reputation."

'Character' is what a person actually is, where as 'reputation' is what neighbours would say what he is. In other words 'reputation' is what is reputed. Thus, reputation involves certain amount of *hearsay*. As an exception to the *hearsay* rule, evidence of reputation can be given, under specific circumstances mentioned in this section. Reputation, though based on *hearsay*, has to be distinguished from 'rumour'. The Punjab High Court, observed: "Reputation, being the community's opinion, is distinguished from mere rumour in two respects. On the one hand, reputation implies the definite and final formation of opinion by the community; while rumour implies merely a report that is not yet finally credited. On the other hand, a rumour is usually thought of as signifying a particular act or occurrence, while a reputation is predicated upon a general trait of character; a man's reputation, for example, may declare him honest, and yet to day rumour may have circulated that this reputed honest man had defaulted yesterday in his accounts."[53]

The Allahabad High Court has held that general repute must necessarily consist largely of "hearsay" evidence; the reputation of a person means what is generally said or believed about his character; a witness may despose; "I believe the accused to be an habitual thief, and that is what persons of the neighbourhood generally say about him.": Such evidence is admissible as evidence of general repute; so far as the witness gives his personal opinion, the evidence is not hearsay; so far as the witness gives the opinion or the statements of other persons, his evidence must in a sense be 'hearsay'. A witness can only know the opinion of other persons by hearing them and say what they think; for that reason the evidence of general repute necessarily consists largely of 'hearsay evidence', i.e., of statements of what persons other than the witness say or believe about the character of the accused.[54]

The Madras High Court has held that, in one sense, the evidence of general repute is *hearsay*, but it is *hearsay* of a particular kind which is made admissible by Section 117, Cr. P.C. (old). It is not necessary that the witness who speaks to the general reputation of the person must be a resident in the

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51. *D. Shashi* v. *K.B. Sahay*, ILR (1953) 32 Pat 276.
52. CRABB'S SYNONYMS, p. 323; **See** *Bhagwan Swarup* v. *State of Maharashtra*, AIR 1965 SC 682. For distinction between 'reputation' and "rumour", **see** *Harbhajan Singh* v. *State of Punjab*, AIR 1961 Punj 215, at p. 226. **See also** commentary under Section 53. *Bhagwati Swroop's* case.
53. *Harbhajan Singh* v. *State*, AIR 1961 Punj 215.
54. *Emperor* v. *Kumera*, AIR 1929 All 650.

same place; a stranger can find out what the general repute of a person is and he is competent to testify to that fact.[55]

The Calcutta High Court has held that reputation includes both character and disposition, and the disposition is not the less proven because it appears on the face of the facts deposed to by the plaintiff, or is a proper inference from those facts.[56]

In *R* v. *Rowton*[57] (as per the majority view), the opinion of a witness given on his own personal experience, was excluded regarding the disposition of the accused charged for indecent assault, as character connotes only general reputation.

LORD ELLENBOROUGH in *R* v. *Davidson*[58] however, held that the personal experience of a witness or his opinion based on it is admissible. The inclusion of the expression 'disposition' in this section is based on the dissenting opinion and the reasons given therein, in *R* v. *Rowton's* case.

In FIELD'S LAW OF EVIDENCE, 11th Edn., Page: 2592, it is observed: "Under the Evidence Act both "reputation" and "disposition" have been included in the definition of "character" and Sir James Stephen deliberately, made a departure from the law in England".

SIR JAMES STEPHEN in his Digest Note to the History of Criminal Law (Vol. 1 P. 450) observed: "This subject is considered at length in *R* v. *Rowton*"[59] One consequence of the view of the subject taken in that case is that a witness may with perfect truth swear that a man who, to his knowledge, has been a receiver of stolen goods for years has an excellent character for honesty, if he has had the good luck to conceal his crime from his neighbours. It is the essence of successful hypocrisy to combine a good reputation with a bad disposition, and according to *R* v. *Rowton*[60] the reputation is the important matter. The case is seldom, if ever, acted on in practice. The question always put to the witness to character is: 'what is the prisoner's character for honesty, morality or humanity as the case may be, nor is the witness ever warned that he is to confine the evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction".

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55. In re : *Perne Maita Rai*, AIR 1938 Mad 591; **see also** *Wahid Ali* v. *State*, 6 Cr LJ 1 (witness need not be a man of immediate neighbourhood of the accused).
56. *Englishman* v. *Lajpatray*, ILR 37 Cal 760; *Devbrata Shastry* v. *Krishna Ballabh*, AIR 1954 Pat 84.
57. (1865) 34 L.J.M.C. 57.
58. 31 How. St. Tr. 99.
59. I.L. & C. 520.
60. I.L. & C. 520.

PART II

ON PROOF

CHAPTER III

FACTS WHICH NEED NOT BE PROVED

Fact judicially noticeable need not be proved.

S. 56. No fact of which the Court will take judicial notice need be proved.

Facts of which Court must take judicial notice.

S. 57. The Court shall take judicial notice of the following facts:—

(1) All laws in force in the territory of India;

(2) All public Acts passed or hereafter to be passed by Parliament of the United Kingdom, and all local and personal Acts directed by Parliament of the United Kingdom to be judicially noticed;

(3) Articles of War for the Indian Army, Navy or Air Force;

(4) The course of proceedings of Parliament of the United Kingdom, of the Constituent Assembly of India, of Parliament and of the Legislatures established under any laws for the time being in force in a Province or in the State;

(5) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland;

(6) All seals of which English Courts take judicial notice: the seals of all the Courts in India, and of all Courts out of India established by the authority of the Central Government or the Crown Representative: the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorised to use by the Constitution or an Act of Parliament of the United Kingdom or an Act or Regulation having the force of law in India;

(7) The accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any State if the fact of their appointment to such office is notified in any official Gazette;

(8) The existence, title, and national flag of every State or Sovereign recognised by the Government of India;

(9) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the official Gazette;

(10) The territories under the dominion of the Government of India;

(11) The commencement, continuance and termination of hostilities between the Government of India and any other State or body of persons:

(12) The names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, *vakils*, pleaders and other persons authorized by law to appear or act before it;

(13) The rule of the road on land or at sea.

In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

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COMMENTS

1. PRINCIPLE AND SCOPE

Part I of the Act deals with what facts may, and what facts may not, be proved in a civil or criminal case. Part II deals with the question of what sort of evidence must be given of a fact which has to be proved. Part-III shows the manner in which a fact in issue or relevant fact must be proved.

All facts in issue and relevant facts must be proved by evidence, either oral or documentary. To this rule there are two exceptions; (a) facts judicially noticeable; and (b) facts admitted.

Section 56 states that a fact judicially noticeable need not be proved, whereas Section 57 enumerates in clauses 1 to 13, the facts which have to be judicially noticed and which need not be proved. The penultimate paragraph in Section 57 states that in all the cases enumerated in clauses 1 to 13, and on

matters of public history, literature, science or art, the Court may resort, for its aid, to appropriate books or documents of reference. The last paragraph of Section 57 states that it may refuse to take judicial notice of any fact, even if a person calls upon the court to do so, until such person produces may such book or document as it may consider necessary to enable it to take judicial notice.

In the cases of the facts dealt with by these sections, the Judge's belief in their existence is induced by the general knowledge acquired, otherwise than in particular proceedings before the Court and independently of the action of the parties therein. The meaning of the section will, however, be apparent, if we consider together with this section the last words of Section 57. What these two provisions really come to this. With regard to the facts enumerated in Section 57, if their existence comes into question, the parties who assert their existence, or the contrary, need not, in the first instance, produce any evidence, in support of their assertions. They need only ask the Judge to say whether these facts exist or not, and if the Judge's own knowledge will not help him, then he must look the matter up; further, the judge can, if he thinks proper, call upon the parties to assist him. But, in making this investigation, the Judge is emancipated entirely from all the rules of evidence laid down for the investigation of facts in general. He may resort to any source of information which he finds handy and which he thinks will help him. Thus he may consult any book or obtain information from a bystander. (MARKBY 49).

2. TAKE JUDICIAL NOTICE

This expression means recognition, without proof, of something as existing, or as being true. Judicial notice is based upon the very obvious reasons of convenience and expediency; and the wisdom of dispensing with proof of matters within the common knowledge of every one has never been questioned.

The expression "taking the judicial notice of law" means that the court is duty bound to find out the law and apply it to the facts of the case, even though the parties or their counsel fail to produce such law.[1]

"Judicial notice is the cognisance taken by the Court itself of certain matters which are so notorious, or clearly established, that evidence of their existence is deemed unnecessary. (STEPHEN, in the first two editions of the *Digest*, described these as "facts which need not be proved," but in later editions calls them "facts proved otherwise than by evidence.")[2]

3. "ALL LAWS IN FORCE IN THE TERRITORY OF INDIA" [CLAUSES (1)]

Under this clause the court is bound to take judicial notice of all laws in force in the territory of India.

The expression "All laws in force in the territory of India" has not been defined in the Evidence Act, or in the General Clauses Act, 1897; however, the expression "Indian Law" is defined in Section 3(29) of the General Clauses Act, 1897, as follows:—"Indian Law" shall mean any Act, Ordinance, Regulation, Rule, Order or Bye-law which, before the commencement of the Constitution, had the force of law, in any Province of India or part thereof, and thereafter has the force of law in any Part A State or Part C State or Part thereof, but does not include any Act of Parliament of the United Kingdom or any Order in Council, Rule or other Instrument made under such Act".

Article 13(1)(a) of the Constitution defines 'Law' as including "any Ordinance, Order, Bye-law, Rule, Regulation, Notification, Custom or Usage having, in the territory of India, the force of Law".

The term 'existing law' has been defined in Art. 336(10) of the Constitution thus: "Existing Law" means any Law, Ordinance, Order, Bye-Law, Rule or Regulation, passed or made before the commencement of this Constitution by any Legislature, Authority of person having power to make such Law, Ordinance, Order, Bye-Law, Rule or Regulation". It is pertinent to note that Art. 372 of the Constitution speaks of the continunance of "all the laws in force in the territory of India".

It was held by the Supreme Court that there is no material difference between an 'Existing Law' as defined in Art. 366(10) and "a law in force"; that the words "law in force, as used in Art. 372, are wide enough to include not merely a legislative enactment but also any regulation or order which has the force

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1. *Mazhar Ali* v. *Hakimuddin*, AIR 1965 Pat 489; *Shyamlal* v. *Munnilal*, AIR 1972 Punj 199.
2. PHIPSON ON EVIDENCE, 15th Edn. (2000), page 5 (para 1-11).

of law; that an order must be a legislative one and not an executive order before it can come within the definition of law.[3]

Order of the Governor General u/s. 94(3) of the Government of India Act 1935.[4]

In HALSBURY'S Law of England (4th Edn., Vol. 17, para 100, page 73) it is stated: "They (the judges) are also bound to take notice of all Public Acts of Parliament, and of all Acts of Parliament whatever passed since the year 1850, unless the contrary is expressly provided in the Act in question. Government orders and statutory instruments are not judicially noticed unless, as is common, provision is made for them to be so noticed". The Court should take judicial notice of the Acts of the Parliament.[5]

Under our legal system and jurisprudence based on the Constitution, "law" is not limited to legislative enactments; all forms of delegated legislative power and all orders and notifications made and issued under statutory powers which are legislative in nature, amount to law, and judicial notice can be taken of them. A statutory order or notification will be legislative in nature if, in substance, it adds o, supplements, modifies or amends a statute, or exempts certain matters from its operation; that rules, regulations, notifications and orders, made or issued in the exercise of legislative power, mus be distinguished from the instruments bearing similar names but made in exercise of executive power. An order or notification, made or issued in exercise of non-statutory power, or in exercise of statutory power which is purely executive in nature will have no legislative content and will not amount to "law".[6]

Relying on notification under 71(1) of Telegraph Wires (unlawful possession of Act).[7]

The Bombay High Court has held that, in the absence of the authenticated copies of Bare Acts, legislations, rules and other statutory instruments having the force of law, the citizens cannot be expected to know the law and it would be difficult for the Courts to act upon the mandate of the Section 57(1) and 78. Appropriate directions were issued to the State and Union Governments and other authorities.[8]

Notification.—A notification issued under a specific provision in an Act of the legislature has the force of law as if made by the legislature itself.[9]

Notification issued by the President of India under Art. 258 of the Constitution, entrusting the functions of the Central Government, under the Land Acquisition Act 1894, to the Commissioners of Divisions in the State of Bombay, amounts the law.[10]

Similarly, a notification issued under Section 139 of the Bombay Prohibition Act, authorising the Government to exempt certain intoxicants has "the force of law as if made by the legislature itself".[11]

A notification under Section 27 of the Bihar and Orissa Excise Act of 1915, imposing a countervailing duty on foreign liquor was held to be "existing law" within the meaning of Article 305 of the Constitution.[12]

It was held that the notification under Section 4 of the U.P. Sales-tax Act, 1948, authorising the Government to exempt certain kinds of transactions from Sales-tax, had the force of law.[13]

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3. *Edward Mills Co. Ltd.* v. *State of Ajmer*, 1955 SCR 735 at 746 : AIR 1955 SC 25.
4. *State* v. *Gopal Singh*, AIR 1956 MB 138 (FB); *Shamlal* v. *Munnilal*, AIR 1972 Punj 199; *State* v. *Ramchandran*, AIR 1977 MP 68 (FB); **approving** *State* v. *Gopal Singh*, AIR 1956 MB 138 (FB); *State* v. *Gopalchand*, AIR 1957 MP 145; and **overruling** *Mathura* v. *State*, AIR 1954 Nag 296; *Mazhar* v. *Hakimuddin*, AIR 1965 Pat 489.
5. *Nityanand Sharma* v. *State of Bihar*, AIR 1996 SC 2306 (para 18).
6. *State of M.P.* v. *Ramchandran*, AIR 1977 MP 68 (FB).
7. *Lachmi Narain* v. *Union of India*, AIR 1976 SC 714; *Edward Mills Co. Ltd.* v. *State of Ajmer*, AIR 1955 SC 25; *Madhaorao* v. *State of M.B.*, AIR 1961 SC 298; *Jayantilal Amaratlal* v. *F.N. Rana*, AIR 1964 SC 648; *Kailash Nath* v. *State of U.P.*, AIR 1957 SC 790; *Saraswati Industrial Syndicate Ltd* v. *Union of India*, AIR 1975 SC 460. **Overruling** *Mathuradas* v. *State*, AIR 1954 Nag 296; *State Bank of Travancore* v. *K. Vinayachandran*, AIR 1989 Ker 302; *State of H.P.* v. *Nilam Das*, AIR 1952 HP 74.
8. *Sanjeev M. Gorwadkar* v. *State of Maharashtra*, AIR 1997 Bom 303.
9. *State of Bombay* v. *F.N. Balasara*, AIR 1951 SC 318; *State* v. *V.P. Enadeen*, AIR 1971 Ker 193 (FB); *State of M.B.* v. *Gopalsingh*, AIR 1956 MB 138 (FB); **overruling** *Pannalal* v. *State*, AIR 1953 MB 84; *Secy. Malabar Market Committee* v. *A.V. Bapputty*, (1962) 2 Cr LJ 549 (Ker).
10. *Jayantilal Amaratlal* v. *F.N. Rana*, AIR 1964 SC 648.
11. *State of Bombay* v. *F.N. Balsara*, AIR 1951 SC 318.
12. *Kalyani Stores* v. *State of Orissa*, AIR 1966 SC 1686.
13. *Kailash Nath* v. *State of U.P.*, AIR 1957 SC 790.

A notification issued by the Government, fixing prices, is in the nature of a legislative measure.[14]

So are the Bye-laws formed by Market Committee u/s. 19 of Madras Commercial Crops Markets Act in exercise delegated power.[15] Orders relating to delimitation of constituencies amount to law, after the publication of the orders.[16]

Judicial notice can be taken of the fact of different municipalities levying on varying basis, some on the weight of the material and others on *ad valorem* basis, on the prices of goods.[17] Judicial notice has to be taken of the notifications published in the gazettee relating to acquisition of intermediary estates under Section 4 of the West Bengal Estates Acquisition Act.[18] State of the law prevailing at the time of passing of a provision can be taken note of by the courts while interpreting the expression "Charitable purpose".[19]

The expression "delegated legislation" includes even the so called "conditional legislation", for it has also the content, however small and restricted, of the law making power itself.[20]

The following are some instances of notifications or rules of which judicial notice was taken:

(i) The Army regulations and ordinances issued by the Government of India.[21]

(ii) Notification of the appointment of a Drug Inspector under Section 21, Clause (1) of the Drugs Act of 1940.[22]

(iii) A rule made under rule 225 of Printing Manual published by the Government of Madras providing for return of old and obsolete stamps to Government Press on receipt of new ones.[23]

(iv) A notification issued by the Government, declaring *Malas* to be socially and educationally backward class.[24]

(v) Rules of business, made under Art. 166(3) of the Constitution, or Statutory Rules, and certified copies thereof.[25]

(vi) Notification under the Prevention of Food Adulteration Act, issued by the Government, empowering the Municipal Commissioner to act as a Local Health Authority.[26]

(vii) A notification issued under Section 11(b) and Section 123(2) of the Customs Act.[27]

(viii) A notification relating to the orders of the Ruler of Gwalior State, published in various issues of the Government Gazette.[28]

(ix) *Kalambandis* of the erstwhile Gwalior State were in the nature of orders or regulations, having the force of law, and were continued under Art. 372 of the Constitution.[29]

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14. *Saraswathi Industrial Syndicate Ltd.* v. *Union of India*, AIR 1975 SC 460.
15. *Public Prosecutor* v. *Illur Thippayya*, AIR 1949 Mad 469; *Tek Chand* v. *Firm Amarnath Basheshardas*, AIR 1972 Punj 46.
16. *Meghraj* v. *Delimitation Commission*, AIR 1967 SC 669.
17. *Municipal Board of Abu Road* v. *Jaishiv*, AIR 1988 SC 338.
18. *Union of India* v. *Nihar Kanta Sen*, AIR 1987 SC 1713.
19. *Addl. Commer. of I.T., Gujrat* v. *Surat Art Silk Cloth Manufacturers Association*, AIR 1980 SC 387.
20. *Lachmi Narain* v. *Union of India*, AIR 1976 SC 714.
21. *Union of India* v. *Govindraj*, 1962 Mys LJ (Supp) 254; *Dhanpat* v. *State of U.P.*, AIR 1960 All 40.
22. *Ramlagan Singh* v. *State of Bihar*, AIR 1960 Pat 243.
23. 1969 Mad LW (Cri) 68.
24. *Chaitram* v. *Sikinder Choudhary*, AIR 1968 Pat 337.
25. *Management of the Advance Insurance Co. Ltd.* v. *Gurudasmal, Supdt. of Police*, AIR 1969 Del 330.
26. *Food Inspector* v. *V. Velayudhan*, 1987 Cr LJ 1137; **See also** *State of Kerala* v. *V.P. Enaden*, AIR 1971 Ker 193 (FB); *Jamshedpur Notified Area Committee* v. *C.L. Mahton*, AIR 1965 Pat 176; *Abdulla Haji* v. *Food Inspector*, (1967) 2 Cr LJ 1719 (FB)(Ker); *Food Inspector Calicut* v. *Velayudhan*, 1980 Ker LT 138 : 1980 Mad LJ (Cri) 505.
27. *S. Nagarajan* v. *Vasanthakumar*, 1988 Cr LJ 1217 (Ker).
28. *Ramji Raja (Smt.)* v. *Puncham Singh*, AIR 1959 MP 269.
29. *Madhaorao Phalke* v. *State of M.B.*, (1961) 1 SCR 957 AIR 1961 SC 298.

4. CUSTOMARY LAW

In HALSBURYS LAWS OF ENGLAND (4th Edn., Vol. 17, Para 101, Page 74) it is observed: "The court will take judicial notice of usages which are embodied in the law merchant, and of commercial and other usages which have been proved sufficiently often in the courts of law".

The Privy Council held that when a custom or usage, whether in regard to a tenure or contract, or a family right, is repeatedly brought to the notice of the Court, of a country, the Court may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It was observed: "Material customs must be proved in the first instance by calling witnesses acquainted with them, until the particular custom has, by frequent proof in the Courts, become so notorious that the Courts take judicial notice of them."[30]

The ordinary rule is that all customs, general or otherwise, have to be proved. But, when a custom has been repeatedly recognized by the Courts, it passes into the law of the land and the proof of it then becomes unnecessary, under Section 57(1) of the Act. In Punjab, the expression "general custom" has really been used in this sense, namely, that the custom has by repeated recognition by the Courts become entitled to judicial notice.[31]

Collaterals succeed in non-ancestrel property.[32]

The Muslim Law of pre-emption has long been judicially recognised, as existing among the Hindus in Bihar State.[33]

Regarding the custom of succession in Punjab, the right of an unmarried daughter in preference to the mother's right to her deceased son's property, as per para 23 of RATTIGAN'S DIGEST, was recognised by the Supreme Court. Similarly, the daughters are entitled to succeed the property of their father, and their mother is not so entitled.[34]

The customary right of an illegitimate son for maintenance in an impartible estate has been taken judicial notice of.[35]

When custom is recognised by Courts, it would form part of the law of the land. A right to drain off the surplus water through a particular vent or channel is in the nature of a customary right and judicial notice can be taken and proof of it need not be given.[36]

The Courts can take judicial notice of customary right of privacy prevailing in U.P. and Oudh; however, it was held that the party who pleads the custom of privacy should lead evidence to show that it is generally prevalent and commonly recognised in Kutch.[37]

A report made by an officer, containing customary law applicable to a particular community, is admissible in evidence.[38]

5. PERSONAL LAW [CLAUSE (2)]

For ascertaining the personal law of the Hindus the method adopted is by reference to an authoritative text and judicial decisions. Previously, the opinion of *pandits* also used to be taken, but

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30. *Effuah Amissan* v. *Effuah Krabah*, AIR 1936 PC 147.
31. *Ujagar Singh* v. *Jeo*, AIR 1959 SC 1041, **relying on** *Abdul Hussain Khan* v. *Mrs. Bibi Sona Dero*, AIR 1917 PC 181; *Gangadhara* v. *Suryarao*, ILR 41 Mad 778 (PC); *Bawa* v. *Tharo*, AIR 1951 Simla 239; *Sukhwant* v. *Balwant*, AIR 1951 Punj 242; *Jangir Singh* v. *Sucha Singh*, ILR (1971) 2 Punj 133. **Also see** *Gurubasawwa* v. *Irawwa*, AIR 1997 Kant 87.
32. *Hemraj* v. *Mathra Das*, AIR 1952 Punj 177.
33. *Jadulal Sahu* v. *Janki Koer*, ILR 39 Cal 915 (PC).
34. *Harchand Sing* v. *Mohinder Kaur*, AIR 1987 P&H 138.
35. *Chelladorai* v. *Varagunarama Pandiya; Chinathambiar*, AIR 1961 Mad 42.
36. *Kasi Vishwehwara Venkata Sastrulu* v. *Satyanarayana Murthy*, (1964) 2 An WR 39.
37. *Nihal* v. *Bhagwan*, AIR 1935 All 1002; *Baqridi* v. *Rahim Bux*, AIR 1926 Oudh 352; *Gokul* v. *Radho*, ILR (1888) 10 All 358; *Syed Habib* v. *Kamal Chand*, AIR 1969 Raj 31; (custom in Rajasthan) *Jivraj* v. *Keshavji*, AIR 1952 Kutch 22.
38. *Tula Ram Sah* v. *Shyam Lal Sah*, ILR (1924) 49 All 848 : AIR 1925 All 648.

later, it was held by the Privy Council, in *Musjid Sahidganj* v. *Gurudwar*,[39] that the opinion of the *Pandit* is not now admissible. In *Collector of Madurai* v. *Muthuramalings*,[40] judicial notice was taken of the customs of different schools in respect of the law of adoption, by referring to sworn translation of Sanskrit works embodying Hindu Law.

The court is bound to take judicial notice under Section 57(1) of the Evidence Act, of Mohammedan Ecclesiastical Law.[41]

However, it was held that the parties setting up a custome under Muslim Law have to prove it when such a custom is pleaded.[42]

The court can take judicial notice of the fact that:

(a) Islam is an accepted religion of a large number of citizens in India and outside India.

(b) *Koran* is the basis religious text or scripture of Islam.

(c) The followers of Islam believe that *Koran* is of divine origin, being relation made by God to Muhammed, the Prophet of Islam.

(d) The *Koran* is considered to be Holy Book by the followers of Islam.[43]

6. ARTICLES OF WAR [CLAUSE (3)]

Courts would take judicial notice of the Articles of War contained in the Indian Army Act 46 of 1950, the Indian Navy Act 34 of 1934 reads with Act 29 and 300 Victoria C 109 and the Air Force Act 45 of 1950.

7. LEGISLATIVE PROCEEDINGS [CLAUSE (4)]

The Courts are bound to take judicial notice of the prorogation of the Parliament and Legislatures and presume the regularity of those actions.[44] A proclamation of emergency, approved by the resolution of both Houses of Parliament can be taken note of judicially; its publication in the Parliament debates is sufficient, and there is no necessity for its publication in the official gazette.[45] Judicial notice has to be taken of such matters as the reports of the Parliament Committee and of such other facts as must be assumed to have been within the contemplation of the Legislature when an Act was passed, and it is legitimate to look at the state of law prevailing at the time of passing of any provision.[46]

The Court takes judicial notice of the law and customs of Parliament, the existence and extent. It is observed: "Courts will take judicial notice of the following signatures; the royal sign manual, and the signatures of the principal Secretaries of State; those of the judges of the superior Courts to any judicial or official document, of the judges and registrars exercising bankruptcy jurisdiction, and of persons before whom depositions are taken.

Notice will also be taken of the signatures of certain persons in respect of the winding up of companies, of the signatures of persons empowered to administer oath or do notorial acts abroad, and of signatures on various public and official documents. In addition, many particular documents are admissible in evidence without proof of the authenticity of the signature they bear."

Under this clause the Court is bound to take judicial notice of the name and signature of the District Magistrate, and there is no need for the prosecution to prove the same if it is contained in the order of sanction to prosecute a person.[47]

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39. 1940 PC 16.
40. 1940 PC 16.
41. *R.* v. *Ram Zan*, ILR (1885) 7 All 461.
42. *Gani Dar* v. *Raji*, AIR 1961 J&K 31.
43. *Chandmal Chopra* v. *State of W.B.*, 1988 Cr LJ 739.
44. *State of Punjab* v. *Satyapal Dang*, AIR 1969 SC 903 : (1969) 1 SCR 478.
45. *Baburao Alias D.P. Samant* v. *Union of India*, AIR 1988 SC 440; *Swadeshi Cotton Mills* v. *Sales-tax Officer*, AIR 1965 All 86.
46. *Additional Commr. of Income-tax* v. *Surat Art Silk Manufacturing Association*, AIR 1980 SC 387.
47. *State of Pepsu* v. *Gurudevsingh Harnamsingh*, AIR 1956 Pepsu 11; *Dhanpat* v. *State of U.P.*, AIR 1960 All 40; *Gayadin* v. *State of U.P.*, AIR 1958 All 39; *State* v. *Janjgir Singh*, AIR 1954 Pepsu 84; *Raghbir Singh* v. *State of*

The signature of an officer to a document showing that some of the officers under him are conferred certain powers privileges of each House of Parliament and the order and course of the proceedings therein and the clearly established privileges of the Crown, *e.g.*, the privileges in relation to the Royal Palaces. (Halsburys' Laws of England 4th Edn., Vol. 17, page 73, para 100).

The debates in Parliament or the Legislative Councils are only evidence of what was stated by the speakers therein and are not evidence of the facts contained in the speeches.[48]

8. CLAUSE (5) AND FIRST PART OF CLAUSE (6)

These relate to the pre-independence period of the country.

9. SEALS [CLAUSE (6)]

A power of attorney given under the seal of a notary public comes within Section 57(6) for taking judicial notice.[49]

The expression "notary public" includes notary public of foreign countries also.[50]

A notification under Section 14 of the Notaries Act is not essential, and a presumption can be drawn regarding the genuineness of the seal of the notary public in the foreign country, though it is rebuttable.[51]

10. ACCESSION TO OFFICE ETC. [CLAUSE (7)]

In HALSBURY'S LAW OF ENGLAND (4th Edn., Vol. 17, para 110, can be taken judicial notice of [matters stated in this Cl. (7)].[52]

Judicial notice shall be taken of the endorsement of sub-registrar about the execution of the documents, and his signature.[53] Judicial notice of the signatures of the Secretaries to the Government on any instrument can be taken, under this clause.[54] A true copy of a gazette notification can be received in evidence of the other party does not object to its admissibility as secondary evidence.[55]

11. EXISTENCE AND TITLE OF STATE [CLAUSE (8)]

All Courts must take judicial notice of the existence and title of every State or Sovereign recognised by the Government of India.

Section 84(2) of C.P.C. 1908 states: "The Court shall take judicial notice of the fact that a foreign State has or has not been recognised by the Central Government."[56]

12. DIVISION OF TIME, WORLD GEOGRAPHICAL DIVISIONS AND PUBLIC FESTIVALS ETC. [CLAUSE (9)]

In HALSBURY'S LAWS OF ENGLAND (4th Edn. Vol. 17, para 104, page 76) it is observed: "The almanac is established by statute, and was previously recognised by the common law. The Court will take judicial notice of the succession of years, months and days, of the years of each soverign's reign and the years in the calendar to which they correspond, and of the days of the week upon which the days in the calender fall.

Haryana, (1968) 70 Punj LR 318; *Kaliprasad Upadhya* v. *Emperor*, AIR 1954 Pat 59 : 23 Pat 475 (signatures of secretary to the Government) In re : *Cholancheri Ayammal*, AIR 1923 Mad 600 : 24 Cr LJ 403; *Abdul Rahman* v. *State of Mysore*, 1972 Cr LJ 406; (Signature of Collector of customs).

48. *Strickland* v. *Bannia*, AIR 1935 PC 34.
49. *Performing R. Society Ltd.* v. *I.M.P. Restaurant*, AIR 1939 Bom 347.
50. *Jugraj* v. *Jaswant*, AIR 1971 SC 761; *National & Grindlay's Bank* v. *World Science News*, AIR 1976 Del 263; *Rajesh Wadhwa* v. *Dr. Sushma Govil*, AIR 1989 Del 144; (sealed by the notary public in U.S.A.).
51. *Rajesh Wadhwa* v. *Dr. Sushma Govil*, AIR 1989 Delhi 144 supra.
52. *Abdul Rahman* v. *State of Mysore*, 1972 Cr. LJ 406; (Collector of customs under the Customs Act).
53. *Radha Mohun Dutt* v. *Nripendranath Nandy*, AIR 1928 Cal 154.
54. *Kali Prasad Upadhya* v. *King-Emperor*, AIR 1945 Pat 59 : ILR (1944) 23 Pat 475.
55. *State* v. *V.P. Enadeen*, AIR 1971 Ker 193 FB.
56. See *Triccam Panachand* v. *Bombay-Baroda & Central Railway*, ILR (1885) 9 Bom 244; *Mighell* v. *Sultan of Jahore*, (1894) 1 QBD 149.

An expression of time in any Act of Parliament, deed or other legal instrument means Greenwich meantime, unless otherwise specifically stated, but judicial notice is taken, if necessary, of the fact that a place lies east or west of Greenwich, and therefore has a time different from Greenwich time, although not of the times at which the sun rises and sets."

The phrase 'divisions of time' includes also Indian eras. Thus *Samvat*, *Saka*, Hindi Bengali, *Hijari* and *Jalus* eras, will be judicially noticed. The court is bound to take judicial notice of the holidays notified in the Official Gazette of any Local Government.

In regard to a suit filed on the re-opening day after the vacation for the Courts, it was held that the Court has to take judicial notice of the public holidays notified in the gazette, according to Order 7, Rule 6, C.P.C., and the Court would not be justified in dismissing the suit, though the limitation had expired for filing the suit during the vacation for the courts.[57]

It was held that the Court has to take judicial notice of corresponding dates of the Indian and Gregorian Calendars.[58]

Under Section 24 of the Limitation Act, all instruments should be deemed to be with reference to Gregorian Calendar.

The court can take note of the fact that all polling days were declared as holidays, to enable the employers to allow their employees to exercise their franchise.[59]

13. INDIAN TERRITORIES [CLAUSE (10)]

Under Art. 1(2) and (3) of the Constitution, the territory of India shall consist of the territories of the States and the Union Territories specified in the First Schedule and such other territories as may be acquired. Under Art. 2, Parliament may by law admit into the Union or establish new States. The Indian Courts must take judicial notice of the territories of the dominion of the Government of India, and if there has been a cession of territory they must take notice of that and they must do so independently of the gazette, which is part of the Session but only evidence of the cession.[60] The court can take judicial notice of the fact that by 19th December, 1961, the territories of Goa, Daman and Diu were completely liberated from colonial rule.[61] The Court can take note of whether a particular territory is part of India or not.[62]

14. HOSTILITIES WITH GOVT. OF INDIA [CLAUSE (11)]

In HALSBURY'S LAWS OF ENGLAND (4th Edn., Vol. 17, para 106, page 78) it is stated: "Judicial notice will be taken of a state of war that exists or has existed between the United Kingdom and any other country; and, possibly, of a state of war existing between two foreign countries, where the fact is recognised by the British Government.

Judicial notice may also be taken of the circumstances in which a war involving the United Kingdom is or was carried on, but not of the date of any particular operation or engagement".

In HALSBURY'S LAW OF ENGLAND (4th Edn., Vol. 17, para 157, page 115) it is also observed: "Where the Court acts upon a certificate by the secretary of state as to the existence or non-existence of a state of war, or as to the sovereign status of a foreign power or individual, the proper view is that it is not receiving evidence, but is taking judicial notice".

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57. *Tekchand* v. *Palto*, AIR 1920 Nag 200; *Gyansingh* v. *Budha*, AIR 1933 Lah 558; *Ramjiraja* v. *Puncham Singh*, AIR 1959 MP 269.
58. *Abdulla Shah* v. *Md. Yukub*, 1938 Lah 558.
59. *Inayathullah Khan* v. *Diwanchand Mahajan*, AIR 1959 MB 58.
60. *Masihan Saheb* v. *Chief Commissioner, Pondicherry*, AIR 1962 SC 797; *Damodar* v. *Deoram*, ILR (1876) 1 Bom 367 (PC).
61. *Cipriano Negredo* v. *Union of India*, AIR 1969 Goa 76; *Rev. Mons. Sebastlao Francisco Xavier dos Remedios Monteiro of Candolim* v. *State*, AIR 1968 Goa 17.
62. *Bhansali* v. *Union of India*, AIR 1973 Raj 49.

15. MEMBERS AND OFFICERS OF COURT [CLAUSE (12)]

Under this clause, the court has to take judicial notice of the members and officers of the Court and of all advocates and attorneys who are authorised by law to appear before the Court. Under the Advocates Act 25 of 1961, legal practitioners have to get themselves enrolled in the High Court before they are allowed to practice.

Judicial notice was taken of the fact that in 1966-67 there had been for the District of 24 Paraganas in West Bengal a Public Prosecutor appointed generally.[63]

16. RULE OF THE ROAD AND MATTERS OF PUBLIC HISTORY [CLAUSE (13)]

(a) 'The rule of the road on land or at sea'.—This means the rule that horses and vehicles of all description should keep to the left side of the road. At sea, the rule is that ships and steam-boats, on meeting, should port their helms, so as to pass on the port or left side of each other; steam-boats should keep out of the way of sailing ships; and every vessel overtaking another should keep out of its way.

The Court can take note of what actually happens when '*bundh*' is called out.[64]

(b) Matters of public history etc.—On all matters of public history, literature, science, or art, the court may resort for its aid to appropriate books or documents of reference. Thus ancient facts of public nature and published works of history can be relied upon for finding the meaning of a "*math*".[65]

The question whether a particular village was granted to a particular person by a former ruler is not a matter of public history within the meaning of this section.[66]

The section does not appear to have the effect of absolving the parties from any rules governing the proof of facts on which they deserve to rely. This section does not say how any fact, historical or otherwise, is to be proved by the parties, but gives the Court plenty to resort for its aid the appropriate books or documents of reference on matters of public history.[67]

Sources of common knowledge may be obtained by reference to Encyclopaedia, and the list of text books given therein, but details obtained from such sources require usually to be established by experts.[68]

Dictionaries may be referred, to ascertain the meaning of the words.[69]

The Courts can refer to articles in journals and books by authors acquainted with the expert matter of such articles, though they are living.[70]

The Court is entitled to refer to authoritative works for meaning of names and terms used in a particular religion, and dealing with the history and beliefs of that religion.[71]

There are innumerable instances where courts have referred to books and documents. A few examples of some of the books referred to by Courts are given below:—

'WILSON'S *Glossary*'.[72]

"Castes and Tribes of Southern India" by THURSTON.[73]

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63. *Raj Kishore Rabidas* v. *State of W.B.*, AIR 1969 Cal 321.
64. *Bharat Kumar K. Palicha* v. *State (FB)*, AIR 1997 Ker 291.
65. *Swami Harbans Chari Ji* v. *M.P.*, AIR 1981 MP 82.
66. *Kishanlal* v. *Sohanlal*, ILR (1955) 5 Raj 191 : AIR 1955 Raj 45.
67. *Englishman Ltd.* v. *Lajpat Rai*, ILR (1910) 37 Cal 760.
68. *United States Shipping Board* v. *The Ship St. Albans'* AIR 1931 PC 189.
69. *The Coca-Cola Co. of Canada Ltd.* v. *Pepsi Cola Co. of Canada Ltd.*, AIR 1942 PC 40.
70. *Madho Singh* v. *State of Bihar*, AIR 1978 Pat 172 (FB).
71. *Sardar Dayal Singh* v. *Tulasidar Tarachand*, AIR 1945 Sindh 177.
72. *Thakooranee Dassi* v. *Bisheshur*, 3 WR 29 (FB).
73. *Subramanya Chettiar* v. *Kumarappa Chettiar*, AIR 1955 Mad 144.

RUSSELL'S *Castes and Tribes* and the Report of 1931 Census Vol. 20.[74]

History of '*Hydraulic Stowing in India*' by N. BARRACLOUGH.[75]

Under the last paragraph, the Court is given the discretion to refuse to take judicial notice of any fact, unless the person calling upon the Court to take judicial notice of such facts produces such book or document as may be necessary to enable it to do so.[76]

17. NOT EXHAUSTIVE

The list of facts mentioned in the Section 57, of which the Court can take judicial notice, is not exhaustive. Indeed, the purpose of the section is to provide that the Court shall take judicial notice of certain facts, rather than exhaust the category of facts of which the Court may, in appropriate cases, take judicial notice. Recognition of facts, without formal proof, is a matter of expediency, and no one has ever questioned the need and vision of accepting the existence of matters which are unquestionably within public knowledge.[77]

STEPHEN in his DIGEST (7th Ed., Notes to XXVI to Article 58 at p. 179) has observed: "It may be doubted whether an absolutely complete list could be framed, as it is practically impossible to enumerate everything which is so notorious in itself, or so distinctly recorded by public authority that it would be sperfluous to prove it".

The following are some instances where the court took judicial notice of facts which do not fall within clauses 1 to 13:—

The Supreme Court held that the court can take judicial notice of the fact that many of the industrial workers are illiterate; hence, where a previously prepared signed statement of a witness was read over to the workmen and they were asked to cross-examine the witness then and there, it amounted to non-compliance with the rules of natural justice.[78]

Judicial notice can be taken of the low expectation of life of hill tribes.[79]

The Court can take judicial notice about: Communal disturbances or other disturbances in the country.[80]

Communal disturbances in 1947 after partition of India.[81]

Explosive ferment of mounting hatred on both sides of Radcliffe line—in 1947.[82]

Disturbances in Andhra Province after death of Potti Sriramulu in connection with formation of Andhra Province.[83]

Government of India's white paper on Punjab Agitation.[84]

Disturbances in August 1942.[85]

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74. *Nathulal Salikram* v. *Rangoba Narbad*, AIR 1952 Nag 133; *Mahadeo Dewanna* v. *Vyan Kamma Bai*, AIR 1948 Nag 287; *Meji Jiyibai* v. *Tabu*, AIR 1933 Nag 274; *Dshwari Prasad* v. *Raj Hari Prasadrai*, AIR 1927 Pat 145.
75. *Nimcha Coal Company Ltd.* v. *Sriniwas Goenka*, ILR (1968) 2 Cal 402.
76. *Public Prosecutor* v. *Thippayya*, ILR 1949 Mad 371 : AIR 1949 Mad 459.
77. *Onkarnath* v. *Delhi Administration*, AIR 1977 SC 1108; *Englishman* v. *Lajpatrai*, ILR (1910) 37 Cal 376 : (1961) 2 Cr LJ 272; *Jit Singh Mohar Singh* v. *Municipal Committee Khanna*, ILR (1960) 1 Punj 803.
78. *Keshoram Cotton Mills* v. *Gangadhar*, AIR 1964 SC 708.
79. *Pati Soura* v. *State*, ILR 1970 Cut 1165.
80. *Shivnath Rajram* v. *Union of India*, AIR 1965 SC 1666.
81. *Ishar Dass* v. *Smt. Chetni Bai* (1970) 72 Punj LR 17; *M/s. Khaki Mal Hukum Chand* v. *Great American Insurance Co. Ltd., New Delhi*, AIR 1960 Punj 523.
82. *Union of India representing Southern Railway* v. *M/s. Natabarlal Jayashankar*, AIR 1963 Ori 66.
83. *Salig Ram* v. *Emperor*, AIR 1943 All 26; (disturbances in August 1942); *Sukhdev Singh* v. *Union Territory of Chandigarh*, AIR 1987 P&H 5 (FB).
84. *Jubba Mallah* v. *Emperor*, AIR 1944 Pat 58.
85. *Kedar* v. *Emperor*, AIR 1944 All 94.

Judicial notice should be taken of the fact that, after the partition, entry of any citizen of India into the territory now in Pakistan, is regulated by permits and visas, and of the fact that cash or produce could not be taken from one Dominion to another without insurmountable difficulties.[86]

Judicial notice was taken of the fact that the war with Pakistan started in June 1965.[87]

The Court can take judicial notice of the prices of commodities, general level of wages, and the appointment of Wage Board.[88]

In a case claiming adequate escalation in pension by the erstwhile Burma Shell Staff Pensioners, the Supreme Court, held that when the Burma Shell, which was having a pension fund, was taken over by the Government and when other similar companies having no fund granted a steep escalation of pension the court can take judicial notice of the loss of purchasing power of a rupee and whether the pensioners would be entitled to a hike in pension.[89] The Court can take judicial notice of the fact of inflation resulting in fall in purchasing power of money and consequent rising of cost of commodities for enhancing maintenance allowance.[90]

Court can take judicial notice of the enormous increase of the rents of buildings throughout the country, particularly in urban areas.[91]

The Court can take judicial notice of the fact that many a time prescribed registers are not available and so they are kept in non-prescribed way and many a time even a case diary is not maintained in the prescribed form.[92]

Courts were justified in assuming, without formal evidence, that a railway strike was imminent on a particular day, and that a strike paralysing the civil life of the Nation was undertaken by a section of workers on another date.[93]

Court can take judicial notice of different ages of retirement in several services in the country.[94]

Late fee is generally charged from members who use the club premises beyond the schedule time. Such charge is usual in most of the clubs and judicial notice of the fact can be taken.[95]

Judicial notice can be taken of the fact, that the cancer ward attached to the Kamala Nehru Maternity Hospital is a separate hospital under the same management.[96]

The court can take note of the fact judicially that Harijans are socially, educationally and economically backward.[97]

Judicial Notice cannot be taken of :

(i) the fact whether a particular railway track which was laid on the land belongs to the Central Government.[98]

(ii) of a notification issued by the Textile Commissioner.[99]

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86. *Harisingh* v. *Dewani Vidhyawati*, AIR 1960 J&K 91.
87. *State of Assam* v. *Bansyidhar*, AIR 1981 SC 1957.
88. *Kamali Metals & Alloys Ltd.* v. *Workmen*, AIR 1967 SC 1175.
89. *Bharat Petroleum Management Staff Pensioners* v. *Bharat Petroleum Corp. Ltd.*, AIR 1988 SC 1407; *Ramalakshmi Ammal* v. *Seeniya Pillai*, AIR 1977 Mad 34.
90. *Dhan Raj* v. *Kishni*, 1998 Cr LJ 1312 (para 7) (Raj).
91. *Rattam Arya* v. *State of Tamil Nadu*, AIR 1986 SC 1444; *Oswal* v. *Subbaiah*, AIR 1992 SC 184.
92. *State of M.P.* v. *Dhirendra Kumar*, AIR 1997 SC 318.
93. *Onkar Nath* v. *Delhi Administration*, AIR 1977 SC 1108.
94. *Life Insurance Corp. of India* v. *S.S. Srivastava*, AIR 1987 SC 1527.
95. *State of A.P.* v. *K. Satyanarayan*, AIR 1968 SC 825.
96. *State of A.P.* v. *K. Satyanarayan*, AIR 1968 SC 825.
97. *Bishnu Charan Swain* v. *Secretary Works & Transport Department*, 1974 Ori 115 (DB); **relying on** *Chitra Ghosh* v. *Union of India*, AIR 1970 SC 35.
98. *Manik* v. *Divisional Superintendent, Central Railways*, 1971 Mah. LJ 468.
99. *Pannalal* v. *State*, AIR 1953 M.B. 84; **see contra** *Public Prosecutor* v. *Kamakshi Ammal*, 1983 Mad. LJ (Cri) 617.

(iii) of a notification under the Forest Act, declaring an area as a reserved forest, as it is an executive character. Proof of it by production of Gazette, or its certified copy, coupled with proof of its publication in the Gazette, has to be given.[1]

(iv) it is not open to the court to take judicial notice of the Clearing House Rules.[2]

18. PRICE OF LAND

Increase in the price of urban and rural lands, after 1958, while valuing lands for compulsory acquisition under the Land Acquisition Act can be taken judicial notice of.[3]

In a suit for specific performance of an agreement to sell land, or for damages for breach of contract, it was held that the court can take judicial notice of the rise in prices and the exact rate of the increase.[4]

Judicial notice can be taken of the fact that the rise in the prices of lands near about a developing town is a continuous and unending phenomenon, while determining the market value.[5]

After the partition of Bengal in 1947, Judicial notice has to be taken of the increase in the land value in Calcutta.[6]

The court can take judicial notice of the general appreciation in land value and the general principles of assessment as recognised by the courts, while fixing the market value under the Land Acquisition Act.[7]

The court is entitled to take judicial notice of facts which are of general knowledge, *e.g.,* that the land value differs in different towns in which municipalities are established, that different types of mills and factories required different types of buildings, and that the buildings of mills and factories are of different age, and the value of a building decreases with its age.[8]

19. BUILDING REGULATIONS

The Court can take judicial notice of the Building Regulations which are made in public interest and apply them to a case.[9]

20. BANKS

The practice of charging interest on the amount overdrawn is so common with the banks that the court is justified in taking judicial notice of that practice.[10]

21. PAY SCALES

In cases of claims for compensation under the Motor Vehicles Act, the court can take judicial notice of enhancement in pay scales and pension of Government servants, while awarding compensation to a deceased Government servant.[11]

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1. *Anthony* v. *Forest Range Officer,* 1978 Mad. L.J. (Cri) 74 (Ker); *Chako Pyli* v. *State,* 1966 Ker. L.J. 76 : 1966 Ker. L.T. 102; *Executive Officer* v. *M. Bharatan,* 1967 Ker. L.T. 161.
2. *Brahma Shumsher Jung Bahadur* v. *Chartered Bank of India,* 1956 Cal 399 (Australia & China).
3. 83 Mad L.W. 621; *Modi Spg. & Wvg. Mills* v. *Virendra,* (1998) 5 SCC 718; *Land Acquisition Officer, Revenue Devisional Officer* v. *L. Kamalamma,* (1998) 2 SCC 385; *State of M.P.* v. *M/s. Ahad Brothers,* 1999 AIHC 3504 (paras 10 and 11) (MP).
4. *Sau Shantabai* v. *Manak Chand Ratan Chand Raka,* AIR 1988 Bom 82.
5. *Puran* v. *State of Haryana,* AIR 1986 Punj & Hariya 305. **Also see** *Gulabi* v. *State,* AIR 1998 HP 9.
6. *Prabodh Chandra Mukherjee* v. *Pashupathi Mukherjee,* (1967) 71 Cal W.N. 649; *Mahmudabad Properties Ltd.* v. *Commissioner of I.T.,* 1971 Tax. LR 845 (Cal); (rise in price of lands between 1954 and 1961.
7. *State of Orissa* v. *Dhunda Gram,* AIR 1978 Ori 74.
8. *Lokamanya Mills Barai Ltd.* v. *Barai Municipal Council,* AIR 1968 Bom 229.
9. *3 ACES, Hyderabad* v. *Municipal Corporation of Hyderabad (FB),* AIR 1995 AP 17 (para 24).
10. *U.P. Union Bank Ltd.* v. *Dinanath Raja Ram,* AIR 1953 All 637.
11. *Bimalkumar Das* v. *Parijata Bewa,* AIR 1987 Ori 146.

22. ACADEMIC SESSIONS

The court can take judicial notice of uncertainty about the commencement and termination of academic sessions.[12]

23. EDUCATIONAL SYSTEM

The Court can take judicial notice of the fact that the educational system in the State (here Bihar) has virtually crumbled and serious allegations are made frequently about the manner in which the system is worked.[13] The High Court can take judicial notice that the State Government alone cannot take effective measure for imparting education to the children of the country.[14]

24. NOTORIOUS FACTS

The court can take judicial notice of what are known as notorious facts. But the condition regarding communal disturbances in a particular State at a particular time is a matter of opinion and somewhat controversial. Controversial facts cannot be considered notorious facts. Judicial notice cannot be taken of such facts.[15]

The holocaust of 1950, on both sides of the border, and crossing thereof by a vast mass of humanity, leading to an agreement known as Nehru-Liaquat Ali agreement, are notorious facts which the court can take judicial notice of.[16]

Where communal feelings are exploited, violence would invariably erupt sooner or later, whether such violence is advocated or not. The courts are justified in taking judicial notice of such a notorious fact.[17]

The court can take judicial notice that Kohima in Nagaland is a disturbed area[18] or a certain area is terrorist-stricken.[19]

Court can take judicial notice that the Central Government is located at New Delhi.[20]

The court took note of the drought in the western part of Orissa, for three or four years.[21]

Information available as to who was *Bhindranwale* and what he stood for, can be taken judicial notice from the Government of India's White Paper on Punjab agitation.[22]

25. SMUGGLING

The court can take judicial notice of extensive smuggling of gold along the West Coast of South India.[23]

Judicial notice can be taken of the fact that Sambalpur district is a surplus district as regards rice, and that there was extensive smuggling from that district to the adjacent States such as Bihar and Central Provinces.[24]

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12. *Basanta Kumar Behera* v. *State of Orissa*, AIR 1988 Ori 124.
13. *Managing Committee of Rajo Sidheshwar High School* v. *State of Bihar*, AIR 1996 Pat 19 (para 6).
14. *Debasish Kar Gupta* v. *State of W.B.*, AIR 1999 Cal 300 (para 7).
15. *Abida Khatoon* v. *State of U.P.*, AIR 1963 All 260; (condition in U.P. in Feb., 1950) *Jay Engineering Wroks Ltd* v. *State of West Bengal*, AIR 1968 Cal 407; *Chait Ram* v. *Sikandar Choudhary*, AIR 1968 Pat 337.
16. *United Bank of India* v. *Narayan Chandra Ghose*, (1970) 74 Cal. W.N. 150.
17. *Md. Ishaq* v. *State of U.P.*, AIR 1957 All 782.
18. *Masha Angami* v. *Govt. of Manipur*, AIR 1968 Manipur 23.
19. *Abdul Malik* v. *State of U.P.*, AIR 1994 All 376 (para 13).
20. *P.N. Films Ltd.* v. *Union of India*, AIR 1955 Bom 381.
21. *Golaprai Jain* v. *Gouranga Meher*, AIR 1969 Ori 266.
22. *Sukhdev Singh* v. *Union Territory Chandigarh*, AIR 1987 P&H 5 (F.B.).
23. *Devichand Jestimall Co., Bangalore* v. *Collector of Central Excise, Madras*, 1960 Mad 281.
24. *Sheonath* v. *State of Orissa*, AIR 1953 Ori 53.

26. ILLEGAL IMMIGRATION

The Court can take judicial notice of the wide spread of malaise of illegal immigration and the exploitation of the youngones by unauthorised recruiting agents. Judicial notice can also be taken of the tragedy which occurred on the night intervening 24th and 25th November, 1996 in which 280 immigrants including 170 Indians, who were being illegally ferried, met their watery graves on their journey from Malta to Cicily.[25]

27. INACTION

Where Agra Development Authority had an income of 20 lakhs only in 1993-94 from toll tax charged from the visitors to Taj Mahal, the Court can take judicial notice of its inaction in preservation of the Taj and the cleanliness of Agra city.[26] Judicial notice of inaction of Bihar Government in not imparting training to untrained primary school assistant teachers recruited three years ago was taken and time-bound direction was given to Government to ensure their training.[27]

28. PROPAGANDA BY GOVERNMENT

Propaganda by the State Government, calling upon the people to help it in finding out corruption and promising them protection against prosecution for being accomplices, can be taken judicial notice of by the Court.[28]

29. SATSANGI

Judicial notice has to be taken of the fact that there is a flourishing colony of *Satsangi* at Agra.[29]

30. GHERAO

Court can take judicial notice regarding *Gheraos* and that the attitude of the Government towards *Gherao* met with adverse reaction in many quarters.[30]

31. ACADEMIC DISTINCTION

The Court can take judicial notice of the fact that many blind persons have made a name for themselves and have acquired great academic distinctions.[31]

32. MATTERS OF COMMON KNOWLEDGE

The court is entitled to take judicial notice of matters with which men of ordinary intelligence are acquainted and to act upon its general knowledge of local affairs.[32] The mortgage of the properties of the Indian Iron and Steel Company with the World Bank is a fact of common knowledge and public history, and the judge can take judicial notice that a particular sale deed of the Company was in the custody of the World Bank.[33] Judicial notice can be taken of the fact that law and order situation has deteriorated over years and is fast worsening.[34] Where the question was as to the justification for dispensing with an enquiry u/s. 5-A of the Land Acquisition Act when acquiring land for a road bridge, it was held that the court can take judicial notice of the traffic congestion which is likely to create a tense situation when accidents occur.[35] The Supreme Court can take judicial notice that a majority of writ petitions are filed

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25. *M.D.K. Immigration Consultant, Chandigarh* v. *Union of India*, 2000 Cr LJ 252 (para 12) (P&H).
26. *M.C. Mehta* v. *Union of India*, (1998) 8 SCC 711.
27. *Ram Vijay Kumar* v. *State of Bihar*, (1998) 9 SCC 227.
28. *Public Prosecutor* v. *Audinarayana Chetti*, AIR 1953 Mad 481.
29. *Comr. of I.T. Lucknow* v. *Radhaswami Satsangh Sabha*, AIR 1954 All 291.
30. *Jay Eng. Works Ltd.* v. *State of W.B.*, AIR 1968 Cal 407.
31. *Jai Shankar Prasad* v. *State of Bihar*, AIR 1993 Pat 22 (para 11).
32. *Madho Singh* v. *State of Bihar*, AIR 1978 Pat 172.
33. ILR (1967) 2 Cal 604.
34. *Shashi Nayar* v. *Union of India*, AIR 1992 SC 395.
35. *Alogsius (Lt. Col.)* v. *State of Karnataka*, AIR 1992 Kant 241.

merely for obtaining *interim* orders.[36] The *Ramayan* is sacrosant to Hindus. Rama, Krishna, Brahma, Mahatma Gandhi, to mention only a few, are held in the highest esteem by them. These are matters of common knowledge and court can take judicial notice of them.[37] The Court may take judicial notice of the fact that in Haryana there has not only been green and white revolution but an industrial revolution also.[38] The Court can take judicial notice of the absence of judicial complexes and inconvenience caused to all. The Govt. should focus attention towards construction of necessary judicial complexes.[39] The Court can take judicial notice of the fact that ordinarily in certain cases one person looks after the case.[40]

Taking judicial notice of the scarcity of dwellings, the Calcutta High Court held that a dwelling house cannot be acquired without providing alternative accommodation.[41] The extent to which, and the process by which, an accurate topographic plan can be produced from a pictorial delineation of a scene are not matters of common knowledge, though such questions have long occupied attention of men of science.[42]

33. PERSONAL KNOWLEDGE OF THE JUDGE

The Supreme Court has held that in assessing the value of oral evidence, the judge is bound to call upon his experience of life.[43] A judge can rely on the information gained by him from the other cases which he has heard during his service.[44]

A judge cannot decide on taking cognizance of an offence, based on his personal knowledge.[45] The Andhra Pradesh High Court held that use of personal knowledge of facts, while judging a case, will be a travesty of justice.[46]

There is a difference between the personal knowledge of a judge as a private man and his knowledge as a judge; he can make use of his experience as a judge by taking judicial notice of facts transpiring in the court.[47] The judge cannot use knowledge of facts which came to him from other sources. A judgement based on such facts, other than legal evidence, would not be in accordance with law.[48]

The Madras High Court observed: "A judge must be allowed to use even his knowledge of concrete private facts, *provided* he mentions his knowledge to the parties, and they do not object to his deciding the case; and he must be allowed of course to use historical, scientific, political, or otherwise, in coming to his conclusion. The only restriction that should be imposed upon the judge is that he should not import knowledge obtained by mere rumour or hearsay of concrete facts with the particular case before him for arriving at a conclusion.[49]

34. AVERMENT OF APPLICANT

Where in a accidental claim petition involving the death of the victim, compensation was granted to the victim's wife and minor son but not to the applicant dependent aged mother, in appeal in absence of any material to the contrary, the Court took notice of the mother's averment and rectifying the award, granted compensation to her also.[50]

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36. *Asst. Collector of Central Excise* v. *Dunlop India Ltd.*, AIR 1985 SC 330.
37. *Lalai Singh Yadav* v. *State of U.P.*, 1976 Cr LJ 98 (SB) (All).
38. *Atam Prakash* v. *State of Haryana*, AIR 1986 SC 859.
39. *District Bar Association, Kurukshetra* v. *State of Haryana (FB)*, 1997 AIHC 3983 (para 16) Vol. 6 (P&H). The Court referred CW No. 10428 of 1995, Dt. 27-3-1996 (P&H).
40. *Shivshankar* v. *Sarjeet Singh*, 2001 AIHC 1131 (para 8) (MP).
41. *Bamandas Mukerjee* v. *State of W.B.*, AIR 1985 Cal 159.
42. *United States Shipping Board* v. *The Ship 'St. Albans'*, AIR 1931 P.C. 189.
43. *Chaturbhuj Pande* v. *Collector of Raigarh*, AIR 1969 SC 255.
44. *Fazal Begum* v. *Hakim Ali*, AIR 1941 Lah 22.
45. *Chabilal Gurung* v. *Krishna Bahadur Grung*, 1984 Cr. LJ 1433.
46. *Seshareddy* v. *China*, AIR 1958 A.P. 595.
47. *Chattra Kumari* v. *Mohan Bikram Shah*, AIR 1931 Pat 114.
48. *Durgaprasad Singh* v. *Ram Dayal Choudhary*, ILR 38 Cal 153.
49. *Lakshmayya* v. *Sri Rajah Varada Raja Apparao Bahadur*, ILR (1912) 36 Mad 168
50. *Gowramma* v. *Nagappa*, 1998 AIHC 1693 (para 3) (Kant).

35. F.I.R.

The fact whether the FIR was sent to the Public Prosecutor and the concerned Magistrate, must be proved like any other fact and is not a matter of which judicial notice can be taken.[51]

36. EVASION OF STAMP DUTY

The Court would not be justified in taking judicial notice of the practice of under valuation for evading stamp duty in the absence of any evidence, though the practice is prevalent.[52]

37. NEWSPAPERS

The facts stated in a newspaper are in the nature of hearsay and so inadmissible, unless the maker is examined, judicial notice of facts stated therein can also not be taken.[53]

Facts admitted need not be proved.

S. 58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

***Provided* that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.**

SYNOPSIS

1. *Principle and scope*	... 613	6. *Admission of documents*	... 617
2. *Implied admission*	... 615	7. *Unstamped and unregistered*	... 618
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COMMENTS

1. PRINCIPLE AND SCOPE

Admissions by parties before suit are dealt with in Section 17, *et seq.* This section deals with admissions at or before the hearing.

No proof need be given of facts which the parties or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by writing under their hands, or which, by any rule of pleading in force at the time, they are deemed to have admitted by their pleadings.[54]

The object of this provision is to save time and expense at the trial.[55]

Admissions which are contemplated under this section are:

(1) Admissions in the pleadings (Order VIII, Rule 5, C.P.C.) or by way of answers to the interrogatories (Order XI, Rule 22, C.P.C.).

(2) Admissions which can be implied from the pleadings.

(3) Admissions by way of agreement in writing before the hearing, or by giving notice to admit (Order XII, C.P.C.).

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51. *Birsingh* v. *State of U.P.*, AIR 1978 SC 59.
52. *Tata Chemicals Limited, Bombay* v. *Sadhu Singh*, AIR 1994 All 66 (para 22).
53. *Laxmi Raj Shetty* v. *State of Tamil Nadu*, AIR 1988 SC 1274 at p. 1290 : 1988 (3) SCC 319. **See also** *Amal Kumar Chatterjee* v. *State of U.P.*, 1999 AIHC 3901 (para 3) (All).
54. **See** *Maung Po Kin* v. *Maung Shwe Bya*, ILR (1923) 1 Ran 405.
55. *John Over* v. *Muriel*, AIR 1925 Bom 231.

(4) Admissions by a party or his lawyer at the time of hearing.

A Court, in general, has to try the questions on which the parties are at issue, and not those on which they are agreed. Admissions which have been deliberately made for the purpose of the suit, whether in the pleading or by agreement, will act as an estoppel to the admission of any evidence contradicting them.[56]

It is with the object of doing away with the necessity of proving documents or facts admitted, that admissions are obtained, and the party unreasonably refusing or neglecting to admit any documents or facts, when called upon to do so, may be ordered to pay the costs of proof. Where the defendant admitted in his written statement that his father was married to the plaintiff's mother according to Henga custom, he was not allowed subsequently to contradict it.[57]

The Supreme Court has observed: "Admission in pleading, or judicial admissions, admissible under Section 58, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the parties that made them and constitute waiver of proof. They by themselves can be made, the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence are by themselves not conclusive; they can be shown to be wrong."[58]

When the execution of a document is admitted there is no need to prove the instrument.[59]

Admissions may be judicial admissions or extra-judicial admissions. Section 17 of the Act deals with admissions which are in the nature of extra-judicial admissions. They are binding on the party against whom they are set up, only to a certain extent, except in cases where they operate as, or have the effect of, estoppel, in which case they would be fully binding and may constitute the foundation of the rights of the parties.[60]

An admission in a pleading means an admission of an averment by the opposite party.[61]

When the defendant does not file any written statement, it does not amount to an admission of the facts stated in the plaint. Sir John Beaumont held that if there was no pleading of the defendant, it is obvious that it can contain no denial or no admission.[62]

But after the amendment of Order VIII, Rule 5, C.P.C. in 1976, adding clause 2 to Rule 4, on the failure of the defendant to file a written statement, the court can take that the allegations in the plaint are admitted by the defendant and pronounce a judgement.

Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or not stated to be not admitted in the pleading of the defendant, shall be taken to be admitted. The court may in its discretion require any fact so admitted to be proved otherwise than by such admission (O. VIII, R. 3, Civil Procedure Code). Where a document is not admitted in the pleadings but only at the trial in evidence, the document must be proved.[63]

In a case the mother of the minor children executed a sale in respect of a piece of land in persuant to an agreement for sale executed by the deceased father and one of the minor children, challenging the sale deed for want of Court's permission, as a witness admitted and there was a recital to that effect in the sale deed too that a small building left by their deceased father was reconstructed with the amount received from the impugned sale deed which fetched rent and the trial Court gave a finding to that effect adding that the rental so received was the only source of maintenance and education of the minor

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56. *Burjorji Cursetji Panthaki* v. *Mundherji Kuverji*, ILR (1880) 5 Bom 143, 152.
57. *Rasamani Das* v. *Patrabala Devi*, AIR 1981 Gau 42.
58. *Nagin Das* v. *Dalpat Ram*, AIR 1974 SC 471; *Nilkant Laxman Joshi* v. *Raghu Mahadu* 1918 Bom 167.
59. *Javerchand* v. *Pukhraj Swurana*, AIR 1961 SC 1655; *Narayana Raja* v. *Chawaraju*, AIR 1968 SC 1276; *Narayan* v. *Gopal*, AIR 1960 SC 100; *Nagabai* v. *Shamarao*, AIR 1956 SC 593; *Ajodhya Prasad* v. *Bhawanishankar*, AIR 1957 All 1 (FB); *Sundaram* v. *Rukmani*, AIR 1975 Mad 83; *Gopi Kishan* v. *Bajrang Lal*, 1996 AIHC 4064 (paras 13 and 14) (Raj).
60. *Ajodhya Prasad Bhargawa* v. *Bhawanishankar Bhargawa*, AIR 1957 All 1 (FB); *Abdul Aziz* v. *Mariyam Bibi*, AIR 1926 All 710; *John Over* v. *Muriel*, AIR 1925 Bom 231.
61. *Latufallah Khudabaksh Khan* v. *Md. Sidik*, AIR 1946 Sind 117.
62. *Shriram Surajmal* v. *Shriram Jhunjhun Wala*, AIR 1936 Bom 285. **See also** *Ross & Co* v. *Scriven*, AIR 1917 Cal 269; *Narinder Singh* v. *C M. King*, AIR 1928 Lah 769; *Gobind Gorki* v. *Baldeo Ram*, AIR 1930 Pat 293.
63. *Maung Wala* v. *Maung Shwe Gon*, ILR (1923) 1 Ran 472.

children. The High Court upheld the finding and held that prior permission of the Court was not required. In such circumstances, the High Court's order remanding the matter to trial Court to record further evidence to prove that the sale proceeds were utilised as mentioned above was not sustainable.[64] Where the tenant admitted before the Court that there was a lease for a specified period on a monthly rental of the specified sum and the lease was admitted to be a valid lease in his written statement, he could not resile from that position.[65] Where the tenant filed objection to the notice and admitted its receipt, it need not be proved by producing oral evidence.[66]

2. IMPLIED ADMISSION

The Supreme Court has held that under Order VIII, Rule 5, C.P.C., the facts, if not admitted specifically, or by necessary implication or not stated to be not admitted in the pleading of the defendant, shall be taken to be admitted, except as against a person under disability.[67]

The doctrine of implied admission can only be invoked when a party on whom the burden lies, fails to state facts in support of his plea or when the facts specifically alleged by a party in support of his plea are not denied by the other party. Further, the doctrine of implied admission can be invoked only against a party who is under an obligation to allege certain facts. It cannot be invoked where there is express evidence to the contrary. The failure on the part of a party to discharge the burden which lies upon him, gives rise to an assumption against him.[68]

A general denial of the allegations does not relieve the plaintiff of the obligation to prove the essential facts.[69]

Where the allegations in a plaint are not controverted in the written statement, the allegations need not be proved.[70] When no case is put forward by the defendant in his written statement that the date of birth mentioned by the plaintiff in his plaint was wrong, the defendant cannot be allowed to dispute the correctness of the plaintiffs date of birth. The plaintiff is entitled to a decree on the basis of the admission of the defendant, where the original of a mortgage deed on foot of which a suit was brought which was admitted by the defendant was lost and the copy was not properly proved, it was held that there was no need to tender formal evidence regarding the loss of the original or the contents of the copy.[71] In an action for infringement of patent, the defendant admitted that the drug which he prepared and sold was the very drug in respect of which plaintiff's have obtained their patent, it was held that the facts admitted need not be proved.[72] Where in a suit for recovery of money, and the plaintiff relied on a letter written by the defendant to save the suit from the bar of limitation, the defendant simply stated that the suit is not saved by the letter from the bar of limitation, and did not deny the letter in his pleading, it was held that the letter must be taken as admitted and no proof need be given of the letter by the plaintiff.[73]

The Supreme Court observed:[74] "It is true that in divorce cases, under the Divorce Act of 1869, the court usually does not decide merely on the basis of the admissions of the parties. This is a rule of prudence and not a requirement of law. That is because parties might make collusive statements, admitting allegations against other, in order to gain the common object that both desire, for personal reasons. A decision on such admissions would be against public policy, and is bound to affect not only the parties to the proceedings but also their issues, if any, and the general interest of the society. Where, however, there is no room for supposing that parties are colluding, there is no reason why admission of parties should not be treated as evidence, just as they are treated in civil proceedings. The provisions of the Evidence Act and the Code of Civil Procedure provide for courts accepting the admissions made by

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64. *Thatchara Bros.* v. *M.K. Marymol*, (1999) 1 SCC 298.
65. *Rajendra Pratap Singh* v. *Rameshwar Prasad*, (1998) 7 SCC 602.
66. *Life Insurance Corporation of India* v. *Advani & Co.*, 2001 AIHC 421 (para 6) (All).
67. *Mahendra Manilal Nanavathi* v. *Sushila Mahendra Nanavathi*, AIR 1965 SC 364 : (1965) 1 SCJ 88, 793.
68. *Manmohan Das* v. *Bahauddin*, AIR 1957 All 575.
69. *Hardayan Gorodia* v. *Gahgadhar*, AIR 1963 Cal 500.
70. *Bhawani Das* v. *The Kayestha Pesthashala Allahabad*, 1977 All LJ 897; *Rameshwar Dayal* v. *State of H.P.*, AIR 1954 HP 21.
71. *Bahadur Shah* v. *Mulk Raj*, AIR 1934 Lah 898; *Hikmatullah Khan* v. *Abdul Axim Khan*, AIR 1921 All 218; *Mohd. Zafar* v. *Zahur Hussain*, AIR 1926 All 741 Mad; *Chuni Kaur* v. *Udai Ram*, ILR (1883) 6 All 73.
72. *Farbwerke Hoechst etc.* v. *Unichem Laboratories*, AIR 1969 Bom 255.
73. *Lakshminarayan* v. *Chinni Ramgirdharilal*, ILR 41 Bom 89, *Emperor* v. *Jaiwham Damkerji*, AIR 1916 Bom 103.
74. *Mahendra Manilal Nanavathi* v. *Sushila Mahendra Nanavathi*, AIR 1965 SC 364 : (1964) 1 SCR 267.

the party and requiring no further proof in support of the facts admitted". In that case, the trial court based its finding on the admission of the wife and also other evidence that the child was conceived by the petitioner before the marriage. But the High Court, after reversing the finding, sent back the case to record a finding on the question whether the child was conceived after the marriage. The Supreme Court, held that the High Court was not right in remitting the case for a finding and that the court can base its decision on the basis of the admissions of the parties.

A party is not bound by an admission in his pleading except for the purpose of the suit in which he pleaded; that admission is not binding in any other suit or for all time.[75]

Where a party produces the previous admission of his opponent in writing, the fact admitted need not be proved by other evidence.[76]

3. ADMISSION MUST BE CLEAR AND SPECIFIC

The admission of a party in respect of a fact must be clear and specific, in order to dispense with the proof of it.[77]

In an earlier suit, when the present plaintiff was a minor, it was stated that the minor left the joint family with his mother. After attaining majority, the plaintiff filled a suit for the partition of the Joint Family property; it was held that the admission in the earlier suit was not binding, as it was not clear and specific, and the *onus* of proof of exclusion was on the opposite party.[78]

The admissions which are to be relied on must be sufficient to cover the entire claim of the plaintiff and relieve him of the necessity of relying on the document; if admissions are indefinite or insufficient to cover the entire claim, then the plaintiff has to prove his claim in the ordinary way by producing the original document or its copies.[79]

The pleading of the party should not be construed strictly.[80]

4. ADMISSION MUST BE TAKEN AS A WHOLE

SIR BARNES PEACOCK, in a Full Bench Case in *Poolin Peharee* v. *Watson & Co.*, (9 Suth. W.R. 190 (F.B.)), reiterating the principle announced by him in the earlier case reported in *Sooltan Ali* v. *Chand Bibi*, (9 Suth. W.R. 130) held that, while the court of law in entitled to accept a part of the evidence of a witness and to reject another part, a pleading cannot be dissected but must be taken or left alone, as a whole; that when a party in a written statement made certain admissions favourable to the plaintiff but denied other fact even though they were favourable to him, and asserted other facts which were unfavourable, the plaintiff, if he wanted to avail himself of the admissions, had to take not only the first set of facts as truly stated but also the second set of facts.[81]

Where the defendant admitted his thumb mark on the *Khata*, but stated that it was obtained by exercise of undue influence, it was held that it was not possible to spell out any admission of liability on the part of the defendant, and as the admission was qualified, it was not sufficient to fasten the liability on the defendant.[82]

5. COMPROMISE

When both parties come before the court and are agreed in stating that the suit has been adjusted, then the court has no option (except perhaps an inherent power to prevent its proceedings from being

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75. *Ramabai Shrinivas* v. *Govt. of Bombay*, AIR 1941 Bom 144.
76. *Ajodhya Prasad Bhargawa* v. *Bhavanishankar Bhargawa*, AIR 1957 All 1 (F.B.).
77. *Marudanayagam Pillai* v. *Sola Pillai*, AIR 1965 Mad 200; *Ajodhya Prasad Bharghawa* v. *Bhavani Shanker Bhargawa*, AIR 1957 All 1 (F.B.).
78. *Marudanayagam Pillai* v. *Sola Pillai*, AIR 1965 Mad 200.
79. *Peareylal* v. *Kunwar Hiradevi Rani*, AIR 1941 All 150.
80. *Bharat Fire & General Insurance Ltd.* v. *Parameshwari Prasad Gupta*, AIR 1968 Del 68.
81. See also *M.M. Nanavati* v. *Sushila*, AIR 1965 SC 364 : *Matabhoy Mulla* v. *Mujji Haridas*, AIR 1915 PC 2 : 42 I.A. 103, 109; *Calcutta National Bank Ltd.* v. *Rangarom Tea Co. Ltd.*, AIR 1967 Cal 294; *Fateh Chand Murlidhar* v. *Juggilal Kamlapati*, AIR 1955 Cal 465; *Gangaram* v. *Hetram*, AIR 1965 Raj 47.
82. *Gangaram* v. *Hetram*, AIR 1965 Raj 47.

used to work substantial injustice) but to record it[83] but this section would not apply where the alleged compromise was found to have been reached after passing of the order by the Court and thus the Court's order was not based on the alleged compromise.[84]

Where the parties entered into a compromise, there is an express or implied admission of the facts concerned in the proceedings, by either party, and if the court is satisfied about the existence of a statutory ground for eviction, the court may pass a decree for eviction on the basis of the compromise. A consent decree for possession, based upon a compromise in a previous case and which showed the existence of a statutory ground of eviction, can take the shape of evidence or an admission which is the best proof of facts and can be made the foundation of the rights of parties.[85]

From the compromise incorporated in the decree, the court's satisfaction about the existence of statutory ground for eviction, can be presumed.[86]

If an agreement of discharge or satisfaction be admitted in the pleadings, and hence no question of proof by oral or documentary evidence arises by virtue of this section, such compromise cannot be said to be inadmissiable for want of registration.[87]

6. ADMISSION OF DOCUMENTS

Formal proof of a document, even when it is required to be proved in a certain way (*e.g.*, by calling the persons who have attested it. see Section 68, *infra*) may be waived by any of the parties whose interest it may affect, although such waiver does not affect the legal character of the document or its validity.[88]

In the case of a will, where its execution or attestation, is not in dispute, there is no necessity to comply with the requirement of calling at least one attesting witness.[89]

Where a will was referred to in a document the execution of which was admitted it was held that the admission did not extend to the execution of the will. The attestation of the will was not proved and hence it was held that execution of the will could not be held to be proved.[90] Where the plaintiff himself accepted the execution of the will but questioned its legal validity in respect of certain properties, Section 58 would be applicable and not Section 68.[91]

Where a tenant admitted the receipt of notice of determination of tenancy but alleged that the notice was bad in law as, instead of the copy of the original, the copy made out from the copy of the notice only had been filed by the landlord, it was held that the burden lay on the tenant to prove the invalidity of the notice, and he should have filed the original notice which he had received to substantiate his point that the notice was bad in law.[92]

When a document is marked on admission, without reservation, the contents are not only evidence, but are taken as admitted and cannot be challenged; but, where documents are marked on admission, dispensing with formal proof, the contents are evidence but the party admitting is free to challenge the contents.[93]

The admission of a document is admission of facts contained therein.[94]

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83. *Surendra Nath* v. *Tarubala dasi,* 1930 PC 158;' *Md. Azizullah Khan* v. *Md. Noorullah, Khan* 1930 Nag (FB).
84. *Jiria Devi* v. *Chhatiya Devi,* AIR 2000 SC 3542 (para 6).
85. *Nagindas* v. *Dalpat Ram,* AIR 1974 SC 471, *Sita Kueri* v. *Basisth Narain,* AIR 1985 Pat 158.
86. *Digambar Narayan* v. *Gajanan Laxman,* ILR 1977 Bom 2482 : (1976) 78 Bom LR 252.
87. *Ramchandra Sau* v. *Kailashchandra Patra,* (1931) 58 Cal 532.
88. *Baijanath Singh* v. *Mussammat Biraj Kuer,* ILR (1922) 2 Pat 52 : AIR 1922 Pat 514; *Arjun Sahu* v. *Kelai Rath,* ILR (1922) 2 Pat 317.
89. *Thayyullathi Kunhikanan* v. *Kalliani,* AIR 1990 Ker 226 (DB).
90. *Purnabai* v. *Ranchoddas,* AIR 1992 AP 270.
91. *Valluri* v. *Kopparthi,* AIR 1994 AP 284 (paras 9 and 10), **reversing** AS No. 2259/86 Dt. 7-6-1990 (AP). **See also** *Narendra Kumar* v. *Vishnu Kr. Nayyar,* AIR 1994 Del 209 (para 9).
92. *Manikant Tiwari* v. *Baburam Dixit,* AIR 1978 All 144.
93. *Lionel Edwards Ltd.* v. *State,* AIR 1967 Cal 191.
94. *Sitaram Motilal* v. *Santaru Prasad,* AIR 1966 SC 1697; *Lionel Edwards* v. *State of West Bengal,* AIR 1967 Cal 191.

Where a consent is given by a party only to exhibit a document, the consent does not amount to an admission of its contents, and the party has a right to show by cross-examination that the document is not genuine.[1]

A document which is not a public document, or is not admitted, cannot be exhibited and looked into unless it is proved by oral evidence or otherwise.[2]

In a mortgage suit, on the basis of the mortgage executed by the *Karta* of a Hindu Joint Family on behalf of all the members including minors, when the *Karta* admitted execution, it was held such admission would not relieve the mortgagee of the necessity to prove its execution against the minor; though the minor is liable to discharge the debt as the debt was incurred for family necessity.[3]

Where the execution of a gift deed was admitted in the written statement and the document was marked with the consent of the parties, the contents of the said document need not be proved.[4]

7. UNSTAMPED AND UNREGISTERED

Even though execution of the document is admitted in the pleading, no relief can be granted on the basis of the admission when the document is insufficiently stamped, in view of the bar under sec 35 of the Stamp Act as it would amount to acting upon an unstamped document.[5]

However the Supreme Court held that once a document was marked as an exhibit and the trial proceeded, the document cannot be challenged on the ground of improper stamp.[6]

In a case on the basis of a registered mortgage deed for recovering an amount, the defendant pleaded an agreement modifying the terms of the written contract under the mortgage deed, for taking a lesser sum, than was due. It was held in the case that, as the subsequent agreement modifying the terms of the written contract has to be proved, oral evidence is not admissible under proviso 4 to Section 92 of the Act. However, if the agreement is admitted by the other party, then the court is not precluded from acting upon such agreement under Section 58, by dispensing with the proof of the agreement.[7]

Where in a suit filed on the basis of a document inadmissible for want of registration, the defendant admitted the execution of the document, but denied that the suit property was conveyed to the plaintiff, under it, it was held there was no admission as to contents of the document and the suit has to fail in the absence of the original.[8]

Where a sale deed of immovable property worth more than Rs. 100 was unregistered, it was held that as the defendant had admitted the sale deed in the pleading, no further proof is required under Section 58, and Section 91, does not come into play.[9] In a case where a party admitted the document but pleaded its *invalidity for want of registration,* it was held that such admission can not be used to bind the party who has made an admission only of the genuineness of the document.[10]

8. AT THE HEARING

The Privy Council, in *Madhusudan* v. *Chandrabati,*[11] held that the statement or the notes of the presiding judge at the trial, whether it be in a criminal or civil case, are conclusive as to what had taken

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1. *Janjay Cotton Co* v. *M/s. Omprakash,* AIR 1973 Bom 40.
2. *Satish Mohan Bindal* v. *State of U.P.,* AIR 1986 All 126.
3. *Nageshwar Prasad* v. *Bachhu Singh,* AIR 1919 Pat 411; *Brahmanand* v. *Kanduri Charandas,* AIR 1959 Ori 125.
4. *Meda Rama Krishna Reddy* v. *Nainar Nammasivayya Prabhakar Reddy,* 1996 AIHC 3946 (para 10) (AP) **distinguishing** *V.A.A. Nanar* v. *A. Chettiar,* AIR 1972 Mad 154; *Purushothama Reddias* v. *Perumal,* AIR 1972 SC 608 and *A.V.S.Perumal* v. *Vadivelu Asari,* AIR 1986 Mad 341.
5. *Dewan Chand Barbar* v. *Jay Pee Finance Corporation* AIR 1977 J&K, 61; *Ylsodammal* v. *Janaki Ammal;* AIR 1968 Mad 294 **overruling** *Alimane Sahibna* v. *Subbarayudu,* AIR 1932 Mad 693; *Ponnuswami Chettiar* v. *Kailasam,* AIR 1947 Mad 422; **and following** *Achyuta Ramana* v. *Jagannathan,* AIR 1933 Mad 117; *Bishnu Kala* v. *Bishnu Maya,* AIR 1980 Sikkim 1; (Unregistered mortgage deed) *Chenabasapa* v. *Lakshman Remachandra,* ILR (1894) 18 Bom 639; *Sohanlal* v. *Raghunath,* AIR 1934 Lah 606.
6. *Pukhraj Surana* v. *Jayer Chand,* AIR 1961 S.C. 1655; **reversing** *Pukhraj Surana* v. *Jayer Chand,* AIR 1957 Raj 47.
7. *Mallappa* v. *Malum Naga Chetty,* ILR 42 Mad 41 (FB) : AIR 1919 Mad 833.
8. *Jadavrai Lalji* v. *Jadvji Bapubhai,* AIR 1951 Kutch 91.
9. *Ganda Singh* v. *Bhan,* AIR 1923 Lah 310.
10. *Shriram Sardarmal* v. *Gourishankar,* AIR 1961 Bom 136.
11. AIR 1917 PC 30.

place at the trial; neither the affidavits of by-standers nor of jurors, nor the notes of the counsel, nor of shorthand writers are admissible, to controvert the notes or the statement of the judge.[12]

Where the parties, counsel admitted the copy of the sale deed of his client, it was held that there was no necessity to summon the original sale deed, or to seek permission of the court to lead secondary evidence to make it admissible in evidence.[13]

9. ADMISSION IN CRIMINAL CASES

In STEPHEN'S DIGEST (Art. 60) it is stated: "The present section appears to allow an accused person to admit at the trial such facts as he pleases to admit." The Madras High Court held that, except the plea of guilty by the accused, other admissions dispensing with proof are not allowed in the criminal trial.[14] It is not in accordance with the usual practice to accept a plea of guilt which would have the natural consequence of a sentence of death on the accused.[15]

Admissions or consent of an advocate for dispensing with proof are not binding on the accused, to his prejudice.[16] In a criminal case, the lawyer has no implied authority to make admissions against the accused, though the accused is entitled to have the benefit of the plea set-up by the lawyer.[17]

Any admission by an accused about the execution of a document, whether filed in the form of a written statement, or in answer to the question under Section 342, Cr. P.C. (old = 313 New Cr. P.C.) cannot be utilised to fill up a gap in the evidence of the prosecution, and it would not relieve it of the necessity of proving the document.[18]

However, in a case of detaining a married woman with a criminal intent, it was held that the statement of the accused under Section 313, Cr.P.C., admitting that the woman was married, can be taken into consideration under Section 58[19]

10. COURT'S DISCRETION [PROVISO]

The proviso to this section gives ample power to the court to exercise its discretion, requiring the parties to prove these facts though they are admitted in the proceeding. When the court is of the opinion that an admission was obtained by fraud or on any other ground, it can, in the exercise of its discretion, under the proviso, require the proof of the facts otherwise than by admission.[20]

In a suit for ejectment, the defendant did not deny the title of the plaintiff, but stated that he was not liable to be ejected. The trial court did not frame any issue but ordered ejectment. The High Court, on appeal, held that, in spite of the law of non-traverse, in view of the proviso to Order VIII, Rule 5, C.P.C., it is the duty of the court to determine the title of the plaintiff by framing an issue, to meet the ends of justice, and remanded the case to the lower court.[21]

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12. *R* v. *Pestonji*, (1873) 10 Bom H.C.R. 75; *Venkatesayya* v. *Md. Ghouse*, AIR 1944 Mad 450; *Nagabhushanam* v. *Jagganaiakalu*, 49 M.L.J. 671 : AIR 1925 Mad 1031.
13. *Bhagawan Singh* v. *Kalu*, ILR (1978) 2 Punj 15.
14. *Raja Gopala* v. *Tirupathia Pillai*, AIR 1926 Mad 426.
15. *Hasaruddin* v. *Emperor*, AIR 1928 Cal 775; *Laxmaya* v. *R*, 19 Bom LR 3561.
16. *Bansilal* v. *R*, AIR 1928 Bom 241; In re : *Rangappa*, ILR (1936) 59 Mad 349 : (proof of postmortem report).
17. *Ngaba Sein* v. *R*, AIR 1936 Rang 1; *Trikam* v. *State*, AIR 1969 Goa 69.
18. *Mohideen* v. *Emperor*, ILR (1904) 27 Mad 238; *Emperor* v. *Chinnappayan*, ILR (1906) 29 Mad 372; *Jeremiah* v. *Vas*, ILR (1912) 36 Mad 457; *Basanta* v. *Queen-Empress*, ILR 26 Cal 49; *Hardevi Malkani* v. *State*, AIR 1969 All 423; *Aunavi* v. *State*, AIR 1961 Mad 851; *S.C. Mitter* v. *State*, AIR 1950 Cal 435.
19. *Sonu Pujari* v. *Arjun Bissoyi*, ILR (1980) 1 Cut 251.
20. *Oriental Life Assurance Co.* v. *Narasimha*, ILR 25M 183 at 205 : 11 M.L.J. 379; **See also** *Muniyappa* v. *Vellachami*, 1918 Mad, W.N. 853.
21. *Biswanath Das* v. *Debiprosad Paul*, AIR 1978 Cal 533; **following** *Satyes* v. *Manmohini*, AIR 1914 Cal 842.

CHAPTER IV

OF ORAL EVIDENCE

Proof of facts by oral evidence.

S. 59. All facts, except the [1][contents of documents or electronic records], may be proved by oral evidence.

COMMENTS

1. THE INFORMATION TECHNOLOGY ACT, 2000 PROOF OF FACTS BY ORAL EVIDENCE

The insertion of the words 'electronic records' by the above mentioned Act puts them in the purview of exceptions to be proved by oral evidence.

2. PRINCIPLE

Oral evidence has been defined by the Act to be all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry (Section 3). All facts except the contents of documents may be proved by oral evidence. This section is not happily worded. Contents of documents may be proved by oral evidence under certain circumstances, *viz.*, when evidence of their contents is admissible as secondary evidence.

Where a fact may be proved by oral evidence, it is not necessary that the statement of the witness should be oral. Any method of communicating thought, which the circumstances of the case or the physical conditions of the witness demand may, in the discretion of the court, be employed. Thus a deaf-mute may testify by signs, by writing, or through an interpreter. So where a dying woman who was conscious, but without power of articulation, was asked whether the defendant was her assailant, and, if so, to squeeze the hand of the questioner, the question and the fact of her affirmative pressure were held admissible in evidence.[2] A woman whose throat had been cut was unable to speak owing to the nature of the wound. She was fully conscious and able to understand what was said to her, to make signs and to nod her head slightly. She was asked whether it was the accused who had cut her throat, and she nodded her head. She died afterwards. It was held that evidence as to signs made in answer to questions put to her was admissible.[3]

Oral evidence, if worthy of credit, is sufficient, without documentary evidence, to prove a fact or title. However, documentary evidence will prevail over oral evidence.[4]

It is a cardinal rule of evidence that, where written documents exist, they must be produced, as being the best evidence of their own contents.[5] Where a lease was not reduced to writing, oral evidence to prove the same was held to be a primary evidence.[6]

Where oral testimony is conflicting, much greater credence is to be given to men's acts than to their alleged words, which are so easily mistaken or misrepresented.[7] Where there was contradictory oral evidence as to who took the deceased to hospital, the accused was given benefit of doubt.[8] The whole testimony of the witness, swearing in favour of one party at one time and after some time in favour of the

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1. Substituted by the Information Technology Act, 2000, S. 92, Sch. II (w.e.f. 17-10-2000).
2. *Queen-Empress* v. *Abdullah*, (1885) 7 All 385 FB
3. *Chandrasekera alias Alisandiri* v. *The King*, AIR 1937 A.C. 220, 39 Bom LR 359; For the meaning of 'Evidence', 'Proved' see commentary on Section 3 of this Act.
4. *V.S. Nagaraja Shetty* v. *M.N. Krishna*, 1996 AIHC 2904 (para 8) (Kant).
5. *Dinomoyi Debi* v. *Roy Luchmiput Singh*, (1879) 7 I.A.8.
6. *Kashiram* v. *State*, AIR 1996 MP 246 (para 10).
7. *Meer Usudulah* v. *Mussumat Beeby Imaman*, (1836) 1 MIA 19, 42, 43.
8. *Ravirajan* v. *State*, 1998 Cr LJ 3086 (para 6) (Mad).

other party in the same proceedings, was liable to be rejected.[9] In cases of contradictions in the oral testimony of witnesses, the court has to look to the documentary evidence, in order to see on which side the truth lies.[10]

Before acting upon the evidence of a witness, the credibility of the witness has to be tested, both intrinsically and extrinsically, as perjury is rampant.[11]

When the question is about the service of a notice, proof of its contents, along with proof of its issue and service, has to be established. About the contents of the notice, there cannot be any oral evidence. They can only be proved either by primary evidence or by adducing secondary evidence under Section 61. Under Section 63(5), secondary evidence can be given by oral accounts of the contents of the notice by some person who had himself seen it. So far as the proof of issue and service are concerned, those facts can be proved by oral evidence.[12]

Where goods sent by rail at owners' risk rate, were short delivered, it was held that to show short delivery the consignee has to produce a certificate obtained under Section 74-C(2) of the Railways Act, and the oral statement to that effect is inadmissible.[13] Oral evidence regarding possession was not relied upon where the documentary evidence and the written statement of the Tahsildar showed that the petitioners were never in continuous possession of the land in dispute.[14]

The word 'contents' in Sections 59 and 61, leaves no room for doubt that, when a document is proved in a manner laid down in the Evidence Act, the contents of that document are also proved. To require that the writer of the document should be called to give evidence, is to import in regard to documentary evidence, a rule laid down in Section 60 which applies only to oral evidence. However, when the contents of a document contain some matter which may be hearsay, that matter cannot be said to be "contents of the document"[15]

In a case, the question was whether rexine bearing railway marks seized from the accused was of the railway stores; it was held that the seized rexine was a 'document' within Section 59 of the Evidence Act, and that proof of it by secondary evidence was governed by Sections 64 and 65 of the Act.[16]

The effect of Sections 59, 61, 63(5) and 65 read together, is that the contents of a lost document may be proved by oral evidence, when such evidence is admissible as secondary evidence.[17]

Oral evidence must be direct.

S. 60. Oral evidence must, in all cases whatever, be direct; that is to say—if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided **that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved**

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9. *Vaidhya Bal Krishan* v. *Dist. Magistrate, Jodhpur*, 1998 AIHC 3260 (para 19) (Raj).
10. *Ramdhandas* v. *Ramkishondas*, AIR 1946 PC 178; Regarding appreciation of oral evidence see commentary on Section 3.
11. *Mohanth Bhagawan* v. *G.N. Bhagat*, AIR 1972 SC 814.
12. *Arunkumar* v. *Union of India*, AIR 1964 Pat 338; a case of notice under Section 7. Administration of Evaquee Property Act of 1950.
13. *Union of India* v. *Ramkumar Agarwala*, AIR 1967 Pat 447.
14. *Mohammad Rahim* v. *State of Rajasthan*, 2000 AIHC 1533 (para 7) (Raj).
15. *Bhima Tima Dhotre* v. *The Pioneer Chemical Co.* : AIR 1968 Mah. LJ 879 (1968) 70 Bom. LR 683.
16. *A.K. Yadav* v. *State of Bihar*, AIR 1973 Cr. LJ 756 (Pat).
17. *Fuljari Lal* v. *Ramsarup*, AIR 1953 MB 177.

by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

***Provided also* that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.**

SYNOPSIS

1. *Principle* ... 623
2. *Hearsay* ... 623
3. *General* ... 627
4. *Facts which could be seen* ... 627
5. *Facts which could be heard* ... 627
6. *Facts which could be perceived by any other sense* ... 628
7. *Opinion* ... 628
8. *Opinion expressed in any treatise [Proviso 1]* ... 629
9. *Evidence regarding any material thing [Proviso 2]* ... 630
10. *Circumstantial evidence* ... 630

COMMENTS

1. PRINCIPLE AND SCOPE

This section states that oral evidence must be direct in all cases. What is direct evidence is also indicated by saying that if the evidence refers to a fact which could be seen, it must be the evidence of a witness who says he saw it, and, if the evidence refers to a fact which could be heard, it must be the evidence of a witness who says he heard it. Similarly, in regard to a fact that can be perceived by any other sense or manner, the witness should say that he perceived it. If the evidence refers to an opinion, he should say that he holds that opinion on certain grounds. In the case of opinion of experts in any treatise, it can be proved by production of that treatise. If the evidence refers to existence of any material things, other than a document, the Court, if it thinks fit, may require the production of such material thing for its inspection.

This section, subject to the proviso, excludes opinions given second-hand. The use of the word 'must' in the first clause of the section imposes a duty on the court to exclude all oral evidence that is not 'direct', whether the party against whom it is tendered objects or not.[18]. The word 'direct' is opposed to mediate or derivative or 'hearsay'.

Where the documentary evidence which could have been available was not produced, the plaintiff could not rest his case on oral evidence which was against the record produced by the defendants.[19] Where a plaintiff proved his case through his son who did not produce the general power of attorney executive by his father in his favour, the son's evidence was rejected.[20]

This section is based on the principles of 'Best Evidence'. It is a cardinal rule of evidence that the best available evidence should be brought before the court. Sections 60, 64 and 91 of the Evidence Act are based on this rule.[21]

2. HEARSAY

The term 'hearsay' is used with reference to what is 'done or written', as well as to what is 'spoken', and, in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person. That this species of evidence is not given upon oath, that it cannot be tested by cross-examination, and that, in many cases, it supposes some better testimony which might be adduced in the particular case, are not the sole grounds for its exclusion. Its tendency to protract legal investigations to

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18. *Stoke's Anglo-Indian Codes, Vol. II, 889, f. note 7.*
19. *Banarsi Das* v. *Brig. Maharaja Sukhjit Singh,* AIR 1998 SC 179.
20. *A.M. Hussein* v. *M.M. Manginmani,* 2001 AIHC 3216 (para 8) (Kant).
21. In re : *Vadlamudi Kutumbarao,* AIR 1957 A.P. 595. **See also** *Pradeep Kumar Agarwal* v. *State,* 1995 Cr LJ 76 (para 3) (Ori).

an embarrassing and dangerous length, its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which may be practised with impunity under its cover, combine to support the rule that hearsay evidence is "inadmissible".[22]

The word 'hearsay' is used in various senses. Sometimes it means whatever a person is heard to say; sometimes it means whatever a person declares on information given by some one else; sometimes it is treated as nearly synonymous with 'irrelevant'.[23]

The Law in England is stated by PHIPSON as follows:—(15th Edn. (2000), page 629, para 25-01) : "It was a fundamental rule of evidence at common law that hearsay evidence is inadmissible. The rule has now been virtually abolished for civil proceedings by the Civil Evidence Act, 1995, and even in criminal cases, there are now many statutory exceptions. There remain many situations where hearsay evidence is inadmissible, and many others where, though it is admissible, the question of whether or not hearsay is relevant to determine whether procedural preconditions for its admission have been satisfied or to the weight to be attributed to it. It therefore remains of the first importance to see what evidence is *prima facie* inadmissible on the ground that it infringes the hearsay rule."

(26-06, page 633) : "No single principle can be assigned as having operated to exclude hearsay generally, or from any ascertainable date".

"In more recent times, rejection, even where such evidence was the "best" obtainable has been based on its relative untrustworthiness for judicial purposes, owing to (1) the irresponsibility of the original declarant, whose statements were made neither on oath, nor subject to cross-examination; (2) the depreciation of truth in the process of repetition; and (3) the opportunities for fraud its admission would open; to which are sometimes added (4) the tendency of such evidence to protract legal inquiries; and (5) to encourage the substitution of weaker for stronger proofs. The absence of an oath and of cross-examination, however, appear to be the only essential objections; even the production of the witness being valuable mainly as a means of ensuring cross-examination, and only secondarily as affording an opportunity for observing demeanour. The latter advantage, indeed, is in many cases waived without entailing the rejection of the evidence."[24]

The Select Committee in their Report observed: "This provision, taken in connection with the provisions of relevancy contained in Chap. II will, we hope, set the whole doctrine of hearsay in a perfectly plain light, for their joint effect is that:— (1) the sayings and doings of third persons are, as a rule, irrelevant, so that no proof of them can be admitted; (2) in some excepted cases they are relevant; (3) every act done or spoken which is relevant on any ground must (if proved by oral evidence) be proved by someone who saw it with his own eyes or heard it with his own ears".

Even the domestic tribunals have to exclude hearsay evidence though there is no necessity for them to follow the rules of evidence.[25]

"Derivative or second-hand proofs are not receivable as evidence in cause..... Instead of stating as maxim that the law requires all evidence to be given on oath, we should always say that the law requires all evidence to be given under personal responsibility *i.e.*, every witness must give his testimony, under such circumstances as expose him to all the penalties of falsehood, which may be inflicted by any of the sanctions of truth.....The true principle therefore appears to be this—that all second-hand evidence, whether of the contents of a document or of the language of a third person, which is not connected by responsible testimony with the party against whom it is offered, is to be rejected".[26]

Derivative or second-hand evidence is excluded owing to its infirmity as compared with its original source.

Evidence of a statement made to a witness by a person, who was not called as a witness, may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish what is contained in the statement. It is admissible if such evidence proposed is to establish the *factum* of the

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22. TAYLOR, 12th Edn., S. 570, p. 363.
23. STEPHEN'S *Introduction*, *J.D. Jain* v. *Management, State Bank of India*, AIR 1982 SC 673.
24. PHIPSON 13th Edn., p. 332 (para 16- 06).
25. *State of Haryana* v. *Ramachander*, AIR 1976 Punj 381 (FB).
26. BEST, 12th Edn., ss. 493, 494, pp. 415, 416.

statement and not the truth of the statement as there is a distinction between proving the *factum* of a statement and proving the truth of the statement.[27]

Where a witness told a material fact to another, but himself resiled from it in the witness-box, narration of the other was rejected as hearsay.[28] A married woman was alleged to have committed suicide. Evidence of her father was that her neighbours, who turned hostile, had told him that some sound of quarrel was coming from the house of the deceased on the fateful night. Such evidence was ruled out as hearsay. But the fact that the neighbours gave him some information which prompted him to rush to the police and they did not deny to have given him some information or having met him, such part of evidence would not be hit by the rule of exclusion of hearsay evidence.[29]

Similarly, where the question was whether *J* was driving the bus at a particular time, no eye-witness was produced, and the witnesses were telling the court what others had told them, their evidence was not allowed.[30] A witness was not able to depose as to the *factum* of second marriage or that the defendant was living with another girl as man and wife; the court held that the evidence fell short of the requirements of Section 60.[31] An adoption which was neither ancient, nor there was an eye-witness or documentary account of it, the court said that the proof of adoption failed.[32] The accused was charged with buggery and murder of a 12-year-old boy. His defence was that he had engaged in an act of intercourse with the boy's consent and then left him unharmed, but he was murdered shortly afterwards by another person M, whom he described and also stated that M had been telling about this to others. The evidence was rejected as hearsay. The court of appeal stated the question of law as to whether a confession by a third person could be cited by the accused; without considering the question, their Lordships upheld the exclusion of the evidence.[33]

Statement of witnesses, based on information received from others, is inadmissible.[34] Where the testimony of the witness is entirely hearsay and on some matters, it was hearsay of hearsay, it was held not admissible.[35] The respondent before the Supreme Court deposed to what transpired between one Saxena and the Superintendent Engineer. The Supreme Court omitted this part of respondents evidence from consideration as hearsay.[36]

Regarding a map drawn by a draftsman in regard to a scene of occurrence, the Supreme Court held that the evidence of the draftsman is not hearsay when the eye-witnesses were called and they stated that they showed the different spots to the draftsman, and insofar as the distances were concerned, the draftsman himself had measured them and he swore in the witness-box that the distances shown in the map were correct.[37] A statement by a prosecution witness A was made to another witness B. A was examined earlier and B was examined later. When A was examined, he was not asked about the statement made by him to B, but B was made to say about the statement. A's statement to B was sought to be made use of by the prosecution. The Supreme Court held that, in the absence of an opportunity to A to explain his statement it was inadmissible.[38] Where an informant, who informed the police that certain accused would be following, in a taxi, a truck carrying prohibited liquor and that 'P' was manager of the truck, was not examined, it was held that the evidence of a police officer who spoke to the receipt of information was inadmissible.[39] Where the evidence was that, after the occurrence of dacoity, the police

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27. *J.D. Jain* v. *Management, State Bank of India,* AIR 1982 SC 673; *Delhi Municipality* v. *P.O. Labour Court,* ILR (1972) 2 Del 653; *State of M.P.* v. *Gangabai,* ILR 1969 MP 1014 : AIR 1980 SC 818.
28. *Yasin Gulam Haider* v. *State of Maharashtra,* (1979) 4 SCC 600; *Vijender* v. *State of Delhi,* (1997) 6 SCC 171 : 1997 SCC (Cri) 857.
29. *Balram Prasad Agrawal* v. *State of Bihar,* AIR 1997 SC 1830 : 1997 Cr LJ 1640. The Court **referred to** *J.D. Jain* v. *Management of State Bank of India,* AIR 1982 SC 673 and *Subramaniam* v. *Public Prosecutor,* (1956) 1 WLR 965.
30. *Jaddoo Singh* v. *Malti Devi,* AIR 1983 All 87 (DB).
31. *Laxmi Sahnami* v. *Maheshwar Sahu,* AIR 1985 Ori 11.
32. *Sauney Majhi* v. *Duli Dei,* AIR 1985 Ori 22 (DB).
33. *R* v. *Blastland,* (1985) 2 All ER 1095 noted in All ER Annual Review 1985.
34. 1964 All WR (HC) 481.
35. *Chakrapani* v. *Chandoo,* AIR 1959 MP 84.
36. *Laliteshwar Prasad* v. *Bateshwar Prasad,* (1966) 2 SCJ 241, 247 : AIR 1966 SC 580.
37. *Santa Singh* v. *State of Punjab,* AIR 1956 SC 526.
38. *Awadh Behari Sharma* v. *State of M.P.,* AIR 1956 SC 738.
39. *B. Gangaram* v. *State of Gujarat,* AIR 1983 SC 906 : 1983 Cr LJ 1276; **See also** *Nihal Singh* v. *Rao Birendra Singh,* (1970) 3 SCC 239.

patrol went round and ascertained whether the accused was in a house, it was held to be hearsay.[40] A statement contained in a site map prepared by an investigating officer was held inadmissible.[41] The Supreme Court has also held similarly in *Girish Yadav* v. *State of M.P.*[42] A history sheet maintained by the police in respect of a man's character is hearsay evidence, as it is based on information and is admissible.[43] *A* and *B* were tried separately, in the trial of *A*, a witness deposed that *B* told him that *A* had stabbed the deceased. It was held that as *B* was not tried along with *A*, *B* should have been produced as a witness. In the absence of *B*'s evidence, the statement of the witness was only hearsay.[44]

The statement of a witness that the deceased had told him of a rumour that Rs. 50,000 was offered by one R to kill the deceased, is hearsay against R; it is not also admissible as a dying declaration, as it was not as to the cause of his death or any circumstance which resulted in his death.[45] Hearsay evidence about the loss of a document is not admissible.[46] Where a conductor was charged for misappropriation of amount collected from passengers without issuing tickets, any evidence let in without examining the passengers, would be hearsay evidence.[47] The evidence of A relating what M told N which had been passed on by N to A, is hearsay, and therefore, inadmissible.[48] Where the witnesses, who had no manner of personal knowledge regarding certain matters stated that the deceased had told them about those matters their evidence is only hearsay evidence.[49] Where a boy was taken in adoption soon after his birth, his evidence as to the ceremony of giving and taking is hearsay evidence.[50] Where the question of relationship of one person with another is in issue and the witnesses produced to prove that relationship neither speak from personal knowledge nor disclose their source of knowledge about such relationship, their evidence is merely hearsay and cannot establish the disputed relationship.[51] Where the plaintiff deposed that his deceased mother gave the names in respect of the family pedigree, the statement was held inadmissible as it was hearsay and was also not covered by Section 32(5).[52]

There is no rule against including hearsay in an FIR to the police.[53] The rule of exclusion of hearsay evidence is relaxed in cases where marriage or relationship of one person to another has to be proved.[54]

Regarding family relationship, a witness deposed that he belonged to the village of the plaintiff's maternal grand-father and saw the plaintiff always accompanying his mother to that village; it was held that such evidence was admissible as it was from the personal knowledge of the witness.[55]

Where the question was whether a woman was a prostitute, running a brothel, it was held it need not necessarily be proved by direct evidence, that is, by the testimony of persons who had direct dealing with the woman.[56]

The statement about the date of expiry given by the manufacturer on the drug is at best a statement about a future occurrence and such a statement can never be based on the personal knowledge as required by the Section 60 and hence, is inadmissible under this section.[57] Where by way of a contradiction the hostile witness stated in the cross-examination that he had stated before the police that

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40. *Md. Jamsher Tadvi* v. *State*, AIR 1956 Bom 186.
41. *Satya* v. *State*, AIR 1958 All 746.
42. 1996 Cr LJ 2159 (para 14) (SC) : AIR 1996 SC 3098, **following** Cri Appeal No. 489 of 1985, Dt. 12-3-1996 (SC).
43. *K.K. Das* v. *State*, AIR 1959 Cal 342.
44. In re : *Krishnan*, AIR 1953 Mad 400.
45. *Ramakrishna Roy* v. *State*, AIR 1952 Cal 231.
46. (1961) 2 Guj. LR 610.
47. *Tarolchansingh* v. *State of Punjab*, 1975 Lab IC 986 (Punj); (checking inspector's report) *Jagroop* v. *R*, AIR 1952 All 276; (enforcement squad inspector's evidence,
48. *Amarsingh* v. *Madanmohan Lal*, AIR 1956 Raj 58; *Raghunath Devi* v. *Samad Gashru*, AIR 1952 J&K 29; *State* v. *Tapas Kumar*, 1985 Cr LJ 871.
49. *R Fr Benedict* v. *State of Kerala*, ILR (1967) 2 Ker 21 : 1967 Mad LJ (Cri) 569.
50. *Debi Prasad* v. *Tribeni Devi*, AIR 1970 SC 1286.
51. *Jawal Mal* v. *Achal Das*, (1953) 4 Raj 33.
52. *Kamalambai* v. *Srinivasa Odayar*, (1968) 2 Mad LJ 487.
53. *V.S. Iyer* v. *State of Kerala*, ILR (1967) 1 Ker 640.
54. 1969 All WR (HC) 579.
55. *Gurnek Singh* v. *Balbir Singh*, 1977 Cur. L.J. (Civil) 256 Punj.
56. *Seetharamamma* v. *Sambasiva Rao*, AIR 1964 A.P. 400.
57. *Dueful Laboratory* v. *State of Rajasthan*, 1998 Cr LJ 4534 (para 36) (Raj).

the people of the locality knew that the accused was a hired contract killer, his statement was held to be not a substantive evidence.[58]

3. GENERAL

The expressions 'saw it', 'heard it', and 'perceived it', in clauses 2, 3 and 4 of the section mean 'saw the fact deposed to', 'heard the fact deposed to', and 'perceived the fact deposed to'.

4. FACTS WHICH COULD BE SEEN

Where the question was in respect of a marriage and there was no documentary evidence in support of the alleged marriage, it was held the persons who attended the marriage could give direct evidence.[59] The statement in the inquest report, which is based on the actual observation of the witness at the spot, being direct evidence, is clearly admissible under Section 60.[60] It has been held that the observation report of the Investigating Officer stating that the floor in bus in question appeared to have been washed, should have been proved like any other document.[61] Matters in the inquest report, found by the investigating officer, are not hit by Section 162, Cr. P.C., and are admissible under Sections 60 and 61 of the Act.[62] Where the question was whether the complainant was an officer in the office of the Food Inspector at the time when he made the complaint, evidence of witnesses that he was the officer at that time is relevant and it would be direct evidence. If that evidence is challenged the order of appointment may be produced.[63]

The facts mentioned in a *Panchanama,* which is not a substantive evidence of the facts therein, have to be proved by the testimony on oath of the *Panchas,* who had seen those facts.[64]

In order to prove a statement of an eye-witness given to the police, the evidence of the person who recorded the statement is necessary to identify the person who made the statement.[65]

What the witness actually saw and heard as to what a mob was doing and saying, is admissible as direct evidence to prove the nature of the assembly. But his opinion and impression that the assembly appeared to be unlawful is not admissible.[66]

5. FACTS WHICH COULD BE HEARD

A written information is not evidence. If it is desired to make the matter contained in it evidence, a person who can directly testify to such matter must be produced.[67] A news item, without any further proof of what had actually happened, through witnesses, is of no value. It is at best second-hand secondary evidence. Such news item cannot be said to prove itself, although it may be taken into account with other evidence if the other evidence is forcible.[68] A news report about a statement in a Press Conference held by a Chief Minister, is not admissible but can be proved by filing affidavits of persons who heard the statement.[69] Regarding the report of speeches made, which were published in a newspaper, though mere tendering the newspaper as proof of the speeches is not admissible, still they can be proved by the persons who had made the speeches or the persons in whose presence such speeches are made, or by the reporter of the newspaper who was present when the speeches were made and who had sent the report to be published in the paper.[70]

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58. *Bullu Das* v. *State of Bihar,* (1998) 8 SCC 130.
59. *Ma Mi* v. *Kallander Ammal,* AIR 1927 PC 15.
60. *Rameshwar Dayal* v. *State of U.P.,* AIR 1978 SC 1558.
61. *K. Mallikarjuna* v. *State of A.P.,* 1995 Cr LJ 3100 (para 52) (AP).
62. *Rameshwar Patra* v. *State,* (1979) 47 Cut LT 171 (DB).
63. *State of Kerala* v. *U.P. Evadeen,* AIR 1971 Ker 193 (FB).
64. *Kanbi Bhavan* v. *Ismail Mamad,* AIR 1955 Sau 32.
65. *Md. Ishaq Madari* v. *Emperor,* AIR 1942 Lah 59.
66. *Jogi Raut* v. *Emperor,* AIR 1928 Pat 98; **see also** *Ganapathi Aiyar* v. *Sakarayappa Mudliar,* AIR 1929 Mad 187.
67. *Mi Huak* v. *King Emperor,* (1907) 4 LBR 121; *Lal Singh* v. *The Crown,* ILR (1924) 5 Lah 396.
68. *S.N. Balakrishna* v. *Fernandez,* AIR 1969 SC 1201; *Priya Gupta* v. *General Manager, N.E. Railways,* AIR 1959 All 643; *Hajarilal* v. *State,* AIR 1953 HP 41; (Newspaper report is not one of the documents referred to in Section 78(2) by which proceedings of the Legislature may be proved) *Harbhajan Singh* v. *State of Punjab,* AIR 1961 Punj 215.
69. *Curcharam Panchayat* v. *Lt. Governor,* AIR 1972 Goa 1.
70. *Khilumal Topandas* v. *Arjundas Tulasidas,* AIR 1959 Raj 280.

In a case of murder, the witness who was present at the place of occurrence stated that he saw the wife of the accused running out of the house and heard her saying that the accused had killed the children and was also going to kill her; he further stated that he was told by the wife of the accused's brother that the accused was killing the children. It was held that the latter part of the statement was not hearsay and was admissible as relevant fact u/Section 60.[71]

A witness proving the information must state in the court what the information was, and that a mere formal proof of the memo of information, by proving the signatures of the police officers who recorded the information would not be sufficient.[72] Where A, in his deposition, refers to a talk he had with B (the accused), who said he had a scuffle or fight with the deceased C, A who heard it can speak about it, and that would be direct oral evidence in respect of that fact. If A then spoke to D, who says that in the court, that would be hearsay, and would not fall under Section 60 of the Evidence Act. Such evidence of D can however become admissible under Section 157, to corroborate the testimony of A, but this can arise only if A's evidence of such a fact is to be corroborated.[73] Where a witness, who is a relative and neighbour of the accused, stated that he heard the daughter of the accused shouting that her father was assaulting her mother, it was held that his evidence was direct evidence.[74]

Where the question was 'where the ancestor of the plaintiff was born', and the ancestor died half a century before the suit, and no direct evidence was available on that question, it was held that the statement of the plaintiff that her mother had told her that the ancestor was born in Coorg was relevant and was not entirely inadmissible as hearsay.[75]

Where the witnesses had deposed that in their presence the parties had negotiated an oral agreement, it would be too hypertechnical to contend that the witnesses should not only state that in their presence negotiation for oral agreement was held but they had heard the talks between the parties.[76]

6. FACTS WHICH COULD BE PERCEIVED BY ANY OTHER SENSE

The state of mind of a person may be proved directly by the person himself by giving evidence of his own mental feelings or indirectly by other witnesses speaking to the outward expression of the condition of the person at the time (*res gestae*), by circumstantial evidence of facts which lead to an inference as to the person's state of mind.

If a person watching the conduct of the members of a family, though he is not a member of that family, gives evidence, he can be treated as a person with special means of knowledge and such evidence is admissible under Section 60.[77]

7. OPINION

Evidence regarding expert opinion must be given orally, and a mere report or certificate given by an expert cannot be evidence unless a statute so provides. If a party does not object to its admission, the party can be said to have waived proof of it and not its relevance.[78]

Where the report of a doctor who examined a girl, about her age was not produced but a reference to it was made in an affidavit of another person; it was held the affidavit was not admissible and the opinion given has to be proved by the doctor.[79] Where the post-mortem report was produced by the record clerk

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71. *Muni Lal Gupta* v. *State*, 1988 Cr LJ 627 (Del).
72. *Kammu* v. *State*, ILR (1964) 14 Raj 715; In re : *Seetha Rami Reddi*, AIR 1939 Mad 766; *Md. Salabat* v. *Emperor*, AIR 1937 Lah 475.
73. *Kahbi Vaghji* v. *State of Gujarat*, AIR 1968 Guj 11.
74. *Tulsiram* v. *State of Maharashtra*, 1984 Cr LJ 209 (Bom-DB).
75. *Alicia* v. *Percival Felix Pinto*, (1967) 2 Mys. L.J. 210.
76. *Achutananda Baidya* v. *Prafullya Kumar Gayen*, AIR 1997 SC 2077.
77. *Ganesh Naraian Singh* v. *Jadunandan Singh*, AIR 1969 Pat 82; *Amarsingh* v. *Chhaju Singh*, AIR 1973 Punj 213 (DB)
78. *B. Poornaish* v. *Union of India*, AIR 1967 AP 338.
79. *Md. Ikram Hussain* v. *State of U.P.*, AIR 1964 SC 1625; *State of Mysore* v. *Kantappa*, (1964) 1 Mys LJ 393; (post mortem certificate given by the doctor) *State* v. *Sadhu Ram*, AIR 1963 Punj 142; (Report of chemical examiner which was found to be vague).

of the hospital and the doctor who conducted the post-mortem was not examined, the said report was not admissible.[80]

The conduct or outer behaviour under Section 50, must be proved in the manner laid down in Section 60. The portion of Section 60 which provides that the person who holds an opinion must be called to prove his opinion does not necessarily delimit the scope of Section 50. Conduct, as an external perceptible fact, may be proved either by the testimony of the person himself, whose opinion is evidence under Section 50, or by some other person acquainted with the facts which express such opinion.[81]

Mere production of medical report is inadmissible as evidence, to prove the illness of a witness.[82] A report of the Probation Officer as to the previous conviction of an accused cannot be admitted without examining the concerned officer.[83]

Opinion evidence as to handwriting is hearsay and becomes relevant only if the condition laid down in Section 47 of the Evidence Act is first proved.[84]

Where a witness stated that a signature seemed to have been erased, it was held that, as the witness was not an expert, his opinion evidence cannot be allowed.[85]

Opinion expressed by conduct with regard to the determination of relationship is admissible.[86]

Mere opinion of a witness as to relationship is not admissible.[87] General reputation, without proof of conduct, is not admissible as proof of relationship.[88] A school teacher who admitted a boy into the school and was giving lessons and marking attendance, cannot express any opinion on the boy's paternity, and such evidence is not direct.[89]

8. OPINION EXPRESSED IN ANY TREATISE [PROVISO 1]

The first proviso is a departure from the rule of English Law, under which medical and other treatises are not admissible, whether the author is alive or not. Any scientific text-book commonly offered for sale is admissible in evidence under the circumstances mentioned in the proviso. Section 45 refers to the evidence of expert witnesses who may be examined in court, Section 38 refers to books on law.

The Supreme Court, dealing with the question of when the quickening of a child in the womb is perceptible to the mother, adopted the opinion expressed in a treatise, "obstetrics and gynaecology" by Dugald Baird and 'Manual of Obstretrics' by Edan and Holland. The Supreme Court preferred the opinion therein to the statements contained in Modi's Medical Jurisprudence.[90]

In India, even if the expert is not examined in court, the court is entitled to consider and act upon the opinions of experts, contained in treatises.[91]

Opinion of a living authority as to usages and tenets in respect of a family or a body of men, contained in a treatise, is not admissible.[92]

"History of Hydraulic Stowing in India" by N. BARRACLOUGH was held to be a treatise by an expert and as a document of reference under Section 57, even though it may not be admissible under

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80. *Vijender* v. *State of Delhi*, (1997) 6 SCC 171 : 1997 SCC (Cri) 857.
81. *Dologobinda* v. *Nimai Charan Misra*, AIR 1959 SC 914; *Shankarlal* v. *Vijayshanker*, AIR 1968 All 58.
82. *Govindrarajulu* v. *Lakshmi Raj Ammal*, AIR 1961 Mad. 158; *Srischandra Nandy* v. *Annapurna*, AIR 1950 Cal 173; *Shaukat Hussain* v. *Sheodayal*, AIR 1958 MP 350; (report of health officer).
83. *Pedru* v. *State of Kerala*, 1958 Cr. LJ 175 (Ker).
84. *Rahim Khan* v. *Khurshid Ahmed*, AIR 1975 SC 290.
85. *Rayma Jusab* v. *State of Gujarat*, (1965) 2 Cr. LJ 448.
86. *Bishwanath Goasain* v. *Dulhim Lalmuni*, AIR 1968 Pat 481; *Fukalia* v. *Mathuram*, AIR 1960 Pat 480.
87. *Amarsingh* v. *Chhaju Singh*, AIR 1973 Punj 213 (FB); *Hadibandhu Malik* v. *Chandra Sekhar Behera*, AIR 1973 Ori 141.
88. *Md. Ayub Khan* v. *Abdus Samad Khan*, 1969 B.L.J.R. 932.
89. *Shanker Lal* v. *Vijayshanker*, AIR 1968 All 58.
90. *Mahendra Manilal Nanavati* v. *Sushila Mahendra Nanavathi*, AIR 1965 SC 364.
91. *John Howe* v. *Charlotte Howe*, AIR 1916 Mad 338 (FB).
92. *Kandan* v. *Jitan*, AIR 1973 Pat 206.

Section 60, first proviso, as not satisfying the tests of being offered for sale, and the author being dead or unavailable.[1]

9. EVIDENCE REGARDING ANY MATERIAL THING [PROVISO 2]

This proviso enables the court to require the production of a material thing for its inspection. Under Section 165 the court has power to direct the production of any document or thing, in order to discover or to obtain proper proof of relevant facts.

Private trade marks exhibited in a case are material things within the meaning of the section.[2]

Where, according to medical witness, the injuries on the victim might have been caused by a flexible rod, and no such rod was recovered, but the prosecutor showed some flexible rod to the court, it was held that there was nothing to show that the rod shown by the public prosecutor, was similar to that alleged to have been used by the accused and that in the absence of production of the material thing, it was not proper to accept the medical evidence.[3]

10. CIRCUMSTANTIAL EVIDENCE

Section 60 does not exclude circumstantial evidence of a thing (fact) which would be seen, heard and felt.[4]

As against direct evidence postulated by Sections 60, 62 and 63 of the Act, there is another type of evidence known as circumstantial evidence which would also be legal evidence, but the concept of what is known as hearsay evidence, is entirely different. Though hearsay evidence is inadmissible to prove a fact, it does not necessarily preclude evidence as to a statement, having been made upon which certain action was taken or certain results followed.[5]

Hearsay evidence which ought to have been rejected as irrelevant, does not become admissible as against a party merely because his counsel fails to take objection when the evidence is tendered.[6] It is the duty of the court to disallow hearsay evidence, even if it is not objected to by the parties or their advocates.[7] A judge cannot admit inadmissible evidence though he feels that it would throw light upon the issue.[8]

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1. *Nimcha Coal Co. Ltd.* v. *Srinivasa Goenka*, ILR (1968) 2 Cal 402.
2. *T. Nooroodeen Sahib* v. *Charles Sowden*, 15 M.L.J. 45.
3. *Amalesh Chandra* v. *State*, AIR 1952 Cal 481.
4. *Makbul Ahmed* v. *Abdul Rahman*, AIR 1952 Cal 494.
5. *State Bank of India* v. *J.D. Jain*, 1979 Lab. IC 1041.
6. *Lim Yam Hong* v. *Lam Choon & Co.*, AIR 1928 PC 127 : (1927) 30 Bom LR 757 (PC)
7. *Munishwar Datt* v. *Indra Kumari*, AIR 1963 Punj 449; *Rayma Jusab* v. *State of Gujarat*, (1965) 2 CrLJ 448 (Guj)
8. *Mahani Dasi* v. *Pareshnath Thakur*, AIR 1954 Ori 198.

CHAPTER V

OF DOCUMENTARY EVIDENCE

Proof of contents of documents.

S. 61. The contents of documents may be proved either by primary or by secondary evidence.

COMMENTS

1. PRINCIPLE AND SCOPE

Documentary evidence means all documents produced for the inspection of the Court (Section 3). Documents are of two kinds: public and private. Section 74 gives a list of documents which are regarded as public documents. All other documents are private (Section 75). The production of documents in courts is regulated by the Civil Procedure Code and the Criminal Procedure Code.

The contents of documents must be proved either by the production of the document which is called primary evidence, or by copies or oral accounts of the contents, which are called secondary evidence. Where there is documentary evidence, oral evidence is not entitled to any weight.[1] The section lays down that the contents of documents may be proved either by primary or secondary evidence; this means that there is no other method allowed by law for proving the contents of documents.[2] The documents should be duly proved by the person who issued them and if the documents virtually go on record by consent undisputed during trial, the defendent would be precluded from disputing their contents at the appellate stage.[3]

Primary evidence is evidence which is required to be given by law first. Secondary evidence is evidence which may be given in the absence of the better evidence which the law requires to be given first, when a proper explanation is given of the absence of that better record. Primary evidence is defined in Section 62 and secondary evidence, in Section 63.

Where the landlord did not produce the rent roll maintained by him it was held that the tenant could produce the order sanctioning mutation and the payment of rent to the landlord as proof of mutation in the rent roll.[4]

The proceedings under the Mysore (Personal and Miscellaneous) *Inams* Abolition Act are not judicial, and so the production of the documents in such proceedings is not strictly governed by the provisions of the Indian Evidence Act.[5]

When the prosecution wants to invoke a particular notification to prove that a private forest in question has been constituted into a protected one, it should produce the gazette in which notification has been published or its certified copies, as it would be the primary evidence in the case.[6] The affidavit of a candidate cannot be said to be a sufficient proof of his correct age.[7] Photocopy is not admissible.[8] Unsigned telegram, unless confirmed by a signed application, representation or an affidavit, cannot be considered.[9] Where the names of two accused persons and use of swords and soda water bottles, not mentioned in the Emergency Police Report, were subsequently interpolated in the F.I.R. as a result of

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1. *Murarka Properties (P) Ltd.* v. *Beharilal Murarka,* AIR 1978 SC 360.
2. *Ram Prasad* v. *Raghunandan Prasad,* ILR (1885) 7 All 738, 743.
3. *Karnataka Power Corporation Ltd.* v. *M/s. Shaik Basha Transport & Civil Contractor,* 2000 AIHC 4428 (para 6) (Kant).
4. *Chandranath* v. *Tusharika Devi,* AIR 1958 SC 521.
5. *State of Mysore* v. *P.T. Muniswamy Gourda,* AIR 1971 SC 1363.
6. *Jaigopal Singh* v. *Divisional Forest Officer,* AIR 1953 Pat 310.
7. *Kripa Shankar* v. *Gurudas,* AIR 1995 SC 2152 (para 5).
8. *Ramesh Verma* v. *Lajesh Saxena,* AIR 1998 MP 46 (para 12).
9. *District Magistrate* v. *G. Jothisankar,* 1993 Cr LJ 3677 (paras 9 and 10) (SC) : AIR 1993 SC 2633.

afterthought, it was held to be most fatal to the prosecution case and it was likely that the informant had not seen the incident.[10]

Mere making of a document as an exhibit does not dispense with the proof of its contents.[11] It must be proved in accordance with law.[12] However the mode of proof being a question of procedure may be waived by the party against whom the document is sought to be proved by giving consent, meaning thereby that the said party waives his right to get the document formally proved but by that way the truth of the contents of the document cannot be said to have been proved, if the facts stated therein are in issue.[13] In a case of non-production of an attesting witness, to prove the contents of the document, on the ground that he was a leper, it was held that the ground was not proper as he could be examined on commission.[14] Executant of a document must be produced or his affidavit filed.[15]

In regard to the notice under Section 7 of the Administration of Evacuee Property Act of 1950, it was held that proof of its contents, along with proof of its issue and service, has to be established.[16]

Proof of the contents of a document by merely proving the signature or handwriting of the author thereof, is not permissible.[17]

Where the report of a doctor regarding the age of a girl was not before the court it was held that an affidavit of a third person referring to the report was not admissible in proof of the contents of the document.[18] The adoption deed showing adoption of a man who was over age and that too unregistered, was held to be not admissible in evidence to prove adoption.[19]

It is well-settled that the documents do not by themselves prove the contents therein. Proof of the contents has to be given by cogent evidence.[20] Where the copy of deposition of a person recorded in another criminal case was relied on by the Court to disbelieve the presence of the eye-witness at the time of occurrence in the instant case but the person concerned was not examined, it was held that the copy of deposition was wrongly relied on.[21] Where the document sought to be relied upon by the defendant, was neither signed by the scribe nor confronted to the plaintiff for admission, it could not be admitted in evidence.[22] Balance sheets relating to accounts do not prove themselves, and the facts mentioned therein have to be proved by evidence, after giving an opportunity to the opposite party to contest the correctness of such evidence by cross-examination.[23] When an attestor and scribe were not examined, it was held that such non-examination cannot by itself lead to an inference that the document was not executed when the executants admit its execution.[24] Mere consent of a party to exhibit the document does not amount to an admission of its contents. A party has a right by cross-examination to show that the document is not genuine.[25] The correctness of the contents of a letter cannot, and does not, stand proved even if it is admitted that letters have passed between the parties.[26] Where in a case involving death by electrocution, the report of the Electrical Inspector was based on the information given by another person but neither the original report was produced nor the informant was examined, no reliance could be placed on the version of that person or the report.[27]

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10. *D.D. Suvarna* v. *State of Maharashtra*, 1994 Cr LJ 3602 (paras 17 and 18) (Bom).
11. *Sait Taraji Khimchand* v. *Satyam*, AIR 1971 SC 1865.
12. *John Mithalal Desai* v. *Dineshbhai K. Vora*, 1998 AIHC 1894 (para 15) (Guj).
13. *John Mithalal Desai* v. *Dineshbhai K. Vora*, 1998 AIHC 1894 (para 13) (Guj).
14. *Ramakrishna Panda* v. *Arjuno Padhano*, AIR 1963 Orissa 29.
15. *Ram Jawai* v. *Shakuntala Devi*, AIR 1993 Del 330 (para 19).
16. *Arunkumar* v. *Union of India*, AIR 1964 Pat 338.
17. *M. Yusuf* v. *D.* AIR 1968 Bom 112 but subsequently same High Court held **contrary** to it in *Cynthia Martin* v. *Prembehari Makhanlal Yadu*, 1998 AIHC 966 (para 13) (Bom).
18. *Md Ikram Hussa* v. *State of U.P.*, AIR 1964 SC 1625.
19. *Rakhi* v. *1st Addl District Judge, Firozabad*, AIR 2000 All 166 (para 9) : 2000 AIHC 3482.
20. *Rajwatidevi* v. *Joint Director Consolidation, Government of Bihar*, AIR 1989 Pat 66.
21. *Pammi* v. *Government of Madhya Pradesh*, AIR 1998 SC 1185 : 1998 Cr LJ 1617 (para 17) (SC).
22. *Debendro* v. *Prabhakar Sahu*, 1998 AIHC 4838 (para 5) (Ori).
23. *Management of Postal R.M.S. Co-op. Society* v. *Workmen*, ILR (1963) 2 Punj 28 **relying on**, *Petlad Turkey Reddye Works* v. *Dyer and Chemicals Workers Union*, AIR 1960 SC 1006.
24. *Surender Reddy* v. *Govt. of A.P.*, (1979) 1 An WR 416.
25. *Sanjay Cotton Co.* v. *Omprakash*, AIR 1973 Bom 40.
26. *Hoare Miller & Co. Ltd.* v. *Union of India*, (1961) 65 CWN 1206.
27. *Asa Ram* v. *M.C.D.*, AIR 1995 Del 164 (para 10).

Factum of mortgage or passing of consideration is not 'contents of a document' within the meaning of Section 61; proving of the factum of mortgage is not the same thing as proving the terms of the mortgage; nor is proving the consideration for the mortgage, the same thing as proving the terms of the mortgage, both aspects have to be proved by evidence.[28] When the document was produced from proper custody, it was held that the document was properly proved.[29] Objection to the mode of proof of contents of the document must be raised before the document is admitted by court and marked as an exhibit on record.[30] In compensation proceedings under the Rajasthan Land Acquisition Act, if no objection was taken by the Government side when certified copies of some sale deeds were tendered, objection cannot be taken in the appellate stage. When the certified copies were issued under Section 57 of the Registration Act, it was held they were admissible under Section 51A of the Rajasthan Act.[31]

A document, evidencing partition, giving no description of the property falling to the shares of the respective parties, is not a partition deed, hence it was admissible in evidence without registration to show the severance of the joint status of the parties.[32] Where an agreement to purchase certain property was subsequently abandoned and a suit was filed for the recovery of the money advanced, it was held that though the document was unregistered, it was admissible as evidence.[33]

Where the counsel of a party admitted the document to be marked as exhibit, it was held that the contents of the document should be held to be admitted as correct.[34]

2. SHAM DOCUMENT

Where in consequence of a deed of agreement between the parties, the respondent conducted a business of agency in the appellant's shop and received commission, the parties maintained accounts and filed returns before various public or statutory authorities which revealed the nature of business conducted, the said agreement could not be said to be a sham document.[35]

3. DOCUMENT—INTERPRETATION OR CONSTRUCTION OF

In interpretation or construction of a document, inescapably extrinsic evidence and the surrounding circumstances from totality of the case are to be considered.[36]

Where it was found that the real intention gathered from the words of endorsement on the reverse of the promissory notes was only 'endorsement' and not 'assignment', the promissory note would not require any stamp duty for the purpose of admitting them in evidence.[37] A partition deed divided the joint family properly equally between the father and the three sons. The first portion of the deed clearly stated that a sharer had the right of alienation including gift, exchange etc. and the second portion stated that the share of the father was to be divided equally among his sons after his death. It was held that the later portion could not be read to cancel the effect of the first portion as to the right of the sharer to alienate his share and that only life estate was created in favour of the father. The gift deed executed by the father was held to be valid.[38]

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28. *Panchia* v. *Harnath*, ILR (1958) 8 Raj 459, **see also** *Banga Chandra* v. *Jagat Kishore*, AIR 1916 PC 110 (recitals as to legal necessity).
29. *Mohanlal* v. *Kumari Babbi*, (1967) 69 Punj LR 578.
30. *Sri Chand Gupta* v. *Madanlal*, 1972 All LJ 635; *P.C. Purushothama* v. *Perumal*, AIR 1972 SC 608; Gopaldas v. Thakurji, AIR 1943 PC 83.
31. *State of Rajasthan* v. *Jeo Raj*, AIR 1990 Raj 90. **See also** *Tata Chemicals Limited, Bombay* v. *Sadhu Singh*, AIR 1994 All 66 (para 9).
32. *Purnabashi Mishra* v. *Raj Kumari Mishra*, AIR 1995 Ori 284 (para 8).
33. *R. Vishwanatham Setty* v. *T. Lakshminarasamma*, 2000 AIHC 4982 (paras 5 and 6) (AP).
34. *A. Rahiman* v. *M. Wabber*, (1973) 1 Mys LJ 376 : 197 Cr LJ 1483. **Contra** : truth or correctness of contents to be ascertained from evidence, *Life Insurance Corporation of India* v. *Narmada Agarwalla*, AIR 1993 Ori 103 (para 11).
35. *Liberty Sales Services* v. *M/s. Jakki Mull and Sons*, 1997 AIHC 2368 (paras 11 and 13) (Del).
36. *Reddi Demudu* v. *Kannuru Demudamma*, 1996 AIHC 4983 (para 9) (AP).
37. *Mulji Mehta & Sons* v. *C. Mohan Krishna*, AIR 1997 AP 153.
38. *Jaggavarapu Krishna Reddy* v. *Jaggavarapu Chittemma*, 1998 AIHC 3834 (paras 5, 8-10) (AP).

Primary evidence.

S. 62. Primary evidence means the document itself produced for the inspection of the Court.

***Explanation 1.*—Where a document is executed in several parts, each part is primary evidence of the document.**

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

***Explanation 2.*—Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.**

ILLUSTRATION

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

SYNOPSIS

1. *Principle* ... 634
2. *Executed in several parts [Explanation 1]* ... 634
3. *Counterparts* ... 635
4. *Carbon copy [Explanation 2]* ... 635
5. *Tape records* ... 636
6. *Photograph* ... 636
7. *Printed copies* ... 636

COMMENTS

1. PRINCIPLE

This section defines primary evidence to mean the document itself produced for the inspection of the court. Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart, each counterpart is primary evidence, as against the party executing it. Where a number of documents are made by printing, lithography, or photography, each is primary evidence of the contents of the rest. Where they are copies of a common original, they are not primary evidence of the contents of the original.

Primary evidence is the evidence which the law requires to be given first.

Section 91 of the Act states that, when the terms of the contract or a grant or any other disposition of property, have been reduced to the form of a document and, in all cases where any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of those terms except the document itself, or secondary evidence, if it is allowed by law. Explanation (2) of Section 91 says that, where there are more originals than one, one original needs to be proved. Under Section 62 where a document is executed in counterpart, each counterpart is primary evidence as against the parties executing it. Explanation (2) says that if the documents are made by one uniform process as in the case of printing, lithography or photography each is primary evidence of the contents of the rest, but copies of a common original are not primary evidence of the contents of the original.

2. EXECUTED IN SEVERAL PARTS [EXPLANATION 1]

Sometimes each party to a transaction wishes, for the sake of convenience, to have a complete document in his own possession. To effect this, the document is written out as many times over as there are parties, and each document is executed, *i.e.*, signed or sealed, as the case may be, by all the parties. Any one of them may be produced as primary evidence of the contents of the documents.

An award, partitioning certain joint family property among three brothers, was prepared in quadruplicate, and all the four documents were scribed by a professional scribe and signed by all the

arbitrators, every page having been initiated. The main document was written on a stamp paper of higher denomination and it was left with one of the arbitrators; the other three copies were scribed on stamp paper of lower denomination and each of the three was given one copy. It was held that as all the documents contained the signatures of the scribe and the arbitrators, each one was original and not a mere copy, subject to the rule of secondary evidence.[1]

3. COUNTERPARTS

A document is executed in counterpart when there are two parties to the transaction. Thus, if the transaction is a contract between A and B, the document is copied out twice, and A alone signs one document, whilst B alone signs the other. A then hands to B the document signed by himself, and B hands to A the document signed by himself. Thus, as against A, the document signed by A is primary evidence, whilst, as against B, the document signed by B is primary evidence. If there are two contemporary writings, the counterparts of each other, one of which is delivered to the opposite party, and the other preserved, as they may both be considered as originals, and they have equal claims to authenticity, the one which is preserved may be received in evidence, without notice to produce the one which was delivered.[2] Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it. (Section 63 *Cl.* 4).

When a deed is prepared in two or more identical forms, the part signed by the grantor is the original and the other parts are 'counterparts'.

A copy is defined as a document which is an accurate and full representation of the original.[3]

Where there was dissolution of partnership by an agreement of the partners, and the copy of the original signed by every one of the partners was handed over to each partner, it was held that the copy will not come under any of the categories of Section 63, and it is a counterpart within the explanation (1) of Section 62.[4]

In the case of agreements executed in duplicate, it is only when each of the instruments is duly signed by the party to be bound by it and delivered to the other, that the documents are termed as counterparts. It is only then that each is evidence against the party executing it, and those in privity with the executing party, and each is secondary evidence of the other.[5] Where the disputed document was purported to have been executed by the plaintiff but did not bear his signature nor it was delivered to the defendants, it could not be termed a counterpart.[6] Where there was no evidence to show that the original partition deed was with the borrower, the bank was held to be justified in accepting its duplicate from him as a collateral security for loan.[7]

Where there was a claim for exemption in respect of sales to registered dealers, it was held that exemption cannot be granted without production of declaration forms, and the counterfoil of declaration forms cannot be regarded as counterparts within the meaning of Section 62 of the Evidence Act.[8]

4. CARBON COPY [EXPLANATION 2]

Where a carbon copy was made by one uniform process, of a certificate of a doctor, given in discharge of his professional duty, and his attendence could not be procured without considerable delay and expense, the copy was held admissible as primary evidence within Exp. (2) of Section 62.[9]

Two wills in identical language were prepared by the process of typing, in which the second copy was obtained by carbon impression. Both were duly executed and attested. Both were held to be original,

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1. *Kruttivasa* v. *Malati*, AIR 1959 Ori 113.
2. *Philipson* v. *Chase*, (1899) 2 Camp 110.
3. *Jayarama* v. *Ramanatha*, 1976 Mad 147.
4. *Jayaram Iyer* v. *Ramanatha Iyer*, AIR 1976 Mad 147.
5. *Katihar Jute Mills Ltd.* v. *Calcutta Match Works Ltd.*, AIR 1958 Pat 133.
6. *Shiv Kant Pandey* v. *Ishwari Singh*, AIR 1997 Raj 155.
7. *State Bank of Travancore* v. *Velayudhan Pillai Bhaskaran Nair*, AIR 1996 Ker 32 (paras 8, 9, 12 and 13).
8. *Kedarnath Jute Mfg. Co. Ltd.* v. *Commercial Tax Officer*, (1962) 13 Sales Tax cases 138.
9. *Prithi Chand* v. *State of H.P.*, AIR 1989 SC 702.

and one was not considered a copy of the other. The fact that the testator inserted a remark on one of them "true copy" would not alter their character.[10]

Carbon copies of the permits written in hand were issued on behalf of the Central Government Officer, as a general practice, to the licencees for transport of tobacco; they also showed evidence of payments of duty, and there were counter-foils. It was held that the carbon copy was admissible as primary evidence of what it contained for the purpose of comparison of handwriting.[11]

Where a carbon copy of a search list, with certain ink writings on it, was produced, it was held that a mere glance at the document would show that, even apart from the ink writings, the whole of it could not have been made by one uniform process and so it would not satisfy the requirement of Section 62 and, therefore, not admissible.[12]

5. TAPE RECORDS

A tape record is primary and direct evidence of the matter recorded.[13]

See also commentary under head 'Tape Recording' in Section 3 and Section 7.

6. PHOTOGRAPH

When reliance is placed on a photograph, it would be primary evidence.[14] The person taking photographs and developing them has to come to the witness-box and depose about both the facts.[15] When a photographer deposed about his taking the photograph and developing it into a negative by himself, it was held that the negative becomes admissible in evidence, but in the case of an enlarged print, the position is different for no print on enlargment can be admitted in evidence without its negative being produced and proved by the photographer.[16]

7. PRINTED COPIES

Where the plaintiff sent printed notices and the press owner was examined, it was held that the notice was proved.[17]

Secondary evidence.

S. 63. Secondary evidence means and includes—

(1) certified copies given under the provisions hereinafter contained;

(2) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it.

ILLUSTRATIONS

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy, compared with a copy of a letter, made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

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10. *Kamala Rajamanikkham* v. *Sushila Thakur Dass*, AIR 1983 All 90.
11. *Sriramulu Naidu* v. *State*, (1963) 2 Cr LJ 546 : (1962) 1 ALT 57.
12. *Makhan Lal* v. *State*, AIR 1958 Cal 517.
13. *Rama Reddy* v. *V.V. Giri*, AIR 1971 SC 1162.
14. *P.L. Shah* v. *State of Gujarat*, 1982 Cr LJ 763 (Guj-DB).
15. *Ghewarlal* v. *Munni Lal Goyal*, 1997 AIHC 3413 (para 7) (Raj), **relying on** *Heera Devi* v. *Bhabha Kantidas*, AIR 1977 Gau 31.
16. *Laxman* v. *Ganpati Ansuya Bai*, AIR 1976 Bom 264, **relied on** in *Ghewarlal* v. *Munni Lal Goyal*, 1997 AIHC 3413 (para 7) (Raj).
17. *Chhaganram* v. *Naginlal*, ILR 1966 Guj 900.

(c) A copy transcribed from a copy, but afterwards compared with the original is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine copy of the original, is secondary evidence of the original.

SYNOPSIS

1. *General* ... 637
2. *Certified Copies [Clause (1)]* ... 638
3. *Copies prepared by mechanical process [Clause (2)]* ... 640
4. *Counter Foils* ... 640
5. *Photographs* ... 640
6. *Carbon copy* ... 641
7. *Tape records* ... 642
8. *Copies made from or compared with original [Clause (3)]* ... 643
   Copy ... 643
9. *Copies of copies* ... 645
10. *Counterparts [Clause (4)]* ... 645
11. *Oral accounts [Clause (5)]* ... 646
12. *Registration Copy* ... 647

COMMENTS

1. GENERAL

This section describes what constitutes 'secondary evidence'. 'Secondary evidence' is evidence which may be given under certain circumstances, in the absence of better evidence which the law requires to be given first.

Secondary evidence means and includes:—

(1) Certified copies;

(2) Copies made from the original by mechanical processes, and copies compared with such copies;

(3) Copies made from or compared with the original;

(4) Counterparts of documents, as against the parties who did not execute them;

(5) Oral accounts of the contents of a document by a person who has seen it.

Clauses 1 to 3 deal with copies of documents.

This section is exhaustive in regard to the kinds of secondary evidence admissible under the Act. The expression "means and includes in Section 63" makes it clear that the five *clauses* referring to secondary evidence are exhaustive Obviously, drafts of the award, from which the award is faired out do not come under any of the *clauses* (1), (2), (4) & (5); they do not come under *clause* (3) of the section. However the drafts could be admissible as secondary evidence, if there be evidence to show that they were compared with the original A piece of written paper cannot be admitted as secondary evidence of the contents of the document simply by its being called a draft.[18]

In a case where the original lease deed was filed by the party in a certain office, it was held that secondary evidence can be given in two ways, *viz.*, oral evidence of persons who were present at the time when the lease was granted, or the production of the copy of the original document, duly certified by the officer; but a copy of the original kept by the party cannot be given as a secondary evidence.[19] It was held that any recitation in the judgement about the pleadings is no evidence of what the pleading contains and cannot be treated as secondary evidence.[20] Similarly, a statement of a witness abstracted from a judgement is not secondary evidence.[21] An abstract translation which is a summary of a document or even a complete translation would not come within the meaning of this section.[22]

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18. *Girdhar Prasad* v. *Ambika Prasad Thakur*, AIR 1969 Pat 218.
19. ILR 1951 Hyd 74.
20. *Surya Narayan* v. *Ratanlal*, AIR 1952 Hyd. 34.
21. *Saradamba* v. *Pattabhiramayaih*, AIR 1931 Mad 207.
22. *Md. Sulaeman* v. *Hariram*, ILR (1940) 21 Lah 363.

A news item, without any further proof through any witness of what had actually happened is of no value. It is at best a second-hand secondary evidence.[23] The news item published in the newspaper without bringing on record the name of the correspondent sending such news or information on the basis of which it was published, cannot be relied upon.[24] Newspapers are not secondary evidence of the facts mentioned by them, unless the correspondent who made the report is examined.[25] Newspaper reports, advertisements or messages are not themselves evidence of the contents thereof and are not admissible unless original manuscript is produced and proved by the concerned person.[26] News items published in daily newspapers cannot *ex facie* be taken to be of such authenticity which may warrant initiation of an action in the proceedings under Article 226 of the Constitution.[27]

Where the terms of a document were sought to be proved by a judgment containing a translation thereof in a suit which was not between the same parties or their representatives in interest, it was held that neither the translation of the document nor the statement in the judgment was secondary evidence of the contents of the document.[28]

Where the existence of the document was proved from the facts mentioned in the plaint and the reply of the defendants, permission to lead secondary evidence on the ground of loss of the document was held to be proper.[29] Where the document in question is merely a receipt and not a bill of exchange or a promissory note, the permission to lead secondary evidence cannot be refused on the ground of inadmissibility of the primary evidence on account of it being insufficiently stamped as it can be admitted in evidence on payment of penal stamp duty under the Stamp Act.[30] Where the original document is inadmissible as being not duly stamped, secondary evidence of its contents cannot be allowed to be received.[31]

However, secondary evidence cannot be made admissible mechanically. Sufficient reason for non-production of the original document must be shown.[32] Where the tenant filed the xerox copy of the money receipt without substantiating his plea that the original was lost and the xerox copy was authentic, refusal to accept the xerox copy in evidence was held to be proper.[33]

2. CERTIFIED COPIES [CLAUSE (1)]

Section 76 defines the expression "certified copies".

See also Sections 77, 78, 79 and 86.

The correctness of certified copies will be presumed under Section 79; but that of other copies will have to be proved. This proof may be afforded by calling a witness who can swear that he had compared the copy tendered in evidence with the original, or with some other person read as the contents of the original and that such is correct.

A copy of the Municipal record which is not issued in accordance with the requirements of the Municipal Act, is not relevant.[34]

If a registered sale deed is not available, for any reason, certified copy thereof could be adduced as secondary evidence; other evidence if received would always be of a very weak character.[35] Where the

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23. *Samant N. Balakrishna* v. *George Fernandez*, AIR 1969 SC 1201.
24. *Manmohan Singh* v. *State of Punjab*, 1994 Cr LJ 3695 (para 14) (P&H).
25. *Bawa Sarup* v. *R.* AIR 1925 Lah 299; *Sangappa Anandappa* v. *Shivamurthi Swamy*, AIR 1961 Mys 106; *Khilmul Topandas* v. *Arjundas Tulsidas*, AIR 1959 Raj 280.
26. *Quamarul Islam* v. *S.K. Kanta*, AIR 1994 SC 1733 (paras 47 and 48). **See also** *C. Sivanandan* v. *State*, AIR 1995 Ker 354 (para 9).
27. *Sudha Gupta* v. *State of Madhya Pradesh (FB)*, 1999 Cr LJ 1742, at p. 1752 (MP).
28. *Jagannath* v. *Secretary of State*, AIR 1922 Mad 334.
29. *Sobha Rani* v. *Ravi Kumar*, AIR 1999 P&H 21 (para 4).
30. *Kundan Mal* v. *Nand Kishore*, AIR 1994 Raj 1 (para 39).
31. *Shiv Kant Pandey* v. *Ishwari Singh*, AIR 1997 Raj 155.
32. *John Mithalal Desai* v. *Dineshbhai K. Vora*, 1998 AIHC 1894 (paras 12 and 13) (Guj).
33. *Anand Kumar Singhal* v. *Banarsi Lall*, 1998 AIHC 2287 (para 9) (Sik).
34. *Ganesh Prasad* v. *Badri Prasad Bhola Nath*, AIR 1980 All 361.
35. *Nambai* v. *Gitabai*, AIR 1958 SC 706; *State of Rajasthan* v. *Jeoraj*, AIR 1990 SC 90; *Land Acquisition Officer* v. *V. Venkata Rao*, AIR 1991 AP 31 (FB); *K.M. Shaffi* v. *Dayamathi Bai*, 1999 AIHC 4071 (para 22) (Kant), **relying on** *Kalyan Singh* v. *Smt. Chhoti*, AIR 1990 SC 396, **holding** *G.C. Papanna* v. *Kenchamma*, II R 1998 Kant 3450 **per incuriam** and **distinguishing** *Sital Das* v. *Sant Ram*, AIR 1954 SC 606.

applicant for probate does not have the original will, he can file a certified copy along with his application in order to comply with Section 276 of the Succession Act.[36] When the original was proved to be lost or destroyed or detained by the opponent or third person who does not produce it after notice, secondary evidence is admissible by production of a certified copy of the document.[37] When the non-availability of the original registered adoption deed has been explained, a certified copy of the document is admissible in evidence.[38] Copies of registered documents are admissible as secondary evidence where the person in whose custody the original should be swears that they are not with him though there is no evidence as to the loss or otherwise of the original.[39] When a registered sale deed is copied in the book under the Registration Act, which is a public document, the certified copy of the sale deed issued by the Registrar's Office can be admitted as secondary evidence.[40] Certified copy of a moneylender's license is admissible licence.[41] When the execution of the original was proved from the endorsement of the registrar, the certified copy was held to be admissible[42] but where service of the original letters upon the defendant was not proved, their copies carried little evidentiary value.[43] A deposition can be proved by a certified copy but the fact that is the deposition of the deponent himself has got to be proved *aliunde*.[44]

Though a certified copy of a document (sale deed) is as good as the original, and its correctness is presumed, mere registration is not proof of its execution. The execution, *i.e.*, the signature of the executant, must be proved to be in his handwriting, and the contents of the certified copy must be proved in the ordinary way.[45] A certificate issued by a registrar is to some extent evidence of the execution of the document, and the admission of the signature before the registrar by the executant can be evidence of the execution of the document.[46] Reliance can be placed on the recitals of the true copy of the document mentioning amicable partition issued from the office of the Sub-Registrar bearing his seal and signature, particularly in view of the conflicting oral evidence.[47]

Certified copies of the Rules of Business made under Article 166(3) of the Constitution are admissible in evidence and judicial notice has to be taken of those rules as they are statutory rules.[48]

Under Section 63 read with 79 of the Act, a certified copy of a document can be admitted without any formal proof.[49]

In the case of a sale deed of 1896, when the party failed to prove the loss of the original but produced a certified copy, for proving the contents of the document, it was held that mere production of a certified copy would not be sufficient to justify the presumption of due execution of the original under Section 90.[50] A certified copy is sufficient secondary evidence under Section 63, of the existence, and contents of the deed, but not of its execution, which must be proved as required under Section 68 of the Evidence Act.[51]

Where the existence of a document was admitted, it was held that, by such admission, secondary evidence furnished by a certified copy assumes the character of primary evidence.[52]

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36. *Rajrani Shegal (Smt.)* v. *Parshottam*, AIR 1992 Del 134. **See also** *Chatra Pratap Singh* v. *Tulsi Prasad*, 2000 AIHC 4031 (para 6) (MP).
37. *Sanatan Mohanty* v. *Baidhar Rout*, AIR 1986 Ori 66; *S.K. Moula-Buksh* v. *Dharam Chand Raniwalla*, (1961) 65 Cal WN 881.
38. *Kartar Singh* v. *Dasaundha Singh*, 1972 Cur LJ 130 (Punj).
39. *Hutchegowda* v. *Chennigegowda*, AIR 1953 Mys 49.
40. *Rama Chandra Mahji* v. *Humbai Majhi*, AIR 1989 Ori 27.
41. *Shivalingarah* v. *Chandrasekhara*, AIR 1993 Kant 29. **See also** *K. Shivalingaiah* v. *B.V. Chandrashekara Gowda*, AIR 1993 Kant 29 (para 18).
42. 1970 Pat LR 342.
43. *J Patel & Co.* v. *National Federation of Industrial Co-operatives Ltd.*, AIR 1996 Cal 253 (para 8).
44. *State* v. *Abdul Qaywm Anwari*, ILR 1956 Hyd 436.
45. *Lourembam Hernant Singh* v. *Laishram Angabal Singh*, AIR 1979 Gau 68.
46. *Gurbux Singh* v. *Bishan Dass*, AIR 1970 Punj 182.
47. *Monoranjan Paul* v. *Narendra Kumar Paul*, AIR 1994 Gau 64 (para 11).
48. *Management of the Advance Insurance Co. Ltd.* v. *Gurudasmal, Supdt. of Police*, AIR 1969 Del 330.
49. 1970 All WR (HC) 69.
50. *Sardaran (Mst.)* v. *Sunderlal Baldeo Prasad*, AIR 1968 All 363.
51. *Brajraj Singh* v. *Yogendrapal Singh*, AIR 1952 MB 146, **relying on** *Sheikh Karimullah* v. *Gudar*, AIR 1925 All 56; *Dy. Commissioner of Partabgarh* v. *The Universal Film Co. Ltd.*, AIR 1950 All 696.
52. *Lakshmi Kanto Roy* v. *Nishi Konto Roy*, (1967) 71 Cal WN 362.

3. COPIES PREPARED BY MECHANICAL PROCESS [CLAUSE (2)]

This *clause* deals with copies prepared by mechanical process and copies compared with such copies. In the former case, as the copy is made from the original it ensures accuracy. To this category belong copies by photography, lithography, cyclostyle, carbon copies. Section 62 explanation (2) states that, where a number of documents are made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustrations (*a*) concerns the first Part of *Clause* (2). It deals with a photograph of an original, and it is admissible under this section though the copy and the original have not been compared, provided it is proved that the thing photographed was the original.

Illustrations (*b*) states that a copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original. This refers to the second part of *Clause* (2).

Illustrations (*c*) says that a copy transcribed from a copy, but afterwards compared with the original is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

Copies of copies kept in a registration office, when signed and sealed by the registering officer, are admissible for the purpose of proving the contents of the originals.[53]

When the prosecution does not establish that the copies in question were made from originals by mechanical process, no reliance can be placed by the prosecution on those copies.[54]

Letter press copies and photographs of writings are secondary evidence.

4. COUNTER FOILS

The counter foils of rent receipts being an admission in favour of the landlord are not admissible against the tenant.[55]

5. PHOTOGRAPHS

HALSBURY[56] states: "Photographs properly verified on oath by a person able to speak to their accuracy are generally admissible to prove the identity of persons, or of the configuration of land as it existed at a particular moment, or the contents of a lost document."

"X-ray photographs are admissible in evidence to determine the extent of a physical injury or disease, *provided* it is proved that the photograph is a photograph of the person injured or diseased. The person who took the photograph should be called, unless his evidence is dispensed with by consent".

PHIPSON[57] states: "A copy made by a copying machine is regarded only as a secondary evidence of the original. And printed, lithographed and photographed copies—though, as we have seen, primary evidence of each other's contents—are merely secondary evidence of the common original.....the accuracy of a photographic copy, particularly of external objects, must, like that of a map or plan, be established on oath, to the satisfaction of the judge, either by the photographer or by someone who can speak to its correctness. Where the photograph is tendered merely as a general representation of physical objects, slighter proof will be required than when matters of detail are all-important, as in cases of disputed handwriting. In a criminal case, a photograph has been held admissible to show the permanent and material structure of a house, but not the interior disposition of the furniture, etc., which was required to be proved by witnesses".

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53. Section 57(5), Act XVI of 1908.
54. *Subramanya* v. *State*, (1976) 1 Kant LJ 178 : 1975 Mad LJ (Cri) 31.
55. *Minati Sen* v. *Kalipada Ganguly*, AIR 1997 Cal 386, **distinguishing** *Idandas* v. *Anant Ram Chandra Phadke*, AIR 1982 SC 127.
56. 4th Edn. Vol. 17 (para 224), p. 158.
57. 13th Edn. Page 892 (para 36-17).

A photographic picture cannot be relied on as proof in itself of the dimensions of the depicted object or objects, and cannot be made properly available to establish the relative proportions of such objects, except by evidence of personal knowledge or scientific experience to demonstrate accurately the facts sought to be established.[58] Photographs, and particularly photographs of persons, taken several hours after the death are very unsafe guides for gauging the build and strength of a person, because the physical and chemical changes that follow physical violence and death make this obvious.[59]

Whether a photograph, is a correct reproduction of the original depends on many facts such as correctness of the lens, the state of the weather, the skill of the operator, the colour of the impression, the purity or the chemical accuracy of forming the angle at which the original was inclined to the sensitive plate, the possible fraud of the operator, etc. The magnified photographic copies of it can be safely received in evidence even without examining the photographer, as the accuracy of the copies can be readily tested by comparison with the original if necessary. That as shown in Illustrations (*a*) the negatives and the photographic prints are secondary evidence of the original (cheque) which is the primary evidence.[60]

The accuracy of the photographic copies, particularly of external objects, as shown in the photograph, is to be established on oath, to the satisfaction of the court, either by the photographer or some one who can speak to their accuracy.[61] Before admitting a photograph, the person who took the photograph has to be examined, and he should produce the negative.[62]

A photostat copy of a letter is a piece of secondary evidence, and it can be admitted in case original is proved to have been lost or not immediately available, for given reasons; it is not conclusive proof in itself of the truthfulness of the contents contained therein.[63] Photostat copies of documents should be accepted in evidence after examining the original records as genuineness of a document was a fundamental question.[64] The witness can be shown and questioned as regards the xerox copy of the document on record and the same will not amount to admission of the said document in evidence. If the witness admits the signature thereon, an objection can be raised at that time before the Court that the document, being a copy, could not be exhibited.[65] In a case where the photostat copy of the original was produced, and there was no proof of its accuracy or of its having been compared with, or its being true reproduction of, the original it was held that the photostat copy cannot be considered as secondary evidence, as necessary foundation for its reception was not laid.[66] A photostat copy of a document is not admissible as secondary evidence unless proved to be genuine or the signatory accepts his signature.[67]

Where a photostat copy of a document was endorsed by the counsel of the party as a true copy, it was held that it may be received as secondary evidence.[68] Photostat copy of a rent note, though not compared with the original, is admissible as secondary evidence.[69]

6. CARBON COPY

A carbon copy of a signature is a piece of secondary evidence within the meaning of Section 63(2) of the Evidence Act, being a copy made by a mechanical process which ensures its correctness.[70] In a claim petition, the original insurance policy was not filed by the owner of the vehicle. He did not object

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58. *United States Shipping Board* v. *The Ship 'St. Albans'*, AIR 1931 PC 189, 194.
59. **In re : *Shivanna*,** AIR 1955 Mys 17.
60. ***Brahma* v. *Chartered Bank of India*,** AIR 1956 Cal 399.
61. ***Latino Andre* v. *Union Government*,** AIR 1968 Goa 132.
62. ***Sabera Begum* v. *G.N. Ansari*,** 1979 Bom CR R 110 (Bom).
63. 1978 JKLR 107. **See also** *Ram Pal Singh* v. *Syndicate Bank*, AIR 2000 P&H 296 (paras 5 and 7).
64. *Govt. of A.P.* v. *Karri Chinna Venkata Reddy*, AIR 1994 SC 591 (para 2). **See also** *Northland Traders* v. *Bank of Baroda*, AIR 1994 All 381 (para 5).
65. *Ahmedabad New Textile Mills* v. *Rajubhai Dalchandbhai*, AIR 1999 Guj 148 (para 4).
66. *British India Steam Navigation Co. Ltd.* v. *Shanmugha Vilas Cashew Industries, Quilon*, ILR (1974) 2 Ker 150.
67. ***Subarna Barik* v. *State of Orissa*,** AIR 1976 Ori 236.
68. *British India Steam Navigation Co. Ltd.* v. *Shanmugha Vilas Cashew Industries*, ILR (1974) 2 Ker 150.
69. *Ratan Sharma* v. *Ambesedar Drycleaners*, AIR 1997 Raj 75, **distinguishing** *Chandanbai* v. *Jagjiwanlal*, AIR 1958 Raj 110. **See also** *D. Sarasu* **v. *Jayalakshmi*,** 2001 AIHC 2484 (para 11) (Mad).
70. *Nityananda Roy* v. *Rashbehari Roy*, AIR 1953 Cal 456.

to the genuineness of the printed copy of the policy giving particulars filed by the Insurance Company. He could not be allowed to raise objection that the same could not be read as evidence.[71]

7. TAPE RECORDS

In the case of a tape-recording, which was referred to by the petitioner in support of his assertions as regards the substance of what passed between him and the Chief Minister of Punjab on several matters, there was no denial of the genuineness of the tape-record; and there was also no assertion that the voices of the persons were not those which they purported to be. On those facts, the Supreme Court held that the tape-recordings can be legal evidence by way of corroborating the statement of a person who deposes that the other speaker and he carried on that conversation, or even of the statement of the person who may depose that he overheard the conversation between the two persons and that what they actually stated had been tape-recorded. What weight is to be attached will depend on other factors which may be established in a particular case.[72]

In *Yusuf Alli Osmail* v. *State of Maharashtra,*[73] it was held that if a statement is relevant, an accurate tape-record of the statement is also relevant and admissible; that the time and place and accuracy of the recording must be proved by a competent witness, and the voices must be properly identified; that one of the features of magnetic tape-recording is the ability to erase and re-use the recording media; that, because of this facility of erasure and re-use, the evidence must be received with caution, and the court must be satisfied beyond reasonable doubt that the record has not been tampered with.[74]

The Supreme Court held that the tape itself is primary and direct evidence of the matter recorded, that it is admissible not only to corroborate under Section 156 of this Act but also for contradiction under Section 155(3) for testing the veracity of the witness under Section 146(1), and for impeaching his impartiality, under exception (2) of Section 153.[75]

Where the voice is denied by the alleged maker thereof, recording of a voice of a witness for comparison with, and identification of the earlier recorded voice is neither expressly nor impliedly prohibited under any statute.[76]

Statements in the tape-recorder can be admitted after proving that they were accurately recorded.[77] A previous inconsistent statement recorded on the tape-recorder is admissible for the purpose of contradiction.[78]

Where the cassette containing the speech of the returned candidate in the election, tape-recorded by the police officer, was tendered in evidence by the election petitioner but how and why it came to be recorded and how the petitioner came to know about it, was not explained by him, it was not relied upon as a piece of evidence.[79]

The Supreme Court observed:[80]

"The conditions for admissibility of a tape recorded statement may be stated as follows:—

1. The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corrollary that the first condition for the admissibility of such a statement is identification of the voice of the speaker. Where the voice has

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71. *Amrit Kaur* v. *Chaman Lal,* AIR 1994 HP 21 (para 18).
72. *Partap Singh* v. *State of Punjab,* AIR 1964 SC 72 : (1964) 4 SCR 733, *on appeal* from *Partap Singh (Dr.)* v. *State of Punjab,* AIR 1963 Punj 298; *Mahabir Prasad Verma* v. *Dr. Surinder Kaur,* AIR 1982 SC 1043 **followed in** *State* v. *Ravi,* 2000 Cr LJ 1125 (para 56) (Del).
73. AIR 1968 SC 147 : (1967) 3 SCR 720.
74. *Ziyauddin Burhanuddin Bukhari* v. *Brijmohan Ramdas Mehra,* 1975 SCR (Sup) 281 : AIR 1975 SC 1788; *Malkani* v. *State,* (1973) 2 SCR 417 : AIR 1973 SC 157; *R. Venkatesan* v. *State,* 1980 Cr LJ 41 (Mad), *Sumitra* v. *Calcutta Dyeing Co.,* AIR 1976 Cal 99; **relying on** *R* v. *Robson,* (1972) 2 All ER 699; *R* v. *Maqsud,* (1965) 2 All ER 464; *R* v. *Stevenson,* (1971) 1 All ER 678; *Ram Singh* v. *Col. Ramsingh,* AIR 1986 SC 3.
75. *Ramareddy* v. *V.V. Giri,* AIR 1971 SC 1162 : (1971) 1 SCR 399.
76. *Dial Singh* v. *Rajpal,* AIR 1969 P&H 350.
77. *Manindra Nath* v. *Biswanath,* 67 Cal WN 191.
78. *Rupchand* v. *Mahabir,* AIR 1956 Punj 173.
79. *Quamarul Islam* v. *S.K. Kanta,* AIR 1994 SC 1733 (paras 56t and 57).
80. *Ram Singh* v. *Col. Ram Singh,* AIR 1986 SC 3 at p. 11. **See also** *K.S. Mohan* v. *Sandhya Mohan,* AIR 1993 Mad 59 (paras 13 and 14).

been denied by the speaker, it will require very strict proof to determine whether or not it was really his voice.

2. The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence, direct or circumstantial.

3. Every possibility of tampering with or erasure of a part of a tape recorded statement must be ruled out, otherwise it may render the said statement out of context and, therefore, inadmissible.

4. The statement must be relevant according to the rules of the Evidence Act.

5. The recorded cassette must be carefully sealed and kept in safe or official custody.

6. The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances".

A taped conversation, not compared with the voice, was not allowed as evidence.[81]

8. COPIES MADE FROM OR COMPARED WITH ORIGINAL [CLAUSE (3)]

Copy.—Copies made from the original, or copies compared with the original, are admissible as secondary evidence. A copy of a copy, when compared with the original, would be receivable as secondary evidence of the original. [Illustrations (*b*)].

A copy of a certified copy of a document, which has not been compared with the original, cannot be admitted in evidence, such a copy being neither primary nor secondary evidence of the contents of the original.[82]

When a document is an accurate or true and full reproduction of the original, it would be a copy.[83]

To admit secondary evidence, it is not sufficient to show merely that the original document is lost; the secondary evidence itself must be of the nature described in Section 63. A "true copy" of a document will not be admissible under Section 63, unless it is shown that it had been made from or compared with the original.[84]

Ordinary copy of a sale deed cannot be admitted as secondary evidence[85] but copies of sale-deeds of acquired land are admissible in evidence, provided the parties to the document are examined to prove the document.[86]

The Supreme Court, dealing with Section 14 of the Arbitration Act, explained the meaning of the expression "signed copy of award" and observed: "Signing means writing one's name on some document or paper; so long as there is the signature of the arbitrator or umpire on the copy of the award filed in court, and it shows that the person signing, authenticated the accuracy or correctness of the copy, the document would be a signed copy of the award; it would in such circumstances be immaterial whether the arbitrator or umpire puts down the words "certified to be true copy" before signing the copy of the award above his signature; when a document is an accurate or true and full reproduction of the original, it would be a copy".[87]

Where the plaintiff, in a suit for ejectment, produced a copy of the notice to quit, in proof of the fact that the notice was valid, and the original was in possession of the other party, and the plaintiff swore that it was a true copy of the original, it was held that it was not necessary that the scribe of the copy should be produced, that any one who had heard the original and the copy read out to him, might swear that the contents of the two were identical, and it would be admissible.[88]

Where a handwritten copy of the adoption deed was tendered in evidence, in the absence of evidence as to who made the copy, from what it was made, or whether it was compared with the original, it must be disregarded.[89]

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81. *Joginder Kaur* v. *Surjit Singh*, AIR 1985 PH 128.
82. *Ram Prasad* v. *Raghunandan Prasad*, ILR (1985) 7 All 738, 743; *Narasimham* v. *Babu Rao*, AIR 1939 Mad 340.
83. *Hindusthan Construction Ltd.* v. *Union of India*, AIR 1967 SC 526 : (1967) 1 SCR 843.
84. *Parekh Brothers* v. *Kartick Chandra Saha*, AIR 1968 Cal 532.
85. *Kalyan Singh* v. *Chhoti*, AIR 1990 SC 396.
86. *Spl. Deputy Collector, Madras* v. *P. Mathusoothanan*, 2000 AIHC 3010 (paras 13 and 14) (Mad).
87. *Hindusthan Construction Co. Ltd.* v. *Union of India*, AIR 1967 SC 526 : (1967) 2 SCJ, 219.
88. *Babulal* v. *Gangasaran*, AIR 1952 All 48.
89. *Laxman Ganpati* v. *Anusuyabi*, AIR 1976 Bom 264.

Section 63(3) refers to two types of copies:

(1) A copy made from the original;

(2) A copy compared with the original.

A copy falling under either of the two heads will be admissible as secondary evidence.[1]

The original dying declaration was lost. A head constable who maintained a copy testified to its accuracy. This was allowed as corroborative evidence.[2]

A certificate as to the date of birth, on the basis of an entry in the register of a church, maintained in the regular course, is not admissible.[3] Where a copy of report which was typed by a typist was not a copy typed by him nor was it a carbon copy it was held not admissible as secondary evidence.[4] An abstract translation or a complete translation of a document is not 'copy made from and compared with the original' within the meaning of this *clause*.[5] A copy of the original letter addressed by the Government to the Commissioner, prepared privately by a party at the time of inspection of relevant file, was held not secondary evidence of the original letter.[6] Where a defendant did not state anywhere in his evidence or produce evidence that the document tendered is a copy made from the original, or that it was compared with the original, and when he failed to prove by evidence the conditions for invoking Section 63, it was held that the document tendered could not be received as secondary evidence under Section 63(1) or (2) or (3) of the Evidence Act.[7] Where a printed copy purports to bear the signature of the candidate's agent in an election, it was held that the candidate's signature does not establish the fact that he really signed it. when the original was not produced by the printer and proprietor of the press where the copies were printed.[8]

When a document was admitted without objection, it was held that omission to object to its admission implied that it was a true copy, and it was not open to the appellate court to consider whether the copy was properly compared with the original or not.[9]

An entry in a deed-writer's register, which contains all the essential particulars contained in the document itself and is also signed or thumb marked by the person executing the document amounts to a copy and is admissible in evidence.[10]

Where a draft of a document is made and on that basis an original is prepared it was held that the draft cannot be treated as secondary evidence.[11] but the Kerala High Court has held that a draft can be accepted in evidence if there is proof that the original has been prepared without any corrections and that it is an exact copy of the draft.[12] The Allahabad High Court has similarly held that Section 63 is not exhaustive of all types of secondary evidence. It, therefore, allowed the draft notice from which the final notice was prepared to be produced as secondary evidence.[13]

It is not necessary for the proof of the bye-laws of a company, that the original copy of the bye-laws bearing any mark of approval of the Board of Directors be produced. The bye-laws can be proved by other evidence.[14]

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1. *Harijiwan Sahu* v. *Jairam Sahu*, AIR 1989 Pat 96.
2. *Aher Ram Gova* v. *State of Gujarat*, 1979 Cr LJ 1081 : AIR 1979 SC 1567.
3. *Harendra Nath Burman* v. *Suprova Burman*, AIR 1989 Cal 120.
4. *R.M. Pandye* v. *Automobile Products of India Ltd.*, AIR 1956 Bom 115.
5. *Muhammad Suleman* v. *Hari Ram*, ILR (1940) 21 Lah 363.
6. *Nurmahamed* v. *Md. Abdul Karim*, AIR 1970 Manipur 7.
7. *Patel Maganbhai* v. *Patel Ishwar Bhai*, AIR 1984 Guj 69.
8. *Ghayar Ali Khan* v. *Keshav Gupta*, AIR 1959 All 264.
9. *Chhatra Kumari Debi* v. *Parbati Kuer (Mst.)*, AIR 1936 Pat 600; *Latchayya Subudhi* v. *Seetaramayya*, AIR 1925 Mad 257; *Kedarnath* v. *Pradhan*, AIR 1937 Nag 13; *Ramlochan Misra* v. *Pandit Harinath Misra*, AIR 1922 Pat 565; *Basanta Kumar Das* v. *Bihayak Das & Ors* 1974 Cut LT 1214; *Padman* v. *Hanwanta*, AIR 1915 PC 111
10. *Sant Ram* v. *Ghasitaram*, ILR 1956 (9) Pun 193.
11. *Devichand* v. *Hari Kishan Das*, (1952) 2 All 531.
12. *P. Kunhammad* v. *Moosankutty*, AIR 1972 Ker 76.
13. *Lachcho* v. *Dwari Mal*, AIR 1986 All 303.
14. *Dalmia* v. *Delhi Administration*, AIR 1962 SC 1821.

9. COPIES OF COPIES

Illustration (*c*) lays down in express language that "a copy transcribed from a copy, but afterwards compared with the original is secondary evidence; but a copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.[15] A copy of a copy is held admissible if the prepared copy is compared with the original, or a copy of the original is taken by means of a mechanical process.[16] The certified copies of sale-deeds are admissible in evidence but they cannot be relied upon without examining the persons connected with the same and the parties thereto.[17] A genuine copy of the original can be looked into as secondary evidence under Section 63 but not a copy of a copy.[18] A copy of a copy can be admitted in evidence by consent of the parties, as it is open to the opposite party to dispense with strict proof of the document.[19]

A copy of a copy is inadmissible when the original itself was not accounted for satisfactorily.[20]

However, a copy of a copy which was kept in the Registration Office and signed and sealed by the registering officer, as required under Section 57(5) of the Registration Act, is admissible for proving the contents of the original.[21]

A record printed in the High Court is not a copy made from or compared with the original but only copy of a copy. In the absence of evidence that the printed copy had been compared with the original, it could not be treated as secondary evidence of the original under Section 63(3).[22] A copy of the office copy of a sale deed, issued by an official receiver, cannot be taken to be a certified copy and therefore inadmissible under Section 63(3).[23] Where a document is a copy of the copy, and the person who made that copy does not give evidence, the document is inadmissible.[24] Where a person made a pencil copy from the original and a fair copy was made from that pencil copy, it was held that the copy of the copy is neither admissible nor could be proved.[25] Where the original mortgage deed was unregistered it was held that secondary evidence by a copy of a copy of the mortgage deed was not admissible.[26]

The decision in *Alapathi Narasinhaw* v. *Ailoori Baburao*[27] distinguished an earlier Madras decision in *Ganapathi Aiyar* v. *Sankasayappa Mudliar*[28], on the ground that the earlier practice was that the printing was being done by the Government Printing Press and before the final order for striking was given the proofs were compared with the original, but later the practice was changed into comparison of the proof with the typed copies sent to the press.

10. COUNTERPARTS [CLAUSE (4)]

A tenant filed receipts issued by the landlord to show that the lease granted to him was a yearly one. When the landlord wanted to show that it was a monthly tenancy, by tendering the counterfoils of receipts, it was held by the Supreme Court that the entries in the counterfoils, being an admission in his own favour, were not admissible against the tenant, and they cannot be called counterparts of the lease.[29]

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15. *Krishna Subala Bose (Smt.)* v. *Dhanapati Dutta*, AIR 1957 Cal 59; *Suganchand* v. *Balchand*, AIR 1957 Raj 89; *Rajendra Narayana Singh Dev* v. *Biharilal Chakravarthy*, AIR 1932 Pat 157; *Commissioner of Wakfs* v. *Kawah*, 58 Cal WN 533; *Badrunnisa Begum* v. *Mohamooda Begum*, AIR 2001 AP 394 (para 5).
16. ***Hanuman Box Agarwalla* v. *Bibhuti Prosad Singh***, AIR 1950 Assam 17.
17. ***A.P.S.R.T.C.* v. *P. Venkaiah***, AIR 1997 SC 2600.
18. ***Aswini Kumar* v. *Union Territory of Tripura***, AIR 1969 Tri 26.
19. ***Narasayya* v. *Krishnamurthi***, AIR 1928 Mad 1255.
20. *Mahadeva* v. *Virabasava*, AIR 1948 PC 114; *Raja Neelard Singh* v. *Naseeb Singh*, 6 WR 80.
21. ***Suganchand* v. *Balchand***, AIR 1957 Raj 89.
22. *Subrahmanya Sastry* v. *Lakshmi Narasamma*, AIR 1958 A.P. 22; **relying on** *Narasimham* v. *Babu Rao*, AIR 1939 Mad 40.
23. *Ramagopal Naicker* v. *Muthu Krishna Ayyar*, AIR 1957 Mad 1.
24. *Suganchand* v. *Balchand*, AIR 1957 Raj 89; *Narendra* v. *Rajendra*, AIR 1941 Cal 526.
25. *Union of India* v. *Omprakash Gupta*, ILR (1969) 2 Punj 473.
26. *Yasin Baig* v. *Haranarayan Agarwalla*, ILR 1970 Cut 711.
27. AIR 1939 Mad 40.
28. AIR 1929 Mad 187.
29. *Idandas* v. *Anant Ramachandra*, AIR 1982 SC 127.

11. ORAL ACCOUNTS [CLAUSE (5)]

Secondary evidence includes, according to *clause* (5), oral accounts of the contents of a document, given by some person who has himself seen the original document.[30]

But, a written statement of the contents of a copy of a document, the original of which the person making the statement has not seen, cannot be accepted as secondary evidence.[31]

The Privy Council in *Ma Mi* v. *Kallander*,[32] explained the import of *Clause* (5) thus: "It means that the oral evidence of the contents of the document must be given by some person who has seen the contents, that is, to say, who had read the document. Evidence that the witness saw the document and heard it read out by someone else is only hearsay, so far as the contents are concerned, and does not fulfil the requirements of Section 60 as to the oral evidence generally."[33]

A person who is unacquainted with the language (Persian character in that case) in which the document was written, cannot read the document and so cannot give secondary evidence.[34]

The Privy Council, in *Munnalal* v. *Mst. Kashibhai*[35] held that the statement as to the contents of a document by a witness who has not himself read the document, is not secondary evidence of the contents of the document, within the meaning of Section 63(5) of the Act.[36]

The *clause* does not necessarily mean that a witness who is called to give evidence as to a lost document must have himself read the document. He would be a competent witness if he, having physically seen the document, had the contents thereof read out or explained to him.[37] Secondary evidence of an endorsement on a railway receipt can be given by a witness who had himself made it or seen it.[38] Where an attesting witness proved the contents of a will, it was held that the evidence was good secondary evidence within Section 63(5), when the original had been lost.[39]

Where the original of a survey and settlement report which was based on a *Jamabandi*, was not produced and was not admitted or exhibited in evidence, it was held that the report cannot be treated as secondary evidence of the contents of the *Jamabandi*.[40] It was held that oral evidence of a witness, for proving entries in a diary which was neither tendered as evidence nor was one maintained by him, is not admissible. Even if the witnesses used the diary for refreshing his memory, his evidence is inadmissible, as the diary did not amount to a document as contemplated by Section 63.[41] In regard to the computation of the market value of an acquired land, on the basis of sales during the past 5 years, evidence of the person who prepared a sales statement is not admissible as secondary evidence of the sale deeds.[42]

In respect of the contents of a lost document, it was held that the effect of Sections 59, 61, 62(5) and 65 read together, is that the contents of a lost document may be proved by oral evidence, when such evidence is admissible as secondary evidence.[43]

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30. *Ma Mi* v. *Kallander Ammal* (No. 2), (1926) 54 IA 61 : 29 Bom LR 800 : ILR 5 Ran 18 : AIR 1927 PC 15.
31. *Kanayalal* v. *Pyarabai*, ILR (1882) 7 Bom 139.
32. AIR 1927 PC 16 : 54 IA 61 at 65.
33. *Kallander Ammal* v. *Ma Mi*, ILR 2 Rang : 1924 R 363; **affirmed, see also** *Trimbak Narayan* v. *Yadorao Shankar Rao*, AIR 1940 Nag 116; *Mangilal* v. *Ram Dayal*, AIR 1951 Ajmeer 21; *Ghure* v. *Chatrapal*, 23 IC 11; *Ramji Das* v. *Mihin Lal*, AIR 1923 All 441.
34. *Ramkrishna Panda* v. *Arjuno Padhano*, 1963 Ori 29.
35. AIR 1947 PC 15.
36. **See also** *Dalu* v. *Juharmal*, AIR 1952 Raj 91; *Katihar Jute Mills* v. *Calcutta Match Works*, AIR 1958 Pat 133.
37. *Mehin Lal* v. *Ramji Das*, ILR (1924) 47 All 13. (This decision can be no longer be good law in view of the above Privy Council decision.)
38. *J.S. Basappa* v. *Provincial Government of Madras*, AIR 1959 AP 192.
39. *Deorao Amrita* v. *Raibhan Sambhaji*, AIR 1954 Nag 357. **See also** *K R Rajalakshmi Devi* v. *K R Chandrasekhar*, 1998 AIHC 1397 (paras 28, 29, 31, 32 and 36) (Kant).
40. *Surendra Nath* v. *Kamakihya Narayan Singh*, AIR 1930 PC 45.
41. *Khemchand Premchand* v. *Dalhousi Jute Co. Ltd.*, ILR (1968) 1 Cal 277.
42. *Collector of Raigarh* v. *Chaturbhuj Panda*, AIR 1964 MP 196; *Kishna Lal* v. *Sohan Lal*, AIR 1955 Raj 45.
43. *Fuljari Lal* v. *Ram Sarup*, AIR 1953 MB 177.

12. REGISTRATION COPY

Where the plaintiff took steps to produce original will but it was not produced by the parties in whose possession it was, it was held that the registration copy of the will which she filed, was admissible in evidence as secondary evidence.[44]

Proof of documents by primary evidence.

S. 64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

SYNOPSIS

1. *General principle* ... 647
2. *Objection to proof* ... 650
3. *Section 64 & 91* ... 650
4. *Document* ... 650

COMMENTS

1. GENERAL PRINCIPLES

This section is based on the best evidence rule, subject to certain exceptions contained in some of the sections of the Evidence Act following this section. Documents must be proved by primary evidence except in the cases provided by the succeeding sections. This section has to be read along with Sections 61, 62 and 65 to 67.

STEPHEN in his Introduction (at page 144) has observed: "Primary evidence is required as a rule, but this is subject to seven important exceptions in which secondary evidence may be given."[45]

The provisions of Sections 60, 64 & 91 of the Evidence Act are based on the cardinal rule that the best available evidence should be brought before the court.[46]

A written document can only be proved by the instrument itself. It is a general rule, that if a person wants to get at the contents of a written document the proper way is to produce it, if he can. "Where the contents of any document are in question, either as a fact directly in issue, or a subalternate principal fact, the document is the proper evidence of its own contents. But where a written instrument or document of any description is not a fact in issue, and is merely used as evidence to prove some fact, independent proof *aliunde* is receivable. Thus, although a receipt has been given for the payment of money, proof of the fact of payment may be made, by any person who witnessed it.... So, although where the contents of a marriage register are in issue, verbal or other evidence of those contents is not receivable, the fact of the marriage may be proved by the independent evidence of a person who was present at it[47]".

In PHIPSON[48] it is stated : "The present rule (corresponding to Section 64) applies only to proof of the contents of documents and not to cases involving their existence or identity, *e.g.*, proceedings for conversion, detention, negligent, loss or theft, for here there is no distinction between a document and other articles, and the plaintiff is not bound to put it in, eventhough the defendant may be willing to produce it."[49]

This section only refers to the method of proof of the terms of a contract, grant or disposition of property. It does not exclude secondary evidence altogether, in proof of the transaction itself.[50]

The Privy Council in *Easwara Moorthy* v. *Emperor* observed: "Sections 62, 64 and 65 of the Evidence Act define the only evidence which the law permits in order to prove a warrant of arrest, and that is, under Section 62 of the Act, production of the original order, or, under the conditions specified in Section 65, of a certified copy. A warrant of arrest is a public document which affects the personal

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44. *Sakunthala* v. *Vijayalakshmi*, 2001 AIHC 273 (para 15) (Mad).
45. They are referred to in *clauses* (a) to (g) of Section 65.
46. In re : *Vadlamudi Kutumba Rao*, AIR 1957 AP 595.
47. BEST, 12th Edn., S. 223, p. 209; *Balbhadhar Prasad* v. *The Maharaja of Bettia*, ILR (1887) 9 All 351, 356.
48. 15th Edn. (2000), para 41-04, page 1104.
49. *Bucher* v. *Jarrett*, 3 B. & P. 143.
50. *Makhdumun (Mst.)* v. *Saiyed Altaf Hussain*, AIR 1922 Pat 222; *Kamal Kant Azad* v. *Emperor*, AIR 1944 Pat 354.

liberty of the subject. The statute as quoted above, prescribes its form. It has to bear the appropriate signature and seal. Any laxity of proof might have serious consequences. It might, for instances, lead to error as to the identity of the person to be apprehended. Secondary evidence, other than a certified copy, would not necessarily, or even obviously, show that the statutory form had been complied with.[51]

The Supreme Court, in *Purushothama Reddiyar* v. *Perumal*[52], held that the documents may either be proved by witnesses or marked on admission, that, when it was marked on admission without any reservation, the contents also are to be taken as admitted; in evidence though the document may not be conclusive evidence. The result is that the contents cannot be challenged by way of cross-examination or otherwise. It is not open to a party to object to the admissibility of the documents as they were marked as exhibits without any objection from such party.[53]

When a document is relied on by a party, definite proof of its genuineness has to be given.[54]

The contents of a sale deed can only be proved by the executant. If he is not examined, it would be inadmissible, though proof of his signature is offered.[55] Where neither the sale-deeds nor the certified copies thereof were exhibited in the Court, mere oral evidence of those transactions were inadmissible.[56] Where the correctness of the contents of a document is in issue, they should be proved by calling the executant of the document or its writer. The contents of the document cannot be proved by a witness, though he is acquainted with the signature or the handwriting of the person who signed and wrote the document, but has no personal knowledge about the contents.[57] Merely because certain personal letters were tendered in evidence and exhibited, there is no reason why their authorship should be taken as what it purports to be, when persons conversant with such handwriting and signatures have not been produced at the trial.[58] In a case where the accused was suspected of complicity in kidnapping a minor girl, a letter written by him to his wife was intercepted. At the trial, the letter was read as evidence without proof. It was held that however valuable the letter is for the purpose of investigation, or for tracing the girl or the accused, as there was no proof of it, it cannot be read in evidence.[59] In the absence of proof regarding the entry in the mutation register, the copy from an entry in the document writers register was held inadmissible.[60]

Where a party relies upon an entry in an account book, the original account book must be produced before the court as primary evidence in proof of the entry.[61] When a prosecution is based on an order promulgated by the Government under the Madras Maintenance of Public Order Act 1 of 1947, it was held that proof of an order appearing in a newspaper was not sufficient and the original order or its certified copy must be filed.[62] Where a party claimed a particular property was joint family property, on the ground that it was purchased from the sale proceeds of a land belonging to the joint family, and he did not produce the sale deed of the land, or the extracts from the land records showing the existence of the joint family property, but offered oral evidence, it was held that the oral evidence cannot be accepted.[63] Entries in the *pahanies* filed by the defendant showing him as cultivator of the land in dispute, would constitute evidence for proof of the factum of his possession in the absence of evidence led to nullify the same.[64]

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51. *Easwaramuthi* v. *Emperor*, 71 IA 83 at 91 : AIR 1944 PC 54.
52. AIR 1972 SC 608.
53. *Bhagat Ram* v. *Khetu Ram*, AIR 1929 PC 110; **followed see also** *Harnath Malhotra* v. *Dhanoo Devi Agarwala*, AIR 1975 Cal 98; *Land Acquisition Officer DIS Cuttack* v. *Madan Gajendra*, (1975) 41 Cut LT 869; *Maharao Shri Madan Singh* v. *State of Gujarat*, AIR 1969 Guj 270: is no longer good law in view of *P C Purushothama* v. *S Perumal*, AIR 1972 SC 608; *State of Kerala* v. *Mariamma Abraham*, AIR 1969 Ker 265.
54. *Kamal Narayan* v. *Ram Kishorelal*, AIR 1958 MP 246.
55. *Prakash Cotton Mills Pvt. Ltd.* v. *Municipal Commissioner*, AIR 1982 Bom 387.
56. *Chintaman* v. *State of Maharashtra*, AIR 1997 SC 448.
57. *Madholal Sindhu* v. *Asian Assurance Co. Ltd.*, AIR 1954 Bom 305; *Bhageerathi Amma* v. *Govinda Kurup*, 1962 Ker LT 858; *Yusuf (Md.)* v. *D*, AIR 1968 Bom 112; *Sita Ramachandra Mahaprabhu* v. *Madano Maharana*, AIR 1968 Ori 217.
58. *Hazara Singh* v. *Attar Kaur*, AIR 1976 Punj 24.
59. *Kan Kanwari (Mst.)* v. *State of Rajasthan*, 1957 Cr LJ 688.
60. *Gurnam Singh* v. *Ass Kaur (Smt.)*, AIR 1977 Punj 103.
61. *Parasnath Hiralal* v. *Kishanlal Chunilal*, AIR 1965 All 189.
62. In re : *Kottapalli Ragahaviah*, AIR 1953 Mad 780.
63. *Krishnakumar Sinha* v. *Kayastha Pathshala*, Allahabad AIR 1966 All 570.
64. *Mohd. Kareemuddin Khan* v. *Syed Azam*, 1997 AIHC 2561 (para 11) (AP).

A will cannot be rejected on the ground that the particulars of the preparation of the draft or whatever happened prior to the final will being prepared were not forth-coming.[65]

Where a document was executed by more than one person, it was held that, when it was proved, mere refusal of execution by some of the executants does not imply necessarily that the document is not genuine.[66]

Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document, or unless the genuineness of a document produced is in question.[67]

The tape-record of a wife was lodged as proof of her mental disorder. She was sitting in the court as a respondent. No effect was made to compare her voice with the tape. The tape was not allowed to be used as evidence or for shaking her credit in cross-examination.[68] Where the xerox copies of the documents pertaining to previous proceedings before the SDO were produced in the suit in which the SDO and the Govt. were parties but they did not take any objection regarding their authenticity, the documents would be admissible.[69]

Where the parties have admitted the contents of the document, either in their pleadings or during the course of the proceedings, the opposite party can rest on admissions alone and he need not produce and prove the original document.[70] In a later case[71], it was held that such admissions of the party must be sufficient to cover the entire claim of the opposite party, to obviate the necessity of relying on the document or any portion of it. When a document is marked by consent, it means that the party consenting is willing to waive his right to have the document in question proved. Formal proof is not required when the document is marked by consent.[72] But consent does not have the effect of dispensing with the proof of the truth or otherwise of the contents.[73] Where the report of the Central Forensic Science Laboratory expert was admitted in evidence without objection regarding its mode of proof, the same could not be objected to at any later stage of the case or in appeal.[74] Where certain certificates were given by the plaintiff to the defendant, and the statements therein were not challenged by the defendant as incorrect, the maker of the statements need not testify to their correctness.[75] But where primary evidence was available, certified copy was held to be inadmissible.[76]

Will cannot be rejected for non-production of its draft or on the ground that the particulars of preparation of draft or whatever happened prior to final will being prepared were not forthcoming.[77]

In a prosecution for defamation, based on a letter written by the accused, it was held that merely because of the admission of the letter by the accused under Section 342, Cr.P.C. (now S. 313) examination, the prosecution was not relieved of its duty to prove the letter by primary evidence.[78]

Section 87(3), Cr.P.C. does not rule out the requirements of Section 64 of the Evidence Act.[79]

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65. *Janardan Badrinarayan Patel* v. *Ambalal Himatlal*, AIR 1999 Guj 162 (para 13.4).
66. ***Rangaraju* v. *Sulochana Ammal***, AIR 1971 Mad 280.
67. *Where there is documentary evidence, oral evidence is not entitled to any weight . Murarka Properties Pvt. Ltd.* v. *Beharilal Murarka*, AIR 1978 SC 300.
68. ***Jogindra Kaur* v. *Surjit Singh***, AIR 1985 P&H 128.
69. *Vithu Hira Mahar* v. *State of Maharashtra*, 1999 AIHC 4295 (para 63) (Bom).
70. *Zafar (Md.)* v. *Zahur Husain*, AIR 1926 All 741; *Hikmatullah Khan* v. *Abdul Azim Khan*, 1921 All 218; *Chuni Kuar* v. *Udairam*, ILR 6 All 73; *Sharda Talkies (Firm)* v. *Madhulata Vyas*, AIR 1996 MP 68 (para 20).
71. ***Pearay Lal* v. *Kunwar Rani Hiradevi***, AIR 1941 All 150.
72. ***Perumal* v. *Vadivelu Asari***, AIR 1986 Mad 341.
73. ***Karupanna Thevar* v. *Rajagopala Thevar***, (1974) 2 MLJ 260.
74. *Amarjit Singh* v. *State (Delhi Administration)*, 1995 Cr LJ 1623 (Del), **following** *Phool Kumar* v. *Delhi Administration*, AIR 1975 SC 905 : 1975 Cr LJ 778. **See also** *Vijay Kumar* v. *State*, 1995 Cr LJ 2599 (para 9) (Del).
75. *Bengal Corp. Pvt. Ltd.* v. *Commissioner for the Port of Calcutta*, AIR 1971 Cal 357.
76. ***Butu Naik* v. *Saraswati Devi***, AIR 1998 Ori 119 (para 5).
77. *Janardan Badrinarayan Patel* v. *Ambalal Himatlal*, AIR 1999 Guj 162 (para 13.4).
78. ***Panna Lal* v. *State of U.P.***, AIR 1969 All 423.
79. ***P.K. Gupta* v. *State of W.B.***, 1973 Cr LJ 1368 (Cal).

2. OBJECTION TO PROOF

Regarding proof of a document, the objection has to be raised at the time when the document was tendered in evidence. It cannot be allowed to be raised at any subsequent stage or appellate stage.[80] In a case where a document was admitted and acted upon by two courts, a plea as to the insufficiency of proof could not be allowed to be taken in second appeal.[81]

Objection to the mode of proof of the document must be taken at the trial, before it is sought to be tendered or marked and admitted in evidence.[82] A deed of adoption was produced before the trial court, without any objection by the opposite party as to its mode of proof. Objections cannot be raised in appeal.[83]

3. SECTIONS 64 & 91

There is a difference between Section 64 and Section 91. Section 64 deals with the mode of proof of the document itself, and the contents of the document which may be proved by tendering the document itself as primary evidence or by secondary evidence contained in Section 65. Section 91 refers to cases where the terms of a contract or of a grant or any other disposition of property have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no parol evidence shall be given in proof of the terms of such contract, or disposition of property or grant, except by tendering the document itself.

4. DOCUMENT

For the meaning of document see definition of 'document', under Section 3 and the commentary under that head.

Cases in which secondary evidence relating to documents may be given.

S. 65. Secondary evidence may be given of the existence, condition or contents of a document in the following cases:—

(*a*) when the original is shown or appears to be in the possession or power—

of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in Section 66, such person does not produce it;

(*b*) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(*c*) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(*d*) when the original is of such a nature as not to be easily movable;

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80. *Annapurna Sahuani* v. *Narendra Prasad Sahu*, AIR 1967 Ori 129; *Mira Bai* v. *Jai Singh*, AIR 1971 Raj 303; *Gopal Das* v. *Sri Thakurji*, AIR 1943 PC 83; *Maharaja Shree Mills* v. *Union of India*, AIR 1960 Raj 92.

81. *Ram Dass* v. *Board of Revenue U.P.*, AIR 1967 All 481. **See also** *Ramesh Ramrao Hate* v. *Parvez B. Bhesania*, 1997 AIHC 2521 (para 9) (Bom).

82. *Mira Bai* v. *Jai Singh*, AIR 1971 Raj 303; *Chandanbai (Mst.)* v. *Jagjaiwanlal*, AIR 1958 Raj 110; *Employers in relation to Central Bank of India* v. *General Secretary, Bihar Provincial Bank of India etc.*, ILR (1967) 46 Pat 1086; *Basanta Kumar Das* v. *Binayak Das & Ors.*, (1974) 40 Cut LT 1214.

83. *Amar Singh* v. *Tej Ram*, AIR 1982 P&H 282.

(*e*) when the original is a public document within the meaning of Section 74;

(*f*) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India, to be given in evidence;

(*g*) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court and the fact to be proved is the general result of the whole collection.

In cases (*a*), (*c*) and (*d*), any secondary evidence of the contents of the document is admissible.

In case (*b*), the written admission is admissible.

In case (*e*) or (*f*), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (*g*), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

SYNOPSIS

1. *Principle* ... 651
2. *Non-production of document to be accounted for* ... 652
3. *Document—means* ... 653
4. *Original shown in possession but not produced [Clause (a)]* ... 654
5. *Person out of reach or not subject to process of the court* ... 655
6. *Legally bound* ... 656
7. *Notice under Section 66* ... 656
8. *Existence of original admitted in writing [Clause (b)]* ... 657
9. *Original destroyed or lost [Clause (c)]* ... 658
10. *Criminal proceedings* ... 661
11. *Contempt proceedings* ... 662
12. *Lost will* ... 662
13. *Original not easily moveable [Clause (d)]* ... 663
14. *When original is a public document or whose certified copy is legally permitted [Clauses (e) and (f)]* ... 663
15. *Documents of which a certified copy is permitted under law* ... 665
16. *Originals consisting of several accounts or can't conveniently be examined [Clause (g)]* ... 665
17. *Objection to secondary evidence* ... 666
18. *Execution must be proved* ... 666

COMMENTS

1. PRINCIPLE AND SCOPE

This section enumerates the seven exceptional cases in which secondary evidence is admissible. Under it, secondary evidence may be given of the contents of a document in civil as well as in criminal proceedings.

HALSBURY (4th Edn., Vol. 17, para 9 and page 10 observes: "In the unavoidable absence of the best or primary evidence of documents, the court will accept secondary evidence. This is evidence which suggests, on the face of it, that other and better evidence exists. A party tendering it ought, therefore, to show that he is unable to obtain the best evidence. Public and judicial documents are usually proved by copies, without accounting for the absence of the originals.

There are no degrees of secondary evidence, and once it has been shown that, for example, a private document cannot be produced for reasons which admit the giving of secondary evidence, the contents may be proved by any type of secondary evidence, for example, by the production of a copy which can be proved to have been correctly made from the original, a counterpart, or a draft, by sworn oral testimony as to the contents of the document, or as authorised by statute. Statements of a deceased person as to the contents of documents may also be admissible". Where the applicant sought to produce a

document after eight years of the institution of the suit and that too was a photocopy and not the original, the same could not be admitted in evidence.[1]

The application seeking permission to produce secondary evidence must give full details necessary to attract the provisions and be supported by a proper affidavit.[2]

2. NON-PRODUCTION OF DOCUMENT TO BE ACCOUNTED FOR

HALSBURY (4th Edn., Vol. 17, para 138, page 102) observes: "Secondary evidence of the contents of private document is inadmissible, if primary evidence is available. Before secondary evidence is tendered, it is therefore usually necessary to account for the absence of the original document; and for this purpose proof that primary evidence is not available may be required".

BEST ON EVIDENCE (8th Edn. p. 416) states: "It is a general and well-known rule that no secondary evidence of a document can be received until an excuse such as the law deems sufficient, is given for non-production of the primary evidence".

The section also says that in cases falling under *Clauses* (*a*), (*c*) & (*d*), any secondary evidence of the contents of the document is admissible.[3] In the case of *clause* (*b*), the written admission is admissible. In the case of *Clause* (*e*) & (*f*), certified copies of the document, and no other kind of secondary evidence, is admissible. That means parol evidence cannot be adduced as secondary evidence in cases falling under *clause* (*e*) or (*f*). So far as *Clause* (*g*) is concerned, secondary evidence may be given by any person who has examined them or who is skilled in the examination of such documents.

Secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for in such manner as to bring the case within one or other of the cases provided for in the section.[4]

The Privy Council, in *Babu Anand Biharilal* v. *M/s. Dinshaw and Co.*[5], held that unless the conditions laid down in any one of the *clauses* of this section are satisfied, no secondary evidence *in lieu of* primary evidence can be received.[6]

The question of proof, by secondary evidence, as to the use of a document is not one of fact but of procedure.[7]

It is incumbent on the person who tenders secondary evidence to show that it is admissible; the question of admissibility is ordinarily for the court of first instance.[8] The Privy Council, in *Rani Haripria Debi (Smt.)* v. *Rukmini Debi,*[9] held that the question whether or not a party to a suit had laid sufficient foundation to entitle him to tender secondary evidence in the place of primary evidence, is a matter of fact, to be judicially determined by the court of first instance which tries the case; its conclusion should not be overruled except in a clear, case of miscarriage.[10] Before invoking the provisions of this section for adducing secondary evidence foundation must be first laid for its reception by fulfilling the conditions laid in the *clauses* of this section.[11]

Where there is no 'document' signed by the parties, much less a registered document, as evidence of partition, there is no question of the plaintiff adducing secondary evidence of the contents of it, within

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1. *Arati Bhargava* v. *Kavi Kumar Bhargava,* AIR 1999 Del 280 (paras 6-8).
2. *State of Rajasthan* v. *Khemraj,* AIR 2000 SC 1759 (paras 2 and 3).
3. *Sanathan Mohanty* v. *Baidhar,* 1986 Ori 66.
4. *Krishna Kishori Chowdhrani* v. *Kishori Lal Roy,* ILR (1887) 14 Cal 486 : 14 IA 71; *Md. Zafar* v. *Zahur Hussain,* ILR (1926) 49 All 78; AIR 1926 All 741; *Womesh Chandar Ghose* v. *Shama Sundari Bai,* ILR (1881) 7 Cal 98; *Hana* v. *Lokumal,* ILR 1943 Kar 420; *John Mithalal Desai* v. *Dineshbhai K. Vora,* 1998 AIHC 1894 (paras 12 and 13) (Guj); *Paramjit Kaur* v. *Sat Kartar Singh,* 1998 AIHC 3470 (para 3) (P&H); *Sukhjinder Kaur* v. *Gurdip Kaur,* 1998 AIHC 3957 (para 3) (P&H).
5. AIR 1946 PC 24.
6. **See also** In re : *Raghauiah,* AIR 1953 Mad 780.
7. *Jagadish Chandra Deo* v. *Gour Hari Mahato,* AIR 1936 PC 258.
8. *Abdul Razack* v. *Ma U,* (1898) 2 UBR (1897-1901) 382, secondary evidence was not allowed where the primary was on record; *Kirpal Singh* v. *Kartaro,* AIR 1980 Raj 213.
9. AIR 19 Cal 438, 442 (PC).
10. **See also** *Sookram Sookul* v. *Ramlal Sookul,* 9 WR 248; *Ningama* v. *Ramappa,* 5 Bom LR 708; *Pandappa Mahalingappa* v. *Shiva Lingappa,* AIR 1946 Bom 193; *Chuhamal* v. *Hazi Rahim Bakhsh,* AIR 1924 Lah 303.
11. *Sitaldas* v. *Sant Ram,* AIR 1954 SC 606.

the meaning of Section 65. In such circumstances, there is no bar to the admission of oral evidence to prove the alleged partition.[12] Where the original documents were not produced, and no foundation was laid for establishing the right to give secondary evidence, the question of admitting secondary evidence would not arise.[13] Where the fact that the original adoption deed was with the plaintiff was not proved, it was held that secondary evidence was not admissible.[14] Where the production of certain documents was not granted under O. XI, R. 14 by the trial Court, rejection of the application to produce secondary evidence in respect of those documents is no material irregularity and illegality.[15]

An order allowing secondary evidence of the contents of the document without compliance with the provisions of Section 65 is illegal.[16]

Section 65 cannot be invoked where a party, being in possession of the document, does not produce it. Where the document not having been produced by a party at all during the relevant periods, he cannot be permitted to produce it from his own possession at the stage of arguments in the High Court. The reason for this is that, if he had produced it in the trial court, the opposite party would have had the opportunity to put forward his contention[17] but where the photocopies, sought to be exhibited, were compared with the originals prior to framing of charge and the plaintiffs in possession were ready to produce them during recording of statements, the order allowing their exhibition without their originals was not improper.[18]

The doctrine of privilege is based upon public interest which is not to suffer for individual gain. If litigants obtained copies of privileged documents surreptitiously, such documents shall not be looked into as secondary evidence of the document.[19]

Under Section 65, secondary evidence is to be given only to prove the existence, condition or contents of a document, and nothing more beyond that.[20]

Section 45-F of the Banking Companies Act of 1949, as amended, is not a provision in derogation of the provisions of Section 65 of the Evidence Act, but it is in addition thereto.[21]

Section 87(3) of Criminal Procedure Code does not rule out the requirements of Section 65 of the Evidence Act.[22]

Assuming that the commercial tax officer acts, as a court as defined by the Evidence Act, while taking evidence, which he is authorised to take, he can admit secondary evidence of the contents of a document which is lost or destroyed.[23]

This section proceeds on the basis that primary evidence is itself admissible.[24]

3. DOCUMENT—MEANS

'Document' means a document admissible in evidence. If a document is inadmissible in consequence of its not being registered, or not being properly stamped, secondary evidence cannot be

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12. *Tahir (Md.)* v. *Sardar Bano (Mst.)*, AIR 1952 All 782.
13. *Roman Catholic Mission* v. *State of Madras*, AIR 1966 SC 1457. **See also** *Kashinath* v. *Union of India*, ILR (1973) 2 All 362; *Phoolchand* v. *L. Puranchand*, ILR (1962) 1 All 671; *Basanti* v. *Pohlu*, AIR 1952 Bilaspur 13; *Kaloo Ram* v. *Gangadass*, ILR 1963 13 Raj 1090; *Alicia* v. *Percival Felix Pinto*, (1972) 2 Mys LJ 210; *Kunhammad* v. *Moosankutty*, 1972 Ker 76.
14. *Laxman Ganpati* v. *Anusuyabai*, AIR 1976 Bom 264.
15. *Dropadi* v. *Mahagraha Bhagwat Singh*, AIR 1995 Raj 138 (para 4).
16. *Laxmi Narain* v. *Parmanand*, 1978 Raj LW 411.
17. *Anantha Raghuram Arya* v. *Rajah B. Naga Chaya Devamma*, AIR 1958 A.P. 418, 422.
18. *Prem Kumari* v. *Sushil Kumari*, AIR 2000 Raj 415 (para 5).
19. *Jaffarul Hossain* v. *Emperor*, AIR 1932 Cal 468; *Bento Souza* v. *Francis*, 1058 Cal; *Dinbai Dinshaw* v. *Dominion of India*, AIR 1951 Bom 72.
20. *Gulab Chand* v. *Sheo Karan Lall Seth*, AIR 1964 Pat 45.
21. *Calcutta National Bank Ltd.* v. *Sonapur Tea Co. Ltd.*, AIR 1957 Cal 9.
22. *P.K. Gupta* v. *State of W.B.*, 1973 Cr. LJ 1368 (Cal).
23. *Kedarnath Jute Manufacturing Co. Ltd.* v. *Commercial Tax Officer*, (1959) 10 STC 241.
24. *K. Muhammed* v. *Nani*, 1970 Ker. LJ 356.

given of its existence.[25] A party should not be allowed to prove a copy of an unstamped original deed and use it as secondary evidence either on due payment of penalty into the court or upon its endorsement by the Collector.[26] If the original document is inadmissible in evidence owing to its being unstamped or unregistered, secondary evidence is inadmissible. Secondary evidence cannot be given to establish a fact, proof whereof by primary evidence is forbidden. Under no circumstances can secondary evidence be admitted as a substitute for inadmissible primary evidence. Where a party comes into court resting his claim on a written title deed which the law requires to be registered, he cannot, when he has failed to register, and is, in consequence unable to use his title deed, turn round and say that he could prove his title by secondary evidence. Therefore, oral evidence of the terms of an unregistered deed of mortgage, required by law to be registered, is inadmissible.[27] When a plea was taken that an award was neither stamped nor registered, it was held that, as the award itself was inadmissible for want of stamp and registration, secondary evidence is not admissible; but as the defendant had not denied the terms of the award which were set out in detail in the plaint, it must be taken that they were under Order VIII, Rule 5, C.P.C., that in such case, award need not be produced in evidence and the question of the admissibility would not arise.[28] If a document which is required to be registered under the Registration Act, is not registered, secondary evidence cannot be given as to its existence.[29]

Where the plaintiff paid penalty and necessary stamp on a document which was impounded, and its execution was also proved, but it was lost while it was in the custody of the court, it was held that the opposite party cannot question it at any subsequent stage on the ground that it was not duly stamped.[30]

An unstamped counterpart of a partnership deed is not inadmissible for want of proof of loss of the original deed which was on a stamp paper, because there is nothing to prevent a person to enter into partnership evidenced by a deed written on a plain sheet of paper.[31]

Where in a suit for redemption, the defendant refused to produce the unregistered mortgage deed, it was held that the plaintiff could adduce secondary evidence thereof for purpose of proving the nature and character of the defendant's possession.[32]

Secondary evidence was allowed where the defendant did not deny the registered deed.[33]

4. ORIGINAL SHOWN IN POSSESSION BUT NOT PRODUCED [CLAUSE (a)]

This *clause* deals with three situations under which secondary evidence can be given. Firstly, when the original is shown or appears to be in the possession and power of the person against whom the document is sought to be proved. Secondly, when it is in the possession or power of any person who is out of reach, or not subject to the process of the court. Thirdly, when it is in the possession of any person legally bound to produce it, but he fails to produce it after the notice mentioned in Section 66 is given to him.

In this clause, the expression "shown or appears to be in possession or power" is used. This presupposes the satisfaction of the court to that effect, before the party is allowed to adduce the secondary evidence. That can be done only by adducing some evidence, or by showing certain circumstances appearing from the record itself.

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25. *Raja of Bobbili* v. *Inuganti China Sitaramaswamy*, ILR 23 Mad 39 (P.C.); *Hiralal* v. *Shankar*, ILR 45 Bom 170; *Jupidi Kesava Rao* v. *Pulavarthi Venkata Subbarao*, AIR 1971 SC 1070; *Chmpalal* v. *Panna Lal*, ILR (1951) 1 Raj 190.
26. *Raja of Bobbili* v. *Inuganti China Sitaramaswamy*, ILR 23 Mad 49 (P.C.).
27. *Sawa* v. *Kuka*, ILR (1951) 1 Raj 69 : AIR 1951 Raj 66; *Campalal* v. *Pannalal*, ILR (1951) 1 Raj 190; *Phoolchand* v. *L. Puran Chand*, ILR (1962) 1 All 671; *Moolchand* v. *Laxman*, AIR 1958 Raj 72; *P.T. Subba Rao* v. *T. Kesava Rao* (1967) 2 An. W.R. 444; *Lachmareddy* v. *Sham Rao*, (1966) 2 An W.R 251; *Ladharam* v. *Harichand* AIR 1938 Lah 90; *Swaminath* v. *Sundara*, (1911) 2 M.W.N. 166; *Harshvardhan Singh* v. *Ranveer Singh*, AIR 1997 Raj 211. The Court referred to *Kale* v. *Deputy Director of Consolidation*, AIR 1976 SC 807.
28. *Pandya Shankerlal Sunderji* v. *Pandya Ramniklal*, AIR 1951 Kutch 23.
29. *Varada Ayyangar* v. *Krishnaswami Ayyangar*, ILR 6 Mad 117; *Sambayya* v. *Gangayya*, ILR 1890 13 Mad 308; *Janardhan* v. *J.* AIR 1927 Nag 214; *Pandya Shankerlal Sunderji* v. *Pandya Ramniklal*, AIR 1951 Kutch 23; *Sawa* v. *Kuka*, AIR 1951 Raj 66; *Yasin Baig* v. *Harnarayan Aggarwalla*, ILR 1970 Cut 711.
30. *Radha Kishan* v. *Laxminarian*, 1957 Raj LW 603.
31. *Hiralal* v. *Gian Singh*, AIR 1951 Punj 441.
32. *Rahim Bux* v. *Illahi Bux*, AIR 1973 Raj 294; **relying on** *Lachhmi Narain* v. *Kalyan*, AIR 1960 Raj 1 (S.B.)
33. *Ranjit Kumar* v. *Kamal Kumar*, AIR 1982 Cal 493; **see also** *Shiolal Sing* v. *Shankar*, AIR 1984 Bom 19; (where execution could not be proved).

The document need not be in the actual possession of the party, it is enough if it is in his power.

According to the first part of Cl. (*a*), secondary evidence of the contents of a document may be given when the original is in the possession or power of the adversary.[34]

The Supreme Court held where it was not shown that the successful candidate in an election was in possession of the original leaflet, that leading secondary evidence by a photostat copy was not permissible.[35] Secondary evidence of the contents of a document cannot be given by a party who has custody of the original.[36] Where a driver and a conductor were prosecuted for contravention of the conditions of registration certificate and the permit, and when they did not produce those documents in the court, it was held that the prosecution could produce secondary evidence.[37] Where the execution of the document was admitted, but the document was not produced by the person holding it, it was held that the contents of the document could, with the permission of the court, be proved by secondary evidence in view of the non-production of the document by the opposite party.[38] Where a notice under Section 80, C.P.C., was given to the Union of India, it was held the production of a copy of a notice by the plaintiff is permissible as secondary evidence, as the original would be with the Union of India.[39] Where a document ought to have been in the possession of the plaintiff, and a notice was also given to him to produce it, but it was not produced, stating that it was not in the plaintiff's possession, it was held that a case was made out to lead secondary evidence by the defendant.[40] Where the best evidence was in the possession of the defendant which he did not produce, grant of permission to the plaintiff to lead secondary evidence could not be interfered with.[41] Where the tenant alleged that the original rent note was in the possession of the landlord, rejection of his application seeking to produce the copy of the rent note on the ground that the same was of doubtful veracity without affording him opportunity to adduce secondary evidence was unjustified.[42]

The Supreme Court, in *Bibi Aisha* v. *Bihar Subai Sunni Majlis Avagaf*[43] held that *clause* (*a*) is not controlled by Cl. (*f*),; when a case falls under *cl.* (*a*), any secondary evidence (a plain copy of the document), and not necessarily a certified copy of the document, is admissible though the case may also fall under *cl.* (*f*) of this section. In the said case, it was observed: "In cases (*a*), (*c*) and (*d*) the words 'any secondary evidence is admissible' are too clear and too strong to be controlled by anything that follows".

Where the plaintiff produced the photostat copy of the alleged assessment order but gave no notice to the witness, in whose possession the original was, to produce the same and there was no material to show that the said photostat copy was made from its original, the order permitting the plaintiff to produce the said copy was held to be not proper.[44]

5. PERSON OUT OF REACH OR NOT SUBJECT TO PROCESS OF THE COURT

Where a person who is in French territory and who is not subject to the process of courts in the Indian Union, is having possession of a document, an authenticated copy could be received under Section 65.[45] Where the original mortgage deed was filed in Pakistan courts before partition of India, the mortgagee migrated to India on partition and filed a suit to enforce the claim against the property in

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34. *Maneklal* v. *Ginwala*, AIR 1950 SC 1; *Muthu Venkatarama Reddiar* v. *Vardaraja Kounder*, AIR 1971 Mad 471; *Chandranath* v. *Tusharika*, AIR 1958 SC 521; *British Transport Co. Ltd.* v. *Suraj Bhan*, AIR 1963 All 313; *Jagroop* v. *Rex*, AIR 1952 All 276; *Vishwanath Vithoba* v. *Genu Kisan*, AIR 1956 Bom 555; *Baboolal* v. *Nathmal*, AIR 1956 Raj 126; *Patel Manilal Chhaganlal* v. *Municipal Corp.*, AIR 1978 Guj 193; *Gopal Das* v. *Thakurji*, AIR 1936 All 422; *Karthikeya* v. *Singaram*, AIR 1956 Mad 693; *Risal* v. *Dy. Director of Consolidation*, 1970 All L.J. 1161; *Bibo Devi (Smt.)* v. *Rattan Lal*, ILR (1972) 2 Delhi 699.
35. *Ashok Dulichand* v. *Madhavlal Dube*, AIR 1975 SC 1748.
36. *Hiralal* v. *Ganesh Prasad*, (1882) 4 All 406 P.C.
37. *Jagroop* v. *R*, AIR 1952 All 276.
38. *Pravin S. Shah* v. *Govind K. Sharma*, 1974 Raj LR 128 (Del).
39. *Lokchand Prithi Singh* v. *Union of India*, AIR 1959 Raj 231.
40. *Dalbir Kaur* v. *Amar Kaur*, (1979) 81 Punj LR 44. **See also** *Gopal Krishna Jiwan Kumar* v. *Puran Singh*, AIR 1998 P&H 144 (para 10); *D. Sarasu* v. *Jayalakshmi*, 2001 AIHC 2484 (para 11) (Mad).
41. *Maithu Lal* v. *Kundan Lal*, AIR 1998 P&H 144 (para 10).
42. *Nawab Singh* v. *Inderjit Kaur*, AIR 1999 SC 1668 (para 3), **reversing** CR No. 600 of 1998, Dt. 16-9-1998 (P&H).
43. AIR 1969 SC 253.
44. *Rajasthan Golden Transport Co.* v. *LRs. of Amritlal*, AIR 1998 Raj 153 (para 5).
45. *Muni Ammal* v. *Govindarajan*, AIR 1958 Mad 393.

India, it was held that the mortgagee was entitled to produce secondary evidence of the mortgage deed, because the original was in custody of the person beyond the jurisdiction of the court.[46] Where an original document was filed in a court in a different State, it was held that the certified copy of the document was admissible.[47]

6. LEGALLY BOUND

In this clause it is stated that when the document is in possession of any person legally bound to produce it, and when, after notice, he does not produce it, secondary evidence can be given.

PHIPSON states (15th Edn. (2000), para 41-32, pages 1121-1122) : "When the stranger is compellable by law to produce, by witness summons, an original document in his possession, but fails to do, so, secondary evidence of its contents cannot be given, although the witness will be punishable for disobedience.....Mere refusal to produce the document will not, therefore, let in secondary evidence thereof; the witness must be justified in his refusal, for otherwise the party has no remedy except as against him, and even a justified refusal will not let in secondary evidence of certain documents protected by public policy. The witness may be justified in such refusal where the document is, *e.g.*, one on which he has a lien for money lent, or is a title deed, or an incriminating document, or one which he holds as trustee, solicitor, or mortgagee for another, and which that other would himself be justified in withholding".

The wording of this *clause* has given rise to considerable doubt. Secondary evidence of a document is admissible when the original appears to be in the possession of any person legally bound to produce it. This clearly covers a document which is unjustifiably withheld by any person, thus differing from the English law on the point. But if a person summoned to produce a document objects to do so, and his objection is upheld by the Court, it seems equally clear that such a document does not fall within the ambit of this section. It may be, however, that the courts will admit secondary evidence in such a case upon the general principles of the English law and the decisions, of the English courts upon the subject.

Where a witness was summoned by registered post to produce the original sale deed, the witness refused to receive the summons, it was held that the certified copy of the sale deed was admissible.[48]

This expression 'not subject to' seems intended to include the case of a person not legally bound to produce the document, who refuses to produce it.[49]

Where the original of a document cannot be admitted in evidence on the ground of privilege under Section 124 of the Evidence Act, no secondary evidence of its contents can be given.[50]

7. NOTICE UNDER SECTION 66

This *clause* seems to mean: when any person in whose possession or power the original may be, after receiving the notice (if any) required by Section 66, does not produce such original.[51]

The purpose of issuing notice to the person in possession of a document is to give the party an opportunity of producing the original and to secure the best evidence of its contents.[52] The sole object of a notice to produce is to enable the adversary to produce the document if he likes, and, if he does not, to enable his opponent to give secondary evidence thereof, so as to exclude the argument that the latter has not taken all reasonable means to procure the original which he must do before he can be permitted to make use of secondary evidence.[53]

If a person who is legally bound to produce the document refuses to produce it, notwithstanding the notice to do so, the existence and contents of the original document can be proved under this *clause* by proof of the authenticated copy.[54] Before secondary evidence is allowed, notice to produce the document

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46. *Jai Singh* v. *Harnam Das*, AIR 1964 All 381.
47. *Biharilal Agarawalla* v. *Tamizul Haque*, AIR 1988 Gau 1.
48. *Chunilal Ojha* v. *Mulsankar Ojha*, ILR (1961) 1 Cut. 635.
49. *Stokes Anglo-Indian codes*, Vol. II, p. 892, f.n. 30.
50. *Sivasankaram* v. *Narayana Rao*, AIR 1937 Mad 807.
51. *Strokes' Anglo-Indian codes*, Vol. II, p. 892, f.n. 4.
52. *Surendra Krishna Roy* v. *Mirza Md. Syed Ali*, AIR 1936 PC 15.
53. *Dwyer* v. *Collins*, (1852) 7 Ex 639, 647.
54. *Muni Ammal* v. *Govindarajan*, AIR 1958 Mad 393.

must be given to the person in possession of it. Where the correspondence of the government officials contained certain terms of the lease, and a notice was issued under Section 66, for production of the original document and they were not produced, it was held by the Supreme Court that secondary evidence could be adduced.[55] Where a thirty year old gift deed was called for by issue of notice and it was not produced, it was held that secondary evidence by production of certified copy was admissible.[56] Where a notice to produce the documents is given under Order XII, Rule 8, C.P.C., and there is non-compliance, striking off of the defence cannot be ordered under Rule 21 of Order XI, C.P.C., as secondary evidence of documents can be given in such a case.[57] Where notice is given, and the document is not produced by the party, secondary evidence under Section 65 is admissible. Further, in such circumstances, a presumption arises under Section 89 of the Evidence Act about the execution of the document in respect of which secondary evidence has been led; such presumption arises in respect of attestation, execution and stamping being done in the manner required by law.[58] Where the plaintiff produced the certified copy of a trust deed, stating that the defendant was in possession of the original, it was held that the defendant must have known that he would be required to produce it, that there was an implied notice under proviso to Section 66(2) to the defendant and hence the certified copy was sufficient proof of the deed.[59]

This rule applies equally both in civil and criminal cases. Before notice is ordered to produce the document, it must be shown that the document is in the hands of the opposite party who is required to produce it.[60]

Where no notice, as required by Section 66, is given, the secondary evidence is not admissible.[61]

A certified copy of a registered document cannot be admitted on the ground of its being a public document under Section 74 of the Act without taking steps for the production of the original or laying the foundation for admitting secondary evidence.[62]

Where the defendant denies having possession of a document there is no necessity to issue a notice for its production.[63]

Where the defendant deposed that the original deed of the family settlement was not with the plaintiff but was with a third party who was dead, and the defendant produced a certified copy and proved it, it was held that *no notice to the plaintiff was required* to admit the certified copy as secondary evidence.[64]

8. EXISTENCE OF ORIGINAL ADMITTED IN WRITING [CLAUSE (b)]

When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved, or by his representative in interest, secondary evidence can be given. This *clause* has to be read with Section 22 of the Act which says that oral admissions as to the contents of a document are not relevant unless and until the party supposing to prove them shows that he is entitled to give secondary evidence of the contents of such document. The secondary evidence admissible under *cl.* (*b*) is the written admission of the person against whom it is sought to be proved or by his representatives in interest, though the original is in existence and not produced.[65]

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55. *Maneklal* v. *Ginwala*, AIR 1950 SC 1; *Surendra Krishna Raj* v. *Mirza Md. Syed Ali*, AIR 1936 PC 15; *Muni Ammal* v. *Govindarajan*, AIR 1958 Mad 393; *Purna Chandra Patnaik* v. *Kalidas Sen*, AIR 1973 Ori 65; *Narsidas* v. *Ravi Shankar*, AIR 1931 Bom 33; *Manidevi (Smt.)* v. *Anpurna Dai*, AIR 1943 Pat 218; *Nityananda Roy* v. *Rashbehari Roy*, AIR 1953 Cal 456.
56. *Rajendra Jha* v. *Tarkeshwar Prasad Agarwal*, ILR (1978) 57 Pat 426.
57. *Krishnarao* v. *State of Andhra*, AIR 1962 A.P. 249.
58. *Dilipsingh* v. *Dhaniram*, AIR 1976 Bom 38; *Kashibai Martand* v. *Vinayak*, AIR 1956 Bom 65 **relied on.**
59. *Laxshmi Kanto Roy* v. *Nishi Kanto Roy*, (1967) 71 Cal. W.N. 362.
60. *Venkatarama Reddiar* v. *Vardaraja*, AIR 1971 Mad 471; *Biswanath* v. *Dhapu Debi*, AIR 1960 Cal 494; *British Transport Co.* v. *Suraj Bhan*, AIR 1963 All 313.
61. *Nityananda Roy* v. *Rashbehari Roy*, AIR 1953 Cal 456; *Kanhiyalal* v. *Jamnalal*, AIR 1950 Raj 47; *Sulochana Devi (Smt.)* v. *Govina Chandra Nag*, AIR 1986 Cal 430.
62. *Paramananda Sahu* v. *Babu Sahu & Ors.*, (1970) 36 Cut LT 1211.
63. *Chandra Sekhar Pati* v. *Ahalya Devi*, AIR 1974 Ori 199.
64. *Abdul Rahman* v. *Rameshwar Prasad*, AIR 1977 All 470.
65. *Hira Lal* v. *Ram Prasad*, AIR 1949 All 677; *Jaigopal* v. *Divisional Forest Officer*, AIR 1953 Pat 310; *Bishwambhar Singh* v. *State of Orissa*, AIR 1954 SC 139; *Rammanlal* v. *Babu Ram*, AIR 1941 All 50; *Purushottama Chettiar* v. *Ramanuja Padayachi*, (1969) 1 MLJ 237.

Secondary evidence was held admissible when the opposite party admitted in a letter about the existence and contents of the document.[66]

Where a high school certificate and a birth extract were admitted by the first appellate court, though not produced before the trial court, on an explanation given by the party that such documents were not in his possession, it was held that such admission of the documents was wrong and was vitiated for want of proof, as there was no admission in writing about the contents of those documents.[67] A denial of the execution of a bond, though accompanied by a statement of discharge of the debt, cannot be regarded as an admission within the meaning of Section 65(b) so as to dispense with the production of the document. A plea of ignorance of the execution of a document, accompanied by even an alternative plea of payment cannot amount to an admission of the execution of the document.[68]

A certified copy of the document containing admission of a party was held admissible against that party, for proving the admission, without confronting the party with his admission contained in a particular document.[69]

Where a suit was filed against a firm for recovery of an amount based on a pronote, a copy of the Balance Sheet enclosed with the Income Tax Return sent by the manager of the firm, which was given to the plaintiff by a partner of the firm, was filed by the plaintiff to show the subsisting liability of the firm and marked with consent, it was held that such statement acknowledging the liability of debt can be relied upon and is admissible.[70]

Where the confession of an accused is not admissible, secondary evidence of it is not admissible, and Section 65(b) cannot be invoked because the accused put the thumb mark to that statement.[71]

A debtor's application to the Debt Conciliation Board cannot be regarded as an admission under this *clause*.[72]

Secondary evidence, by means of a written admission under this *clause*, cannot be given of the contents of a document, which is inadmissible for want of registration or of stamps.[73] Section 65(b) is not applicable to an admission of the contents of a document made by a defendant in his written statement, where the original itself was inadmissible for want of stamp.[74]

9. ORIGINAL DESTROYED OR LOST [CLAUSE (c)]

Clause (c) consists of two parts: the first part is an independent one, stating that when the original document had been destroyed or lost, he can produce secondary evidence; the second part comes when a party offering evidence of its contents cannot, for any other reason, not arising from his own default or neglect, produce it in reasonable time. The words in the second part "arising from his own fault or neglect" do not qualify the first part, but apply only to the second part.

When a party admitted that he had not preserved the original, the opposite party can give oral evidence of it.[75]

Secondary evidence of a document which is lost or difficult to trace can be adduced in two ways:

(1) by oral evidence of persons who were present when the document was executed;

(2) by a certified copy of the original document.[76]

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66. *Biswanbhar* v. *State*, AIR 1954 SC 139.
67. 1966 All WR (HC) 634.
68. *Ananta Raghuram Arya* v. *Rajah B. Nagachaya Devamma*, AIR 1958 A.P. 418.
69. *Bhag Singh* v. *Bhaika Bhag Co-operative Society Ltd.*, (1979) 81 Punj. LR 255.
70. *V.K.M. Electrical Stores* v. *Lakshmi Kanthamma*, (1968) 2 An. W.R. 567.
71. *R.* v. *Viran*, ILR 9 Mad 224, 240.
72. *Udhao* v. *Nanaji Gadewar* v. *Narayan Vithoba Rangliwar*, (1941) Nag 95.
73. *Varada* v. *Krishnasami*, ILR (1882) 6 Mad 117; *Damodar Jagannath* v. *Atmaram Babaji*, ILR (1888) 12 Bom 443
74. *Krishnaswami* v. *Ranga Swami*, ILR 7 Mad 112; *Pramathanath* v. *Drawaka*, ILR 23 Cal 851; *Damodar* v. *Atmaram*, ILR (1888) 12 Bom 433.
75. *Pearey* v. *Nanak*, AIR 1948 PC 108.
76. *Veerappa* v. *Md. Attaullah*, 1951 Hyd 74.

Where certified copy of a sale deed could not be obtained as the record of the Registrar's Office was destroyed, but, the plaintiff produced a copy prepared from a certified copy which the defendant had produced in a former suit, but which was not available as the court record also had been destroyed, it was held that the copy produced by the plaintiff was admissible.[77] Where the original certified copy of the certificate of registration of a premises was lost but the certificate number and the year of registration was given by the tenant, he would be permitted to adduce the secondary evidence to prove the attested copy of the certificate.[78]

Where a person in whose custody the document was alleged to be, deposed to its loss, or that he was not in possession of the document, unless there is some motive suggested for his being untruthful, such evidence should be accepted as sufficient to allow secondary evidence.[79]

It is enough for the plaintiff to prove that the original is not in his possession as so far as he is concerned, it is lost.[80] Copies of registered documents are admissible as secondary evidence where the person in whose custody the original should be, swears that they are not with him, though there is no evidence as to the loss or otherwise of the original.[81] Where there was evidence on record to show that the original will had been eaten away by rats, the secondary evidence was admissible under the law.[82] Where an original order authorising an officer to do certain acts was not traceable, it was held that secondary evidence of such authorisation is admissible under *cl.* (*c*). If it is a public document, cl. (e) would only apply where there was loss of the original.[83] Where the original records have been lost, it is open to a party to offer evidence of the contents, and such secondary evidence includes copies made from or compared with the original, and also oral evidence as to the contents, given by some person who has seen the original document.[84] Where to prove the loss of the original arbitration award one of the arbitrators was examined, the photocopy of the said lost award bearing the signature of the said arbitrator and the signatures of both the parties was admissible in evidence.[85] Where a solicitor stated on oath that he was entrusted by the plaintiff with two original *hundies,* and that the copy of each of the two *hundies* was prepared under his supervision and compared with the originals which was later found missing, it was held that the copies of the *hundies* and their contents can be received as secondary evidence under Section 63(3) and 65(*c*).[86] Original documents not traceable can be said to be lost and certified copies thereof may be received as secondary evidence.[87] When the original document was filed already in a court in a different State, its certified copy is admissible under Section 65(*c*).[88] Where a certified copy of the document thirty years old, was produced and there was evidence showing the loss of the original, and its non-production thereof was not due to fault or neglect, the certified copies could be received as secondary evidence of the original.[89] Where the plaintiff filed the suit for title and possession, relying on a *kabuliyat*, the original was not in his possession and the production of the original was found not reasonably possible for the plaintiff, it was held that the certified copy of the *kabuliyat* can be accepted in view of Section 65(*c*).[90] Where a promissory note filed with a plaint disappeared from the court file, it was held that the plaintiff was entitled, without showing how the disappearance of loss arose or who abstracted it from the file, to give secondary evidence of it.[91] Where the original suit agreement was filed

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77. *Bibi Aisha (Mst.)* v. *Bihar Subai Sunni Majlis Avaqaf,* AIR 1969 SC 253; *Shehal Kumar* v. *Economic Transport Corporation Organisation,* AIR 1975 Guj 73; *Surjit Kaur* v. *Nachhattar Singh,* 2001 AIHC 556 (paras 1 and 12) (P&H) : AIR 2001 NOC 15 (P&H).
78. *Tulsi Devi* v. *Som Nath,* 1997 AIHC 253 (paras 6 and 10) (HP).
79. *M. Ihtishan Ali* v. *Jamna Prasad,* AIR 1922 PC 56; *Basant* v. *Brijraj,* AIR 1935 P.C. 132; *S. Rathnammal* v. *Mottadu,* 1998 AIHC 3094 (para 12) (Mad).
80. *Biswanath Agarwalla* v. *Dhapu Debi Jejodia,* AIR 1960 Cal 494, 500.
81. *Hutchegowda* v. *Chennigegowda,* AIR 1953 Mys 49.
82. *Chandan* v. *Longa Bai,* AIR 1998 MP 1.
83. *Babu Jagiwan Dass* v. *Chotey Lal,* 1964 All LJ 788; **relying on** *Chikka Veerasetty* v. *Nanjundachari,* AIR 1955 Mys 139; *Lakunandan* v. *Kunhunm,* ILR 6 Mad 80; *Ananda Kumar* v. *Secretary of State,* AIR 1916 Cal 446; *Chandreshwar Prasad* v. *Bisheshwar Pratap,* AIR 1927 Pat 61.
84. *Pran Jivan Jaitha* v. *State of West Bengal,* AIR 1974 Cal 210.
85. *Om Prakash* v. *Dev Raj,* AIR 1995 P&H 349 (para 14).
86. *Balaram Das* v. *Kesardeo Khemka,* (1967) 71 Cal. WN 51.
87. *Sanatan Mahonty* v. *Baidhar Rout,* AIR 1986 Ori 66; *Hariharpal* v. *Sudhir Kumar Pal,* AIR 1988 Cal 68.
88. *Biharilal Agarwalla* v. *Tamizul Haque,* AIR 1988 Gau 1.
89. *Hariharpal* v. *Sudhir Kumar Pal,* AIR 1988 Cal 68.
90. (1977) 1 Cal. LJ 578.
91. *Tulsi Ram* v. *Ram Saran,* (1924) 27 Bom LR 777 (P.C.) : AIR 1925 P.C. 80.

but was lost from the court's custody, its true copy was held admissible in the absence of any rebuttable evidence.[1] Where the record in a case has been destroyed and is therefore not available for the purpose of proving previous convictions, secondary evidence under this *clause* is admissible.[2] An original document was filed before the sub-registrar but the registration was refused. A suit was filed under Section 77 of the Registration Act, wherein the original document was filed, but, part of the document was subsequently missing from the record of the court. It was held that the court could admit secondary evidence of the document and, after reconstructing the document, and could order the registration of the document.[3] Secondary evidence was allowed where the plaintiff stated on oath in an affidavit that the original was lost, and also where the sale deed was handed over to a *patwari* and the same was not returned by him.[4] Where the original document has either been lost, or is being deliberately withheld, by the person in whose custody it was kept, secondary evidence in the nature of oral evidence as to the contents of the original can be admitted in evidence.[5] Copies of telegrams are admissible in evidence as secondary evidence, after the lapse of three months, as a presumption arises under the Telegraph Rules that originals are destroyed after three months.[6]

Where there is no evidence showing that the document is lost, this section is not applicable.[7] A copy of the document cannot be admitted as secondary evidence unless the loss of the original is proved and the copy tendered is proved to be a correct copy of the original.[8] Where there was no proper and sufficient explanation offered as to why a power of attorney under which a deed had been executed, was not produced, the Privy Council held that the evidence of the managing clerk who had read it was useless for proving its contents.[9] Non-production of the original on the ground of the record being very old and the primary evident not being available despite best efforts, was held to be not sufficient and the attested copy was held to be inadmissible.[10]

Under Section 65, secondary evidence is admissible only of the existence or the contents of a document which is lost, but the execution of the document must be proved be primary evidence as required by Section 67 read with Section 47.[11] Before invoking the aid of this section, foundation must be first laid for its reception, by proving that the original document was lost or that the party was not in a position to produce it, and that, to the satisfaction of the court.[12] Secondary evidence can only be admitted when the court is satisfied that the original was lost or destroyed, or when the party is unable to produce it within a reasonable time for any other reason.[13] In order to claim the benefit of Section 65(*c*)

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1. *Harijiwan Sahu* v. *Jairam Sahu*, AIR 1989 Pat 96.
2. *Pokar* v. *Crown*, (1941) Kar 308.
3. *Saraswati Bai (Smt.)* v. *Md. Idarkuddin*, AIR 1963 MP 234.
4. *Sanatan Mohanty* v. *Baidhar Rout*, AIR 1986 Ori 66; *Krishna Devi* v. *Gian Kaur*, AIR 1981 P&H 224.
5. *Ramchand Gupta* v. *Wazir Chand*, AIR 1962 Punj 293.
6. *State* v. *Ganpat Lal*, 1969 Raj LW 537; *Manchalal* v. *Shah Manickchand*, AIR 1988 Kant 221.
7. *Bhubaneshwari Debi* v. *Harisaran*, ILR (1881) 6 Cal 720 (PC); *Krishna Kishori* v. *Kishorilal*, 14 Cal 486 (PC), *Bhagwan Sarup* v. *Jagdish Kumar Jain*, 2000 AIHC 1373 (para 6) (P&H).
8. *Anand* v. *Dinshaw & Co.*, AIR 1946 PC 24; *Mohanlal* v. *Samal*, AIR 1961 Pat 300; *Sardaran* v. *Sunderlal*, AIR 1968 All 363.
9. *Bonnerjee* v. *Sithanath*, 49 IA 46 : 49 Cal 325.
10. *Akshara Nand* v. *State of H.P.*, 1996 AIHC 1894 (paras 4 and 5) (HP).
11. *Akshay Narayan* v. *Maheshwar Bag*, AIR 1958 Ori 207; **relying on** *Haria* v. *Manakchand*, AIR 1914 Nag 87; *Laham* v. *Bala*, AIR 1922 Nag 227; *Ponnuswami Goundan* v. *Kalyana Sundara Ayyar*, AIR 1930 Mad 770; *Manilal Raghvaji* v. *Union of India*, AIR 1956 Pat 434.
12. *Sital Das* v. *Santa Ram*, AIR 1954 SC 606; *Jagadish Prasad* v. *Girija Shankar*, AIR 1968 All 425; (case of a will), *Filmistan Pvt. Ltd* v. *Municipal Corporation Bombay*, AIR 1973 Bom 66; *Parekh Brothers* v. *Kartick Chandra Saha* AIR 1968 Cal 532; *Katihar Jute Mills Ltd* v. *Calcutta Match Works (India) Ltd.*, AIR 1958 Pat 133.
13. *Venkata Ramanujacharyulu* v. *Appalacharyulu*, AIR 1926 Mad 1003; *Rajendra Narayana* v. *Biharilal*, AIR 1932 Pat 157; *Veerasetty* v. *Nanjundachari*, AIR 1955 Mys 139; *Katihar Jute Mills Ltd* v. *Match Works Ltd* AIR 1958 Pat 133; *Manilal Raghavji* v. *Union of India*, AIR 1956 Pat 434; *Ramchand Gupta* v. *Wazirchand*, AIR 1962 Punj 293; *Akshya Narayan* v. *Maheshwar Bag* AIR 1958 Ori 207; *Pearey Lal* v. *Nanak Chand*, AIR 1948 PC 108; *Om Prakash* v. *State*, AIR 1957 All 388; *R.M. Pandye* v. *Automobile Products of India Ltd.*, AIR 1956 Bom 115; *Satyacharan* v. *Hrishikesh Kedar*, AIR 1959 Cal 795; *Babu Jagjiwan Das* v. *Chhoteylal*, 1964 All LJ 788; *Kangabam Ongbi* v. *Guru Mayum Ningol*, AIR 1958 Manipur 16.

there should be credible evidence of the loss of the original. Thus, it must be established that the party has exhausted the sources and means in the search of the document, which were available to him.[14]

The evidence about the search and the enquiries made about the original, and the evidence about its loss are necessary before secondary evidence is admitted in proof of the original.[15]

Original registered will is not a public document, and a certified copy of it is not admissible without proof of the loss of the original.[16]

Evidence of a person deposing to the loss of the document in his custody is sufficient to allow secondary evidence.[17] There must be evidence on record to show that the document has been lost.[18] To prove the loss of a document, evidence of diligent search is necessary. See illus. (b) to Section 104. Copies are inadmissible without proof of the search of the originals.[19] The loss of a document can never be proved absolutely. Where a document has not been seen for many years, the statement by a person who was alleged to have been in possession of it, that it was never with him nor was it with him then, is sufficient evidence of its loss.[20]

If a registered sale deed is lost, a certified copy can be put as secondary evidence, but the reception of other evidence must always be of a very weak character in place of registered document evidencing the transaction.[21]

In an election petition, the photo copy of the manuscript of a leaflet was not allowed because it was not shown where the original was. There must be some explanation about the original.[22]

Where there is a finding that the loss of the original document is fully explained and established, it is a finding of fact; and it is not open in second appeal to set aside that finding on the basis of the insufficiency of evidence.[23]

When a document is lost or destroyed, the provisions of *clause* (e) & (f) are not attracted, it is only clause (c) applies and it is not controlled by cl.(e) & (f).

Section 65(c), which is independent of cl. (e) & (f), applies to all cases, whereas *clause* (e) & (f) apply only to those documents which are in existence in public records but are to be protected from the risk to which they would be exposed any constant production in courts. So certified copies are necessary only in respect of such documents.[24]

10. CRIMINAL PROCEEDINGS

In the case of a criminal trial, where the original police papers and documents were missing, it was held that, by itself, that was not a ground to quash the proceedings, and that the question whether secondary evidence could be admitted was for the trial court to decide, with reference to each document.[25]

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14. *Bobba Suramma (Smt.)* v. *Peddi Reddi Chandramma (Smt.)*, AIR 1959 A.P. 568; *Ananta Raghuram Arya* v. *Rajah B. Nagachaya Devamma*, AIR 1958 A.P. 418; *Bishwanath Agarwalla* v. *Dhapudebi Jajodia (Smt.)*, AIR 1966 Cal 13; *Atra Devi* v. *Ramswaroop Prasad*, AIR 1972 Pat 186; *Mohanlal Sah* v. *Samal Ram Potdar*, AIR 1961 Pat 300; *Suraj Bhan* v. *Harchandgir*, AIR 1954 Pepsu 65; *Kangabam Ongbi Tongbram* v. *Gurumayum Ningol*, AIR 1958 Manipur 16; *Parekh Brothers* v. *Kartick*, AIR 1968 Cal 532; *Maung Bau* v. *Dan Kha*, AIR 1935 Ran 502; *Pandu* v. *Bapudas*, AIR 1929 Nag 288; *Gaya* v. *Jaswant*, AIR 1930 All 550; *Vishvanath* v. *Rahibai*, AIR 1931 Bom 105.
15. ***Rabindra*** **v.** ***Santosh Kumar***, AIR 1975 Cal 381.
16. ***Parsa Singh*** **v.** ***Parkash Kaur (Smt.)***, AIR 1976 Punj 235.
17. ***Laiqan Begum*** **v.** ***Abdul Hamid***, AIR 1979 Rajadhani L.R. 545 (Del).
18. ***Mond Khan*** **v.** ***Sheo Bhikh Singh***, (1930) 5 Luck 377.
19. *Krishna Kishori* v. *Kishori Lal Roy*, ILR (1887) 14 Cal 486 : 14 I.A. 71; *Haripria Debi* v. *Rukmini Debi*, ILR (1892) 19 Cal 438, 19 I.A. 79.
20. *Basant Singh* v. *Brij Raj Saran Singh*, (1937) Bom L.R. 805, 62 I.C. 180 : ILR 57 All 494 : AIR 1935 PC 132.
21. *Entisham Ali* v. *Janna Prasad*, (1922) 24 Bom. IR 675 : 48 I.A. 385; *Nani Bai* v. *Gita Bai*, AIR 1958 SC 706.
22. *Ashok* v. *Madhav Lal*, AIR 1975 SC 1748. **See also** *Joginder Pal* v. *Parduman Singh*, 1999 AIHC 1093 (para 4) (P&H), **distinguishing** *Mohinder Pal Singh* v. *Surjit Singh*, 1995 (2) PLR 204 and *Raj Kumar* v. *Lal Chand*, 1994 (1) Civil CC 477.
23. *Bansraj Kahar* v. *Kaushal Kishore Saran*, AIR 1973 All 99.
24. *Chikka Veerasetty* v. *Nanjundachari*, AIR 1955 Mys 139; *Tara Ram Chand* v. *State*, 1971 Cr LJ 1201 (Ori); *Babu Jagjiwan Das* v. *Choteylal*, 1964 All LJ 788.
25. *Sudhakar Dinkar Malekar* **v.** ***Hemu Prabhudas Thakur***, (1981) 83 Bom LR 496.

It was held that, even if the originals have not been produced, as provided by Section 173 (5) (b) of the Cr. P.C., Section 65 is wide enough to enable the accused to use the copies delivered to him as secondary evidence for purpose of contradicing the witnesses.[26]

On proof of loss of the original dying declaration, secondary evidence can be given by the prosecution.[27]

When an accused preferred a cross-complaint, and an uncertified copy of the complaint was produced through a defence witness, and not by the accused himself, it was held that, if the complaint is treated as a public document, then under Section 65(f), an uncertified copy would not be admissible, and secondary evidence would not be admissible under Section 62 when the original is available.[28]

Where the original first information report, which was written by a constable, was missing and the constable proved its carbon copy and also the loss of the original, it was held that the carbon copy was admissible and the investigation was not vitiated by the loss of the original F.I.R.[29]

Where no steps were taken to recover the original or to produce it before the court, and when the trial court also entertained doubt about its execution, it was held that it would be clear miscarriage of justice to admit secondary evidence.[30]

11. CONTEMPT PROCEEDINGS

In contempt proceedings relating to a newspaper article, when the question of authorship is to be decided, it may be determined by statement on affidavit of persons from relevant departments of the newspaper, or by examining them in Court. The article, accompanied by covering letter on the letter head of a certain advocate, was not produced, nor was the loss proved; evidence of witness from the newspaper was held admissible only regarding the name of the person on the letter head and not about the contents.[31]

12. LOST WILL

The original will in Bengali was executed before 1921, and it was not traceable. In about 1936, the widow of the testator had filed in the Court of Wards Office, the original or a copy of it. There was a translation of the will by that office but not of the entire will. The name of the translator was not mentioned in the translation. A certified copy of the translation was signed by an officer who did not know the language in which the will was written but who stated it was a true and correct translation. On those facts it was held that, even though the certified copy could be treated as secondary evidence of the original, it could not be believed as a reliable translation of the original; that the document attached to the application of the widow to the Court of Wards might not have been the original, but a copy, and the translation would be the translation of the copy and so would not be admissible as secondary evidence of the original will.[32]

Grant of probate is conclusive evidence against all. Secondary evidence is admissible to prove it when there is loss of the original will.[33] Secondary evidence can be accepted in case of the registered will if loss of original is pleaded and proved satisfactorily, provided there is compliance with the provisions of Section 65 (a), (b) and latter part of (c).[34]

In regard to wills, proof of a lost will can be given by secondary evidence as in the case of any other lost document, because, in principle, there is no distinction between the proof of a document and proof of

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26. *State of Kerala* v. *Raju*, 1982 Cr LJ 304 (Ker).
27. *Aher Rama Gova* v. *State of Gujarat*, AIR 1979 SC 1567.
28. *Lalpratap Singh* v. *State*, (1963) 1 Cr LJ 355 (Guj).
29. *State of U.P.* v. *Kubhi Ram*, 1969 All LJ 982.
30. *Ramanna* v. *Sambamoorthy*, AIR 1961 AP 361.
31. In the matter of *Basanta Chandra Ghosh Adv., Patna*, AIR 1960 Pat 430 (FB).
32. *Thakur Krishna* v. *Kanhayalal*, AIR 1961 All 206; **relying on** *Raja Mahadeva Royal* v. *Raja Virabasava Chikka Royal*, AIR 1948 PC 114. In re. *Tarit Kanti*, AIR 1918 Cal 988 (S.B.).
33. *Satyacharan Dass* v. *Hrishikesh*, AIR 1959 Cal 795.
34. *Gutari* v. *Shivcharan*, AIR 1980 Hindu LR 273 (FB) (P&H).

a will. Where the testatrix destroyed the earlier will, after executing a fresh will which was found to be invalid, it was held that the earlier valid will could be proved by oral evidence.[35]

Loss of a will does not operate as revocation of it, and a certified copy of it is admissible.[36] Where the court comes to a conclusion that a will has been lost it has to allow the party to lead secondary evidence, by giving a finding to that effect.[37]

13. CLAUSE (d)—ORIGINAL NOT EASILY MOVEABLE

This clause covers things not easily moveable, as in the case of things fixed in the ground, or a building for example: notices painted on walls, tablets in buildings, tombstones, monuments, or marks on boundary stones or trees. Secondary evidence is admissible in such cases, on account of great inconvenience and impracticability of producing the original.

PHIPSON (15th Edn. (2000), para 41-35 pages 1123-24) states: "When production of the original is physically impossible or highly inconvenient, *e.g.*, inscriptions on walls, tombstones, etc., unless there are circumstances of suspicion, the object itself will not have to be produced.....Where a notice was merely suspended from a wall by a nail, it was held necessary to produce it at the trial; but where the notice, though movable, was one required by statute and under a penalty to be kept constantly affixed, it was held, on grounds of convenience, that secondary evidence thereof might be given without notice to produce the original"[38].

14. CLAUSES (e) & (f)—WHEN ORIGINAL IS A PUBLIC DOCUMENT OR WHOSE CERTIFIED COPY IS LEGALLY PERMITTED

Clause (e) is intended to protect the originals of public records from the risk to which they would be exposed by constant production in evidence. Secondary evidence is admissible in the case of public documents mentioned in Section 74. Section 74 provides that public records kept in any State of private documents are also public documents.

Certified copies are admissible as secondary evidence under clause (f). Sections 76, 78 and 86 may be read along with it. Where an original document cannot be given in evidence owing to a statutory ban, its certified copy cannot be admitted in evidence, *e.g.*, certified copy of the income tax return[39] or that of a sale deed for determining the amount of compensation for the land acquired.[40]

Section 78 of this Act mentions certain documents for which certified copies have to be given. The other statutes which provide for issue of certified copies are Section 4 of the Banker's Book Evidence Act, Section 45 of the Banking Companies Act, Section 4(d) of Powers of Attorney Act, and Section 69 of the Registration Act.

The last but one paragraph of this section provides: "In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible". This applies to the case in which the public document is still in existence on the public records.[41]

Where a case falls under clause (a) or clause (c) and also under clause (f) any secondary evidence may be received.[42]

A copy of the Municipal record not issued in accordance with the requirements of the Muncipal Act is not relevant.[43]

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35. *Russell* v. *Delaney*, (1951) 1 All ER 920.
36. *Babulal* v. *Baijnath*, AIR 1946 Pat 24.
37. *Balbir Singh* v. *Darshan Kaur*, ILR (1977) 1 Punj 239 : (1976) 78 DLR 239.
38. **See also** HALSBURY 4th Edn. Vol. 17 (para 141) page 104.
39. *Devidatt* v. *Shriram*, (1931) 34 Bom LR 236 : ILR 56 Bom 324 : AIR 1932 Bom 291.
40. *State of Kerala* v. *Chalil Saidali*, 1999 AIHC 3262 (para 6) (Ker).
41. *Bibi Aisha* v. *Bihar S.S.M. Avaqaf*, AIR 1969 SC 253; *Hurish* v. *Prosunno*, AIR 22 WR 303; *Anadha* v. *Secretary of State*, ILR 43 Cal 973; *Pran Jivan* v. *State of West Bengal*, AIR 1974 Cal 210; *Janu Khan* v. *State*, AIR 1960 Pat 213; *Chacko Pyli* v. *State of Kerala*, ILR (1966) 1 Ker 320; *Somanna* v. *Subba Rao*, AIR 1958 AP 200; *Mathuradas* v. *State*, AIR 1954 Nag 296; *Pannalal* v. *State*, AIR 1953 MB 84.
42. In the matter of a collision between the "Ava" and the "Brenhilda", ILR (1879) 5 Cal 568, 573; approved by the Supreme Court in *Bibi Aisha* v. *Bihar, SSM Aaqaf*, AIR 1969 SC 253.
43. *Ganesh Prasad.* v. *Badri Prasad Bhola Nath*, AIR 1980 All 361.

The object of these two *clauses* was clarified in an old Madras case by stating that the rule in Cl. (e) or (f), that a certified copy of the document, but no other kind of secondary evidence is admissible, applies to a case in which the public document is still in existence on the public records, and is a provision intended rather to protect the originals of public record from the danger to which they would be exposed by constant production in evidence, than to interfere with the general rule of evidence given in Cl. (c) of the same section, that secondary evidence may be given when the original has been destroyed or lost.[44]

The Calcutta High Court excluded certified copies of records of a foreign court on the ground that they were not proved according to the mode mentioned in Section 56. The Privy Council observed that under Sections 65 & 66, evidence may be given of public documents without notice to the adverse party when the person in possession of the document is out of the reach of or not subject to the process of court. By relying in Section 65 & 66 it would appear that the Privy Council impliedly held that 65(e) & (f) are not the only provisions applicable to public documents.[45]

Public documents can only be proved by the production of certified copies; they cannot be proved by oral evidence.[46]

A reading of cl. (e) and (f) would show that certified copy is admissible in evidence though the original is in existence.[47]

Secondary evidence of documents held as public documents within the meaning of Section 74 can be given by tendering certified copies thereof.[48]

A registered document does not fall under either clause (e) or (f). The entry in the register book is a public document; but, the original is a private document.

When a true copy of a gazette notification is received in evidence without any objection, the other party cannot object subsequently that such secondary evidence is not admissible.[49]

Where public official documents of other States were tendered in evidence, it was held that the authorities before which the documents were tendered must give credit to them, and that they should not ignore them on suspicion.[50]

If the sale deeds were the primary evidence of the interest sold and were said to be registered documents, which were not available for any reason, certified copy thereof could be adduced as secondary evidence, but the reception of other evidence must always be of a very weak character in place of the registered document evidencing those transactions.[51]

Under Section 57(5) of the Indian Registration Act, the certified copy obtained from the Registrar's Office shall be admissible for the purpose of proving the contents of the document; and no further proof is required.[52] Where a registered will is in possession of the person interested in denying the execution, the certified copy of the will is admissible as evidence of the execution of the will.[53] Where the certified copy of a will obtained from the Court where its original was produced, was filed and admitted, non-production of the original could not be urged as a ground later on to invalidate the will.[54] Secondary

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44. *Kunneth* v. *Vayoth*, ILR (1882) 6 Mad 80; *Veera Shetty* v. *Nanjundachari*, AIR 1955 Mys 139.
45. *Haranand* v. *Ramgopal*, ILR 27 IA 1 : 27 Cal 639.
46. *Gangaram* v. *Emperor*, (902) PR No. 5 of 1903 (Cri).
47. *Krishnakishori* v. *Kishorilal* ILR 14 Cal 486 (PC); *Ram Prasady R*, AIR 1945 Pat 210; *Venkata Gopala Ramarao* v. *Venkataramayya*, AIR 1940 Mad 768; *Chandreswar* v. *Bisheswar*, AIR 1927 Pat 61; *Annada Charan* v. *Emperor*, AIR 1943 Cal 251; *Veera Shetty* v. *Nanjundachari*, AIR 1955 Mys 139.
48. **See commentary** on Section 74 as to what are public documents.
49. *State of Kerala* v. *V.P. Enadeen*, AIR 1971 Ker 193 (FB).
50. *Vijay Wine Stores* v. *State of Karnataka*, (1975) 1 Kant LJ 170.
51. *Nanibai* v. *Gitabai*, AIR 1958 SC 706.
52. *Karuppanna* v. *Kolandaswami*, AIR 1954 Mad 486; *Chudasama Khoduba* v. *Chudasama Takhatsand*, AIR 1922 Bom 177(2); *Salimun* v. *Hakim*, AIR 1928 All 394; *Ma Yin* v. *Ma Bok*, AIR 1929 Rang 277; *Patel Maulal* v. *Municipal Corp., Surat* AIR 1978 Guj 193; *Pattu Kumari* v. *Nirmal Kumar Singh*, 43 CWN 907 : AIR 1939 Cal 569 (certified copy of an entry in the register of power of attorney); *Romti* v. *Ratno*, (1969) 71 Punj LR 17 (Del); *S. Madasamy Thevar* v. *A.M. Arjuna Raja*, AIR 2000 Mad 465 (para 39).
53. *Arya Prathinidhi Sabha* v. *Devraj*, AIR 1963 Punj 208.
54. *S.A. Quddus* v. *S. Veerappa*, AIR 1994 Kant 20 (para 13).

evidence in the form of an ordinary copy is admissible, when both the original and the certified copy is lost.[55]

A sale deed was missing from the record of an earlier revenue suit, and procurement of a certified copy was impossible due to destruction of the relevant register for registration of documents. It was held that the vendee should prove its existence and contents by offering secondary evidence; the prohibition contained in the proviso requiring the production of only certified copy of the document as secondary evidence cannot be regarded as exhaustive.[56] Where the plaintiff produced a certified copy of a registered deed in support of his claim and withheld the original which should have been in his possession, it was held that the deed, not being a public document, he was rightly denied the benefit of this section.[57]

15. DOCUMENTS OF WHICH A CERTIFIED COPY IS PERMITTED UNDER LAW

Where a document is registered, but the entry is made in a wrong book in the Registrar's Office, the deed is validly registered.[58] Hence, upon proof of the loss of the original, a certified copy though entered in the wrong book bearing the certificate of the registering authority as being a true copy, is admissible as secondary evidence.[59] A certified copy of a statement of account of entries in the Banker's Book is admissible.[60] Hindu Marriage Register, being a public document, contents of its certified copies are admissible in evidence.[61]

16. ORIGINALS CONSISTING OF SEVERAL ACCOUNTS OR CAN'T CONVENIENTLY BE EXAMINED [CLAUSE (g)]

This provision is meant for saving public time. Where the fact to be proved is the general result of the examination of numerous documents and not the contents of each particular document, and the documents as such cannot be conveniently examined in court, evidence may be given, under this section, as to the general result of the documents by a person who has examined them and who is skilled in the examination of those documents, although they may be public within the meaning of Section 65 and Section 74[62].

STEPHEN in his Digest (7th Edn. p. 81, art. 71) has observed: "In the case of voluminous documents, accounts, records, etc., it is obvious that it would often be practically out of question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered, in the shape of the testimony of a competent witness who has perused the entire mass and will state summarily the net result. Upon the same principle, summaries of official or corporate records might be presented; and testimony, by one who has examined records, that no record of a specific tenor is there contained, is receivable instead of producing the entire mass for perusal in the court-room."

Secondary evidence may be given as to the general result of documents by any person who has examined them and who is skilled in the examination of such documents. The Allahabad High Court held that the competence of the witness must therefore be proved to the satisfaction of the court before such evidence is tendered. A summary of the result of an examination of account books by a person who knew the character in which they were written was held admissible under *Cl.* (g).[63]

Where the originals consist of numerous accounts and the original books of account were eaten away and were in a tattered condition, no secondary evidence is admissible.[64]

Cl. (g) of Section 65 has nothing to do with documents which are not available to the court; the very fact that Cl. (g) provides for secondary evidence because the documents cannot conveniently be

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55. *Marwari Kumhar* v. *Bhagwanpuri Guru Ganeshpuri*, AIR 2000 SC 2629 (para 11).
56. 1970 All WR (HC) 637.
57. *Gurmukh Ram Madan (Dr.)* v. *Bhagwan Das Madan*, AIR 1998 SC 2776.
58. *Satindranath* v. *Jatindranath*, 1935 PC 165 : 62 IA 265.
59. *Bishwanath Agarwalla* v. *Dhapu Debi Jajodia*, AIR 1960 Cal 494.
60. *Calcutta National Bank Ltd.* v. *Sonapur Tea Co. Ltd.*, AIR 1957 Cal 9.
61. *Manjula* v. *Mani*, 1998 Cr LJ 1476 (paras 16 and 20) (Mad).
62. *Sundar Kar* v. *Chandreshwar Prasad Narain*, ILR (1907) 34 Cal 293.
63. *Phulwanti* v. *Janeshar Dass*, AIR 1924 All 625.
64. *Amrita Devi* v. *Sripat Rai*, AIR 1962 All 111.

examined in court, shows that the documents are there for the court to examine if it so likes to do; but where no attempt is made to produce the original documents from which the result was prepared, Section 65(g) cannot be used for the admission of the summary.

When original account books are available, copies thereof being secondary evidence are not admissible.[65]

For attracting Cl. (g) it is necessary that the originals must consist of numerous documents. Where they were not numerous, evidence of a person who prepared the sales statement was held inadmissible as secondary evidence.[66]

Secondary evidence cannot be given by a person who has not examined the documents. The expression "who is skilled in the examination of the documents" is intended to afford an opportunity to find out the truth by his cross-examination.[67]

17. OBJECTION TO SECONDARY EVIDENCE

If a copy of a document is admitted in evidence in the first court without any objection, no objection can be allowed to be taken in the appellate court as to its admissibility.[68]

The question of proof of a document is a question of procedure and can be waived.[69]

But, a question of relevancy of document is a question of law, and can be raised at the appellate stage as well.[70]

The object of the rule is obvious, if objection is taken in the first court, the party producing the copy can ask for an adjournment in order to get the original or else to give evidence justifying the admission of the secondary evidence.

It is well settled that on objection to the admissibility of the document, which was received without objection at the court of first instance cannot be entertained in a court of appeal. If an objection had been taken in the trial court, it would have been possible for the opposite party to meet such objection, and the proceedings would have been regularised.[71]

The objection that has to be taken in the court of first instance is to the mode of proof of the document, and it should be taken before a document is marked as an exhibit and admitted to the record. The objection regarding inherent admissibility can be taken at any time, even at the appellate stage, as it would be question of law. If the objection as to the proof is taken in the court of first instance, a strict formal proof might or might not have been possible.[72]

Objection regarding the admissibility of secondary evidence of a document, being purely legal in nature, could be allowed to be raised for the first time in revision.[73]

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65. *Jainarayan Das* v. *Jubeda Khatoon*, AIR 1972 All 494.

66. *Raigarh* v. *Chaturbhuj*, AIR 1964 MP 196.

67. *Krishna* v. *R.*, AIR 1946 All 277.

68. *Kishori Lal Goswami* v. *Rakhal Das Banerjee*, ILR (1903) 31 Cal 155; *Akbar Ali* v. *Bhvea Lal Jha*, ILR (1880) 6 Cal 666; *Bacharam Mundul* v. *Peary Mohun Banerjee*, ILR (1883) 9 Cal 813; *Narendra Narain Rai* v. *Bishen Chundra Das*, ILR (1885) 12 Cal 182; *Chimnaji Govind Godbole* v. *Dinkar Dhondev Godbole*, (1886) 11 Bom 320; *Thet She* v. *Moung Ba*, (1903) 3 LBR 49; *Amar Singh* v. *Tej Ram*, AIR 1982 P&H 282; *Lakshman* v. *Amrit*, ILR (1900) 24 Bom 591; *Ram Lochan* v. *Pandit Harinath*, (1922) 1 Pat 606 : AIR 1922 Pat 565.

69. *Subbarao* v. *Venkata Rama Rao*, AIR 1964 Andhra 53; *Kanchanganga* v. *State of West Bengal*, AIR 1973 Cal 325; *Budhi Mahal* v. *Gangadhan Das* (1978) 46 Cut. LT 287; *Annapoorna Subnari* v. *Narendra*, AIR 1967 Ori 129.

70. *M.S. Ramsingh* v. *Bijoy Singh*, AIR 1972 Cal 190.

71. *Padman* v. *Hanwantha*, AIR 1915 PC 111; *Lachuman Lal Pathak* v. *Kamakshya Narayan Singh*, AIR 1931 Pat 224; *Shahzadi Begam* v. *Secy. of State*, ILR 34 Cal 1059 (PC); *Mahadeo Prasad* v. *Ghulam Mohammad*, AIR 1947 All 161; *Kundan Bai* v. *Venu Bai*, AIR 1952 Nag 47; *Saveruddin* v. *Samiruddin*, AIR 1923 Cal 378; *Gulabchand* v. *Sheo Karan Seth*, 1964 Pat 45; *Basanti* v. *Pholo*, AIR 1955 HP 37; *Basanta Kumar Das* v. *Binayak Das & ors.*, (1974) 40 Cut LT 1214; *Kakoti Veeraiah Gupta* v. *Sonde Mall*, ILR 1963 AP 754; *Pramatha Nath* v. *Tarini Charan Das*, AIR 1953 Assam 80; *Bhudheram* v. *Hira*, AIR 1953 HP 52; *Hutchegowda* v. *Chennije Gowda*, AIR 1953 Mys 49, **relying on** *Vishvanath* v. *Rahibai*, AIR 1931 Bom 105; *Md. Ilushan Ali* v. *Jamna Prasad*, AIR 1922 PC 56; *State of Rajasthan* v. *Jeo Raj*, AIR 1990 Raj 90.

72. *Gopal Das* v. *Shri Takurji*, AIR 1943 PC 83; *Bacharbhai* v. *Mohanlal Ranchhod Das*, AIR 1956 Bom 196; *Biswambhar Singh* v. *State of Orissa*, AIR 1954 SC 139; *Shahzadi Begum* v. *Secy. of State*, ILR 34 Cal 1059 (PC).

73. *Gurcharan Singh* v. *Harbhagwan*, (1979) 81 Punj LR 409.

When a party has waived proof of the circumstances justifying the giving of secondary evidence and the secondary evidence is allowed, he cannot raise the objection to its admissibility, in appeal.[74]

The rule, however, does not apply where the document admitted was not even secondary evidence.[75]

18. EXECUTION MUST BE PROVED

It was held that mere production of a mortgage deed is not enough to fasten any liability on parties who are not executants of the document. The plaintiff would not be relieved of the burden of proving the document as required by law, to entitle him to a decree on the basis of the document. The proof can be dispensed with only where the execution is admitted, or has not been denied. Where the document is lost and secondary evidence is allowed to be led, the formality of an attesting witness being called has to be observed, as required by Section 68 of the Evidence Act, which is stringent and mandatory. Failure to call the attesting witness, where it is not established that all of the attesting witnesses are dead or were incapable of giving evidence, is a fatal defect and the document cannot be held to have been proved.[76]

In case of proof of adoption by one B, a certified copy of a will executed by B's widow was put in evidence as it recited the factum of adoption. It was held that the copy of the will was not sufficient evidence of the fact of adoption recited in it; that the certified copy was secondary evidence under Section 65, of the existence, conditions or the contents of the deed, but not of its execution which has to be proved under Section 68 of the Evidence Act.[77]

Special provisions as to evidence relating to electronic record.

[78][**S. 65-A. The contents of electronic records may be proved in accordance with the provisions of Section 65-B.**

Admissibility of electronic records.

S. 65-B. (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely—

(*a*) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(*b*) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

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74. *Bishwambar Singh* v. *State of Orissa*, AIR 1954 SC 139; *Subbarao* v. *Venkata Ramarao*, AIR 1964 AP 53; *Bachar Bhai Nara Bhai* v. *Mohanlal Ranchhoddas*, AIR 1956 Bom 196; *Collector of Cuttack* v. *Rajib Bhol*, AIR 1972 Ori 200; *Dula Dei* v. *Jadi Bewa*, AIR 1965 Ori 113; *Sangila Bapuji* v. *Ambabhai*, AIR 1953 Nag 266.
75. *Kalyan Singh* v. *Chhoti (Smt.)*, AIR 1973 Raj 263.
76. *Ananta Raghuram Arya* v. *Rajah B. Nagachaya Devamma*, AIR 1958 AP 418. **See also** *Gurdial Kaur* v. *Registrar, Co-operative Society, Chandigarh*, AIR 2000 P&H 82 (para 9).
77. *Brajraj Singh* v. *Yogendra Pal Singh*, AIR 1952 MB 146.
78. Ss. 65A & 65B inserted by the Information Technology Act, 2000, S. 92, Sch. II (w.e.f. 17-10-2000).

(*c*) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(*d*) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in Clause (*a*) of sub-section (2) was regularly performed by computers, whether—

(*a*) by a combination of computers operating over that period; or

(*b*) by different computers operating in succession over that period; or

(*c*) by different combinations of computers operating in succession over that period; or

(*d*) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—

(*a*) identifying the electronic record containing the statement and describing the manner in which it was produced;

(*b*) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(*c*) dealing with any of the maters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,—

(*a*) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or

(with or without human intervention) by means of any appropriate equipment;

(*b*) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(*c*) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

***Explanation.*—For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.]**

COMMENTS

1. THE INFORMATION TECHNOLOGY ACT, 2000 PROOF OF CONTENTS OF ELECTRONIC RECORDS

The new Section 65-A provides that the contents of electronic records may be proved in accordance with the provision of the new Section 65-B which provides for the mode of its proof. The facility of proof by secondary evidence would apply to any computer output as the same has been deemed to be a document for the purposes of proof.

"In cases prior to the Police and Criminal Evidence Act, 1984, certain material produced by computers was held to be real evidence. In *R.* v. *Wood,*[79] the Court of Appeal considered computer printouts in circumstances in which they were not admissible under the Criminal Justice Act 1965.[80] It was necessary for the prosecution to present evidence of a comparison of the analysis of certain processed metals stolen with that of metals found in the defendant's possession. The Court held that since the computer had been used as a calculator, the print-outs were a piece of real evidence. In *Castle* v. *Cross,*[81] the prosecution sought to rely on a print-out of an automatic breath-testing device, which was a computer. The Divisional Court held that the print-out was admissible and that the operator of the device should have been permitted to give evidence of what he observed and to interpret the print-out."[82]

"The law of evidence must be adapted to the realities of contemporary business practice. Mainframe computers, minicomputers and microcomputers play a pervasive role in our society. Often the only record of a transaction, which nobody can be expected to remember, will be in the memory of a computer. The versatility, power and frequency of use of computers will increase. If computer output cannot relatively readily be used as evidence in criminal cases, much crime (and notably offences involving dishonesty) will in practice be immune from prosecution. On the other hand, computers are not infallible. They do occasionally malfunction. Software systems often have "bugs". Unauthorised alteration of information stored on a computer is possible. The phenomenon of a "virus" attacking computers is also well established. Realistically, therefore, computers must be regarded as imperfect devices."[83]

However, a document produced by a computer does not become the statement of a person initialling it if the purpose of doing so is merely to authorise the transaction rather than to confirm or authenticate its contents.[84] The Court has power to require oral evidence of anything of which evidence could be

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79. (1982) 76 Cr App R 23.

80. Later repealed.

81. (1984) 1 WLR 1372 DC. *Cf. Garner* v. *DPP,* (1989) Crim LR 583 DC, in which the Court does not appear to have considered the effect of the Police and Criminal Evidence Act, 1984, S. 69.

82. PHIPSON ON EVIDENCE, 15th Edn. (2000), page 697 (para 27-28).

83. *R.* v. *Minors and Harper,* (1989) 90 Cr App R 102, 103-104.

84. *R.* v. *Boulkhrif,* (1999) Crim LR 73 CA.

given by such a certificate. However, evidence by certificate is merely one option. The conditions of admissibility may be proved by oral evidence from a person familiar with the operation of the computer who can give evidence of its reliability and such a person need not be a computer expert or someone qualified to sign a certificate.[85] The Court is not entitled to rely on the maxim *omnia praesumuntur rite esse acta*.[86] The conditions of admissibility must be proved beyond reasonable doubt if the document is tendered by the prosecution,[87] but on the balance of probabilities if tendered by the defence. If the conditions of admissibility are in dispute, a trial within a trial may be required.[88]

In estimating the weight, if any, to be attached to a statement "regard shall be had (a) to whether it provides information that was supplied contemporaneously to the computer, or recorded contemporaneously for the purpose of being so supplied; and (b) to whether anyone concerned with the supply of the information or the operation of the computer had an incentive to conceal or misrepresent the facts."[89]

Rules as to notice to produce.

S. 66. Secondary evidence of the contents of the documents referred to in Section 65, clause (*a*), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his attorney or pleader, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

***Provided* that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—**

(1) when the document to be proved is itself a notice;

(2) when, from the nature of the case, the adverse party must know that he will be required to produce it;

(3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(4) when the adverse party or his agent has the original in Court;

(5) when the adverse party or his agent has admitted the loss of the document;

(6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

SYNOPSIS

1. *General principle* ... 671
2. *Notice prescribed by law* ... 671
3. *When notice shall not be required [Provisos]* ... 672
   (a) *When notice itself is to be proved [Proviso (1)]* ... 672
   (b) *The adverse party must know that he will be required to produce it [Proviso (1)]* ... 672
   (c) *Adverse party obtaining possession of original by fraud or force [Proviso (3)]* ... 673
   (d) *Person in possession out of reach or out of jurisdiction of Court [Proviso (6)]* ... 673
4. *Any other case the court thinks to dispense with notice* ... 674

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85. *R* v. *Shephard*, (1993) 96 Cr App R 345 HL. *Cf. Darby* v. *DPP*, *The Times*, November 4, 1994, DC (police officer's evidence as to the working of a speed trap device).
86. *R* v. *Shephard*, (1993) 96 Cr App R 345 HL, **overruling**, *R* v. *Spiby*, (1990) 91 Cr App R 186, and *R* v. *Governor of Pentonville Prison, ex p. Osman*, (1990) 90 Cr App R 281, 307 DC.
87. *R.* v. *Minors and Harper*, (1989) 90 Cr App R 102.
88. *R.* v. *Minors and Harper*, (1989) 90 Cr App R 102.
89. For detailed discussion, see PHIPSON ON EVIDENCE, 15th Edn. (2000), pages 696-701 (paras 27-28 to 27-36).

COMMENTS

1. GENERAL PRINCIPLE

This section lays down that a notice must be given before secondary evidence can be received under Section 65(*a*). Notice to produce a document must be in writing. Order XI, Rule 15, of the Civil Procedure Code, prescribes the kind of notice to produce a document.

Notice under this section has to be given to the party in whose possession or power the document is. The word 'party' means not only the adversary but also a stranger 'legally bound to produce' the document.

The procedure for the production of documents in criminal cases is laid down in Sections 93-96 of the Criminal Procedure Code.

While Section 65(*a*) refers to secondary evidence of the existence, condition or contents of a document this section refers only to 'contents' and not the existence or condition of the document.

The object of this rule is to give the party an opportunity to enable him to produce the document and thus to secure the best evidence of its contents.[90]

In order that secondary evidence of documents mentioned in Section 65(*a*) may be given, it is essential that the procedure laid down in Section 66 should be strictly complied with. When no notice, as required by Section 66, has been given, secondary evidence is not admissible.[91]

Before secondary evidence of the existence, condition or contents of a document is admitted, it must be proved that the document is in the possession of the person against whom it is sought to be proved and that, though such person was issued with notice, he had failed to produce it.[92]

Where a party sought to prove, by production of the registers of the sub-registrar's office, not by any original entry prepared by the sub-registrar himself but copies of the document, the originals of which were in the custody of the persons in whose favour they were executed, it was held that such documents cannot be admitted in evidence by simply producing the registers of the Registration Office without calling for the original documents from the persons concerned.[93]

Where an original unregistered sale deed is in the possession of the plaintiff and is available, no secondary evidence can be admitted unless notice under Section 66 to.

Where an objection is taken for adducing secondary evidence, on the ground of non-service of notice, the trial court has to consider whether a notice should be given or be dispensed with; if the objection is not raised in the trial court, it should not be permitted to be raised in the Appellate Court.[94]

Where the insurer did not give notice to the owner to produce the original policy of insurance, and also did not take any step contemplated under the Civil Procedure Code for its production, and the insurer then tendered the copy of the insurance policy at a late stage of the proceedings, it was held that it was not admissible.[95]

2. NOTICE PRESCRIBED BY LAW

Where a *Pardanashin* woman is living with her brother, service of notice on the brother constitutes notice as required by this section.[96] In the case of *Pardanashin* Ladies, normally their husbands would appear to produce the documents summoned from their wives as they would naturally be in possession of the documents. So, they can also prove the documents which were executed in favour of their wives,

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90. *Dwyer* v. *Collins*, 7 Ex 639-647; *Surendra Krishna Roy* v. *Mirza Md. Syed Ali*, AIR 1936 PC 15 : 63 IA 85, 92.
91. *Nityananda Roy* v. *Rashbehari Roy*, AIR 1953 Cal 456; *Nami Devi (Smt.)* v. *Anupurna Devi*, AIR 1945 Pat 218; *Sulochana Devi (Smt.)* v. *Gobinda Chandra Nag*, AIR 1986 Cal 430; *Kanhyalal* v. *Jamnalal*, AIR 1950 Raj 47; *Narsidas* v. *Ravishankar*, AIR 1931 Bom 33; *Subbarayulu Naidu* v. *Vengama Naidu*, AIR 1930 Mad 742.
92. *Venkatarama Reddiar* v. *Vardaraja Kounder*, AIR 1971 Mad 471; *Bishwanath* v. *Dhapu Debi*, AIR 1960 Cal 494; *Sudakar Mishra* v. *Nilkantha Das*, AIR 1936 Pat 129; *British Transport Co.* v. *Suraj Bhan*, AIR 1963 All 313; *D. Sarasu* v. *Jayalakshmi*, 2001 AIHC 2484 (para 11) (Mad).
93. *Naresh Chandra Bose* v. *State of West Bengal*, AIR 1955 Cal 398.
94. *Kundanbai* v. *Venubai*, AIR 1952 Nag 47; *Radha* v. *Laxmi*, 1957 Raj LW 603; *Kishorilal* v. *Rakhal Das*, ILR (1903) 31 Cal 155; *Prakasaraynam* v. *Venkatrao*, ILR 38 Mad 160; *U Po Kin* v. *U So Gale*, AIR 1936 Rang 277.
95. *Oriental Fire and General Insurance Co. Ltd.* v. *Chandrawali Smt.*, AIR 1989 R&H 300.
96. *Durgawati Kunwar* v. *Jagannath Prasad*, AIR 1929 All 680.

even if the wives are not *benamidars* of the husbands. So service of notice on them cannot be a ground to reject the husband's evidence to prove the documents.[1]

Issuing of notice to produce some documents not referred to in the opposite party's affidavit of documents as being in his possession, was held not a good notice.[2]

Section 175 of the Indian Penal Code punishes the person who omits to produce a document required by a public servant.

3. WHEN NOTICE SHALL NOT BE REQUIRED [PROVISOS]

The proviso enumerates the following six cases in which a notice is not required to be given to the party in whose possession or power the document is, in order to render secondary evidence admissible.

(a) When Notice itself is to be proved [Proviso (1)]

Notice shall not be required to be given (under this section) when the document to be proved is itself a notice. When a party sends a notice to the opposite party and it is received by him, a copy of the notice is admissible, and it is not obligatory to issue notice calling upon the opposite party to produce the original notice.

PHIPSON on Evidence (15th Edn. (2000), para 41-31, page 1120) observes: "Notice to produce the original is not necessary:

(a) .....

(b) When the document to be proved is itself a notice which has been served on the adversary; though not on a third, *e.g.* a notice to produce or to quit, or of action, or of the dishonour of a bill, when the action is brought upon the bill, or of intention to remove a building, pursuant to a by-law under the Public Health Act, 1875 (now the Highways Act, 1980)".[3]

In a suit against the Union of India, a copy of the notice under Section 80, CPC, was sought to be produced by the plaintiff, but it was objected to on behalf of the defendant on the ground that a copy was not admissible. It was held that Section 65, read with Section 66 of the Evidence Act, permits the plaintiff to produce the copy of the notice without summoning the original; it was for the defendant to show, by production of the original, that the document did not amount to a notice according to Section 80, CPC. Where the defendant failed to produce the original, he could not have any grievance when its copy was produced by the plaintiff.[4]

(b) The adverse party must know that he will be required to produce it [Proviso (2)]

According to this, when, from the nature of the case, the adverse party must know that he will be required to produce a document, notice shall not be required for tendering secondary evidence.

When it is clear that the original is in the possession or control of the party taking an objection to the admissibility of secondary evidence, and he has failed to produce it, sub. *Cl.* (2) of Proviso to Section 66 applies, as the adverse party knows that he would be required to produce it. When he fails to produce it, secondary evidence is admissible, without giving notice.[5]

However, it was held that Sections 65 and Section 66 must be read together, and the court ought not to hold that the adverse party must have known that he would be required to produce it so as to dispense with the necessity of a notice to produce, unless the original is shown or appears to be in the possession of the person against whom the presumption is drawn.[6] In a suit for declaration that the subject matter of

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1. *Suchandra Bhushan Kumar Lal* v. *Laloo Modi*, AIR 1941 Pat 202; **relying on** *Hiralal* v. *Ganesh Prasad*, II R 4 All 406 (PC).
2. *Narsidas* v. *Ravishankar*, AIR 1931 Bom 33.
3. **See also** In re : *Sundaresa*, AIR 1950 Mad 657.
4. *Lockchand* v. *Union of India*, AIR 1959 Raj 231.
5. *Sudhakar* v. *Nilkantha Das*, AIR 1936 Pat 129; *Kundanbai* v. *Venubai*, AIR 1952 Nag 47; *Raghunath Misra* v. *Kishore Chandra Deo*, AIR 1958 Ori 260; *Amir Bi* v. *Nilasandra Mosque*, 1969 Mys 103; *Rajeshwari* v. *Varalakshmamma*, AIR 1964 AP 284; *British Transport Co.* v. *Suraj Ban*, AIR 1963 All 313 (a case of written agreement).
6. *Mangra* v. *Bedi Ram*, AIR 1916 All 221.

the suit is trust property, plaintiff stated that he had seen the original deed of the trust in the possession of the defendant; and then produced a certified copy of the trust deed. It was held that the defendant must have known that he would be required to produce the document, that proviso (2) to Section 66 was satisfied and so the production of the certified copy was sufficient proof of the deed itself.[7] Where the plaintiff stated that the original deed relating to the suit house, was with the defendant who did not deny the statement, it was held that it would be a proper case to dispense with the notice, and the certified copy was admissible.[8] Where a defendant denied any knowledge of the execution of *Wakfnama* by her late husband, but said in her evidence that she might be in possession of the document, but she was not sure of it, it was held that notice was not necessary as there was implied knowledge of the existence of the document and that she was required to produce it.[9] Where a driver and conductor were prosecuted under the Motor Vehicles Act for committing breach of the conditions of the registration certificate, it was held that they must be deemed to have known that they would be required to produce the certificate and the permit; and that if they failed to produce them, the prosecution was entitled to produce secondary evidence.[10] In a suit for redemption of mortgaged property, the defendants who are in possession of the mortgage deed must have known that they would be required to produce it in the suit; accordingly, secondary evidence, without noticed to them for its production, was held admissible.[11] Where the plaintiff mentioned in the plaint itself about a certain document and the defendants denied its existence, it was held notice was not necessary and copy of that document was admissible.[12]

Where the defendant deposed that the original deed of a family settlement was not with the plaintiff, but was with a third party who was dead, it was held that, to admit secondary evidence, no notice to the plaintiff was required.[13]

Sometimes, from the pleadings, implied notice to the adverse party showing that he will be required to produce the document can be gathered.

(c) Adverse party obtaining possession of original by fraud or force [Proviso (3)]

Where the application, alleging force or fraud committed by the opposite party, to obtain the possession of the original document, was neither pleaded in the plaint nor proved, the plaintiff was not entitled to exemption from giving him notice.[14]

(d) Person in possession out of reach or out of jurisdiction of Court [Proviso (6)]

In *Haranand* v. *Ramgopal,*[15] it was held that secondary evidence may be given of the judicial proceedings of a foreign State without notice to the adverse party, when the person in possession of the document is out of reach of or is not subject to the process of the court. The provision as to notice under Section 65 is qualified by *Cl.* (6) of Section 65, which dispenses with notice when the person in possession of the document is out of reach and not subject to the process of the court.[16] Secondary evidence of the contents of the document was held admissible when the defendant was out of the jurisdiction of the court, and did not comply with the summons to produce the document and when the service of notice upon his pleader at the last moment would have been nugatory.[17]

It must be shown to the court, to its satisfaction, that the person who is in possession of the document is out of reach and is not subject to the process of the court. It was held that, when the original award was in possession of the person who was not subject to the process of the court, a copy of the original was admissible.[18]

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7. *Lakshmi Kanto Roy* v. *Nishi Kanto Roy,* 71 Cal WN 362.
8. *Vishwanath Vithoba* v. *Genu Kisan,* AIR 1956 Bom 555.
9. *Amirbi* v. *Nilasandra Mosque,* AIR 1969 Mys. 103.
10. *Jagroop* v. *R.,* AIR 1952 All 276.
11. *Dwaraka Singh* v. *Ramnand Upadhyay,* AIR 1919 All 232; *Dinanath* v. *Rama Rai,* AIR 1926 Pat 512; *Mirabai* v. *Jai Singh,* AIR 1971 Raj 303; **see contra:** *Maung PO Ni* v. *Ma Shwe Kyi,* AIR 1925 Rang 7.
12. *Chandrasekhar Pati* v. *Ahalya Devi,* AIR 1974 Ori 199.
13. *Abdul Rahman* v. *Rameshwar Prasad,* AIR 1977 All 470.
14. *Ram Singh Sahu* v. *Ram Dayal,* 2000 AIHC 3900 (paras 10-12) (MP).
15. ILR 27 Cal 639 (PC).
16. *Ralli* v. *Gau Kim Swee,* ILR (1883) 9 Cal 939.
17. *Bishop Mellus* v. *Vicar Apostolic of Malabar,* ILR (1879) 2 Mad 295.
18. *Sanjihil Lal Braj Kishore* v. *Parsan Koer,* AIR 1917 Pat 241.

4. ANY OTHER CASE THE COURT THINKS FIT TO DISPENSE WITH NOTICE

Apart from the provisions of *clauses* 1 to 6 of Section 66, there is also a general provision in the proviso stating that in any other case notice can be dispensed with, when the court thinks fit. In *Surendra Krishna* v. *Mirja Md. Syed Ali,*[19] it was held that court has absolute power under Section 66 to dispense with notice when it thinks fit.[20]

Notice to produce the document can be dispensed with where the defendant denies the existence of the document itself. When, in the previous litigation, it was held that the document in question was in the possession of the plaintiff's father, it was held that there was no reason to suppose it was in the possession of the defendant, in the present suit; thus a notice to produce was a mere formality.[21]

A technical defect in the service of notice can be condoned, in the absence of any prejudice to any of the accused persons, resulting in clear mis-carriage of justice.[22]

The Calcutta High Court has held that oral evidence of the contents of a letter which had neither been called for, nor produced, was inadmissible under this section, though no objection was taken to the giving of that evidence, and that no subsequent order dispensing with notice could operate to make it admissible. There is no law in this country that the absence of objection to the evidence which is legally admissible makes it admissible.[23]

However, where the copies of registered documents, without issue of notice to the opposite party, were admitted and marked as exhibits in the case, without any objection being raised, it was held that it was not open to the party against whom they were admitted, to raise any objection that proper procedure had not been followed or proper foundation was not laid for admission of such secondary evidence.[24]

Proof of signature and handwriting of person alleged to have signed or written document produced.

S. 67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

SYNOPSIS

1. *Principle* ... 674
2. *Proof of handwriting in proof of exeuction* ... 675
3. *Execution of document—meaning* ... 677
4. *Proof of contents* ... 678
5. *Objection to mode of proof* ... 678
6. *Registration and proof* ... 678
7. *Registration certificate—Value [Section 60(2)]* ... 678
8. *Modes of proving signature and handwriting* ... 679

COMMENTS

1. PRINCIPLE

Besides the question which arises as to the contents of a document (see Ss. 61-66), there is always the question when the document is used in evidence;—Is it what it purports to be? The evidence upon this point is dealt with in Ss. 67-73. The nature of the evidence will depend to a large extent on the nature of the document. If it is a mere memorandum, such as an entry in a diary mentioned in S. 32(*b*), it must be proved that the diary was really that of the person whose statements it is said to contain. If it is a

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19. 1936 PC 15 : 63 IA 85, 92.
20. **See also** *Habiram* v. *Hemnath Sharma*, 19 Cal WN 1068 : AIR 1916 Cal 676; *U Po Kin* v. *U So Gale*, AIR 1936 Rang 277; *Kundan Bai* v. *Venu Bai*, AIR 1952 Nag 47.
21. *Gopal Das* v. *Thakurji*, AIR 1943 PC 83; **see also** *Mira Bai* v. *Jai Singh*, AIR 1971 Raj 303; *Dinanath Rai* v. *Rama Rai*, AIR 1926 Pat 512; *Achhru Ram* v. *Emperor*, AIR 1926 Lah 326.
22. *Jithendra Nath Gupta* v. *Emperor*, AIR 1937 Cal 99; *Prafulla Kumar* v. *Emperor*, AIR 1930 Cal 209.
23. *Prafulla Kumar* v. *Emperor*, AIR 1930 Cal 209.
24. *Collector of Cuttack* v. *Rajib Bhol*, AIR 1972 Ori 200.

letter, it must be shown who wrote it, or at any rate who signed it, for a signature to a document turns the whole document into a statement by the person who signs it. If it is an agreement it must be shown who executed it.[25]

In *Venkatachala* v. *Thimmajamma*,[26] it was observed at p. 517: Under Section 67, if a document is alleged to be signed be any person, the signature of the said person must be proved to be in his handwriting and, for proving such a handwriting under Sections 45 and 47 of the Act, the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law".

The normal methods of proof of signatures and handwriting are:—

(1) By calling the person who signed or wrote the document.

(2) By calling the person in whose presence the document was signed and written.

(3) By calling an expert.

(4) By calling the person who is acquainted with the handwriting of the persons by whom the document was purported to be signed or written.

(5) By the admission of the person who was alleged to have signed or written.

(6) By comparison, of the signature on the document with the admitted or proved signature of the person who purported to have signed or written the document.

(7) By other circumstantial evidence.[27]

The definition of the word "proved" in Section 3 must be read along with this section. According to Section 3 there must be specific evidence that the signature purporting to be that of the executant, is in the handwriting of the executant; until that is proved, the court cannot consider whether execution is proved. In other words, Section 67 makes proof of execution of a document something different from mere proof of the matter.[28]

2. PROOF OF HANDWRITING IN PROOF OF EXECUTION

Where merely the signature of a person on a typewritten document was identified by a witness, it was held that what was formally proved was the signature and not the body of the document.[29]

Appellate court is entitled to weigh the evidence, to give a finding on the execution of a document by a particular person.[30]

A Sub-Divisional Officer stated that a complaint was handed over and it did not bear any signature, but two persons came and gave it to him. One of them deposed that there were two other persons of the same name as his. It was held that the statement of the Sub-Divisional Officer only proved that the writer of it handed over the complaint, that neither the contents of the complaint were proved nor the maker of the complaint proved it and hence the complaint was not proved.[31]

A party seeking to prove the execution of a document is not required to prove that the executant knew the contents thereof, when the executant denies having signed it and pleads it as forgery. But, if the executant pleads ignorance, then in certain circumstances it may be necessary to satisfy the court that the executant had knowledge of the contents.[32]

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25. Markby 60.
26. 1959 SCJ 507 : AIR 1959 SC 443. **Also see** *Gulzar Ali* v. *State of H.P.*, (1998) 2 SCC 192 : 1998 SCC (Cri) 605.
27. *Kangabam Birasingh* v. *Manipur Drivers Union Co-operative Association*, AIR 1957 Manipur 9. **See also Commentary under Sections 45, 47 and 73.**
28. *Salaik Chand* v. *Tamiz Bano*, AIR 1928 All 303.
29. *In the matter of Mr. D. & Mr. S.*, (1966) 68 Bom LR 228; but **see contra** the view expressed by VIMADALAL J., in *Bhima Tima* v. *Pioneer Chemicals*, (1968) 70 Bom LR 683. *Madholal* v. *Asian Assu Co. Ltd.*, AIR 1954 Bom 305.
30. *Bhaiyalal* v. *Ram Din*, AIR 1989 All 130.
31. *Ram Singh* v. *Col. Ram Singh*, AIR 1986 SC 3.
32. *Dattatreya* v. *Ranganath*, AIR 1971 SC 2548.

It was held that, in order to prove the writing of a person, it is not necessary that the person must know the language in which the document has been written; if he has deposed that the execution has been made in his presence and he had seen the executant putting his signature in his presence, the document stands proved; on the same reasoning, even if a person is an illeterate but he has seen somebody putting his signature on the document in his presence, he must be said to have proved the document.[33]

An illiterate person not being able to identify a document on which he has seen someone writing, cannot ordinarily prove a writing or signature made, but another person knowing the language in which the document was written can identify the document with certainty and he can prove the writing.[34]

Where a pronote was written in Hindi and signed by the executant, and the witnesses testified to its signing by the executants in their presence, execution of the document was held proved.[35]

In divorce cases, marriage certificates and other correspondence must be proved as required under Section 67.[36]

Where the plaintiff stated that he obtained the horoscope in question from his father, but did not state the name of the astrologer and whether he was familiar with the writings of the said astrologer, it was held that the document could not be admitted in evidence for proving the date of birth.[37] Where a suit was filed for refund of price paid under a sale deed and also for damages, alleging breach of warranty of title, and the vendor was not examined, it was held that the sale deed could not be said to have been proved.[38] The sanction for prosecution cannot be termed as proved unless proved as per Ss. 47 and 67. Mere statement that the sanction was given by the authorised person without any evidence as to acquaintance with the signature and contents thereof, the document as such could not be said to be proved.[39] Where an agreement of sale, bearing the vendors' signatures on the first two sheets, was found to be validly executed, it was held that no inference could be drawn that the agreement was proved, when the third sheet did not bear their signatures.[40]

This section does not prescribe any particular mode of proof. So, in addition to the modes of proof of handwriting, it may also be proved by circumstantial evidence, the only requirement being that the proof should be given to the satisfaction of the court, either by direct or by circumstantial evidence.[41] Section 67 does not lay down any specific mode of proof and therefore circumstantial evidence as a mode of proof of authorship or execution of documents is not excluded. Such evidence may consist of internal evidence contained in the document itself. Oral evidence of witnesses can prove other surrounding circumstances.[42] The execution or authorship of a document is a question of fact and may be proved like any other fact, by direct as well as circumstantial evidence, although the circumstantial evidence must be of sufficient strength to carry conviction. Circumstantial evidence may be (1) Internal evidence contained in the document; (2) oral evidence of witnesses to prove other circumstances.[43]

When both parties admitted the transactions in certain consignment notes, it was held that, though those documents were not proved according to Section 67, the doctrine of authentication by contents would come into play, and the notes were proved by internal evidence afforded by their contents which were found to be correct on evidence aliunde.[44]

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33. *Gajraj* v. *Board of Revenue U.P.*, 1966 All LJ 149, **relying on** *Bheek Chand* v. *Parbhuji*, AIR 1963 Raj 84; *Puria Sethi* v. *Khetraonohan Mohaty*; (1975) 41 Cut LT 1272; *Bhanuwar Lal* v. *Ahmed Khan*, AIR 1977 Gau 27.
34. *Bheek Chand* v. *Parbhuji*, AIR 1963 Raj 84.
35. *Babban* v. *Shiv Nath*, AIR 1986 All 185.
36. *Chandra Leela* v. *P. Victor Matheus*, AIR 1956 Hyd. 144 (FB).
37. *Union of India* v. *Lachman*, ILR (1976) 2 Cal 328.
38. (1976) 89 MLW 405.
39. *State of M.P.* v. *Param*, 1997 AIHC 4150 (paras 3-5) Vol. 6 (MP), **relying on** *Sait Tarajee Khimchand* v. *Yelamarti Satyam*, AIR 1971 SC 1865 and *Suresh H. Rajput* v. *Bhartiben Pravinbhai Soni*, 1996 Cr LJ 1921 : AIR 1996 SC 2883.
40. *Har Kaur (Smt.)* v. *Gura S.*, AIR 1988 P&H 41.
41. *Karali* v. *EIRy. Co.*, 1928 Cal 498; *Anima Das Sharma* v. *Rev. Dr. Lawrance Trevor*, (1976) 80 CWN 788.
42. *Govind Ram* v. *Abdul Wahab*, AIR 1963 Raj 234.
43. *Krishna Biharilal* v. *State*, AIR 1956 MB 86; *Govardhan Das* v. *Ahmadi Begam*, AIR 1953 Hyd. 181.
44. *Snow White F. Product Pvt. Ltd.* v. *Sonanlal*, AIR 1964 Cal 209 **relying on** *Mobarik Ali Ahmed* v. *State of Bombay*, AIR 1957 SC 857.

The section deals with proof of the signature of the person who is alleged to have executed the document. It does not deal with the signatures of attestors in whose presence the document is signed.[45]

3. EXECUTION OF DOCUMENT—MEANING

Execution means signing, sealing and delivery of a document. The term may be defined as a formal completion of a deed. It is the last act or series of acts which completes it.[46]

Execution of a document is something different from mere signing of the document. The term execution is not defined. JUSTICE RANKIN observed: "The ordinary meaning of 'executant' is fairly clear....the ordinary meaning of executing a document is signing a document as a consenting party thereto..... The man whose name has been put to the document as evidencing his assent thereto is the executant for the purpose of the section (Section 35 Registration Act)... In the case of *Bakalam* (by the pen) Signature, such as we have here, a person whose name is put with his authority in evidence of his assent to a document, is 'executant' within the meaning of Section 35".[47] While this decision was affirmed by the Privy Council it was observed: "A document is executed when those who take benefits and obligations under it have put or caused to put their names to it. Personal signature is not required."[48]

"Execution" means something more than mere signing. It includes delivery and signing in the presence of witnesses where they are necessary.[49]

Execution of the document means that the executant must have signed or put his thumb mark impression, only after the contents of the document have been fully stated and read by the executant before he put his signature thereon. Mere admission of the initial by the executant would not be tantamount to an admission of execution of the document.[50] Execution is, when applied to a document, the last act or series of acts, which complete it. It might be defined as formal completion. Thus, execution of deeds is the signing, sealing and delivering of them in the presence of the witnesses. Execution of a will includes attestation. 'Execution' does not mean merely signing. It should be accompanied by the intention to give effect and operation to the instrument signed.[51]

In the case of a thumb impression by an illeterate person, the burden is on the person relying on the document to prove that the document was read and explained.[52]

Where a document purports to have been executed by a *paradanashin* or illiterate woman, the parties relying upon it must not only formally prove the document but must, in addition, prove that the contents were read over and explained to the executant.[53]

Putting of thumb impression by a person who knows how to sign his name, does not invalidate the document.[54]

This section requires proof of signature and handwriting of the person who is alleged to have signed or written the document produced.[55] Mere admission of execution of a document is not sufficient. Proof that the signature of the executant is in his handwriting is necessary.[56]

The Evidence Act permits secondary evidence to be given with regard to the attestation of an attesting witness who is either dead or cannot be brought to Court. The signature of the attesting witness when proved in evidence is proof of everything on the face of the document and that he saw the executant make his mark.[57] A certified copy of a sale-deed is admissible in evidence but where the

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45. *Hasan Abdulla* v. *State of Gujarat*, AIR 1962 Guj 214.
46. *Bhawanji Horbhum* v. *Devji Punja*, ILR (1894) 19 Bom 635.
47. *Manrriatho Nath Mukherjee* v. *Puron Chand Nahattha*, 29 Cal WN 539 : AIR 1925 Cal 703.
48. *Puran Chand* v. *Manmotho*, 1928 PC 38.
49. *Arjun* v. *Kailas*, AIR 1923 Cal 149(2) : 36 CLJ 373.
50. *State of Orissa* v. *Khetra Mohan Singh*, AIR 1965 Ori 126.
51. *Kumari Shantha Arogyadoss* v. *G.C. Kamala*, 2000 AIHC 227 (para 20) (Mad).
52. *Ranjan Khan* v. *Babu Raghunath Dass*, AIR 1992 MP 22.
53. *Kali Dei* v. *Brundaban Malik*, AIR 1972 Ori 132.
54. *Gangadhar Das* v. *Gadadhar Das*, AIR 1986 Ori 173.
55. *Abdool Ali* v. *Abdoor Rushman*, (1874) 21 WR 429; *Madholal Sindhu* v. *Asian, Assu Co. Ltd.*, (1945) 56 Bom LR 147 : AIR 1954 Bom 305.
56. *Bulakidas Hardas Mahesari* v. *Sh. Chotu*, (1942) Nag 661; *Bhanwaria* v. *Ramratan*, ILR (1953) 4 Raj 145.
57. *Ponnuswami Goundan* v. *Kalyana Sundara Iyer*, ILR (1934) 57 Mad 662 : AIR 1934 Mad 365.

vender is denying its execution, it should be proved as required under this section. Mere production of the certified copy will not be sufficient.[58]

A deed of conveyance was tendered in evidence; it purported to bear the mark of G, as vendor, and was duly attested by four witnesses, G, however, denied that she had executed the deed, and said that the mark was not hers. All the attesting witnesses were dead. A witness who knew the handwriting of one of the attesting witnesses, was called; he swore that the signature of that witness to the attestation *clause* of the deed was genuine. It was held that the deed was admissible in evidence, its execution by G being sufficiently proved.[59]

4. PROOF OF CONTENTS

It was held that, unless the writer of the document himself is examined, evidence of contents of the documents is hearsay. Any attempt to prove contents by proving signature or handwriting of the author thereof is not permissible.[60]

The consent given by a party for making a document does not dispense with either the proof of the contents of the document or the truth or otherwise of the contents.[61]

5. OBJECTION TO MODE OF PROOF

Objection to mode of proof of a document must be taken at the time when it is exhibited.[62]

6. REGISTRATION AND PROOF

Mere registration of a document is not in itself sufficient proof of its execution.[63]

The mere production of a registered deed is not sufficient to prove it. The identity of the executant has to be established by oral evidence before the deed can be taken to have been proved.[64]

In regard to will, it was held that the presumption in favour of due execution of the will, could be raised if the signatures of testator and attestors are proved. If attestors are not available, registration of will does not *ipso facto* constitute proof of valid execution.[65]

7. REGISTRATION CERTIFICATE—VALUE [SECTION 60(2)]

In *Gopal Das* v. *Shri Thakurji*,[66] it was held that the evidence of due registration was itself some evidence of execution, against the party so making the admission. In that case, at the time of registration, the executant was identified by two persons one of whom was known to the registrar and who was also the scribe of the document. Dealing with that, the Privy Council observed; "What remains to be shown is that the person admitting execution before the registrar was this Parshotam Das and no impostor. The question is one of fact except insofar as there was as a matter of law a presumption that the registration proceedings were regular and honestly carried out. It seems clear that any objection to the sufficiency of the proof upon this point would have been idle, the circumstances being such in the evidence of the due registration is itself some evidence of execution as against the plaintiff. Wills and documents which are required by law to be attested, raise other questions but this receipt was not in that clause.[67]

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58. *Manindra Kumar Dey* v. *Mahendra Suklabaidya*, 1999 AIHC 2147 (para 15) (Gau).
59. *Abdulla Paru* v. *Gannibai*, ILR (1887) 11 Bom 690.
60. *Md Yusuf* v. *D.*, AIR 1968 Bom 112; *Ramkrishna Girishchandra Dode* v. *Anand Govind Kelkar*, AIR 1999 Bom 89 (paras 33 and 35).
61. *Karuppanna Thevar* v. *Rajagopala Thevar*, AIR 1975 Mad 257; *Palaniyappa Chettiar* v. *Bombay Life Assurance Co Ltd.*, AIR 1948 Mad 298.
62. *Gopal Das* v. *Thakurji*, AIR 1943 PC 83; *Bhagwan Das* v. *Khemchand*, AIR 1973 P&H 477 referred to and followed. ***Sankara Lingam* v. *Arunachala*, (1993) 1 MLJ 472.**
63. *Salimatul-Fatima Alias Bibi Hossaini* v. *Koylashpoti Narain Singh*, ILR (1890) 17 Cal 903; *Bulakidas* v. *Shaikh Chhotu*, AIR (1942) Nag 661; *Naresh Chandra* v. *State of W. Bengal*, AIR 1955 Cal 398.
64. *Prem Raj* v. *Mishrimal*, (1959) 9 Raj 573.
65. *Yenkatarama Raju* v. *Narasa Raju*, (1966) 2 An WR 134.
66. AIR 1943 PC 83.
67. *Kalu Nimbaji* v. *Bapurao Chinkaji*, AIR 1950 Nag 6; **see also** *Hutchegowda* v. *Chennige Gowda*, AIR 1953 Mys 49

Registration is a solemn act to be performed in the presence of a competent official appointed to act as Registrar. All things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order.[68] Certificate of registration is *prima facie* proof of execution, in the absence of other evidence.[69] Where the execution of a registered document was denied, it was held that the endorsement of a registering officer was sufficient to dispense with proof as required by Section 67.[70]

It is to be noted that documents which are required by law to be attested must be distinguished from documents which are not so required to be attested. The Privy Council case *Gopal Das* v. *Shri Thakurji*[71] relates to a document not required by law to be attested.

In the case of documents required by law to be attested, mere endorsement of the registrar will not be sufficient to prove the document; according to Section 68, one attesting witness at least has to be called for the purpose of proving its execution, except in the case of the will, unless the execution of the will is specifically denied. It was held that the presumption under Section 60(2) of the Registration Act cannot take the place of proof as required by Section 67, when the witnesses are available to prove the document in the manner provided by the Evidence Act.[72]

In the case of a registered document more than 30 years old, mere production of certified copy is not enough to prove the execution of the document. The admission of execution incorporated in the certificate issued by the registrar, is acceptable in evidence to prove to some extent the admission of the execution made by the executor before the registrar. Proof of execution under Section 67 is still necessary.[73]

8. MODES OF PROVING SIGNATURE AND HANDWRITING

It was held that the carbon copies of transport permit, written in hand by a government officer and issued as a general practice, are admissible as primary evidence for comparison of handwriting.[74]

However, the carbon copies cannot be generally relied upon, for the purpose of comparison because the impression made upon such carbon paper is generally irregular and blotched.[75]

Where the statements of the accused persons were signed by them as well as by their lawyer, and the accused, during the trial, admitted their signatures, it was held that the statements must be held to be proved and there was no necessity to examine the lawyer.[76]

Where the defendant denied the execution and consideration of the suit pronote, but alleged that he had entrusted to the plaintiff a blank paper bearing his thumb impression, it was held that the plaintiff has to prove both the fact of execution and also the advancement of consideration; that the admission of the defendant as to his thumb impression on a blank paper cannot amount to admission as to the execution of the pronote.[77]

Proof as to digital signature.

[78][S. 67-A. Except in the case of a secure digital signature, if the digital signature of any subscriber is alleged to have been affixed to an electronic record the fact that such digital signature is the digital signature of the subscriber must be proved.]

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68. *Gangamoyi Debi* v. *Troiluckyanath*, ILR 33 Cal 537 (PC); *Ehtishan* v. *Jamna*, AIR 1922 PC 56.
69. *Irudayam Ammal* v. *Salayath Mary*, AIR 1973 Mad 421; *Monbi Devi* v. *Amubi Devi*, AIR 1958 Manipur 16.
70. *Ram Krishna Ganpat* v. *Md. Kasim*, AIR 1973 Bom 242.
71. AIR 1943 PC 83.
72. *Indernath Modi* v. *Nandram*, AIR 1957 Raj 231.
73. *Rajeshwari* v. *Varalakshmamma*, AIR 1964 AP 284; *Bhutkani Nath* v. *Kamaleshwari Nath*, AIR 1972 Assam 15; *Ramakrishna Ganpat* v. *Md. Kasam*, AIR 1973 Bom 242; *Maruti Baaji Patil* v. *Dattu Mukumda Savant*, AIR 1923 Bom 253; *Lourembam Heramot* v. *Laisram Angahal*, AIR 1979 Gau 68; *Naresh Chandra Bose* v. *State of West Bengal*, AIR 1955 Cal 398; *Bulaki* v. *Chotu*, AIR 1942 Nag 84.
74. (1952) 1 An LT 57.
75. *Nityananda Roy* v. *Rashbehari Roy*, AIR 1953 Cal 546.
76. *Soni Vallabhdas Liladhar* v. *Asstt. Collector of Jamnagar*, AIR 1965 SC 481; **see also** *Jagapath Rao* v. *Krishaji Gopal Naik*, (1957) 2 An WR 217.
77. *Seithammarakkath* v. *Koyommatath Mammad*, AIR 1957 Ker 63.
78. Inserted by the Information Technology Act, 2000, S. 92, Sch. II (w.e.f. 17-10-2000).

Proof of execution of document required by law to be attested.

S. 68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided **that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.**

SYNOPSIS

1. *Principle* ... 680
2. *Required by law to be attested* ... 680
3. *Attestaion* ... 681
4. *Attesting witness* ... 683
5. *Until atleast one attesting witness has been called* ... 683
6. *Execution by Pardanashin Women* ... 684
7. *Proof of attestation* ... 685
8. *Proof of execution of a registered document [Proviso]* ... 686
9. *Meaning [Execution]* ... 687
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14. *Scribe or Identifying witness as attesting witness* ... 692

COMMENTS

1. PRINCIPLE

This section lays down, subject to the proviso, that the documents required by law to be attested shall not be used as evidence until one attesting witness at least has been called for proving its execution, if there be an attesting witness alive, capable of giving evidence and subject to the process of the Court.

The proviso was added by the Amending Act 31 of 1926. According to it, in the case of a document other than a will, it shall not be necessary to call an attesting witness in proof of its execution if it has been registered under the provisions of the Registration Act, unless its execution by the person by whom it purports to have been executed is specifically denied. So, the position is that. if any document other than a will is registered, generally it is not necessary to call an attesting witness. But even if it is registered, if the alleged executant denies its execution, then it would become necessary to comply with the main provision by examining at least one attesting witness.

This section applies to cases where an instrument required by law to be attested bears the necessary attestation. What the section prohibits is proof of execution of a document otherwise than by the evidence of an attesting witness if available.[1]

This section applies only where the execution of a document has to be proved. Where, however, the execution is not to be proved, it is not necessary to call any attesting witness, unless it is expressly contended that the attesting witness has not witnessed the execution of the document.[2]

This section is not permissive or enabling. It lays down the necessary requirements which the Court has to observe in order that a document can be held to be proved.

2. REQUIRED BY LAW TO BE ATTESTED

The expression "required by law to be attested" means that under some enactment the document has to be attested. This means 'required by the law of the country where the property is situated'. The rule as to the law of domicile is not extended to immovable property.

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1. *Veerappa Kavundan* v. *Ramasami Kavundan*, ILR (1907) 30 Mad 251; *Ram Gopal Lal* v. *Aipna Kunwar*, ILR (1922) 44 All 495 : 49 IA 413.
2. *Komalsing* v. *Krishnabai*, (1945) 48 Bom LR 83 : ILR (1946) Bom 146 : AIR 1946 Bom 304.

The following are the documents which are required by law to be attested:

(*a*) A mortgage deed where the amount secured is Rs. 100 or more, *vide* Section 59 of the Transfer of Property Act.

(*b*) Gift of immovable property, *vide* Section 123 of the Transfer of Property Act.

(*c*) Wills executed by persons other than Hindus, Muslims or Buddhists— Sections 58 & 63 of Indian Succession Act, 39 of 1925.

(*d*) Wills made by Hindus, Jains, Sikhs and Buddhists—Section 57 of the Act 39 of 1925.

The principle underlying the section is that execution of a will must be proved by at least one attesting witness, that it is only an attesting witness who is entitled to prove the execution of the will. It is a concession that the legislature has made. If that concession does not result in complying with the mandatory requirements of this section the only proper method is to call the other attesting witness, so that both the attesting witnessess are before the Court, and the due execution of the will is proved by the two attesting witnesses which are necessary before a will can become a valid document.[3]

The necessity of examining an attesting witness would arise only when the document which is required by law to be attested is sought to be used in evidence and the execution thereof is questioned.[4]

A bond is not required by law to be attested, and production of attesting witnesses is not necessary[5], so is a sale-deed[6] and an agreement of re-conveyance.[7] Where a gift is executed by a Mahommedan in compliance with Mahomeddan Law, it was held that Section 123 of the Transfer of Property Act and Section 68 of Evidence Act do not apply even if it is by registered deed, and it can be proved without examining the attesting witnesses, under Section 72 of the Evidence Act.[8] Release deed is not a document required by law to be attested. So attesting witness need not be examined.[9]

Under Section 58, a document requiring attestation, if not attested, cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution. A mortgage is admissible as evidence of personal covenant to pay, since such covenant does not require attestation in law.[10]

Where a gift deed and an assignment deed were in question and those documents were registered documents of more than thirty years old, it was held that there was no necessity to call the attesting witness to prove the gift deed though it was required by law to be attested by two witnesses. Regarding the deed of assignment there was no question of calling any attesting witness as it was not required by law to be attested[11] but where the provisions of Section 123, T.P.A. and Section 68 of the Evidence Act were not complied with, the gift deed was held to be inadmissible in evidence.[12]

Where a document not required to be attested, is attested the attesting witness need not be examined.

3. ATTESTATION

The word 'attested' used in this section, is not defined in this Act. But a definition of the word "attested" was given for the first time in the Transfer of Property Act, by the Amending Act 27 of 1926. Section 3 of that Act as amended reads: "attested" in relation to an instrument, means and shall be deemed always to have meant, attested by two or more witnesses each of whom has seen the executant

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3. *Vishnu Ram Krishan* v. *Nathu Vithal*, (1948) 51 Bom LR 245 : AIR 1949 Bom 266; *Ram Rattan* v. *Bittan Kaur*, AIR 1980 All 395 (where the attesting witness though alive was not produced).
4. *Amar Singh* v. *Gosai*, AIR 1972 Guj 74.
5. *Jora (Smt.)* v. *Prabhu Narain*, AIR 1958 Raj 310.
6. *Hans Raji* v. *Yasodanand*, AIR 1996 SC 761 (para 10).
7. *H.S. Rudrappa* v. *H.Y. Shivalingappa*, 1999 AIHC 4543 (para 4) (Kant) : AIR 2000 NOC 42.
8. 1971 All WR (HC) 542.
9. *Krushanadas* v. *Bhagwan Das*, AIR 1976 Bom 153.
10. *Puluka Veetil* v. *Thiruthi Palli*, ILR (1908) 32 Mad 416 (FB); **following** *Sadakaravar* v. *Tadepally*, ILR (1907) 30 Mad 284; **overruling** *D. Society* v. *Ponnamali*, ILR 18 Mad 29; **see also** *Venkata Jagannath* v. *Venkata Kumara*, AIR 1931 Mad 140 : ILR 54 Mad 163; *Sonatun* v. *Dino*, ILR (1898) 26 Cal 222; *Kondisama* v. *Firam of M*, 43 MLJ 475; *Dhana* v. *Nastulla*, AIR 1926 Cal 637.
11. *Kunha Mina Umma* v. *Special Tahsildar*, AIR 1977 Ker 41.
12. *Flora Margaret* v. *A. Lawrence*, 2000 AIHC 3987 (paras 22 and 23) (Kant) : AIR 2000 NOC 81 (Kant).

sign, or affix his mark to the instrument, or has seen some other person sign the instrument, in the presence, and by the direction, of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one such witness shall have been present at the same time and no particular form of attestation shall be necessary.

Section 63(*c*) of the Indian Succession Act (Act 39 of 1925) is also in terms identical with Section 3 of the Transfer of Property Act.

The Supreme Court in *Beni Chand* v. *Smt. Kamala Kunwar*,[13] held that by attestation is meant the signing of a document to signify that the attestor is a witness to the execution of the document; and by Section 63(*c*) of the Secesion Act, an attesting witness to a will is one who signs the document in the presence of the executant, after seeing the execution of the document, or after receiving a personal acknowledgement from the executant as regards the execution of the document.[14]

In Section 3 Transfer of Property Act, while defining the word "attested", the expression "personal acknowledgement of his signature" is used, as was used in Section 9 of the English Wills Act 1837 in England. "Personal acknowledgement" is not equivalent to "express acknowledgement". It is not necessary that an acknowledgement should be express and should be made verbally.[15]

"Attested" means that a person has signed the document by way of testimony to the fact that he saw it executed.[16] An attesting witness is one who signs the document in the presence of the executant, ofter seeing the execution of the document, or after receiving a personal acknowledgement of the execution of the document by the executant.[17]

The object of attestation is that some person should verify that the deed was signed voluntarily. Knowledge of the contents of a document ought not to be inferred from the mere fact of attestation.[18]

Attestation and execution are two different acts, attestation follows execution. Attestation is meant to ensure that the executant was a free agent and not under pressure or subject to fraud, while executing the document. For the purpose attestation is insisted upon under the Transfer of Property Act. To make a deed of mortgage or gift admissible in evidence it is enough to comply with the provisions of Section 68. The question whether the document really created a mortgage or a gift or not, must be proved separately by showing that the requirements of Section 59 or Section 123 of the Transfer of Property Act have been complied with.[19]

This section applies only to a document duly attested and not to one which has not been proved to be so. Where the question was whether the document is a mortgage or a simple money bond, and when the execution was not specifically denied, it was held that even then, due attestation must be proved, though not by any attesting witness, in order to take advantage of the transaction as mortgage.[20]

The object of attestation is to protect the executant from being required to execute a document by the other party thereto by force, fraud or undue influence. A mortgagee who admits execution cannot be permitted to contend that the mortgagor failed to prove the requirements of Section 59 of the Transfer of Property Act.[21]

The object of placing more attestations than one upon a document whether at the party's voluntary instance or by requirement of law, is ordinarily not to demand the combined testimony of all at the trial, but merely to provide by way of caution a number of witnesses; so that the contingencies of death,

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13. AIR 1977 SC 63.
14. **Also see** *Nagulapati Lakhsmamma* v. *Mupparaju Subbaiah*, (1998) 5 SCC 285 : AIR 1998 SC 2904.
15. *Amir Husain* v. *Abdul Samad*, AIR 1937 All 646; *Ghanshyam Das* v. *Gulab*, ILR 50 Mad 927 (FB); *Umrao* v. *Bakshi*, AIR 1957 Raj 180.
16. *Alagappa Chettyar* v. *Ko Kala Pai*, AIR 1940 Rang 134; *Shamu Patter* v. *Abdul Kadir Ravuthan*, ILR (1912) 35 Mad 607 : 39 IA 218 : (1912) 14 Bom LR 1034.
17. *Lachman Singh* v. *Surendra Bahadur Singh*, ILR (1932) 54 All 1051 FB : AIR 1932 All 527.
18. *Nansukhdas Sheonarayan Shop* v. *Gowardhandas*, ILR (1947) Nag 510 : AIR 1948 Nag 110.
19. *Dhuren Bailung* v. *Bhutuki*, AIR 1972 Gau 44; **relying on** *Lachman Singh* v. *Surendra Bahadur Singh* AIR 1932 All 527 (FB).
20. *Dondapani Gondo* v. *Hrushikesh Patnaik*, ILR 1967 Cut 593.
21. *Rondapani Goudo* v. *Hrusikesh Patnaik*, ILR 1970 Cut 396.

removal of residence, and the like, may be guarded against, and one witness at least may be available. But the main object in statutes requiring attestation as an element of validity is to surround the act of execution with certain safeguards; the object of securing evidence for litigation is a secondary one.[22]

4. ATTESTING WITNESS

Under Section 3 of the Transfer of Property Act, the attesting witness must see the executant sign. Where a witness was blind, he was incapable of attesting the document, as he could not see the executant sign.[23]

Where an attesting witness stated that the executant put her thumb impression in their presence it is sufficient proof of valid attestation.[24] It must be shown that the attestator signed the document in the presence of the executant.[25]

The Privy Council in *Kundan* v. *Mushrrafi Begam*, held that the expression "signed in the presence" does not necessarily mean that the attesting witness should actually see the executants sign the document. It is enough if their signatures are made under the circumstances that the executant, if he was minded to see the witnesses sign, he could have done so.[26]

The Supreme Court in *Abdul Jabbar* v. *Venkata Sastri*,[27] held that the act of attestation must be done *animo attestandi i.e.*, with the intention to attest; the fact that one's name is on the document does not make him an attesting witness, irrespective of the purpose for which it is there.[28]

An illiterate person also may be an attesting witness by affixing his mark or finger impression. The word 'sign' includes "mark" under the General *Clauses* Act 10 of 1897.[29]

It is not necessary that all the attesting witnesses should be present at a time for affixing their signatures on the document.

What has to be proved is that each of the attesting witnesses saw the testator signing the will or received from the testator a personal acknowledgement of his signature and that each of the witnesses signed the will in the presence of the testator. It is not necessary that the attesting witnesses should be able to identify the signature of each other or even to know each other.[30]

5. UNTIL AT LEAST ONE ATTESTING WITNESS HAS BEEN CALLED

When one of the two attesting witnesses proved due execution of a gift deed, the other attesting witness need not be produced.[31]

In cases where the two attesting witnesses had signed in the presence of each other, it is not necessary to examine the both to prove that they had received acknowledgement from the testator or his signature or mark on the will.[32]

There is no need to produce both the witnesses who attested the documents, to prove the execution. If one is examined it is sufficient. No adverse inference can be drawn for non-production of the other.[33]

The word 'called' means tendered for the purpose of giving evidence.[34] It is not used in the sense of summoned.[35] It is not necessary for the attesting person, in order to prove execution, to point to the

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22. WIGMORE, Section 1304.
23. In re : *Charles Gilson*, AIR 1949 Pat 434.
24. *Kishore* v. *Ganesh*, AIR 1954 SC 316.
25. (1975) 1 Cut WR 512.
26. AIR 1936 PC 207.
27. AIR 1969 SC 1147.
28. *Abinash* v. *Dasrath*, 32 Cal WN 1228; *Shamu Pattar* v. *Abdul Kadir*, ILR 35 Mad 607 (PC); *Rajammal* v. *Chinnatal*, AIR 1976 Mad 4; *Gurnam Singh* v. *Ass Kaur*, AIR 1977 P&H 103.
29. *Prankr* v. *Jadhunath*, 2 Cal WN 603.
30. *Krishna Kumar* v. *Kayashta Pathshala*, AIR 1966 All 570.
31. *Narain* v. *P. Mohan*, AIR 1972 Raj 25; **following** *Abdul Jabbar* v. *Venkatasastri*, AIR 1969 SC 1147; *T.V. Narayana Panicker* v. *Neelakandan Damodaran*, 2001 AIHC 825 (para 12) (Ker).
32. *M.S. Thanigachala* v. *Rukmani Ammal*, AIR 1989 Mad 99.
33. *Musti Ladi Agarwallani* v. *Bhagabandoi Agarwallani*, ILR (1966) 18 Assam 462.
34. *Moti Chand* v. *Lalta Prasad*, ILR (1927) 40 All 266.
35. *Ruprao* v. *Ramrao*, AIR 1952 Nag 88.

signature or mark made by the executant. It does not therefore follow that because a witness is unable to point to the signature on a document of the person whose signature he purports to have attested, he has failed to prove that signature.[36]

This section provides that a document cannot be held to have been proved unless one of the attesting witnesses is called where it is not established that all of them are dead or were incapable of giving evidence[37] but the fact that the said witness will prove hostile does not absolve the party from calling him as a witness and mere examination of the writer of the deed or the fact that the will was registered one was held to be not sufficient proof of its due execution.[38] Where the plaintiffs and the defendants failed to produce the only alive attesting witness in spite of having been given a number of opportunities for the same and the evidence was ordered to be closed, application for producing additional evidence was allowed as the proof of the registered will was not possible without examining the attesting witness.[39]

The words 'at least' presuppose that more evidence may be required and it can only be by reference to the circumstances of each case that the quantum of evidence necessary to discharge the onus of proof can be measured. A will duly signed by the testator and attested by two witnesses, who attest not in the presence of each other but at different times on the acknowledgement by the testator of his own signature, cannot be admitted to proof on the evidence of only one of the attesting witnesses.[40]

There is no requirement that attesting witnesses should identify each other.[41]

Where the attesting witnesses proved the execution, it was immaterial that their names were not mentioned in the will.[42] Where the sole evidence of a title was a "will" and the attesting witness failed to prove it, it would not be said that the will had been legally proved.[43]

It would not be necessary to call an attesting witness where execution of a deed was not denied, only its validity was questioned on the ground of undue influence.[44]

In the case of a mortgage deed if the evidence of one attesting witness has not been accepted, further evidence of due execution and attestation of the mortgage deed is necessary.[45]

6. EXECUTION BY *PARDANASHIN* WOMEN

When women signed behind the *purdah* and the identifier stated that they are his wives, though the witnesses did not see the women putting their signatures, it was held that the deed was properly attested.[46] Where the attesting witnesses were acquainted with the voice of the lady and recognised it, it was held that though the witnesses were unable to see the face of the lady who was sitting behind a chick, the document was duly attested.[47]

Where a woman executed a document sitting behind a *purdah* and her son took the document to her and brought back the deed bearing her signature and said that the deed was signed by his mother, and witnesses thereupon attested it, it was held that the document was not properly attested as the attestor did not take the personal acknowledgement from the executant of her signature.[48]

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36. *Riazulnisa Begam* v. *Lala Puran Chand*, ILR (1943) 19 Luck 443 : AIR 1944 Oudh 40.
37. *Ananta Raghuram* v. *Rajah Bommaderara*, AIR 1958 Andhra 418; *Lalita James* v. *Ajit Kumar*, AIR 1991 MP 15.
38. *Asia Bi* v. *S.A. Abdul Gaffor*, 1996 AIHC 1332 (paras 12 and 13) (Mad).
39. *Rajinder Singh* v. *Subedar Hari Singh*, AIR 2000 P&H 257 (para 10).
40. *Roda Framroze* v. *Kanta Varjivandas*, (1945) 47 Bom LR 709 : ILR (1946) Bom 295; *Ruprao* v. *Ramrao*, AIR 1952 Nag 88.
41. *Krishna Kumar* v. *Kayastha Patsala*, AIR 1966 All 570.
42. *Beni Chand* v. *Kamla Kunwar*, AIR 1977 SC 63.
43. *Rameshwari Devi* v. *Shyam Lal*, AIR 1980 All 292.
44. *Engineers (Overseas) Corpn.* v. *W.B. Fin. Corpn.*, AIR 1986 Cal 132.
45. *Surendra* v. *Behari*, AIR 1939 PC 117.
46. *Kasidanbi* v. *Gangulal*, 16 NLR 196 : 56 IC 247.
47. *Padarnath* v. *Ram Narain*, 19 Cal WN 991; *Barkatunnissa* v. *Debi*, AIR 1927 PC 84; *Sarurjigar* v. *Barada*, ILR 37 Cal 526.
48. *Ganga Pershad* v. *Ishri Pershad*, AIR 1918 PC 3; *Hira Bibi* v. *Ramhari*, AIR 1925 PC 203.

A party to a document is not competent to attest.[49] A power of attorney agent executing the deed for another cannot be an attesting witness to it.[50]

7. PROOF OF ATTESTATION

The direct evidence of the attestor will be "primary evidence". If there is no attesting witness alive, then the document must be proved in the manner provided by Sections 47 and 73.

Where the plaintiff got issued the summons to the attesting witnesses under Order XVI, Rule 8, CPC., and they were not served, it was held that the responsibility of the plaintiff did not end and that he must take coercive steps under Order XVI, Rule 10, CPC., for securing their attendence in court; if that was not done, it would not amount to compliance with Section 68, regarding proof of attestation.[51]

Failure to call an attesting witness where it is not established that all of the attesting witnesses are dead or are incapable of giving evidence, is a fatal defect, and the document cannot be held to have been proved.[52]

Where the document concerned is not the foundation of a suit, non-compliance with Section 68 does not prevent the document from being used in evidence for a collateral purpose.[53]

When both parties admit the execution formal proof of execution is not necessary.[54] Where a document was admitted after formal proof is waived, it means admission by the party waiving such formal proof, of due execution of the document. If the execution itself is admitted the question of proving execution of the document by the attesting witnesses would not arise.[55] Where the mortgagee stated that the defendant executed the document, but he was not cross-examined regarding the details of the execution or about attestation, though it was generally denied, by the mortgagor in his written statement, it was held that it would be presumed there was due execution and also attestation as there is no attack on due execution.[56] Where the defendant admitted the execution and also the attestation signatures, but contended that the attesting witnesses had not seen the mortgagor signing the document it was held that it is for the defendant to prove such contention, as there would be presumption of due execution and attestation on the admission of the defendant.[57]

This section applies only where the execution of a document has to be proved. Where however, the execution is not to be proved, it is not necessary to call any attesting witness, unless it is expressly contended that the attesting witness has not witnessed the execution of the document.[58] Where the execution or the attestation of the will is not in dispute, there is no need to comply with the requirement of calling at least one attesting witness.[59]

Execution means not only signing by the person executing the document but also the attestation of his signature by witnesses where it requires such attestation.[60]

It was held that, even though the attesting witnesses are defendants in the case, they should be examined as attesting witnesses; on their denying their attestation, they could be treated as hostile and then the plaintiff would be in a position to prove the execution of the document in another manner. Merely because they are defendants, the responsibility cast on the plaintiff under Section 68 is not discharged.[61]

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49. *Sarurjigar* v. *Barada*, ILR 37 Cal 526; *Venkataramayya* v. *Nagamma*, AIR 1932 Mad 272.
50. *Gomathi* v. *Krishna*, AIR 1954 Mad 126.
51. *R. Nammayyamma* v. *K. Musalayya*, (1980) 2 An WR 350.
52. *Ananta Raghu Ram* v. *Rajah Bommadevara*, AIR 1958 AP 418; *Govind Gountia* v. *Balamukund Sahu*, ILR 1964 Cut 27.
53. *Brundaban Sahu* v. *Chaitanya Sahu*, (1975) 41 Cut LT 597; **following** *Shyamlal* v. *Lakshmi Narain*, AIR 1939 All 269; *Mahadeo Prasad* v. *Ghulam Mohammad*, AIR 1947 All 161.
54. *Panchanan Roy* v. *Braja Gopal Sarkar*, ILR (1972) 1 Cal 669.
55. *Durgapada Jana* v. *Nemai Charan Jana*, AIR 1986 Cal 23.
56. *Dashratha Prasad* v. *Lallosingh*, AIR 1951 Nag 343.
57. *Akhayyamma* v. *Papaiah*, AIR 1956 Mys 36.
58. *Komalsingh Kuwarsing* v. *Krishnabai*, (1946) 48 Bom LR 83 : (1946) Bom 146.
59. *Thayyullathil Kunhikannan* v. *Kalliani*, AIR 1990 Ker 226.
60. *Hari Nath Ghosh* v. *Nepal Chandra Ray Chaudhuri*, ILR (1937) 1 Cal 507.
61. *Rajyalaxmi* v. *Satywani*, (1970) 2 An WR 88.

Where an attesting witness deposed that he had attested the mortgage bond, and the other attestor has also witnessed its execution, it is sufficient evidence of valid attestation.[62]

Where one attesting witness states that the executant signed in his presence but did not state about the attestation by the other attesting witnesses, it was held that it was necessary to prove that the document was properly attested by the other attesting witnesses.[63]

When the attestation is not specifically challenged, and the witness is not cross-examined, regarding the details of the attestation, it is sufficient for him to say that the document was attested by the other witnesses and himself, and it is sufficient proof of attestation under this section.[64]

Where one of the attesting witnesses was called and his evidence was disbelieved, it was held that it cannot be said that the provisions of Section 68 were complied with.[65]

In such a case it cannot be presumed that the document was attested by the other signatory.[66]

Though the witnesses required to prove the attestation might not have stated that they put the signature in the presence of the executant, if there is evidence showing their presence at the time of the execution and of the registration of the document at the same time and at the same place, it can be legitimately inferred that the witnesses put their signatures in the presence of the executants, after having seem them signing the instrument.[67]

Mere production of an entry in the document writers register cannot be taken as proof of attestation of the will.[68]

Where a document is written, executed and attested in one ink the presumption of due attestation is permissible under the maxim "*Omnia presumuntur rite at solenniter esse act aonec probetur in contrarium*".[69]

Where the original document consisting of two sheets attested by two witnesses and the first sheet was removed and substituted by two sheets not attested by those witnesses and that too without the consent of the executant, it was held that the document of three sheets cannot be said to have been properly attested and executed; that the admission before the registrar of the execution was not sufficient proof of execution.[70]

Where the only available attesting witness to a mortgage deed denies his attestation, it is permissible to prove the deed by calling its writer under Section 71 to depose to the execution of the deed by the mortgagor and to its attestation by the two witnesses.[71]

8. PROOF OF EXECUTION OF A REGISTERED DOCUMENT [PROVISO]

The proviso was added by Act XXXI of 1926. It simplifies the difficulty of calling attesting witnesses where the document to be proved is a registered one and is not a will and its execution is not specifically denied by the person executing it.[72] If the attestation is not specifically denied it is not necessary to call any attesting witness.[73]

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62. *Kishore* v. *Ganesh*, AIR 1954 SC 316; *Raman Pillai* v. *Ramakrishna Pillai*, AIR 1952 Tra & Co. 195; *Ghansilal* v. *Bhuri Devi*, AIR 1964 Raj 39.
63. *Zaharul* v. *Mahadeo*, AIR 1949 Nag 149; *Vishnu* v. *Nathu*, AIR 1949 Bom 266; *Mirza Md* v. *Jambulingam*, AIR 1941 Rang 122; *Ramaswamy* v. *C. Ramaswami*, AIR 1975 Mad 88.
64. *Kuwar Lal Amritlal* v. *Rekhlal*, AIR 1950 Nag 83; **relying on** *Kundanlal* v. *Musharrafi*, AIR 1936 PC 207.
65. *Surendra* v. *Behari*, AIR 1939 PC 117.
66. *Sita Dakuani* v. *Rama Chandra Nahak*, ILR 1967 Cut 593.
67. *Mahaluxmi Bank Ltd.* v. *Kamakhyalal*, AIR 1958 Assam 56.
68. *Bibo Devi Smt.* v. *Rattan Lal*, ILR (1972) 2 Delhi 699.
69. *Bhimasingh* v. *Fakirchand*, AIR 1948 Nag 1552 : ILR (1947) Nag 649.
70. *Karri Venkata Reddi* v. *Gudimatta Sathi Reddi*, (1973) 2 An LT 180.
71. *Lakshman* v. *Krishnaji*, (1927) 29 Bom LR 1425.
72. The following cases are affected by this proviso : *Veerappa Kavundan* v. *Ramasami Kavundan*, ILR (1907) 30 Mad 251; *Satish Chandra Mitra* v. *Jogendranath Mahalanabis*, ILR (1916) 44 Cal 345; *Shayama Devi* v. *Premvati*, AIR 1996 All 57 (para 22).
73. *Yacubkhan* v. *Guljarkhan*, (1927) 52 Bom 219 : 1928 30 Bom LR 565; *Hari Nath Ghosh* v. *Nepal Chandra Ray Chaudhuri*, ILR (1937) 1 Cal 507; *Sheo Rattan Singh* v. *Jagannath*, ILR (1936) 12 Luck 681; *Bhagwandas Dhondidas* v. *Basawwa*, ILR (1956) 58 Bom LR 809; **See also** *Surendra* v. *Behari*, AIR 1939 PC 117.

What has to be specifically denied is the execution of the document and a mere denial of the genuineness of the document is not enough to indicate that the execution of the document was denied.[74]

The Madras High Court has held that the proviso has a retrospective effect as it relates to procedural law and not to substantive law. If the execution of a deed required to be attested by law is not denied by the executant, it need not be proved by any attesting witness, though it might have been executed before the enactment of the proviso.[75]

9. MEANING [EXECUTION]

The word "execution" in the proviso not only means signing by the executant but means and includes all the series of acts which would give validity to the document concerned.[76]

Mere admission by the executant of the mortgage bond that it has been signed by him cannot dispense with the proof of attestation.[77]

The word "execution" is hardly apt when used in regard to the drafting of a letter and is only appropriate in regard to a deed or instrument, and in such cases, certain formalities are insisted upon by law and they are to be followed by the executant in order to make the document effective in law.[78]

Where the defendant pleaded in his statement that he did not admit execution or receipt of consideration one has to prove both execution and consideration of the document. The contention that there was no specific denial of signature and attestation cannot be accepted.[79]

Where the true copy of the power of attorney shows that the original was not signed by the managing director of a company and does not bear the seal of the company, it was held that there was no proper execution of the power of attorney.[80]

In the case of a will it was held that affixing of thumb mark on the document is not a necessary legal requirement of execution. It can be executed by putting a pen mark on it, but if the thumb mark is on the back of the will, it is not execution of the will[81] but where the deceased the executant of the will put his signature in the presence of the witnesses who put their signature in the presence of the executant and the advocate, drafting the will, put his signature after seeing that the executant and the witnesses had so put their signature, it was held that the will was properly executed and attested.[82]

Execution of a document implies intelligent and conscious appreciation of the contents and the facts connected with the document. Where the thumb mark or signature is affixed to a piece of blank paper and which does not contain necessary contents of the transaction there is no execution of the document.[83]

As regards a will execution means and implies testamentary capacity as well as formal execution and attestation.[84]

The certificate of the registrar is *prima facie* evidence of execution and also conclusive when there is no evidence to throw any doubt.[85] Where the Sub-Registrar had endorsed a registered will that the executant of the will was introduced to him by the *lambardar* of a village and the executant admitted execution of the will and signed in his presence but the Sub-Registrar could not say whether the

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74. *K. Narasimhappa* v. *Lakkanna*, AIR 1959 Mys. 148.
75. *Thayammal* v. *Mutukumaraswami Chettiar*, (1929) 53 Mad 119.
76. *Lachman Singh* v. *Surendra Bahadur*, AIR 1932 All 527 (FB); *Amir Husain* v. *Abdul Samad*, AIR 1937 All 646.
77. *Rajani Kantha* v. *Bonbehari Sarkar*, AIR 1952 Cal 7; *Kundan* v. *Mushrrafi*, AIR 1936 PC 207; *Bindeshri* v. *Panchayati*, AIR 1936 All 169; *Ebrahim Mandal* v. *Akshya Konar*, 40 Cal WN 151.
78. *Sivaramakrishnayya* v. *Kasiwiswanadham*, AIR 1957 AP 584.
79. *Surendra* v. *Behari*, 1939 PC 117; *Ghansilal* v. *Bhuridevi*, AIR 1964 Raj 39.
80. *D.H.M. Framji* v. *Eastern Union Bank*, AIR 1951 Punj 371.
81. *Ramnath* v. *Ramnagina*, AIR 1962 Pat 481.
82. *Jamunabai* v. *Surendrakumar*, AIR 1995 MP 274 (para 17). **See also** *Bhagya Wati Jain* v. *General Public*, AIR 1995 P&H 201 (para 22); *K.R. Rajalakshmi Devi* v. *K.R. Chandrasekhar*, 1998 AIHC 1397 (paras 28, 29, 31, 32 and 36) (Kant).
83. *Ramadhin* v. *Siaram*, AIR 1957 Pat 64; *Chulhai Lal* v. *Kuldip Singh*, AIR 1931 Pat 266.
84. *Krishna Kumar* v. *Kayastha Pathshala*, AIR 1966 All 570.
85. *Monbi Devi* v. *Amubi Devi*, AIR 1958 Manipur 16; *Gangamoyi Devi* v. *Troilucyanath Chowdary*, ILR 33 Cal 537 (PC).

lambardar who identified the executant was a Harijan or someone else and the scribe deposed that he did not know the executants of the will, the Court doubted its genuineness.[86]

Mere proof of signature of a party to a document is not a same thing as proving due execution of the document.[87]

10. SPECIFICALLY DENIES

The words "specifically denied" means specifically denied by the party against whom it is sought to be used and not only by the executant. Where, therefore, a party against whom a document is sought to be used denied its execution, even though the executant does not do so, it is necessary to call an attesting witness to prove it.[88]

A third party who is a party to a mortgage suit but not to the mortgage deed can deny execution and require proof of attestation when the executant of the deed admits execution.[89]

Where the plaintiff alleged that the executant of the gift deed was so old and infirm that he could not understand the nature of the document, the Court said that it was not "a specific denial".[90] A mere general denial of a mortgage or not admitting it cannot be regarded as a specific denial of its execution within the meaning of the provisio to this section. When there is only a general denial of the execution and there is no cross-examination regarding attestation of a witness who comes forward to swear to execution then it can be presumed that there was due attestation.[91] Attacking a document as a sham and nominal transaction would not amount to a specific denial of execution.[92] A plea that the plaintiff was not aware of the execution of a document does not amount to specific denial.[93] The law requires not a mere denial but a specific denial which means, not only that the denial must be in express terms but it should be definite and unambigious what has to be specifically denied is the execution of the document. Other contentions not distinctly referring to the execution of the document by the alleged executant are not covered by the expression denial in the proviso.[94]

When the borrower did not specifically deny execution of the mortgage deed but only alleged that it was got by coercion and undue influence and was not supported fully by consideration, it was held that the execution of the deed was admitted and therefore it was not required to be proved by one atleast of the attesting witnesses.[95] Where the execution of a mortgage deed was specifically denied, and the attesting witness was not examined on the ground that he was won over, it was held that it was not a sufficient ground for considering other evidence to prove execution.[96]

The specific denial of execution of a document must be in a proceeding before a court. If the execution or the attestation is specifically denied in the written statement the plaintiff is bound to produce an attesting witness to prove execution or the attestation.[97] When execution of a gift deed is specifically denied attesting witness has to be called for proof but not where the donor specifically admitted its execution.[98] If it is not denied in the pleading there is no necessity to call the attesting witness.[99]

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86. *Gurdial Kaur* v. *Kartar Kaur*, (1998) 4 SCC 384.
87. *Narayanappa* v. *Lachmakka*, ILR 1958 Mys 263.
88. *Chandra Kali* v. *Bhabuti Prasad*, ILR (1943) 19 Luck 365 : AIR 1943 Oudh 416.
89. *Syed Zaharul Hussain* v. *Mahadeo Ramji*, AIR 1949 Nag 149.
90. *Chhuttan Lal* v. *Shanti Prakash*, AIR 1981 All 50; *Karimullah* v. *Gudar Koeri*, AIR 1925 All 56; *Radha Ballab* v. *Deoki Nandan*, AIR 1932 All 320; *Babanchanran* v. *Puran Chandra*, (1959) 25 Cut LT 291; *Harnam Singh* v. *Dalip Singh*, (1963) 65 Punj LR 1133; *Narasimhappa* v. *Lakkanna*, AIR 1959 Mys 148; *Nikunja Bala* v. *Suchitra Dasi*, AIR 1955 Tripura 17.
91. *Dashrath Prasad* v. *Laloo Singh*, AIR 1951 Nag 343.
92. *Vedachala* v. *Ameena*, AIR 1944 Mad 121.
93. *Kadiya Umma* v. *Mayan Kutty*, AIR 1992 Ker 261.
94. *Narasimhamappa* v. *Lakkanna*, AIR 1959 Mys 148; **relying on** *Surendra* v. *Behar*, AIR 1939 PC 117.
95. *Engineers (overseas) Corporation Pvt. Ltd.* v. *WB Financial Corporation*, AIR 1986 Cal 132.
96. *Ram Ratan* v. *Bittan Kaur*, AIR 1980 All 395.
97. *Ebrahim Mandal* v. *Akshya Konar*, 40 Cal WN 151; *Harnam Singh* v. *Dalip Singh*, (1963) 65 Punj LR 1133.
98. *Surendra Kumar* v. *Nathulal*, AIR 2001 SC 2040 (para 12).
99. *Lakho Tewari* v. *Lalit Koeri*, AIR 1927 Pat 403.

Where the execution is not specifically denied, attestation can be proved by any other method without taking recourse to the provisions of Section 68 which would come into operation only when the execution is specifically denied.[1]

It is only when there is specific denial by the defendant of the execution of the document, the plaintiff is to give strict proof of the execution under Section 68.[2]

In a suit for redemption of a unsufructuary mortgage where the execution of the mortgage deed was not denied by the mortgagee, it was held that as the deed was not attested it is invalid but a decree could be granted for redemption on the basis of mortgagor's title, as the mortgage was not denied.[3]

11. EXCEPTIONS TO THE ABOVE RULE

The rule enshrined in this section is however, subject to certain exceptions. PHIPSON enumerates the exceptions in para 40-18, p. 1086-88 - 13th edition. The exceptions with reference to Indian Law may be stated as hereunder:

(1) When the opponent by his prior conduct is estopped from denying execution. The adverse party may be estopped from disputing the document by the recital in a deed to which he is a party and under which he has acquited some benefit on the faith of the document recited being valid.

(2) When although producing it, the opponent claims an interest under the same instrument in the cause: his claim of interest predicates an admission of its validity or genuineness.

(3) When the document is tendered against a public officer, who is bound by law to have it executed and who has dealt with it as a document duly executed.

(4) When the attesting witness has signed the instrument merely in pursuance of a rule in some court and such court has subsequently recognised the validity of the instrument by acting upon it.

(5) When the attesting witness refuses to testify; where the attestator is privileged not to testify and thus is not compellable and where the attestor, though not privileged, nevertheless refuses to testify, the proponent should be excused, provided it is made to appear that there is no collusion.

(6) When the party to an attested document has admitted the execution of the document for purpose of the trial (*vide* Section 70).

(7) When the document is proved to be in the possession of adverse party and he refuses to produce it after notice. Then the secondary evidence can be given in which case the court also be presumed due execution and attestation unless and until it is disproved. (*vide* Section 65 & Section 89). The person refusing to produce the document cannot be allowed to rebut the presumption by his producing the document subsequently without the consent of the opposite party or the order of the court. (*Vide* Section 164).

(8) When the document is thirty years old and where the court presumes under Section 90 about the attestation then proof can be dispensed with.

(9) When the attesting witness is dead or is not available on account of any physical or legal obstacle like imprisonment, insanity, infirmity, blindness, absence of jurisdiction, etc., the proof of execution by attesting witness can be dispensed with and may be proved by other means (*vide* Section 69).

(10) When the attesting witness does not recollect or denies the execution. (*Vide* Section 71).

(11) In the case of wills when probate is granted by a competent court, it would be sufficient evidence of the validity and contents of the will and in such cases attestation need not be proved. (*Vide* Exception 2 of Section 91).

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1. *Prauas Chandrapati* v. *Jagan Mohan Das*, ILR 1960 Cut 214; *Ghansilal* v. *Bhuri Devi*, AIR 1964 Raj 39; no specific denial of execution and marked without objection, *Sunamani Dei* v. *Chakradhar Das*, 1998 AIHC 3205 (para 5) (Ori); *Ishwar Dass Jain* v. *Sohan Lal*, AIR 2000 SC 426 (para 12); *Rosammal Issetheenammal Fernandez* v. *Joosa Mariyan Fernandez*, AIR 2000 SC 2857 (paras 7, 9 and 10).
2. *G. Royyalakshmamma* v. *R. Satyavani*, (1970) 2 An WR 88.
3. *Arab Ali* v. *Farid Ali*, AIR 1961 Assam 48.

12. SHALL NOT BE USED

These words mean that the document cannot be used in a suit for enforcement of the document, leaving the ordinary provisions of law in Section 67 to apply where the document is to be used for any other purpose. Although a document cannot be used in evidence as a mortgage deed, which requires attestation, yet this section does not prevent it from being used in evidence for the purpose of proving it as an acknowledgement saving limitation.[4]

13. WILLS—PROOF

Proof of the will is to be made either in the Court of law or any procedure known to law provided under the Registration Act without which no right can be acquired under it.[5]

The onus of proving a will is on the propounder. Proof of the signature of the testator, the testamentary capacity, and at the time of execution the testator was in a sound and disposing state of mind have to be proved.[6] The testator should speak not only about the testator's signature of affixing his mark to the will, or somebody else signing it in his presence and by his direction, but that he had attested the will after taking acknowledgement from the testator of his signature or mark. He should also depose that each of the witnesses had signed the will in the presence of the testator. The attestor's participation even at the time of registration does not dispense with the proof of execution and attestation of a will in accordance with Section 68[7] and the propounder has to examine at least one attesting witness to prove this.[8] Where the fact of giving instructions for preparation of the will by the testator and his presenting it for registration after acknowledging the execution of it, were proved and there being no vitiating circumstances to rebut the presumption as to the regularity of its execution or to the same or to throw any doubt about it, the finding about it being validly executed called for no interference.[9]

Section 68 is mandatory and one attesting witness at least has to be called to prove the execution. Where the only living attesting witness omits to testify, such omission cannot be cured with evidence of other witnesses like the scribe, or a beneficiary under the will.[10] The statement of the scribe of a will can be taken to be the statement of an attesting witness.[11] Where the attesting witnesses of a will were not examined to prove its execution, examination of the identifying witness who had seen the process of the testator executing and signing the will in his presence, was held to be not sufficient to prove its execution. Besides there were suspicious circumstances.[12]

Where the propounder who was the beneficiary under the will examined only one attestor as required under Section 68 and did not examine other witnesses, it was held that the propunder was under a duty to examine all available witnesses and to produce the best available (witness and to produce the best available) evidence in support of the execution of the will[13] but where the will was registered and was duly proved as per requirement of law, it was not necessary to examine the advocate who drafted the will and the typist who typed it.[14]

On a harmonious interpretation of the relevant provisions of the Succession Act and the Evidence Act, it can safely be laid down that for proper proof of a will at least one of the attestators, if alive,

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4. *Shyam Lal* v. *Lakshmi Narain*, AIR 1939 All 269.
5. *Lakshmi* v. *Asstt. Commissioner, Doddaballapur Sub-Division Bangalore*, 2000 AIHC 462 (paras 1 and 2) (Kant).
6. *Venkatachala* v. *Thimmajamma*, AIR 1959 SC 443; *Purnima* v. *Khagendra*, AIR 1962 SC 567; *Shashi Kumar* v. *Subhodh Kumar*, AIR 1964 SC 529; *Gorantla* v. *Thotakura*, AIR 1968 SC 1332; *Susama* v. *Anath*, AIR 1976 Cal 377; *Ajit Kumar* v. *Mukunda Lal*, AIR 1988 Cal 196; *Dinesh Kumar* v. *Khajan Singh*, AIR 1988 Delhi 273; *Medhi* v. *Lakheswar Nath*, AIR 1976 Gau 74.
7. *K. Nookaraju* v. *P. Venaktrao*, AIR 1974 AP 13; **dissented in** *K.M. Varghese* v. *K.M. Oommen*, AIR 1994 Ker 85 (paras 55 and 75); *Jagadish* v. *Rajendra*, AIR 1975 All 395; *Girja Datt Singh* v. *Gangotri Datt Singh*, AIR 1955 SC 346; *Illyas* v. *Badshah alias Kamla*, AIR 1990 MP 334.
8. *Ravi Shanker* v. *Rajendra Kumar Dubey*, 1999 AIHC 3499 (paras 12 and 13) (MP).
9. *Baburajan* v. *Parukutty*, AIR 1999 Ker 274 (para 6).
10. *Harish Chandra* v. *Basant Kumar*, AIR 1974 Ori 170; *Mathew Jacob* v. *Salestine Jacob*, AIR 1998 Del 390 (para 6)
11. *Dhyan Chand* v. *Savitri Devi*, AIR 1998 HP 37 (para 16).
12. *Narayanamma* v. *Mayamma*, 1999 AIHC 3942 (paras 8, 10 and 11) (Kant).
13. *Venkatarama Raju* v. *Narasa Raju*, (1966) 2 An WR 134.
14. *Ravi Shanker* v. *Rajendra Kumar Dubey*, 1999 AIHC 3499 (para 23) (MP).

should be examined and that whatever is not proved through him should be proved through other evidence, direct or circumstantial.[15]

Where a certified copy of the will reciting the *factum* of adoption was sought to be relied on, it was held that proof of execution of the will is essential.[16]

When the Sub-Registrar by his evidence proved a certified copy of a will, it was held that the execution of the will and the disposing state of the mind of the testator were proved.[17]

It was held that when all the surviving attestors were examined in proof of the execution of the will, non-examination of the scribe is of little consequence.[18]

In the former Jaipur State prior to 1943 there was no Succession Act or any law requiring a will to be attested. Dealing with a case of a will of that State, it was held that when the scribe of the registered will deposed that he wrote the will on the instructions of the testatrix who later affixed her thumb impression after he had read over and explained the will to her, the will should be held to be duly proved.[19] Where the testator had put his signature at the end of the will after the schedule of the properties was set out in it and thereafter the attestators had put their signatures, it was held to be duly executed. Failure of the testator to sign on one of the pages of the will would not make the will incomplete or inoperative.[20]

Although in a proceedings for probate of the will one attesting witness as required by Section 81 of the Succession Act was examined, an affidavit should be filed by the attesting witness proving the execution as required by Section 68 in the regular proceedings.[21]

Where a plaintiff produced a will but it was not exhibited, and the defendant made use of the will in cross-examination of the plaintiff and it was marked as an exhibit at the instance of the defendant, it was held that the defendant must be taken to have waived the requirement of formal proof.[22]

Where the original will was not produced and the only attesting witness produced stated that he was not aware of the execution or being thumb marked of any will by the testator and the propounder failed to prove the tastator's disposing mind free from extraneous influences and his sound disposing mind when he executed the will, the will could not be said to have been proved.[23] Where the attesting witness denied the execution of the will, it was held that the execution can be proved by other evidence[24] and where the evidence of the attesting witness is vague, the Court cannot conclude that the will has not been proved. It should take into consideration all the circumstances before reaching any conclusion.[25]

The proviso to Section 68 is not applicable in the case of wills, but, as the will is a document required by law to be attested the main provision in Section 68 is applicable. The expression 'called' in the section is not used in the sense of 'summoned'. The expression 'clearly' means tendered for the purpose of giving evidence. If one of the attesting witnesses had not been called for the purpose of proving its execution, the will is not admissible as evidence under Section 68. [26]

Where it was alleged that there was conspiracy with the witnesses to concot the will, it was held that when the terms of the will are natural and proper and the execution and attestation was proved by disinterested witnesses; the testamantory capacity was established and conspiracy to concot to the will could not be attributed.[27]

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15. *Kuttiappa* v. *Krishnan*, ILR (1970) 1 Ker 313.
16. *Braj Raj Singh* v. *Yogendrapal Singh*, AIR 1952 MB 146.
17. *Mehtab Singh* v. *Amrik Singh*, AIR 1957 Punj 146.
18. *R Kameswara Rao* v. *B. Surya Prakasa Rao*, AIR 1962 AP 178; **relying on** *Kristo Gopal* v. *Baidya Nath*, AIR 1939 Cal 87.
19. *Bajji (Mst.)* v. *Bhairon*, AIR 1957 Raj 261.
20. *Baburajan* v. *Parukutty*, AIR 1999 Ker 274 (para 7).
21. *In the Goods of Edwin Carlow Marulline*, ILR (1953) 1 Cal 185.
22. *Chunilal Ojha* v. *Mulsankar Ojha*, ILR 1961 Cut 635.
23. *State of Haryana* v. *Raj Kaur*, AIR 2001 P&H 322 (para 28).
24. *Ananth Raj Hegde* v. *Dharmapala Hedge*, (1965) 2 Mys LJ 112.
25. *K.M. Varghese* v. *K.M. Dommen*, AIR 1994 Ker 85 (para 52).
26. *Ruprao* v. *Ramrao*, AIR 1952 Nag 88; *Kamalakshy* v. *Madhavi Amma*, 1980 Ker LT 493 (Ker)..
27. *R. Kameswara Rao* v. *B. Surya Prakash Rao*, AIR 1962 AP 178; **relying on** *Govind Prasad* v. *Bala Kunwar*, AIR 1934 PC 12; *Chotey Narain Singh* v. *Ratan Koer*, ILR (1894) 22 Cal 519 (PC).

In the absence of suspicious circumstances like undue influence or fraud or coercion, surrounding the execution of the will, the proof of testamantory capacity and signature of the testator as required by law are sufficient to discharge the onus.[28] Where the testator lived for nearly five years after the execution and registration of the will without making any attempt to cancel it and the evidence of the attestors was found to be credible, mere fact the plaintiff accompanied the testator on the date of its execution does not create suspicion as to influence or doubt as to its genuineness.[29]

If the proof as envisaged by Section 68 falls short of the legal requirements, it cannot be taken into consideration.[30]

In a proceeding to obtain probate of a will be a legatee, one of the three brothers named as opposite parties filed no objection affidavit for the issue of probate, and three attesting witnesses supported the genuineness of the will; it was held that the petitioner/legatee is entitled to the grant of probate.[31]

Where the bequest was in favour of wife and children excluding the eldest son from inheritence, and one of the attesting witnesses denied attestation in the presence of the testator, it was held that when the terms of the will are rational and it was executed in sound state of mind, the legatees can be granted letters of administration.[32]

Where a witness stated that a certain person cancelled his will through a publication in his newspaper on a certain date, neither the publication nor his statement was held to be sufficient proof of the will in question.[33]

Where the will in question was a registered document of more than 30 years, with no suspicious circumstance regarding its execution and all the attesting witnesses and the scribe were dead, its genuineness was presumed.[34]

14. SCRIBE OR IDENTIFYING WITNESS AS ATTESTING WITNESS

Different views were expressed by different High Courts on the question as to whether, and if so in what circumstances, a scribe can be treated as an attesting witness. One view is that the scribe cannot be treated as an attesting witness, even though the deed may in fact have been executed in his presence. A contrary view was expressed in other cases. A third view is that the scribe may perform a dual role; he may be an attesting witness as well as a writer. Though the *prima facie* inference in a case where a person describes himself as the scribe, is that he signs as the writer and nothing else, it can be shown that he signed not only as a writer, but as a witness of the fact that he saw the document executed or received an acknowledgement from the executant that he had executed it.[35]

The Supreme Court has clarified the position in: *Abdul Jabbar* v. *Venkata Sastri*.[36] It observed: "This was an appeal against the judgement of the High Court where on a reference Full Bench had to consider the question whether an earlier decision of a Full Bench in *Veerappa Chettiar* v. *Sobrahmanya Ayyar*,[37] required reconsideration. The Full Bench in an opinion reported in (1961) 2 MLJ 78

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28. *Ajit Kumar* v. *Mukunda Lal*, AIR 1988 Cal 196; *Manorama* v. *Saroj*, AIR 1989 All 17.
29. *Ramkrishna Shivaram Hegde* v. *F.M. Ganapathi Shivaram Hegde*, 1999 AIHC 3795 (paras 7, 8 and 18) (Kant).
30. *Gullan Devi* v. *Puna*, AIR 1989 J&K 51; *Rameshwari Devi* v. *Shyam Lal*, AIR 1980 All 292.
31. *Tilak Raj* v. *Shambhu Nath*, AIR 1987 Del 360.
32. *Mathew* v. *Devassy Kutty*, AIR 1988 Ker 315.
33. *Chandan* v. *Longa Bai*, AIR 1998 MP 1.
34. *Kesarapu Manikyalu* v. *Venna Perumallayya*, 2000 AIHC 590 (paras 4 and 8) (AP) : AIR 2000 NOC 20 (AP).
35. *Badri Prasad* v. *Abdul Karim*, ILR (1913) 35 All 254; *Ram Bahadur Singh* v. *Ajodhya Singh*, (1916) 20 CWN 699 (Patna); *Dalichand* v. *Lotu*, (1919) 22 Bom LR 136 : ILR 44 Bom 405 : AIR 1920 Bom 294; *Amardas Mangaldas* v. *Harmanbhai Jethabhai*, (1942) 44 Bom 643 : AIR 1942 Bom 291; *Paramasiva Udayan* v. *Krishna Padayachi*, ILR (1917) 41 Mad 535 : AIR 1918 Mad 491; *Jagannath Khan* v. *Bajrang Das Agarwala*, AIR 1921 Cal 208 : ILR (1920) 48 Cal 61; *Abinash Chandra* v. *Dasarath Malo*, (1928) 56 Cal 598 : AIR 1929 Cal 123; *Dhruba Sahu* v. *Paramanada Sahu*, AIR 1983 Ori 24, the Court adding that it is not necessary for the attesting witness to add that he signed in the presence of the executant. *Ujagar Singh* v. *Chanan Singh*, AIR 1986 P&H 230; *Venkatasubbiah* v. *M Subbamma*, AIR 1956 Andhra 195; *Ayyaaswami* v. *Kyalaswami*, AIR 1915 M 1052 (1); *Nirade Mohan* v. *Charu Chandra*, AIR 1950 Cal 401; *Umrao* v. *Bakshi Gopal Bux*, AIR 1957 Raj 180; *Alagappa Chettyar* v. *Ko Kala Pai*, (1940) Rang 199 : AIR 1940 Rang 134; *Yacubkhan* v. *Guljarkhan*, (1927) 52 Bom 219 : (1928) 30 Bom LR 565.
36. AIR 1969 SC 1147 : (1969) 2 An WR 107 SC.
37. AIR 1929 Mad 1 : ILR 52 Mad 123.

[*H. Venkata Sastri* v. *Rahilna Bi*,[38]] observed: "In our opinion, such signatures of the registering officer and the identifying witnesses endorsed on a mortgage document can be treated as those of attesting witnesses if (1) the signatories are those who have seen the execution or received a personal acknowledgement from the executant of his having executed the document, (2) they sign their names in the presence of the executant and (3) while so doing they had the animus to attest. The mere presence of the signatures of the registering officer of the identifying witnesses on the registration endorsements would not by themselves be sufficient to satisfy the requirements of a valid attestation; but it would be competent for the parties to show by evidence that any or all of these persons did in fact intend to and did sign as attesting witness as well".

Abdul Jabbar v. *Venkata Sastri*,[39] it is observed at page 111: "It is essential that the witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement for some other purpose, *e.g.*, to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness".

"In every case the court must be satisfied that the names were written *animo attestandi*."[40] Evidence is admissible to show whether the witness had the intention to attest. "The attesting witnesses must subscribe with the intention that the subscription made should be complete attestation of the will, and evidence is admissible to show whether such was the intention or not.[41]" The Supreme Court held that the two persons who had identified the testator at the time of the registration of the will and had appended their signatures at the foot of the endorsement by the Sub-Registrar, were not attesting witnesses, as their signatures were not put "*animo attestandi*".[42] Subscribing a signature on the part of the scribe cannot be equated with that of the signature of an attesting witness which is the requirement of the statute.[43] The Calcutta High Court has held that a person who had put his name under the word "scribe" was not an attesting witness, as he had put his signature only for the purpose of authenticating that he was a "scribe".[44] The Privy Council held that the legatees who had put their signatures on will in token of their consent to its execution were not attesting witnesses and were not disqualified from taking as legatees.[45]

The Supreme Court had to consider whether the Sub-Registrar before whom the executant admitted execution at the time of registration and the identifying witnesses could be considered as attesting witnesses. The Supreme Court observed that *prima facie* the registering officer puts his signature on the document in discharge of his statutory duty under Section 59 of the Registration Act, and not for the purpose of attesting it. In that case, it was not proved that he put his signature with the intention of attesting the document. Similarly the identifying witnesses were not shown to have put their signatures for the purpose of attesting the document. Therefore the Sub-Registrar and the identifying witnesses were not treated as attesting witnesses. The Supreme Court cited with approval *Surendra Bahadur Singh* v. *Thakur Behari Singh*.[46]

In *M. Venkatasubbiah* v. *M. Subbamma*,[47] the judges relied on *Paramhansa* v. *Krishna*[48]; *Ayyaswami Iyengar* v. *Kyalaswami Pilla*.[49]

The decision of the Supreme Court was followed in *Rajyalakshmamma* v. *Satyavani*[50] in which it was pointed out that the view expressed in *M. Venakta Subbaiah* v. *M. Subbamma*[51] cannot be approved

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38. AIR 1962 Mad 111 (FB).
39. (1969) 2 An WR 107.
40. **See** JARMAN ON WILLS, 8th Edn. 137.
41. **See** THEOBALD ON WILLS, 12th Edn. page 129.
42. *Girja Datt* v. *Gangotri Datt*, AIR 1955 SC 346, 351.
43. *N. Kamalam* v. *Ayyasamy*, AIR 2001 SC 2802 (paras 26 and 27).
44. *Abinash Chandra* v. *Dasarath Malo*, AIR 1929 Cal 123 : ILR 56 Cal 598. **See also** *Union of India* v. *Debika Guha*, AIR 2000 SC 3522 (1) (para 2).
45. *Shiam Sundar Singh* v. *Jagannath Singh*, (1928) 54 MLJ 43.
46. (1939) 2 MLJ 762. The decision of the Supreme Court was **followed in** *Valliammal* v. *Rakkia Gounder*, (1991) 2 MLJ 478; **see also** *Mira Bai* v. *Jai Singh*, AIR 1971 Raj 303; *Sakharam* v. *Sushila Bai*, AIR 1953 Nag 339; *Dharmdas* v. *Kashinath*, AIR 1959 Cal 243; *Rajammal* v. *Chinnathal*, AIR 1976 Mad 4.
47. 1956 An WR 195 : AIR 1956 Andhra 195.
48. 1918 Mad 491.
49. 1915 M 1052.
50. (1970) 2 An WR 88.
51. (1956) Andhra 195.

in view of the decision of the Supreme Court dissenting from *Jarnail Singh* v. *Narain Singh*[52]; see also *K. Nookaraju* v. *P. Venkatarao*.[53]

In cases coming under the Transfer of Property Act, where the document becomes complete and valid only on registration, the Sub-Registrar and the identifying witness of registration may not become attesting witnesses, but in a case where the document is a will (which is excluded from the proviso) which does not require registration, the Sub-Registrar and the identifying witnesses, if they conform to the law regarding attestation, may become attesting witnesses.[54]

In the absence of evidence to prove that the identifying witnesses were present at the time of actual execution of the document; their attestation will not prove due execution of the document. If signatures of the two persons appearing at the foot of the endorsement of the registration of a will, were of the same persons who attested the document as required under Section 68, then it can be construed that they have appended their signatures in their capacity as attesting witnesses to the will.[55]

Proof where no attesting witness found.

S. 69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

COMMENTS

1. PRINCIPLE AND SCOPE

This section gives an alternative method of proof of documents required to be attested by law. It applies: (1) if no such attesting witness can be found; (2) if the document purports to have been executed in the United Kingdom. In these two cases, it must be proved that the attestation of one of the attesting witnesses at least is in his handwriting. It should also be proved that the signature of the person executing the document is in the handwriting of that person. This means any person who can identify the signature and the handwriting of the executant and of one attesting witness's signature, can prove the document according to this Section. This Section has to be read with Section 68 which deals with the question of proof of a document which requires attestation.[56]

The Evidence Act was enacted when India was a part of the British Empire. Reference to the United Kingdom in this and other sections still appear. This anachronism should be removed by suitable amendments. Apparently, this aspect has escaped the attention of our legislators.

This section would come into play when no attesting witness can be found.[57] Where none of the attesting witnesses of a document is available, this section declares that the signature of at least one of them must be proved by a witness.[58] Where one of the attesting witnesses of a will was not examined and the other refused to support the will, the scribe of the will and the doctor who certified the testator's mental condition to execute the will could be viewed as attesting witnesses from their testimony validating the execution of the will.[59]

Due diligence on the part of the party is required in tracing the attesting witnesses. The court must be satisfied that, in spite of diligent search, they could not be found. Then only one can take the aid of this section.[60] The party should exhaust all the processes of the court to compel the attendance of any

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52. 1984 P&H 181.
53. AIR 1974 AP 13.
54. *Ammu D/o P. Konnu* v. *Krishnan S/o T. Kunhunni*, AIR 1965 Ker 32; *Ruprao* v. *Ramarao*, AIR 1952 Nag 88 (a case of will); *Umarao* v. *Bakshi Gopal Bux*, AIR 1957 Raj 180.
55. *Gurnam Singh* v. *Ass Kaur*, AIR 1977 Punj 103.
56. *Parumal* v. *Abdul*, AIR 1929 Sind 235.
57. *Doraiswami* v. *Rathnammal*, AIR 1978 Mad 78.
58. *Bhuban Chandra Medhi* v. *Ramdas Medni*, ILR (1967) 19 Assam 10.
59. *Surinder Singh* v. *Anup Singh*, 2001 AIHC 4551 (paras 20, 22, 24 and 25) (P&H)
60. *Bam Jassa Kunwar* v. *Sahu Narain Das*, AIR 1946 All 178; *Uttam Singh* v. *Hukam Singh*, 39 All 112 : AIR 1917 All 89; *Venkatramanyya* v. *Kamisetti Gattayya*, AIR 1927 Mad 662; *Muthuraman* v. *Subramanian*, AIR 1933 Mad 612;

one of the attesting witnesses, and only when it is not possible to produce that witness, either legally or physically, this section can be availed of.[61]

Section 69 can be invoked only when the absence of the attesting witnesses is sufficiently accounted for. If the attesting witness denies the signatures or does not recollect the execution of the document, its execution may be proved by other evidence.[62]

The law of attestation of wills is contained in Section 63 (*c*) of the Indian Succession Act, and the mode of proving the documents required by law to be attested has been laid down in Sections 68 to 72 of the Evidence Act. Nothing in these provisions makes it a necessary element in proof of attestation that the signatures of the attesting witnesses of a will should be identified.[63] Where there was no suspicion as to the unnaturalness of or tampering with a more than 30 year old will whose executant and the attesting witnesses were not alive, presumption could be raised in favour of it.[64]

The words "if no such attesting witness can be found" are not very appropriate; they must be interpreted to include not only cases where the witnesses cannot be produced because they cannot be traced, but cases where the witness, for reasons of physical or mental disability, or for other reasons, which the court considers sufficient, is no longer a competent witness for the purpose, as is provided in Section 88 of the Evidence Act.[65]

Where the executant, who was an illiterate, denied execution, and all the attesting witnesses were either dead or turned hostile or were not available, it was held that there was no rule of law which prevented a court from holding the execution proved, when the signature of the attesting witnesses were proved to the satisfying of the court, regard being had also to the circumstances of the case.[66]

Where the executant and the attesting witnesses of a gift-deed were dead, execution of the document would be proved by the proof of the signature of at least one of the attesting witnesses and that of the executant.[67]

When the signature of an attesting witness is proved, it is evidence of everything upon the face of the instrument, since it is to be presumed that the witness would not have subscribed his name in attestation of that which did not take place.[68]

Admission of execution by party to attested document.

S. 70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

COMMENTS

1. PRINCIPLE AND SCOPE

Unlike the English rule that the attesting witnesses must be called though the execution of the document is admitted by the party to it, this section states that if the party admits execution of an attested document it shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

This section is an exception to the general rule contained in Section 68 which states that "If a document is required by law to be attested, it shall not be used as evidence until one attesting witness atleast has been called for the purpose of proving its execution." This exception must be read in the light

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Bhairon Singh v. *Ganga Narain*, AIR 1935 All 527; *Yenkataraman Raju* v. *Narasa Raju*, (1966) 2 An WR 134. (a case of a will)

61. *Harekrishna* v. *Jogneshwar Panda*, AIR 1939 Cal 688.
62. *Sita Dakuani* v. *Ramachandra Nahak*, ILR 1967 Cut 593.
63. *Krishna Kumar* v. *Kayastha Pathshala*, AIR 1966 All 570.
64. *Haradhan Mahatha* v. *Dukhu Mahatha*, AIR 1993 Pat 129 (paras 10, 12 and 15).
65. *Bam Jassa Kunwar* v. *Sahu Narain Das*, AIR 1946 All 178.
66. *Ponnuswami* v. *Kalyanasundara*, AIR 1930 Mad 770; **see contra:** *Gobardhan* v. *Horilal*, ILR 35 All 364.
67. *T.R. Srikantaiah Setty* v. *Balkrishna*, 1999 AIHC 3477 (para 12) (Kant).
68. *Ponnuswami* v. *Kalyanasundaram*, 1934 Mad 365 (FB); *Abdulla Paru* v. *Gannibai*, 11 Bom 690; *Nooruddin* v. *Mahomed Oorner*, 1956 Bom 641.

of the words used in it and by so reading the section, the meaning is that an examination of an attesting witness will not be necessary for the purpose of proving the execution of the document required by law to be attested if the executant admits the execution.[69]

This section operates where the person relying on a document has not given any evidence at all of the due execution of the document by the executant but relies on an admission of execution by the latter. If a mortgagor admits execution of a document in the written statement, it is wholly unnecessary for the mortgagee to adduce any evidence as to the execution of the document. Where the execution of a mortgage bond was admitted by the executant, it was held that there was no necessity to call any attesting witness.[70]

Where the defendant admitted the execution in the written statement it was held that the document should be taken as proved even though the attesting witness stated that the executant did not sign in his presence.[71]

The word used in Section 70 is "execution" of a document and not "signature" of the executant as used in Section 69. Admission of "execution" in this section was held not only to mean an admission of signature but also the valid attestation of the signature by the two witnesses as required by law.[72]

Where an accused admitted the signature on a certain document in a statement prepared in English, it was held that the admission of mere signature on the document by itself does not prove the contents thereof, that the accused did not know the English language but signed on it, and that in the absence of the attesting witnesses being examined the document could not be treated as proved.[73] Admission of signature does not dispense with the proof of attestation as required by law.[74]

A reading of this section shows that it applies only to a document duly attested. It was observed those words (of Section 70) apply only to a document duly attested. The mortgage deed here in question was not, in a legal sense attested; for it was merely signed by persons who professed to be witnesses to its execution, although in truth and in fact they were not so".[75]

An attested document means a duly attested one and the execution that is contemplated in this section is a due execution or execution in accordance with what the law requires for a particular document, so if a question of attestion is put in issue, it is incumbent on the plaintiff to prove that the document has been duly attested before this section can be relied on.[76]

Admission of execution is binding against the executant only and not on others.[77] The persons claiming through him are not bound by such admission.

Signature of the executant of mortgage bonds is required by Section 59 of the Transfer of Property Act to be attested by two witnesses. Under Section 68 of this Act at least one attesting witness should be called to prove the document by stating that it was duly attested, then only on the strength of the evidence given by the attesting witness, the provisions of Section 70 can be invoked.[78]

Where it appears on the face of a document or it is positively made out by the evidence on record that a document required by law to be attested has not been attested in accordance with law this section cannot be applied in spite of the admission of party to an attested document of its execution by himself

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69. *Asharfi Lal* v. *Narnhi*, 44 All 127 : AIR 1922 All 153(1); *Satishchandra* v. *Jogendra Nath*, AIR 1917 Cal 693; *Raja Ram* v. *Thakur Rameshwar Bakhsh Singh*, (1936) 12 Luck 109.
70. *Somasundaram* v. *Muthirulappa*, AIR 1933 Mad 432; *Ramanand Rai* v. *Deputy Director of Consolidation*, ILR (1978) 1 All 467 (a case of will).
71. *Ramlal* v. *Septi*, AIR 1926 Pat 295.
72. *Arjun Chendre* v. *Kaildas Chendra*, AIR 1923 Cal 149; *Hira Bibi* v. *Ram Hari Lal*, AIR 1925 PC 203; *Harinath Ghosh* v. *Nepal Chandra Rai*, 41 Cal WN 306 : ILR (1937) 1 Cal 507.
73. *State of Orissa* v. *Bhourilal*, (1962) 1 Cr LJ 835.
74. *Lachman Singh* v. *Surendra Bahadur*, AIR 1932 All 527 (FB).
75. *Heera Bibi* v. *Rambari*, AIR 1925 PC 203.
76. *Davood Rowther* v. *Ramanadhan Chettiar*, (1938) Mad 523 : AIR 1938 Mad 43
77. *Arjun Sahu* v. *Keleirath*, ILR (1922) 2 Pat 317; *Rajyalakshmi* v. *Satyarani*, (1970) 2 An WR 88; *Jagannath* v. *Ravji*, (1922) 24 Bom LR 1296 : 47 Bom 137; *Bhagwandas* v. *Basawpuram*, (1956) 58 Bom LR 809.
78. *Arjun Chandra* v. *Kailas Chandra*, AIR 1923 Cal 149; *Davood Rowther* v. *Ramanathan*, AIR 1938 Mad 43; *Hare Krishna Panigrahi* v. *Jogneswar Pande*, AIR 1939 Cal 688; *Harinath Ghosh* v. *Nepal Chandri Rai*, ILR (1937) 1 Cal 507.

for the simple reason that a Court cannot shut its eyes to obvious facts appearing on the face of a document or on the record.[79]

"Admission" referred to is admission of a validly attested document which means that when a party admits execution of the documents, he thereby not only admits the mere signing thereof but also the entire series of acts which would give validity to the document concerned.[80]

The Bombay High Court has held that there is no reason for holding that where a party admits execution within the meaning of Section 70, he must necessarily be taken to admit that the document has been attested as required by Section 59 of the Transfer of Property Act.

When the defendant disputes the claim generally, but does not dispute the execution or attestation, proof of the document can be dispensed with.[81]

When the execution is admitted and the attestation on the bond as required by law is denied the attestation must be strictly proved.[82]

The Madras High Court has held that the legislature contemplates a distinction between admissions made for the purpose of dispensing with proof at the trial and evidentiary admission, the scope and purpose of the two classes of admissions are distinct. The one relates to relevancy and the other relates solely to proof at the trial.[83]

The above case referred to an old decision[84] wherein it was observed: "The attesting witness must be called to prove the execution of a deed for this reason, that by an imperative rule of law, the parties are supposed to have agreed *inter se* that the deed shall not be given in evidence without his being called to depose to the circumstances attesting its execution. If, therefore, the attesting witness is not called, the deed cannot be read, because this agreement cannot be broken; but any agreement may be waived by the parties to it. If, then, in the course of the proceedings in the cause, the party to the deed admits the execution or if by his pleadings he does not require the execution to be proved, he may be very reasonably said to have waived the agreement, and the other party, accepting the waiver, does not call the attesting witness, in equity an admission in the defendant's answer is sufficient, and is a waiver of the agreement; but, where bill and answer are the pleadings, and the defendant has put the execution of the deed in issue, and he is called and compelled as a witness to prove the fact, how can that be put reasonably as a waiver of the agreement not to give the deed in evidence without calling the attesting witness. Manifestly it is no waiver at all".

The Calcutta and the Allahabad High Courts have held that the word admission relates only to the admission of a party in the course of the trial of a suit, and not to the attestation of a document by the admission of the party executing it. In other words, it has no relation to any admission of execution made before an attesting witness without reference to any suit or proceeding.[85] But the Patna and the Rangoon High Courts have laid down that an admission under this section is admissible in evidence even though it be an admission not made in the course of legal proceedings pending before a Court of Justice, but is an admission made antecedent to the institution of legal proceedings.[86]

The Madras High Court has adopted the view of the Calcutta and the Allahabad High Courts and held that the admission within the meaning of this section must be an admission made for the purpose of or having reference to the cause either in the pleading or during the course of the trial.

Admission should be by a party.—Admission of execution contemplated in Section 70 relates only to the person who has actually executed or purported to have executed the document.[87]

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79. *Rajaram* v. *Thakur Rameshwar*, (1936) 12 Luck 109; *Mg. Po Gyi* v. *Mg. Min Din*, AIR 1927 Rangoon 233.
80. *R. Nahak* v. *Sitadakuam*, AIR 1970 Ori 82; *Sita Dakuani* v. *Ramachandra Nahak*, ILR 1967 Cut 593; *Harinath Ghosh* v. *Nepal Chandre Rai*; (1937) 1 Cal 507 : 41 Cal WN 306.
81. *Jagannath* v. *Ravji*, ILR 47 Bom 137.
82. *Benoy Bhushan* v. *Dhirendre Nath Dey*, AIR 1924 Cal 415; *Komalsingh* v. *Krishnabai*, AIR 1946 Bom 304; *Ebrahim Mondal* v. *Akshay Konor*, 40 Cal WN 151.
83. *Davood Rowther* v. *Ramanathan*, AIR 1938 Mad 43.
84. *Whyman* v. *Garth*, 1953 8 EX 803.
85. *Abdul Karim* v. *Saliman*, ILR (1899) 27 Cal 190; *Rai Mangal Misra* v. *Mathura, Dulhan*, ILR (1915) An 383; **see** *Asharfi Lal* v. *Musumma Nanhi*, (1921) 44 All 127.
86. *Nageshwar Prasad* v. *Bachu Singh*, (1919) 4 Pat. LJ 511; **doubted in** *Musututal Hira Bibi* v. *Ramdhan Lal*, (1921) 6 Pat. LJ 465; *Aung Aung Kiwa Pra*, ILR (1923) 1 Ran 557.
87. *Hava* v. *Lokumal*, AIR 1944 Sind 61.

An admission by the heir of the executant would not serve the requirement of law and the benefit of the section would not be available.[88]

Interpretation of words in a receipt for payment of rent does not make it inadmissible.[89]

SIR, JAMES STEPHEN in his digest of the law of evidence in (Art. 66) states "that the attesting witness can be dispensed with only in cases where the admission has been made for the purpose of or having reference to the cause".

2. THE ADMISSION MUST BE UNQUALIFIED

The admission to be effective under this section must be unqualified. It was held that mere admission of thumb impression or the signatures on a blank sheet of paper, as stated by the executant does not mean an admission of execution which means that the executant must have signed or put his thumb impression after the document is fully read out.[90]

Where the mortgagor while admitting the signature denied due attestation, it was held that marking the document as an exhibit without objection, could not absolve the mortgagee from proving due attestation, as the admission was a qualified one.[91]

3. CERTIFIED COPIES OF ADMISSION

The admission of the executant incorporated in the certificate of the Registering Officer is evidence of execution, but mere production of a certified copy of such endorsement of the Registering Officer is not enough to prove execution.[92]

The certificate of admission of execution endorsed by the Registering Officer, cannot be used as an admission within the meaning of Section 70, though it may be *prima facie* evidence under Section 71.[93]

Proof when attesting witness denies the execution.

S. 71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

COMMENTS

1. PRINCIPLE AND SCOPE

STEPHEN in his Digest (7th Ed., Art. 67, p. 78) gives three circumstances under which an attesting witness, though alive, need not be called upon, to prove the attestation and execution of a document.

(1) Where the parties admit the execution of the document for the purpose of the trial.

(2) Where the opponent is given a notice to produce the document and the opponent declines to produce it.

(3) Where such opponent produces the document on being so required, but claims an interest under the document with respect to the subject matter of the suit.

To these may be added following instances where attesting witness need not be called:

(1) Where the document purports to be 30 years old.

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88. (1975) 1 Cut WR 8.
89. *Kuri Lal Rungta* v. *Banarsi Devi*, AIR 1986 All 94. **See also**, *Chandra Muli* v. *Bhabhuni Prasad*, 1943 oudh 416, *Thiswari* v. *Chandra*, (1948) Bom 322; *Ammu* v. *Krishnan*, (1969) Ker LT 656 : 1969 Ker LJ 562; *Banwasi Prasad* v. *Bigni Kuer*, AIR 1927 Pat 131; *Gandham Rajyala Kshmamma* v. *Ravanapati Satyauani*, (1970) 2 An WR 88
90. *Radhanath* v. *Madhusudan*, AIR 1956 Ori 58; *Narayanappa Minor by father Ramaiah* v. *Lachamakka*, ILR 1958 Mys. 263.
91. *Rajani Kanta* v. *Bohbehari Sarkar*, AIR 1952 Cal 7; *Arjun Chandra* v. *Kailash Chandra*, AIR 1923 Cal 149.
92. *Rajeshwari* v. *Varalakshmamma*, AIR 1964 AP 284.
93. *Deorao* v. *Dhondrao*, AIR 1928 Nag 244; *Banwari Lal* v. *Bigni*, AIR 1927 Pat 131; *Thimmauua* v. *Channavva*, AIR 1948 Bom 322, *Rajmangal Migir* v. *Mathura Dubain*, AIR 1915 All 383; *Sarja* v. *Murlidhar*, 42 IC. 715; *Bhukari* v. *Sudhir*, 42 Cal WN 1055.

(2) Where the party against whom the document is tendered is a public officer who is legally bound to get it duly executed and who has treated it as such.

(3) Where estoppel prevents the opponent from questioning the document by reason of a recital in it.

This section enables the party to prove the document by other evidence when the attesting witness denies the execution of the document or does not recollect its execution. Section 67 of this Act deals with the proof of signature or the handwriting on the document. In the case of documents not required by law to be attested, one may take the aid of Section 67, but this section applies to all documents, whether they require attestation, or not, under any law.

STEPHEN in his Digest (7th Ed., Art. 68, P. 78) states: "where an attesting witness has denied all knowledge of the matter, the case stands as if there was no attesting witness, and the execution of the document may be proved by independent evidence *aliunde*[1]." Where the attesting witness denied the attestation of the will, evidence of the scribe and the other witnesses was admissible to prove its execution.[2]

This section is a sort of safeguard introduced by the Legislature to the mandatory provisions of Section 68, where it is not possible to prove the execution of the will by calling attesting witnesses, though alive. This section can only be requisitioned when the attesting witnesses, who have been called, fail to prove the execution of the will by reason of either their denying their own signatures, or denying the signature of the testator, or having no recollection as to the execution of the document.

For the applicability of this section it would be incumbent on the party to call the attesting witness, in compliance with Section 68, which says that at least one attesting witness should be called for the purpose of proving the execution of the document.[3]

The Privy Council in *Surendra* v. *Behari*,[4] settled the question, in the event of one of two or more attesting witnesses being called and his denying the execution, or his not recollecting the execution whether it is permissible to give other evidence without calling the other attesting witnesses, if available. The Privy Council stated that there was no intention on the part of the Legislature to depart from the rule of Egnlish Law that other evidence should not be allowed, unless all the attesting witnesses alive, and subject to the process of the Court, are called or their absence has been satisfactorily explained.[5]

It was further held by the Privy Council in the above case that registration proceedings can be relied upon under this section to prove due execution or attestation.

In the case of a will, the attestor was declared hostile. It was held that other evidence, showing proper execution of the will, can be relied upon.[6]

A will has got to be executed as required by Section 63 of the Indian Succession Act, and is a document which is required by law to be attested. Section 68 of the Evidence Act requires that at least one attesting witness, if he is alive and subject to the process of the Court, should be called to prove the execution of a compulsorily attestable document. As Section 71 is in the nature of an exception, when the attesting witness denies the execution of the will, it can be proved by other evidence. What weight should be given to such other evidence is a different matter.[7]

This section has no application where the attesting witness is not actually before the court, because no question of his denying or failing to recollect the execution of the document can arise then.[8]

In the case of a will, it was held that, the words "execution of a will" comprehend the attestation in testator's presence; that, therefore, the testimony of a non-attesting witness under Section 71 is of no help, and the will must be held as not properly proved.[9]

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1. **See** *Lakshman* v. *Krishnaji*, (1927) 29 Bom LR 1425.
2. *Chandan* v. *Longa Bai*, AIR 1998 MP 1.
3. *Banwari Lal* v. *Gopi Nath*, AIR 1931 All 411; *Hare Krishna Panigrahi* v. *Jogneswar Panda*, AIR 1939 Cal 688.
4. AIR 1939 PC 117.
5. **See also** *Vishnu Ramkrishna* v. *Nathu Vital*, (1948) 51 Bom LR 245 : AIR 1949 Bom 266.
6. *B. Veeramma* v. *C. Ramakrishna*, AIR 1976 AP 370; **see also** *Maharaj Lal* v. *Anjuman*, 48 IC 538; *Jaikaran* v. *Protap*, 43 Cal WN 1084; *Chaitan Charan Parida* v. *Maheshwar Parida*, AIR 1991 Ori 125.
7. *Anantharaj Hegde* v. *Dharmapala Hegde*, (1965) 2 Mys. LJ 112.
8. *Ram Ratan* v. *Bittan Kaur*, AIR 1980 All 395.
9. *Harish Chandra* v. *Basant Kumar*, AIR 1974 Ori 170.

The section has no application when one attesting witness has failed to prove the execution of the will and other attesting witnesses are available who could prove the execution if they were called[10], identification of the signature of the testator by a person knowing him, will only mean that the document contains the signature of the executor; that will not amount to proof of the execution of the document by a person by whom it purports to have been executed, as there is possibility of the executor's signature having been taken on blank paper or on a misrepresentation that the document represents a different transaction.[11]

Under this section execution of a document includes attestation.[12]

The attestation of a document does not amount to an admission of its contents by the attesting person, unless it can be proved that the document was read over to him and that he made the attestation after being conscious of the statement made in the document.[13]

There is no requirement that the attesting witnesses should identify each other.[14]

In PHIPSON on Evidence 15th Edn. (2000), Page: 1086, Para : 40-17 it is observed: "Where the witness has no recollection of the execution, but from seeing his signature has no doubt that it took place, this is sufficient proof.[15] And where a person who saw the execution, afterwards subscribed his name without the knowledge or request of the parties[16]; or, where one of the latter had subscribed a fictitious name as witness[17], the execution was allowed to be proved as if there were no witness, *i.e.*, by evidence of the handwriting of the party executing, or otherwise. If the attesting witnesses to a will refuse to make an affidavit of execution, the court may order their examination in court[18]; or dispense with their evidence and accept that of the executor alone[19]. And where an attesting witness denies the execution, other evidence thereof is admissible, and the document may be upheld in spite of such denial[20], though where the denial is distinct and positive and there is nothing to throw doubt upon it, the attestation will be rejected[21]. A party, however, is not bound to call a hostile attesting witness if there be another available[22]. Where both the attesting witnesses gave evidence that the testator did not subscribe the will until after they had done so, it was held that their evidence was not conclusive and other persons present could be called to prove that they were mistaken[23].

In a case where the attesting witness of a mortgage deed was not examined on the ground that he was won over by the opposite party, it was held that it was not sufficient for consideration of other evidence to prove execution.[24]

Proof of document not required by law to be attested.

S. 72. An attested document not required by law to be attested may be proved as if it was unattested.

COMMENTS

1. PRINCIPLE AND SCOPE

This Section states that any attested document, if it is not required by law to be attested, may be proved as if it was unattested.

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10. *Vishu Ramkrishna* v. *Nathu Vital*, (1948) 51 Bom LR 245.
11. *Doraiswami* v. *Rathnammal*, AIR 1978 Mad 78.
12. *Lakshman Sahu* v. *Gokul Maharana*, ILR (1921) 1 Pat 154; *Ram Ratan* v. *Bittan Kaur*, AIR 1980 All 395.
13. *Roop Lal* v. *Shanker*, (1951) 1 Raj 597.
14. *Krishna Kumar* v. *Kayastha Patshala*, AIR 1966 All 570.
15. See as to wills, *Wright* v. *Sanderson*, (1884) 9 PD 149; *Woodhouse* v. *Balfour*, (1888) 13 PD 2; *Paton* v. *Ormerod*, The Times, February 3, 1892 (CA); *Whiting* v. *Turner*, (1903) 89 LT 71.
16. *M'Craw* v. *Gentry*, (1812) 3 Camp 232.
17. *Fassett* v. *Brown*, (1790) 1 Peake 33.
18. Re : *Sweet* [1891] P. 400.
19. Re : *Ovens*, (1892) 29 LR 451.
20. *Coles* v. *Coles*, (1866) LR 1 P&D. 70; *Bowman* v. *Hodgson*, (1867) LR 1 P&D 362; *Dayman* v. *Dayman*, (1895) 71 LT 699; *Pikington* v. *Gray*, (1899) AC 401; *Goodisson* v. *Goodisson*, (1913) 1 IR 218; *cf. Whiting* v. *Turner*, *ante*.
21. *Wyatt* v. *Berry*, (1893) P. 5; *Cf. Woodhouse* v. *Balfour*, 13 PD 2.
22. *Belbin* v. *Skeats*, 1 S&T 148.
23. *Re Vere-Wardale*, (1949) P. 395.
24. *Ram Ratan* v. *Bittan Kaur*, AIR 1980 All 395.

Where the law does not require attestation, for the validity of a document, it may be proved by admission or otherwise, as though no attesting witnesses existed.

Section 67, states that, if a document is alleged to be signed or to have been written, the signature or the handwriting on the document must be proved to be in his handwriting. If that is done the document would be taken to have been proved under Section 67. Even a document, which is attested but is not required by law to be attested can be proved without reference to Section 67.

No attesting witness need be examined with reference to a document like a sale deed, as it does not require attestation.[25] A bond also, is not required by law to be attested. So Section 72 applies and Section 68 does not apply.[26]

By virtue of Section 129 of the Transfer of Property Act, Section 68 of Evidence Act is not applicable to a gift made by a Mohammadan in compliance with the provisions of Mohammadan Law. Even if the gift is created by a registered deed, it can be proved without examining the attesting witness under Section 72 of the Evidence Act.[27]

In PHIPSON on Evidence[28] it is stated that the rule embodied in Section 72 and applies only where all the parties are before the court, and that in proceedings *ex parte* the attesting witness must still be called.[29]

Comparison of signature, writing or seal with others admitted or proved.

S. 73. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

This section applies also, with any necessary modifications, to finger impressions.

SYNOPSIS

1. *Principle and scope* ... 701
2. *Object not to assist parties* ... 704
3. *To be exercised with care and caution* ... 704
4. *How to be compared* ... 705
5. *Hazardous and inconclusive* ... 705
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7. *Comparison of handwriting by the court* ... 706
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COMMENTS

1. PRINCIPLE AND SCOPE

The provisions of this section will apply only when a matter is pending before the Court and not otherwise.[30] The Court may compare the disputed signature, writing, or seal of a person with signatures,

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25. *Karuppiah* v. *Muthuaruppan*, AIR 1975 Mad 221; **see also** *Daitary Mohanti* v. *Jngo Bundho Mohanti*, 23 WR 293.
26. *Ramchandra* v. *Jhibal*, AIR 1940 Nag 240; *Shankarram* v. *Awadhsharanram*, 1962 MP LJ (notes) 62.
27. 1971 All WR (HC) 542.
28. 15th Edn. (2000), P. 1088 (para 40-19).
29. Re : *Reay* 3 WR 312: Re lice 32 Ch. D. 35, *Worthington* v. *Moore*, (1891) 64 LT 338.

writings or seals which have been admitted or proved to the satisfaction of the Court to have been made or written by that person. A Court may rely upon its own comparison of the signature, writing, or seal, unaided by expert evidence.[31] The rule of prudence is that comparison of signatures by Courts as a mode of ascertaining the truth should be used with great care and caution.[32] This section does not infringe Art. 20(3) of the Constitution of India.[33]

Handwriting can be proved in the following ways:—

(1) By proof of signature and handwriting of the person alleged to have signed or written the document (S. 67).

(2) By the opinion of an expert who can compare handwritings (S. 45).

(3) By a witness who is acquainted with the handwriting of a person by whom it is supposed to have been written and signed (S. 47).

(4) By comparison of signature, writing or seal with others admitted or proved (S. 73).

The writing obtained by the court under this section does not come within the expression 'evidence'.[34]

This section is based on the principles of English Law now in force which was adopted from the practice in the old eclesiastical courts with some modifications in about 1854. The Supreme Court in *State (Delhi Admn.)* v. *Pali Ram*[35], quoted with approval, TAYLOR ON EVIDENCE[36], the passage in which it was observed: "Comparison of a disputed writing with any writing proved to the satisfaction of a judge to be genuine, shall be permitted to be made by the witness; and such writings and the evidence of the witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuiness or otherwise of the writing in dispute".

The Supreme Court further observed: "The first part of the section provides for the comparison of signature, writing, finger impression etc., purporting to have been written or made by a person with another admitted or proved to the satisfaction of the Court to have been written or made by the same person. But it does not say by whom such comparison may be made. Construed in the light of the English Law on the subject, which is the legislative source of this provision, it is clear that such comparison may be made by a handwriting expert (Section 45) or by one familiar with the handwriting of the person concerned (Section 47) or by the Court".

The direct comparison by the court is contemplated under this section as an alternative method. For that purpose, the court is given the power to direct any person present in court to write any words or figures, for enabling the court to compare them with the words or figures alleged to have been made by such person. It is only a discretionary and enabling power as the expression "may direct" is used. When the court directs, if the person refuses to comply with it, adverse inference under Section 114 of the Act may be drawn.

This section applies to both civil and criminal proceedings.

In a proceeding for maintenance under Section 125, Cr PC., the husband denied a letter by him bearing on the question of marriage. It was held that the court has discretion to ask the husband under Section 73 of the act to give specimen signature for purpose of comparison by an expart.[37]

The Supreme Court in *State (Delhi Admn.)* v. *Pali Ram*[38] observed: "The two paragraphs in the section are complimentary to each other and are not mutually exclusive. Section 73 is, therefore, to be read as a whole, in the light of Section 45, and so it is clear that a court can direct an accused, appearing

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30. *T. Subbiah* v. *Ramaswamy*, AIR 1970 Mad 85.
31. *Abdul Subhan Khan alias Khalilur-Rahman* v. *Nusrat Ali Khan*, ILR (1936) 12 Luck 606; *Pakala Narayana Swami* v. *King-Emperor*, AIR 1939 PC 47. **See** *Tilakdhari* v. *Jagat Rai*, AIR 1961 Pat 76.
32. *Nagappa Chendappa* v. *Nannibu*, AIR 1960 Mys 220.
33. *State of Bombay* v. *Kathi Kalu*, (1962) 64 Bom LR 240 : AIR 1961 SC 1808.
34. *Ram Swarup* v. *State*, AIR 1958 All 119.
35. AIR 1979 SC 14 : (1979) 2 SCC 158; *Ajit Savant Majagavi* v. *State of Karnataka*, AIR 1997 SC 3255 : 1997 Cr LJ 3964; *Tarak Nath Sha* v. *Bhutoria Brothers Pvt. Ltd.*, AIR 1998 Cal 31.
36. Paras 1870, 1871.
37. *Kumaran Nair* v. *Bhargavi*, 1988 Cr LJ 1000 (Ker); *State of U.P.* v. *Ram Babu*, AIR 1980 SC 791.
38. AIR 1979 SC 14.

before it, to give his sample writing to be compared by a handwriting expert chosen or approved by the court, irrespective of whether his name was suggested by the prosecution or the defence, to enable the court to reach its own conclusion with the assistance of the expert".

Section 73 as a whole makes it clear in the light of Section 45 and 47, that the court does not exceed its power under Section 73, if in the interest of the justice, it directs a person appearing before it, whether it is a civil or criminal court, to give sample writing to enable the same to be compared by a handwriting expert.[39]

For the application of the section, two conditions are to be satisfied. Firstly, the writing with which comparison is to be made, or otherwise called standard writing, should be one either admitted by the person alleged to have made the writing, or should be proved to have been written by the person to whom it is attributed. Secondly, the writing to be compared with the standard one must be shown to have been written by the same person, *i.e.*, the writing itself must state or indicate that it was written by that person.[40]

The ordinary methods of proving the handwriting are (1) by calling the person who wrote the document, or saw it written as a witness, or a person who is qualified to express an opinion according to Section 47; (2) by a comparison of handwriting under Section 73; and (3) by admission of the person against whom it was tendered.[41]

Under Sections 45 and 73, the court is empowered to direct any party to give specimen signature or handwriting, with a view to getting the same compared with the disputed one, or for sending it to a handwriting expert.[42]

There is no legal bar to the judge using his own eyes to compare the disputed writing with the admitted writing under Section 73. However, the opinion of the court arrived at is not conclusive and is liable to error. So the court as a matter of prudence and caution should hesitate or be slow to arrive its findings solely on the comparison made by itself.[43]

To decide very vital claims of parties the judge should not compare the disputed handwritings with admitted handwriting so as to ascertain whether they are in the handwriting of one and the same person.[44]

This section deals with comparison of signature, handwriting, or seal of a person purporting to have been written or made by such person, with admitted or proved signature of that person. This section also applies with necessary modifications, to finger print impressions.

The section thus provides one of the modes of proving the handwriting or the signature on a document. Section 45 provides another mode of proof as to the identity of handwriting or signature, with the aid of experts, whereas Section 47 enables proof of the handwriting or signatures of a person *viz.*, by examining any person acquainted with such handwriting or signature.

The mode of proof contemplated by Section 73 is by direct comparison of the disputed signature or handwriting with the one which is admittedly genuine or proved to be so. The second para of Section 73 enables the court to direct any person present in the court to write any words or figures for the purpose of enabling the court to compare the words and figures so written with any words, figures alleged to have been written by such person. But the use of the expression "may direct", in the second paragraph of Section 73 would indicate that the section is only an enabling provision. This does not mean that the court can compel the person to give specimen handwriting or signature under the section.

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39. *Kumaran Nair* v. *Bhargavi*, 1988 Cr LJ 1000 (Ker); *Babubhai* v. *Iswarlal*, AIR 1975 Guj 95.
40. *Sarojini Dassi* v. *Hari Das*, 1922 Cal 12; *Srimathi Ponnada Seetha Mahalakshmi* v. *Golam Veeraraju Sri*, (1970) 1 An LT 64; *Krushna Chandra* v. *Commr. of Endowments*, AIR 1976 Ori 52.
41. *Barindra Kumar* v. *R.*, ILR 37 Cal 467.
42. *Sheo Narain* v. *Rawat*, AIR 1986 P&H 174; *Sashi Bhusan* v. *State Bank of India*, AIR 1986 Ori 218; *M. Narayanaswamy* v. *Yangatanna*, AIR 1975 AP 88; *State* v. *C.V. Gopala Rao*, AIR 1954 Mys 117; *Golam Rahman* v. *King*, AIR 1950 Cal 66.
43. *Alauddin* v. *Sishir Kumar Dutta*, AIR 1989 Gau 42; *Bisseswar* v. *Nabadwip Chandra*, AIR 1961 Cal 300; **relying on** *Kessar Bai* v. *Jethabhai*, AIR 1928 PC 277; *Madhavayya* v. *Achamma*, AIR 1949 PC 325; *Manindra* v. *Mahaluxmi Bank Ltd.*, AIR 1945 PC 105; *Fazaladdin* v. *Panchanan Das*, AIR 1957 Cal 92; *Sarojini Dassi* v. *Hari Das*, AIR 1922 Cal 12; *Dhanji Arjan* v. *Ramji Mavji*, AIR 1950 Kutch 58; *Alauddin* v. *Sishir Kumar Dutta*, AIR 1989 Gau 42.
44. *Shanta Trivedi* v. *L.I.C. of India*, Air 1988 Del 39.

The Magistrate has no power to ask an accused person, who is on bail, to go to a police station and give his specimen signature or handwriting; the powers of the magistrate and police officer are prescribed under some statutes and those powers cannot be enlarged. There is no provision for the exercise by them of a power under Section 73.[45]

As the definition of "Sign" in Section 3(56) General Clauses Act, includes a thumb impression, as Section 73 permitting comparison of signature, writing and seal is intended to be quite comprehensive, on a liberal interpretation, the presiding officer can compare thumb impressions for the purpose of determining the identity or otherwise of the thumb impressions, or at any rate for appreciating the evidence of experts.[46]

The court can compare the disputed writing of a person with other writings, either admitted to be his by that person or proved to be of that person.[47]

Where the Magistrate compared a disputed signature with another signature which was not admitted by the accused or was not proved to be that of the accused it was held that the finding of the magistrate was based absolutely on no legal evidence.[48]

Specimen signatures and writings made by an accused person while he is in the custody of the police and while the police are investigating the offence are admissible in evidence at the trial of the accused for the offence of forgery.[49]

It was held in the case of letters containing the disputed signature of a person G that the court is entitled to compare it with the signature of G on a postal acknowledgement cards where the court was satisfied that the postal acknowledgement cards contained the signatures of G.[50]

2. OBJECT NOT TO ASSIST PARTIES

The power cannot be used as an instrument or a device for the advantage of any party, either the prosecution or the accused; the object of the provision is to enable the court to find out the truth and to do complete justice between the parties. This section enables the court to assist itself and not to assist the parties.[51] Where the specimen of handwriting were obtained under the directions of the SDM who was neither conducting the enquiry nor was the trial fixed before him and there was no evidence of the accused giving the specimen voluntarily, it was held that, in the circumstances, specimen were not meant to assist the "Court to form its opinion" as envisaged by Section 45.[52]

3. TO BE EXERCISED WITH CARE AND CAUTION

Section 73 enables the court to do the comparison. Comparison requires some special skill acquired after a regular course of study; that it is not possible for every presiding officer of the court to have obtained expert skill in that regard; it has the effect of making the court itself a witness, who cannot be a cross-examined, though an expert, if he gives evidence, can be cross-examined. But these factors cannot restrict the exercise of the power of the court. The way of reconciling the enabling the provisions of the statute with these factors is only the principle of prudence and caution. Though the court is competent under law to make a comparison, it should exercise the power very sparingly and with utmost caution.[53]

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45. *Keshava Lal Trikamlal* v. *State of Gujarat*, (1964) 1 Cr LJ 94.
46. *Pannalal* v. *State*, ILR (1960) 10 Raj 1191.
47. *State of Gujarat* v. *Vinaya Chandra*, AIR 1967 SC 778; *State* v. *Tribikram Bohidar*, (1971) 37 Cut LT 714.
48. *Taru Bala* v. *State*, AIR 1953 Cal 307; *Sri Prasad* v. *Special Manager Court of Wards, Bahampur Estate*, (1936) 12 Luck 400 : AIR 1937 Ondh 194.
49. *Emperor* v. *Ramrao Mangesh*, ILR (1932) 56 Bom 304 : (1932) 34 Bom LR 598.
50. *Kamlesh* v. *B.S. Bedi*, AIR 1973 P&H 152.
51. *Hiralal* v. *State*, AIR 1958 Cal 123; **See also** *State* v. *Poonam Chand*, 1957 Nag LJ 535 : AIR 1958 Bom 207; *Heeralal Agarwala* v. *State*, 61 Cal WN 691; *State* v. *Poonam Chand Gupta*, AIR 1958 Bom 207; *Public Prosecutor* v. *Kandaswami*, ILR 50 Mad 462 : AIR 1927 Mad 696; *Vinod Kumar* v. *State*, 1981 Cr LJ 927 (Del). (a prosecution witness cannot be called upon to get his voice tape-recorded for comparison); *Dharamvir Singh* v. *State*, 1975 Cr LJ 884 (P&H); *T. Subbiah* v. *S.K.D. Ramaswamy*, 1970 Cr LJ 254 (Mad) : AIR 1970 Mad 85; *Babubhai* v. *Iswarlal*, AIR 1975 Guj 95; *Shaik Hussain* v. *Putei Begum*, ILR 1976 AP 1145.
52. *Amarjit Singh* v. *State of U.P.*, (1998) 8 SCC 613 : 1998 SCC (Cri) 1609.
53. *Rudragouda* v. *Basangouda*, AIR 1938 Bom 257; *Nagappa* v. *Nannibu*, AIR 1960 Mys 220; *R* v. *Ramrao*, ILR 56 Bom 304. *Major Barkar* v. *Mrs. Barkar*, AIR 1955 MB 103 (FB), *Saurendra Mohan Basu* v. *Saroj*, AIR 1961 Cal

The Court is entitled to compare the disputed and admitted signatures and handwriting for coming to a conclusion but the rule of prudence and caution requires that in the first place the expert's opinion should be obtained for assistance and if such an opinion is not available, the presiding judge must disclose in the judgment his knowledge in the subject of comparison of hand writing or should mention that he has taken aid from some authoritative text book. The Court should also mention whether the result of its comparison finds support from some evidence adduced by the parties in the shape of oral or documentary evidence or direct evidence. Mere statement in the judgment that on comparison the disputed and admitted signatures are found to be of the same person is not enough and it cannot be said to be a sound finding based on cogent and scientific reasons and data.[54]

4. HOW TO BE COMPARED

For the purpose of comparison the true test to be applied, is to consider the general character of the two writings, sought to be compared, and not to lose oneself in scrutinising the formation of each individual letter. It is not uncommon to find differences in the writing of one and the same person, even after a short interval of time. It depends upon so many extraneous circumstances, the pen, the ink, the paper, the posture of the hand and the general conditions in which a person writes. It is for that reason that the law merely requires consideration of the general character of the two handwritings.[55]

In examining the documents the court has to see the dissimilarities between the disputed and genuine document because forged documents usually are good imitations of genuine documents.[56]

In the absence of marked differences between the two signatures, the court would not be justified in rejecting the disputed signatures as not genuine.[57] Personal characteristics of the writer are the unfailing guides in determining the genuineness of handwriting.[58]

5. HAZARDOUS AND INCONCLUSIVE

A direction to an accused under Section 73 is not tantamount to his examination under the Cr. P.C., or to making an order to the prejudice of the accused under Section 439, Cr. P.C.[59]

The conclusions based on mere comparison of handwriting must, at best, be indecisive and yield to the positive evidence in the case.[60]

It is unsatisfactory and dangerous in any event, to stake a decision in the case on a comparison of handwriting.[61]

LORD ATKIN observed; "But their Lordships have also themselves carefully compared the endorsement with the admitted signatures, and they are unable to feel the certainty which was expressed by the Chief Justice. The signatures appear to be written with different ink and possibility at different times, and though the purported signature bears a close resemblance to some of the genuine examples produced notably to a signature in a letter of authority addressed to Jethabhai himself, the purported signature of Keshvalal himself is by no means convincing".[62]

It should not be taken that the above observation prohibits comparison by the court. Even the Privy Council compared the handwritings as there was no expert evidence adduced in that case. MADHAVAN

461; *Annapurnamma* v. *B. Shankararao*, AIR 1960 AP 359; *Ramkrishna* v. *Md. Kasam*, AIR 1973 Bom 242; *Bhagwan Din* v. *Gouri Shankar*, AIR 1957 All 119; *Tilakdhari* v. *Jagat*, AIR 1961 Pat 76; *Bhagwan* v. *Gouri*, AIR 1957 All 119; *Barindra Kumar* v. *R*, ILR 37 Cal 467; *Sarojini Dassi* v. *Haridas*, AIR 1922 Cal 12; *R.* v. *Ramarao*, ILR 56 Bom 304; *Major Barkar* v. *Mrs. Barkar*, AIR 1955 MB 103 (FB).

54. *Ashok Kumar Uttamchand Shah* v. *P.M.A. Chanchad*, AIR 1999 Guj 108 (paras 11 and 13).
55. *Bhupendra Narain* v. *Ek Narayan Lal*, AIR 1965 Pat 332.
56. *Raujappa* v. *Nilakanta Rao*, AIR 1962 Mys 53.
57. *Annapurnamma* v. *Shankararao*, AIR 1960 AP 359.
58. *Bisseswar* v. *Nabadwip Chandra*, AIR 1961 Cal 300.
59. *Kishan Diyal* v. *State*, 1953 Cr LJ 162 (Bilaspur).
60. *Kishore Chandra* v. *Ganesh Prasad*, AIR 1954 SC 316.
61. *Kessarbai* v. *Jethabhai*, AIR 1928 PC 277; **See also** *Sarojini Dassi* v. *Hari Das*, AIR 1922 Cal 12; *Barindra Kumar* v. *R.*, ILR 37 Cal 467; *Saurendra Mohan Basu* v. *Saroj Ranjan*, AIR 1961 Cal 461 (FB).
62. *Kessarbai* v. *Jethabhai*, AIR 1928 PC 277.

NAIR J. observed at P. 329 "after carefully examining the various signatures, their Lordships are not satisfied that the disputed signature is that of the deceased".[63]

The Supreme Court compared the various admitted signatures and the writings of the testators at different times, to decide about the genuineness of the signatures in a will, and held that it was genuine.[64]

Their Lordships were strongly impressed by the comparison of the disputed signature with the admittedly genuine signature.[65]

A comparison of handwriting as a mode of proof is at all times hazardous and inconclusive and especially when it is made by any one not conversant with the subject and without guidance from expert evidence.[66]

6. WHEN COMPARISON UNNECESSARY

When oral evidence clearly establishes that a person executed a certain document, it is unnecessary for the Court to embark upon an investigation into the signatures by comparison.[67]

Where there is no evidence on the question of genuineness of the disputed signature, either direct or circumstantial, or the opinions of experts or of persons acquainted with such handwriting or signature (under Section 45 or 47 of the Evidence Act), the Court's own opinion arrived at as a result of comparison authorised by Section 73 would not be adequate for resting its finding.[68]

7. COMPARISON OF HANDWRITING BY THE COURT

This section enables the court to compare the handwritings with the sole object of ascertaining whether the signature which is disputed is genuine or not. The court is given the power to direct any person present in the court to give specimen handwriting or signature, for the purpose of comparison with the disputed one. But where in a case of enforcement of bank guarantee, the guarantor took the plea that the signatures on the deed were forged and for comparison of signatures the admitted signatures of the guarantor on acknowledgement, summon etc. were available before the Court, further getting his another signature in the open Court for comparison was not necessary.[69] The Court cannot compare the signatures and base its findings on it. However, it can compare signatures in order to strengthen its findings based on other cogent evidence or material on record.[70] Comparison of signatures by the Court and its conclusion thereon would not prevail over the cogent, consistent and convincing oral testimony.[71]

It was held that the judge should as a matter of prudence and caution, hesitate to base his finding solely on the comparison made by him; that the prudent course would be to obtain opinion or assistance of an expert.[72] Where the entire case of the plaintiff was based on the deed of agreement for sale of a disputed house in respect of which the defendant contended to be forged and fabricated, the Court should not have rejected the application for sending the disputed signature for examination to handwriting expert.[73] In several cases it has been held the power to compare the documents should be done with great care and caution.[74] Comparison of disputed signatures by the High Court without the aid of the expert or

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63. *G. Madevaih* v. *G. Achamma*, AIR 1949 PC 325.

64. *Shashi Kumar* v. *Subodh Kumar*, AIR 1964 SC 529.

65. *Manindra* v. *Mahalakshmi Bank Ltd.*, 1945 PC 105.

66. *State of Bihar* v. *Kailash Prasad*, AIR 1961 Pat 451; *Ram Sabhag* v. *Emperor*, AIR 1937 Pat 146; *Glastaaun* v. *Sonatan Pal*, AIR 1925 Cal 489; *Kessarbai* v. *Jethabhai*, AIR 1928 PC 277; *Ramkrishna* v. *Md Kasam*, AIR 1973 Bom 242; *Shanta Trivedi* v. *LIC of India*, AIR 1988 Del 39; *Chandreshwar Singh* v. *Ramchandra Singh*, AIR 1973 Pat 215; *Ala Uddin* v. *Sishir Kumar Dutta*, AIR 1989 Gau 42 : *K. Siuan Achari* v. *State of Kerala*, (1985) 2 Crimes 288 (Ker); *Panna Lal* v. *State of U.P.*, 1982 All LJ 242 (such opinion after comparison cannot be a substitute for the evidence) *Saurendra Mohan Basu* v. *Saroj Ranjan Sarkar*, AIR 1961 Cal 461.

67. *Annapurnamma* v. *Vadrevu Bhima Sankararao*, AIR 1960 AP 359.

68. *Vazir Begum* v. *Seth Tholaram*, (1960) 1 MLJ 142; *Haridas Mundhra* v. *State*, ILR (1962) 1 All 451; *Fazaladdin* v. *Panchanan Das*, AIR 1957 Cal 92.

69. *New Bank of India, Trivandrum* v. *M/s Sajitha Textiles*, AIR 1997 Ker 201.

70. *Satish Jayantilal Shah* v. *Pankaj Mashruwala*, 1996 Cr LJ 3099 (para 13) (Guj).

71. *Rugmini Amma* v. *Bhargavi Kovil*, 2000 AIHC 4677 (paras 33 and 34) (Ker).

72. *State (Delhi Admn.)* v. *Pali Ram*, AIR 1979 SC 14.

73. *Bhagirati Sahu* v. *Akapati Bhaskar Patra*, AIR 2001 Ori 185 (para 11).

74. *Bhagwan Din* v. *Gauri Shankar*, AIR 1957 All 119; *Vazir Begum* v. *Seth Tholaram*, (1960) 1 MLJ 142; *Haridas Mundhra* v. *State*, ILR (1962) 1 All 451.

the person conversant with the disputed signatures is illegal[75] but the Court is competent to draw the comparison on the basis of admitted signatures.[76] However, the Madras High Court has held that it is not always necessary that the expert should invariably be examined and his opinion alone must be taken into account for comparing the disputed signature.[77]

"See cases under the head, to be exercised with care and cautions".

When handwriting expert said the thumb impression was not that of a person the court cannot substitute its opinion.[78]

8. COMPARISON BY APPELLATE COURTS AND IN REVISION

The Appellate Court is entitled under Section 73 to compare the signatures and come to its own conclusion, where the identity of signatures was in issue before the trial court.[79] The Supreme Court held that in an appeal the court is entitled to call for the writing for making a comparison thereof.[80] The trial Court can also do it.[81]

Determining the genuineness of the signature on the document by comparing it with proved signature cannot be done in revision, as it amounts to bringing in new evidence.[82]

When the court compares handwriting unaided by expert evidence, it should be before lawyers and with their assistance.[83] Where the court rejects the evidence of the experts on both sides, it should not convert itself into a handwriting expert, and stake a decision on the correct determination of the genuineness of the signature. The conclusions based on mere comparison are at best indecisive and must yield to the positive evidence in the case.[84] A court will not be justified in relying mainly upon its own impressions by comparison of the disputed signature with the admitted signature but should consider the entire evidence in the case.[85] The dispute regarding genuineness of a signature should not be decided by the Court merely on the basis of its personal comparison.[86] When the opposite party has refused to examine the expert, the court can examine the disputed handwriting with the admitted one.[87] The comparison of signatures by a court is not and should not be dependant on the examination of a handwriting expert.[88] This section does not prohibit this sending of handwriting given by a person in court to a handwriting expert for his opinion.[89] The court is not bound to refer to a handwriting expert when by itself it could note dissmiliarity in the signature and handwriting.[90] There is no rule of law that the court is precluded from coming to its own conclusion in cases where it is fully familiar with the language and script of the document which is the subject matter of scrutiny before it and where it has the assistance in such scrutiny of the counsel of the parties. When it comes to its own conclusion by comparison, it is not bound to seek the assistance of the handwriting expert. It may be a rule of caution and prudence that, where the court considers that the opinion of a handwriting expert would be of assistance to it in coming to a decision, it may call for the evidence of an expert.[91]

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75. *O Bharathan* v. *K Sudhakaran*, AIR 1996 SC 1140 (paras 18-22), **relying on** *State (Delhi Administrative)* v. *Pali Ram*, AIR 1979 SC 14 and **reversing** the E.P. No. 4 of 1991, Dt. 10-8-1992 (Ker). **See also** *Shyam Sundar Chowkhani* v. *Kajal Kanti Biswas*, AIR 1999 Gau 101 (para 15).
76. *Mathew Jacob* v. *Salestine Jacob*, AIR 1998 Del 390 (para 7). **See also** *D. Pandi* v. *Dhanalakshmi Bank Ltd.*, AIR 2001 Mad 243 (paras 9, 13 and 16).
77. *Venkatesa Naidu* v. *Perumal*, 1998 AIHC 2171 (para 3) (Mad).
78. *Hamida* v. *Humer Smt.*, AIR 1992 All 346.
79. (1957) 100 Cal LJ 167.
80. *Fakhruddin* v. *State of MP*, AIR 1967 SC 1326 : 1967 GLJ 1197.
81. *K.S. Satyanarayana* v. *V.R. Narayana Rao*, AIR 1999 SC 2544 (paras 7 and 8), **reversing** RFA No. 460 of 1996, Dt. 3-3-1998 (Kant).
82. *Hardevi Malkani* v. *State*, 1969 All 423.
83. *Bhupendra Narain* v. *Narayan Lal*, AIR 1965 Pat 332.
84. *Tilakdhari* v. *Jagath Rai*, 1961 Pat 76; *Fazaladdin* v. *Panchanan Das*, AIR 1957 Cal 92; *Kessarbai* v. *Jethabhai Jivan*, AIR 1928 PC 277; *Kishore Chandra* v. *Ganesh Prasad*, AIR 1954 SC 316.
85. *Ambikacharan Basu* v. *Nareswari Dasi*, AIR 1925 Cal 145 : 29 Cal WN 75.
86. *Laxmi Bai* v. *A. Chandravati*, AIR 1995 Ori 131 (para 9), **reversing** FA No. 381 of 1981 Dt. 18-3-1991 (Ori).
87. *Salig Ram* v. *State of HP*, 1973 Cr LJ 1030 (HP).
88. *Iswar Chandra* v. *Ramnik Lal*, AIR 1978 Ori 156.
89. *Rama Rao* v. *Laxmi Amma*, (1969) 2 Mys. LJ 158.
90. *Jagan Mohan Rao* v. *K. Swarup*, (1972) 2 Mad LJ 77.
91. *Bhaggu* v. *Manni Prasad*, AIR 1965 All 202.

Section 73 is quite general in its terms and applies to all cases; if there is nothing in the criminal procedure code which precludes its application to criminal trials. There is no reason why the plain language of the section should not be given its full effect. Section 342, Cr.P.C., does not make Section 73 of the Evidence Act inapplicable to criminal trials. When an impression is taken under the provisions of the Identification of Prisoner Act (1920), it is in strict compliance with Section 73.[1]

Under Sections 4 & 5 of the Identification of Prisoners Act, the accused can be compelled to give his measurements; the word "measurements" as defined in Section 2(*a*) of that Act does not include "specimen handwriting". It was held that accused cannot be compelled to give specimen handwriting under Sections 4 & 5 though it has power under Section 73 of this Act to direct the accused to give finger impressions as well as specimen writing.[2]

Where the evidence of the handwriting expert was not corroborated, it was held that the Court can furnish corroboration by comparing the handwriting and come to the conclusion.[3]

The comparison a court makes is only to assist it in arriving at the conclusion whether the evidence led on one side or the other is acceptable.[4]

A comparison of the disputed with the admitted writings, is a piece of evidence on record and it is a method of examining the internal evidence of a document and of judging whether it finds support from other evidence which is external *qua* the document containing the disputed writing. Another method is to look for other kinds of circumstantial or direct corroborative evidence on record.[5]

Plaintiff is not bound to examine a handwriting expert to prove his case, whenever the defendant denies his signature, nor is the court bound to accept the evidence of an expert produced by the defendant as true.[6]

According to the Bombay High Court the expression by whom it purports to have been written or made means by whom it is alleged to have been written or made[7]. The Calcutta High Court has construed it to mean that the writing which is in dispute must itself in terms express or indicate that it was written by the person to whom the writing is attributed. It has observed that the section "does not sanction the comparison of any two documents, but requires that the writing with which the comparison is to be made.... shall be admitted or proved to have been written by the person to whom it is attributed, and next the writing to be compared with the standard...must purport to have been written by the same person, that is to say, the writing itself must state or indicate that it was written by that person...a comparison of handwriting is at all times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts"[8].

According to the Bombay view when an anonymous writing is produced and ascribed by the prosecution to a particular person, the case for the prosecution must be taken to be that having regard to the admitted documents and the comparison between them and the disputed writing, the prosecution alleges that the disputed document purports to have been written or made by the accused.[9]

The Madras High Court dissenting from *Barindra* v. *R.*[10] and approving *R.* v. *Ganpat Balkrishna.*[11] held that the word "purports" does not limit the scope to such documents only as are signed or contain some intrinsic statements of identity of the writer; any document alleged by a party to be in the

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1. *Golam Rahman* v. *King*, AIR 1950 Cal 66.
2. *Govt. of Manipur* v. *Thokchom Thomba Singh*, AIR 1969 Manipur 22.
3. *Suresh Shankarrao Kher* v. *State*, ILR 1978 Bom 729; **relied on** *Fakhruddin* v. *State of MP*, AIR 1967 SC 1326.
4. *State of Gujarat* v. *Vinaya Chandra*, AIR 1967 SC 778.
5. *Devi Prasad* v. *State*, AIR 1967 All 64.
6. *Panchulal* v. *Ganeshilal*, AIR 1973 Raj 12.
7. *Emperor* v. *Ganpat Balkrishna*, 1912 14 Bom LR 310.
8. *Barindra Kumar Ghose* v. *Emperor*, ILR (1909) 37 Cal 467, 502, 503. **See** *Sarojini Dassi* v. *Hari Das Ghose*, AIR 1922 Cal 12 : (1921) 49 Cal 235; *Khiruddin Sonar* v. *Emperor*, (1925) 53 Cal 372 : AIR 1926 Cal 139.
9. *Emperor* v. *Ganpat Balkrishna*, (1912) 14 Bom LR 310.
10. 37 Cal 467.
11. (1912) 14 Bom LR 310.

handwriting of a particular person may, for the purpose of proof, be compared with other writing or signature admitted or proved.[12]

This view seems to be correct as it is not always possible to have a statement in the document disclosing or indicating the identity of the writer.

Section 73 is in *part materia* with Section 540, Cr. P.C. If a party files a petition under Section 540, Cr. P.C., that does not obliterate the power of the court to summon a witness as a court witness. On the same analogy, filing of a petition by the complainant for taking action under Section 73 Evidence Act does not take away the statutory power of the court to act according to Section 540.[13]

The court cannot hand over the specimen handwriting taken in the court, to the prosecution, for use and opinion of the handwriting expert.[14]

The Court also cannot send such a document to an expert who is a prosecution witness, but it can call its own expert as a Court-witness.[15]

The Supreme Court in *State of Delhi Administration* v. *Pali Ram*[16] reversing the decision in 1975 Cr LJ. 1736 (Delhi) held that the two paragraphs of Section 73 are not mutually exclusive but are complementary to each other; Section 73 is therefore to be read as a whole in the light of Section 45. A court holding an enquiry under the Criminal Procedure Code in respect of an offence triable by itself or by the Court of sessions does not exceed its powers under Section 73, if, in the interest of justice, it directs an accused person appearing before it to give his sample writing, to enable the same to be compared by a handwriting expert chosen or approved by the court, irrespective of whether his name was suggested by the prosecution or the defence, because even in adopting this course, the purpose is to enable the court before which he is ultimately put up for trial to compare the disputed writing with his (accused) admitted writing and to reach its own conclusion with the assistance of the experts. It is not advisable that the Judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other; and the prudent course is to obtain the opinion and assistance of an expert.[17]

The court can direct a person to appear in court and give specimen of his handwriting. The power can be exercised *suo motu* or on application of a party.[18]

9. "ANY PERSON"

The words "any person" in Section 73, para 2 are wide enough to cover an accused person.[19]

The words "any person" are so wide as to include all persons; the words "person present in court" limits only those persons who are before the court and may not include an on looker or a spectator but refers to persons who are parties to the "cause" pending before the court. It may include even the witnesses of the contesting parties in the said cause.[20]

It was held that the direction to the son of the defendant who was present in court, to give his handwriting, was unquestionable, as the son's interest was represented by his father as a defendant in the suit, and that a stranger must also come within the sweep of Section 73, so that the object of the section may not be defeated.[21]

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12. **See also** *Kanwarlal Gupta* v. *Amarnath Chawla*, ILR (1972) 1 Delhi 717.
13. *Benu Behera* v. *Sunakar Parida*, ILR 1972 Cut 1232.
14. *R.B. Khajotia* v. *A.S.T. Zaidy*, 1973 Cr LJ 1499 (Bom).
15. *Hiralal* v. *State*, AIR 1958 Cal 123.
16. AIR 1979 SC 14.
17. **See also** *Kanwar Lal Gupta* v. *Amarnath Chawla*, ILR (1972) 1 Del 717.
18. *Guru Nanak Construction Co.* v. *Jai Bharat Steel Rolling Mills*, ILR (1977) 1 Punj 565.
19. *State* v. *Parameswaran Pillai*, AIR 1952 Tra & Co. 482 (FB); *Sailendra Nath* v. *State*, AIR 1955 Cal 247; *Benu Behara* v. *Sunakar Parida*, (1972) 2 Cut WR 1557 : ILR 1972 Cut 1232; *State of Mysore* v. *Gopal Rao*, ILR 1953 Mys. 697; *Aloysious Admn.* v. *State*, 1966 MLJ (Cri) 298 (Ker); *State Delhi Admn.* v. *Paliram*, AIR 1979 SC 14; *R.* v. *Nga Tun Hlaing*, AIR 1924 Rang 115 (FB); *R.* v. *Ramarao*, ILR 56 Bom 304; *Golam* v. *King*, AIR 1950 Cal 66; *Narayana Swami* v. *Emperor*, AIR 1939 PC 47 (dealing Section 162 Cr PC); *Zahur* v. *Emperor*, ILR (1927) 6 Pat 623.
20. *T. Subbiah* v. *Ramaswamy*, AIR 1970 Mad 85.
21. *Dinanath* v. *Sukhdeo*, AIR 1980 Pat 253.

The Gujarat High Court held that under Rule 78 of the Civil Manual (Gujarat) Vol. I. Chap. VII, there is no provision enabling the court to take writings of a party or a witness in the presence of the court, with a view to supplying the standard writing for comparison with the disputed writing.[22]

10. CONSTITUTIONAL VALIDITY [SECTION 73]

The principle enshrined in Art. 20(3) of the Constitution is known as testimonial compulsion. In *Sharma* v. *Satish*,[23] the Supreme Court observed that a direction to the accused to give specimen writing or finger impression or the issue of any compulsory process for the production of any document which is reasonably likely to support the prosecution case infringed Art 20(3) of the Constitution. It was a case of seizure of some documents from the premises under a search warrant and it was held that the seizure was not unconstitutional, under Art 20(3) of the Constitution. The above observation of the Supreme Court was held *obiter* in a later case before the Supreme Court in *Md. Dastagir* v. *State of Madras*[24] and reiterated in another Supreme Court case, *State of Madras* v. *Kathi Kalu*.[25]

Several High Courts followed the Supreme Court decision in *Sharma* v. *Satish*.[26]

It has been held in some cases that mere direction by a Court to give specimen handwriting or finger impression does not violate Art. 20(3) of the Constitution, as it does not amount to "compulsion" or testimonial compulsion, and as the person to whom it is directed may still refuse to comply in which case adverse inference may be drawn under Section 114 of the Evidence Act.[27]

The Supreme Court held:[28] (*a*) 'To be a witness' is not equivalent to 'furnishing evidence' in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.

(*b*) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness'.

(*c*) 'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court or otherwise.

(*d*) 'To be a witness' in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing.[29]

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22. *Babubhai* v. *Ishwarlal*, AIR 1975 Guj 95.
23. AIR 1954 SC 300.
24. AIR 1960 SC 756.
25. AIR 1961 SC 1808.
26. AIR 1954 SC 300. **See also** *Swarnalingam* v. *Assistant Inspector of Labour*, AIR 1955 Mad 716; *Rajamuthukoil* v. *Periyasami*, AIR 1956 Mad 632; *Collector of Customs* v. *Calcutta M. Cycle Co.*, AIR 1958 Cal 682; (diss in 1976 Cr LJ 244); *Gupta* v. *State*, AIR 1959 All 219; *State of Mah.* v. *Nagpur E.L. & P. Co.*, AIR 1961 Bom 242; *Ranchhoddas* v. *Jahangir*, AIR 1961 Guj 137; *Bhaluka Behera* v. *State*, AIR 1957 Ori 172; *Gulam Nabi* v. *State*, AIR 1957 J&K 44; *Krishnan Kesauan* v. *State*, AIR 1957 Ker 78; *State* v. *Ram Kumar*, AIR 1957 MP 73 **Dissented in** *Ram Swarup* v. *State*, 1958 All 119); *Brij Bhushan* v. *State*, AIR 1957 MP 106 **diss from** *Sailendra Nath* v. *State*, AIR 1955 Cal 247; *Tarini Kumar* v. *State*, AIR 1960 Cal 318; *Farid* v. *State*, AIR 1960 Cal 32; *State* v. *Sankaran Nair*, AIR 1960 Ker 392 (FB); (**reversed in** *State of Kathi Kalu* AIR 1961 SC 1808); *R.B. Khajotia* v. *A.S. Zaidy*, 1973 Cr LJ 1499 (Bom); *Iqbal Ahmad* v. *Ketki Devi*, 1976 Cr LJ 244 (All); *State of Bombay* v. *Poonam Chand*, AIR 1958 Bom 207; 1958 Cr LJ 619 (Bom); *Iqbal Ahmad* v. *Ketki Devi*, 1976 Cr LJ 244).
27. In re : *Palani Goundan*, AIR 1957 Mad 546; *Ram Swarup* v. *State*, 1958 All 119; *Ranjit Ram* v. *State*, 1961 All 456 (FB); *Nazir Singh* v. *State*, AIR 1959 MP 411; *Mahal Chand* v. *State*, AIR 1961 Cal 123; *Sekender Sheikh* v. *State*, AIR 1962 Cal 36; *Pakhar Singh* v. *State*, AIR 1958 Punjab 294; *Sailendra Nath* v. *State*, AIR 1955 Cal 247 (**diss. in** *Brij Bhushan* v. *State*, 1957 MP 106); *State* v. *C.V. Gopala Rao*, AIR 1954 Mys 117; *Bhupendra Nath* v. *Union of India*, AIR 1959 HP 29; *Iqbal Ahmad* v. *Ketki Devi*, 1976 Cr LJ 244 (All) (**dissenting from** *R.B. Khajotia* v. *A.S.T. Zaidy*, 1973 Cr LJ 1499 (Bom); *Hiralal* v. *State*, AIR 1958 Cal 123 : 1958 Cr LJ 367 (Cal) and *State of V. Poonamchand*, AIR 1958 Bom 207 : 1958 Cr LJ 619 (Bom); *Benu Behera* v. *Sunakar Parida*, II R 1972 Cut 1232; *Rakesh Gupta* v. *State*, 1979 Raj LW 453.
28. *The State of Bombay* v. *Kathikalu*, AIR 1961 SC 1808.
29. AIR 1961 SC 1808.

Three judges however expressed a different view in regard to the proposition (*c*) above. Delivering the judgment on their behalf DAS GUPTA J. said: "That brings us to the suggestion that the expression "to be a witness" must be limited to a statement whether oral or in writing by an accused person imparting knowledge of relevant facts; but that mere production of some material evidence, whether documentary or otherwise would not come within the ambit of this expression. This suggestion has found favour with the majority of the Bench; we think however that this is an unduly narrow interpretation. We have to remind ourselves that while on the one hand we should bear in mind that the Constitution-makers could not have intended to stifle legitimate modes of investigation. We have to remember further that quite clearly they thought that certain things should not be allowed to be done, during the investigation, or trial, however helpful they might seem to be to the unfolding of truth and an unnecessary apprehension of disaster to the police system and the administration of justice, should not deter us from giving the words their proper meaning. It appears to us that to limit the meaning of the words "to be a witness" in Art. 20(3) in the manner suggested would result in allowing compulsion to be used in procuring the production from the accused of a large number of documents, which are of evidentiary value, sometimes even more so than any oral statement of a witness might be. Suppose, for example, an accused person has in his possession, a letter written to him by an alleged co-conspirator in reference to their common intention in connection with the conspiracy for committing a particular offence. Under S. 10 of the Evidence Act this document is a relevant fact as against the accused himself for the purpose of proving the existence of the conspiracy and also for the purpose of shwoing that any such person was a party to it. By producing this, the accused will not be imparting any personal knowledge of facts; yet it would certainly be giving evidence of a relevant fact. Again, the possession by an accused of the plan of a house where burglary has taken place would be a relevant fact under S. 8 of the Evidence Act as showing preparation for committing theft. By producing this plan is he not giving evidence against himself ?[30]

Though in proposition by the majority observed that giving specimen writing is not included in the expression to be a witness, the minority observed that an accused would be furnishing evidence, when he is giving his specimen handwriting. But he cannot be said to have been compelled to be a witness *against himself* within the meaning of Art 20(3). They observed: "But the evidence of specimen handwriting or the impressions of the accused person's fingers, palm or foot, will incriminate him, only if on comparison of these with certain other handwritings or certain other impressions, identity between the two sets is established. By themselves, these impressions or the handwritings do not incriminate the accused person, or even tend to do so. That is why it must be held that by giving these impressions or specimen handwriting, the accused person does not furnish evidence against himself. So when an accused person is compelled to give a specimen handwriting or impressions of his finger, palm or foot, it may be said that he has been compelled to be a witness; it cannot however be said that he has been compelled to be a witness against himself.[31]

On this reasoning they agreed with the majority that there is no infringement of Art. 20(3) of the Constitution by compelling an accused person to give his specimen handwriting or signature or his impressions of his fingers, palm or foot by the court for purpose of comparison under Section 73.

It is to be noted here that when an accused is called upon to do an act *i.e.*, to give impression of the finger or own handwriting, and if he does it, then it would involve necessarily his volition to do that act which in the language of the Supreme Court amounts to personal testimony. Of course, if he refuses to comply, then he cannot be compelled in any manner and then the only course the court may adopt is to draw an adverse inference under Section 114. If the accused does not raise any objection, he shall be deemed to have complied with the direction voluntarily and not under any compulsion.[32] A person required by the court to give a specimen may refuse to do so. There is no element of compulsion in it. The only consequence of non-compliance is that the Court is free to draw on adverse presumption under S. 114.[33] If he refuses to comply with the direction of the Court, and if the thumb impression is taken in spite of his protests, the Court may draw adverse presumption against him.[34]

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30. *State of Bombay* v. *Kathi Kalu*, AIR 1961 SC 1808.
31. *State of Bombay* v. *Kathi Kalu*, AIR 1961 SC 1808 : (1962) 3 SCR 10 in pages 45 & 46.
32. *Bennu Behera* v. *Sunakar Parida*, ILR 1972 Cut 1232.
33. *Sashi Bhusan* v. *SBI*, AIR 1986 Ori 218. **Contra :** *Shyam Sundar Chowkhani* v. *Kajal Kanti Biswas*, AIR 1999 Gau 101 (paras 9 and 15).
34. *Balraj Bhalla* v. *Ramesh Chandra*, AIR 1960 All 157; *Bennu Behera* v. *Sunakar Parida*, ILR 1972 Cut 1232; *State of Bombay* v. *Kathi Kalu*, AIR 1961 SC 1808; *Lilly* v. *Vijayalaxmi*, 1985 Ker LT 696.

11. WHETHER DIRECTION CAN BE GIVEN DURING INVESTIGATION

The Supreme Court has left open the question whether a magistrate can direct the accused to give specimen handwriting during the course of investigation, without giving any definite pronouncement.[35]

The Supreme Court in *State of U.P.* v. *Ram Babu Misra*,[36] while over-ruling[37]; *Gulzar Khan* v. *State* and[38] *B. Ramreddy* v. *State of A.P.* and explaining the earlier decision of the Supreme Court in *State of Bombay* v. *Kathi Kalu*[39] observed "though a direction by the magistrate to the accused to give his specimen writing when the case is still under investigation would surely be in the interest of administration of justice, the language of Section 73 of the Evidence Act does not enable the magistrate to give such a direction when the case is still under investigation. The section contemplates pendency of some proceedings before a court. It does not permit a court to give a direction to the accused to give specimen writings for anticipated necessity of comparison in a proceeding which may later be instituted. Further Section 73 makes no distinction between a civil court and a criminal court.[40] The power under this section can be exercised only when an enquiry or trial is pending before the Court.[41]

It has been held that direction to a person to give his thumb impression during investigation is permissible under Section 73.[42]

A Sub-Divisional Magistrate lodging a complaint of an offence, cannot issue a direction to the accused under Section 73 as he is in the position of a prosecutor.[43]

12. FOOTMARKS

In order to secure evidentiary value to documents it is not enough to show that the footmarks tally with the shoes of the accused. The evidence must go further and show that the marks have some peculiarity which is found in the shoes of the accused and will not be found in most other shoes.[44] The Court cannot be told not to exercise the power under the section only because it is hazardous to do so. The court is not thereby assuming the role of an expert.[45]

Proof as to verification of digital signature.

[46][S. 73-A. In order to ascertain whether a digital signature is that of the person by whom it purports to have been affixed, the Court may direct—

(*a*) that person or the Controller or the Certifying Authority to produce the Digital Signature Certificate;

(*b*) any other person to apply the public key listed in the Digital Signature Certificate and verify the digital signature purported to have been affixed by that person.

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35. *State* v. *Pali Ram*, AIR 1979 SC 14.
36. AIR 1980 SC 791 **followed in** *State of Haryana* v. *Jagbir Singh*, 1996 Cr LJ 2545 (para 26) (P&H).
37. AIR 1962 Pat 255 (FB).
38. (1971) 2 An WR 94 : 1972 Cr LJ 1991.
39. AIR 1961 SC 1808.
40. **See also** *Priti Ranjan Ghose* v. *State*, ILR (1973) 2 Cal 354; *Hiralal Aganoalla* v. *State*, AIR 1958 Cal 123; *T Subbaiah* v. *S K B. Ramaswamy*, AIR 1970 Mad 85; *Sailendranath Singh* v. *State*, AIR 1955 Cal 247; *Srikanth* v. *State*, (1972) 2 Cut. WR 1332; *Aloysious John* v. *States*, 1966 MLJ (Cri) 298 (Ker); *George* v. *State*, 1980 MLJ (Cri) 543 : 1980 Ker LT 222. *State of MP* v. *Ram Kumar Ramgopal*, AIR 1957 MP 73; *Dharm Vir Singh* v. *State*, 1975 Cr LJ 884 (P&H); *Sherchand* v. *State*, 1983 Cr LJ 1482 (J&K); *Patipabanapaim Panda* v. *State*, 1983 Cut LR (Cri) 45 : 1983 Cr LJ (NOC) 124.
41. *Sub-Inspector of Police* v. *Devarajan*, 1999 Cr LJ 4264 (Ker).
42. *Mukhtiar Singh* v. *State of Punjab*, 1997 Cr LJ 4544 (P&H), **distinguishing from** *Dharamvir Singh* v. *State*, 1975 Cr LJ 884 : 1975 Chand LR (Cri) 46 (P&H).
43. (1972) 2 Cut WR 1332.
44. *Emperor* v. *Bhika Gabar*, (1943) 45 Bom LB 884 (1944) Bom 25.
45. *Muralilal* v. *State of M P*, AIR 1980 SC 531 at 537 citing *Shashi Kumar* v. *Subodh Kumar*, AIR 1964 SC 529 and *Fakhruddin* v. *State of M P*, AIR 1967 SC 1326 where the Court itself had done the comparison.
46. Inserted by the Information Technology Act, 2000, S. 92, Sch. II (w.e.f. 17-10-2000).

***Explanation.*—For the purposes of this section, "Controller" means the Controller appointed under sub-section (1) of Section 17 of the Information Technology Act, 2000.]**

COMMENTS

1. THE INFORMATION TECHNOLOGY ACT, 2000 PROOF OF DIGITAL SIGNATURE

To ascertain whether a digital signature is that of the person by whom it purports to have been affixed, the Court may direct that person or the Controller or the Certifying Authority to produce the original digital signature certificate. The Court may direct any other person to apply the public key listed in the Digital Signature Certificate and verify the digital signature purported to have been affixed by that person.

PUBLIC DOCUMENTS

Public documents.

S. 74. The following documents are public documents:—

(1) documents forming the acts or records of the acts—

(*i*) of the sovereign authority,

(*ii*) of official bodies and tribunals, and

(*iii*) of public officers, legislative, judicial and executive, [47][of any part of India or of the Commonwealth], or of a foreign country;

(2) public records kept [48][in any] State of private documents.

Private documents

S. 75. All other documents are private.

SYNOPSIS

1. *Principle and scope* ... 713
2. *"Public document"* ... 715
3. *Proof* ... 715
4. *Documents forming the acts or record of the acts* ... 716
5. *Public records kept of private documents [Clause 2]* ... 722
6. *Records of an Income-tax case* ... 722

COMMENTS

1. PRINCIPLE AND SCOPE

Documents are divided into two categories: public and private.

Section 74 states what is within the category of public documents. Section 75 states that all other documents are private.

Certain modes of proof are prescribed in regard to public documents as distinguished from private documents.

Sections 74-78 deal with (*a*) the nature of public documents, and (*b*) the proof which is to be given to them. Section 74 defines their nature; and Sections 76-78 deal with the exceptional mode of proof applicable in their case. The proof of private documents is subject to the general provisions of the Act relating to the proof of documentary evidence contained in Sections 71-73.

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47. Substituted successively by AO 1948 and 1950.
48. Substituted by AO 1950.

"There are several exceptions to the rule which requires primary evidence to be given. The most important and conspicuous exception, however, is with respect to the proof of records, and other public documents of general concern; the objection to producing which rests on the ground of *moral*, not physical inconvenience. They are, comparatively speaking, not liable to correction, alteration, or misrepresentation the whole community being interested in their preservation, and, in most instances, entitled to inspect them; while private writings, on the contrary, are the objects of interest but to few, whose property they are, and the inspection of them can only be obtained, if at all, by application to a Court of justice. The number of persons interested in public documents also renders them much more frequently required for evidentiary purposes; and if the production of the originals were insisted on, not only would great inconvenience result from the same documents being wanted in different places at the same time, but the continual change of place would expose them to be lost, and the handling from frequent use would soon ensure their destruction. For these and other reasons the law deems it better to allow their contents to be proved by derivative evidence, and to run the chance, whatever that may be, of errors arising from inaccurate transcription, either intentional or casual. But, true to its great principle of exacting the best evidence that the nature of the matter affords, the law requires this derivative evidence to be of a very trustworthy kind, and has defined, with much precision, the forms of it which may be resorted to in proof of the different sorts of public writings"[49].

In TAYLOR ON EVIDENCE[50] it is stated "Public writings consist of the acts of public functionaries in the Executive, Legislative and Judicial departments of government. Under the head of public documents come also the transactions which the official persons are required to enter in books or registers, in the course of their public duties, and which occur within the circle of their own personal knowledge and observation. Foreign acts of State, and the Judgments of Foreign Courts also belong to the class of public document".

In HALSBURY'S LAWS OF ENGLAND, 4th Edn., Vol. 17, para, 163, it is observed that: "To render such a document admissible there must have been a judicial or quasi-judicial duty to inquire, undertaken by a public officer, the matter must have been required to be ascertained for a public purpose, and the document must have been made for the purpose of the public making use of it and being able to refer to it.

"The public" in this context does not mean the whole world, but all persons concerned, for instance all persons interested in a manor in the case of an entry in the books of a manor.[51]

The limits within which such documents are admissible are laid down by LORD BLACKBURN in *Sturla* v. *Freccia*.[52] The document must be brought into existence for the purpose of its being retained indefinitely as a document of record available for inspection by the public.[53]

Where the question arose as to the admissibility of a statement regarding age and place of birth of an individual, contained in a report appointed by a foreign government to know the individual's fitness to hold a post under that government, the House of Lords in *Sturla* v. *Freccia*[54], rejected the evidence afforded by that report. LORD BLACKBURN stated that the document was not (1) made under a duty to enquire into the circumstances recorded. (2) concerned with a public matter. (3) intended to be retained permanently, and (4) meant for public inspection.

FARWELL J., observed: "The test of publicity as put by LORD BLACKBURN, is that the public are interested in it and entitled to see it, so that if there is anything wrong in it they would be entitled to protest. In that sense, it becomes a statement that would be open to the public to challenge or dispute, and therefore it has a certain amount of authority. The whole gist of the rule as to public documents is that the publicity must be contemporaneous, and publicity means such publicity as would afford the opportunity of correcting anything that is wrong".[55]

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49. BEST 12th Edn., ss. 484, 485, pp. 407-409.
50. 10th Ed. Section 1479, p. 1073.
51. *Sturla* v. *Freccia*, (1880) 5 App Cas 623, HL, per LORD BLACKBURN.
52. (1880) 5 App Cas 623, HL. **See also** *Ioannou* v. *Demetriou*, (1952) AC 84 (1952) 1 All ER 179, PC; *Mercer* v. *Denne*, (1905) 2 Ch 538 (CA); *North Staffordshire Rly Co.* v. *Hanley Corpn*, (1909) 73 JP 477 CA, *Daniel* v. *Wilkin*, (1852) 7 Exch 429 at 437.
53. *White* v. *Taylor*, (1969) 1 Ch 150 at 155, (1967) 3 All ER 349 at 351.
54. (1882) 5 AC 623.
55. *Mercer* v. *Denne*, (1905) 2 Ch 538.

This section deals with two sets of documents; the first set is covered by *Cl.* 1. They are:—documents forming the acts or records of the acts—(1) of the sovereign authority (2) of official bodies and tribunals, (3) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth or of a Foreign Country.

The second set of documents are given in *Cl.* 2 *viz.*, public records kept in any State of private documents. The rest of the documents, other than those noted above, would be private documents, as can be seen from Section 75 of the Act.

2. "PUBLIC DOCUMENT"

WIGMORE[56] has observed: "The term "public document" is inadequate and misleading. In the first place, the word "public" is ambiguous. It may signify "open to all", capable of being known or observed by all; or it may signify "having an interest for persons in general"; or it may signify "made or done by an officer of the Government". These are decidedly different senses. So far as the term may indicate a general principle, it is obvious that the principle may result in different rules according to the sense in which the word "public", is to be interpreted.

A public document is one prepared by a public servant in the discharge of his official duties. All the public documents have this characteristic that they are kept in some special custody and are provable by means of a copy without production of original.[57]

A private document does not become a public document simply because it is filed in the court. To be a public document, it should be record of the act of a public officer or of a court, that a part of the document, namely, the original part would be a private document forming the record of the act of the private parties, and what is subsequently added to that document by the court would be a public document.[58] Similarly, a declaration made by a private party before a public authority and bearing the seal of that authority, would not make it a public document.[59]

3. PROOF

Once a document is held to be a public document and it is properly proved as required by Section 78, the presumption in respect of the public document would apply irrespective of the fact whether those public documents are of British India or of a foreign state.[60]

A question arose whether a statement recorded under Section 164, Cr.P.C., during investigation is a public document and whether the accused has got a right to inspect it and obtain a certified copy of it. The Madras High Court, after reviewing the case law, observed (1) the statements recorded under Section 164, Cr.P.C., would be public documents falling under Section 74, *Cl.* (1) (*iii*) of the evidence Act. (2) the accused will be entitled to copies of the same as a person interested. (3) but his right to obtain such copies before the filing of the charge sheet has been taken away by implication, by the provisions of Section 173 of the Cr.P.C., and (4) he will be entitled to the copies of the documents only if on charge sheet is filed.[61]

The Madras High Court has held that the accused had no right to inspect or obtain certified copies of statements or confessions recorded under Section 164, Cr.P.C. before the charge sheet was filed.[62]

In the Calcutta case[63] the court had to deal with a statement recorded during investigation by the Excise Officer under the Bengal Excise Act. It was observed that Section 173(4) was not made applicable by Section 74 of the West Bengal Excise Act though Sections 160 to 171 of Cr.P.C. were made applicable.

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56. 2nd Ed. Vol. 35, p. 1630.
57. *Thsasyvoulos Ioannou* v. *Papa Christoforos Demetrioa*, AIR 1952 AC 84; *State* v. *Chimanlal*, AIR 1942 Bom 161.
58. *State of Gujarat* v. *Ambalal Maganlal Shah*, 1966 Cr LJ 967 (1).
59. *Manuel Barreto Xavier* v. *Narayan Biku Naik*, 1997 AIHC 959 (para 3) (Bom).
60. *Lab Haribansha* v. *Nikunja Behari*, ILR 1960 Cut 230, **relying on** *Maharaj Bhanudas* v. *Krishnabai*, AIR 1927 Bom 11; *Abanti Jena* v. *Priyambada Jena*, AIR 2000 Ori 156 (paras 3, 4 and 5).
61. *State of Madras* v. *G. Krishnan*, AIR 1961 Mad 92 (FB).
62. *Emperor* v. *Muthia Swamiyar*, ILR 30 Mad 466.
63. *Sunil Kumar Datta* v. *State of W.B.*, AIR 1963 Cal 431.

It was held by the Supreme Court that the discovery and arrest of the accused being one of the essential steps in the course of investigation, the confessional statement may be taken to have been recorded during the course of investigation within the meaning of Section 164, Cr.P.C., but as the recording magistrate was a second class Magistrate not specifically empowered in that behalf, the record is inadmissible in evidence at the trial. Even under Section 74 it cannot be treated as a public document and admissible under Section 80 of this Act.[64]

Merely production of a document kept in police custody will not be a proof of it as a public document. Unless the officer who recorded the statement is called for and examined, those documents cannot be said to be proved, particularly when the person who recorded the statement was very much alive.[65]

4. DOCUMENTS FORMING THE ACTS OR RECORD OF THE ACTS

A check memo which is required to be maintained by the officer in charge of the counting table is a document forming record of the acts of a public officer, and therefore a certified copy given by the collector in whose custody the document is kept, can be admitted in evidence in proof of the contents of the original document.[66] The word "acts" in the phrase "documents forming the acts or records of the acts" is used in one and the same sense. The act of which the record made is a public document must be similar in kind to the act which takes shape of form in a public document. The kind of acts which Section 74 has in view is indicated by Section 78. The acts there mentioned are all final completed acts as distinguished from acts of a preparatory or tentative character. The inquiries which a public officer may make whether under the Criminal Procedure Code or otherwise may or may not result in action. There may be no publicity about them. There is a substantial distinction between such measures and the specific act in which they may result. It is to the latter only that Section 74 was intended to refer.[67]

A document which is brought into existance as a result of a survey, inquiry or inquisition carried out or held under lawful authority is not admissible in evidence as a public document unless the inquiry was a judicial or quasi-judicial inquiry and the document is not only available for public inspection but was brought into existance for that very purpose. The statements in a document tendered in evidence as a public document should be statements with regard to matters which it was the duty of the public officer building the inquiry to inquire into and report on.[68]

TAYLOR ON EVIDENCE[69] states: The records of courts of justice and other judicial writing also constitute public documents. Amongst the above class of documents come the records of the old superior courts of law and equity and the Quasi Records of those courts. The expression "Quasi records" embraces the following:—

(1) Depositions (2) Affidavits (3) Bills (4) Answers (5) Orders (6) Decrees and (7) Rules of the Court (8) and certain other documents, which, though not strictly records, partake so much of their nature that they can be proved by means of copies to the same extent as records and are subject generally to the same rule of evidence.

The Madras High Court has held that it is unwarranted to place restrictions on the words "document forming the acts or the records of the acts" and to say that they should be confined to those parts of the Income-tax records which the Income Tax Officer had himself prepared, and to exclude the documents which he had himself called for *e.g.*, record returns, profits and loss statements, *etc.*, or which has been admitted to the record for the purpose of assessment.[70]

An endorsement of a Magistrate on a complaint and the order sheet in the case transferring the same to another Megistrate for disposal is admissible under Section 74 as a being the act of the judicial officer. Similarly, the copy of the order sheet in the case is admissible as it is the act of the court.[71] The records

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64. *Nikaram* v. *State of H.P.*, AIR 1972 SC 2077; *State of U.P.* v. *Singhara Singh*, AIR 1964 SC 358; *Nazir Ahmed* v. *Emperor*, AIR 1936 PC 253; *State of Madras* v. *G. Krishnan*, AIR 1961 Mad 92.
65. *Shrawan Nathu Kannuar* v. *A.S. Kannuar*, 1997 Cr LJ 491 (Bom).
66. *Banamali Das* v. *Rajendra Chandra*, AIR 1975 SC 1863.
67. *Queen Emperor* v. *Arumugam*, (1897) 20 Mad 189, 197 FB.
68. *Thrasyvoulos Ioannou* v. *Papa Christoforor Demetriou*, AIR 1952 AC 84.
69. 10th Ed Section 1534, p. 1108.
70. *Narasimha Rama Rao* v. *Venkatramayya*, AIR 1940 Mad 768 FB.
71. *Mishrimal* v. *Sohan Raj*, ILR (1959) 9 Raj 934.

of acts of public tribunals are public records which the parties to the adjudication are entitled to inspect and obtain their certified copies.[72] Documents forming acts, or record of acts, of police and the magistrate exercising the power under Cr.P.C. are public documents.[73]

Where there were two documents of two different public schools, showing same age of a child and were in existence *anti litem motem*, it was held that there could be no ground to doubt the genuineness of the document and it can be treated as evidence, but Section 74 would be irrelevant.[74]

Distinction between Record of the Court and Record of Act of the Court:

There is a distinction between the record of the court of and the record of the act of the court. It is only the record of the act of the court which is a public document, therefore a compromise petition filed by the parties before a court is not a public document. So also the pleadings of the parties before the court, are not public documents. But orders or decrees passed by the courts are public documents as they are the record of the acts of the court.

The following are public documents:

The judgment of a court.[75]

A certified copy of a decree of court.[76]

Certified copy of an order of the probate court with a copy of the will annexed.[77]

A certified copy of a registered private sale-deed.[78]

A statement of a witness in a Criminal Court.[79]

The records of acts of public tribunals.[80]

Notes of evidence recorded by a court of small causes.[81]

A written order for the issue of a search warrant by a magistrate, or court.[82]

A warrant issued by a court.[83]

A report submitted by police officer for granting remand of the accused or for retention of remand.[84]

The F.I.R. filed in the court.[85]

Statements of witnesses recorded by a public officer who is authorised to record such statement.[86]

A charge sheet filed by the police against an accused.[87]

A school master comes within the purview of executive officer and a copy of a certificate given by him is admissible in evidence if properly certified.[88]

Notifications issued by the Central or State Governments or by a department of any state government.[89]

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72. *Mahaboob Shahi Kulbarga Mills Co. Ltd.* v. *K. Vittal Kamath*, AIR 1959 Mys 180.
73. *V.J. Thomas* v. *State of Kerala*, AIR 1970 Ker 273.
74. *Umesh Chandra* v. *State of Rajasthan*, AIR 1982 SC 1057.
75. *Ladli Prasad Zutshi* v. *Emperor*, AIR 1931 All 364; *State* v. *G. Veerana Goud*, AIR 1959 Mys 52.
76. *Collector of Gorakhpur* v. *Ram Sunder Mal*, AIR 1934 PC 157; *Gaibandha Loan Officer* v. *(Mst) Saiyadunneesa*, AIR 1943 Cal 114; *Hulasi* v. *Mohan Lal Khatane*, ILR (1960) 10 Raj 94.
77. *Habiram* v. *Ramnath*, 19 Cal WN 1068 : AIR 1919 Cal 676.
78. *Manindra Kumar Dey* v. *Mahendra Suklabaidya*, 1999 AIHC 2147 (para 14) (Gau). **See also** *K.M. Shaffi* v. *Dayamathi Bai*, 1999 AIHC 4071 (para 22) (Kant).
79. *Saudagar Singh* v. *State*, (1974) 76 Pun LR 57; *Firm Ramchend Bhagirath* v. *Gonpatram*, (1972) WLN 1116 (Raj).
80. *Mahaboob Shahi Kulbarga Mills Ltd.* v. *Vittal Kamath*, AIR 1959 Mys 180.
81. *Zohara Begum* v. *Ghouse Quadri*, 1969 Mad LJ (Cri) 702.
82. *Kalinga Tubes Ltd.* v. *Suri*, AIR 1953 Ori 49.
83. *Easwaramurthy* v. *Emperor*, AIR 1944 PC 54; *Kantilal Ambalal* v. *State*, AIR 1968 Guj 100.
84. *Circle Inspector of Police* v. *Velu*, ILR (1973) 1 Ker 50.
85. *Channappa* v. *State*, 1980 CrLJ 922 (Kant). **See also** *Shyam Lal* v. *State of U.P.*, 1998 Cr LJ 2879 (All).
86. *Mohamal* v. *Shri Sayaji Jublee Cotton and Jute Mills Co.*, AIR 1965 Guj 96.
87. *R* v. *Arumugam*, AIR Mad 189 (FB).
88. *Maharaj Bhanudas* v. *Krishnabai*, (1926) 28 Bom LR 1225 : 51 Bom 716.
89. *Janukhan* v. *State*, AIR 1960 Pat 213; *Chacko Pyli* v. *State of Kerala*, ILR (1966) 1 Ker 320; *Somanna* v. *Subba Rao*, AIR 1958 AP 200; *Mathuradas* v. *State*, AIR 1954 Nag 296; *Pannalal* v. *State*, AIR 1959 MB 84; *Deputy Managing Director, CESC Ltd.* v. *Naba Kumar Mondal*, AIR 2000 Cal 97 (para 14).

Hindu Marriage Register[1]

Documents furnished to the Press Council of India for its reconstitution.[2]

Circulars issued by the General Manager of Delhi Electric Supply Undertakings.[3]

The *Dag Chitha* containing entries made according to the rules under Manipur Land Revenue and Land Reforms Act.[4]

Pariwarik register prepared under Bihar *Panchayat* rules.[5]

Quinquennial registers in West Bengal.[6]

The resolutions of allotment and recommendations of allotment committee for allotment of sites by the Improvement Trusts.[7]

Adangal and "B" change register under the Board standing orders.[8]

A file of papers containing official communications maintained according to the practice is a public document within Section 74 where the copy of the sanction for the prosecution has been lost, original from the file can be produced as secondary evidence.[9]

The official register containing the copies of communications maintained according to official practice.[10]

Original notification in the form of an official gazette under Bihar Private Protected Forest Act of 1947.[11]

Proceedings of a market committee established under the Madras Act 20 of 1933.[12]

The death register maintained under the Municipal Act.[13]

Birth registers maintained under the Municipal Act.[14]

Birth entries in police registers maintained under the Berar *Patels* and *Patwaria Law*, rule App. XI-B.[15]

The visa issued by a visa officer of the Government of India at a place situated in a foreign country.[16]

The register for admission or withdrawal of student in a Municipal High School.[17]

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1. *Manjula* v. *Mani*, 1998 Cr LJ 1474 (para 16) (Mad).
2. *Indian Federation of S. & M. Newspapers* v. *Press Council of India*, AIR 1996 Del 90 (para 5).
3. *State (Delhi Admn.)* v. *Dharam Pal*, 1980 CrLJ 1394.
4. *Ningombam Parijan Singh* v. *Chief Commer., Govt. of Manipur*, AIR 1969 Manipur 79.
5. *Toral Mahto* v. *Chandreshwar Mahaton*, AIR 1972 Pat 13.
6. *Ganesh Chandra* v. *State of West Bengal*, ILR (1972) 1 Cal 171; *Sreemutty* v. *Bishonath Datt*, 7 WR 14.
7. *Krishna Rao* v. *Board of Trustees*, (1972) 1 Mys LJ 101.
8. *Raghunath Panigrahi* v. *Udayanath Sahu*, ILR 1969 Cut 214.
9. *Public Prosecutor* v. *Sada Gopan*, AIR 1953 Mad 785; *Ravi Datt* v. *State*, AIR 1956 Pepsu 12; *State* v. *Gurdeo Singh*, AIR 1956 Pepsu 13; *Sagar Mal* v. *State*, AIR 1951 All 816; *State* v. *Sagarmal*, AIR 1951 All 515; *State* v. *Jangir Singh*, AIR 1954 Pepsu 84; *Gayadin* v. *State*, AIR 1958 All 39; *State of Bihar* v. *Ghulam Saruar*, AIR 1965 Pat 393.
10. *Public Prosecutor* v. *Sadagopan*, AIR 1953 Mad 785; *Octavious Steel Co.* v. *Endogram Tea Company*, AIR 1980 Cal 83.
11. *Jai Gopal* v. *Divisional Forest Officer*, AIR 1953 Pat 310.
12. *Secretary Mallabar Market Committee* v. *Bapputty*, (1962) 2 CrLJ 546 (Ker).
13. *Uli Bewa* v. *Mana Bewa*, ILR 1963 Cut 451; *Gopichand Arya* v. *Bedamo Kuer*, AIR 1966 Pat 231; *Mariklal Shah* v. *Haralal*, 1950 Cal 377.
14. *Venajakahamma* v. *Gopalakrishna*, 1970 Mys 305; *Manikro Jairamji* v. *Deorao Baeiram*, AIR 1955 Nag 290.
15. *Dalim Kumar Sain* v. *Nandarani Dossi*, AIR 1970 Cal 292; (Municipal Birth Register extract), *Anilkri shna Basak* v. *Sailendranath Paul*, (1965) 69 Cal WN 593; (Municipal Birth Register extract).
16. *State* v. *Abdul Sattar*, AIR 1963 Guj 226 (FB); **reversed on** facts to *Abdul Sattar* v. *State of Gujarat*, AIR 1965 SC 810; *State* v. *Abdul Rashid*, AIR 1961 Pat 112 (DB).
17. *Subbarao* v. *Venkata Rama Rao*, AIR 1964 AP 53 (DB).

The record of an income-tax case must be regarded as the record of the acts of the income-tax officer in making the assessment and any document properly on the record is just as much a public document as the final order of assessment itself. Consequently, the income-tax return and the statement in support of it would fall within the meaning of public documents.[18]

A confidential report on the method adopted by the election officer as to the counting of votes at an election, by show of hands, submitted to the additional District Panchayat Officer and to the regional Inspector of Municipal Councils and Local Board.[19]

The Electoral Roll prepared under a statute.[20]

Maintenance application filed before the *Salar Jung* Estate Committee.[21]

An outdoor ticket and the discharge certificate granted by the authorities of a public hospital.[22]

Injury report[23] or Medico Legal Case (MLC) report[24] prepared by a medical officer of government hospital.

Site Inspection Map and Site Inspection Memo prepared by the Police Officer in discharge of his official duties.[25]

The food grains procurement stock register.[26]

An agreement between a Maharaja setting up a public trust, namely *gurdwara*, on the one hand and the Government on the other, for setting-up a board of management for managing the affairs of temples including the *gurudwara*.[27]

Survey and settlement report.[28]

Official reports about the nature of an estate.[29]

Records maintained by revenue officers relating to land revenue, survey and settlement etc. *e.g.* '*pahanies*' and '*faisal patties*'.[30]

Accounts prepared by a Revenue Officer showing the area of cultivation.[31]

The method adopted by the settlement authorities to determine the net annual yield, incorporated in the report.[32]

It was held by the Kerala High Court that the entries in the cultivation registers of paddy producers and rent receivers are admissible, even without examining the public servant who made the entries and that the combined effect of Sections 35(e), 76, 77 & 79 is to enable proof of public documents being offered by production of certified copies.[33]

The *Ayakut* accounts maintained for revenue purposes, showing the sources of revenue in each village and giving the limits of the villages to which they refer.[34]

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18. *Sreeramulu* v. *V.V. Raju*, ILR 1977 AP 267.
19. *Raja Gopala Rao* v. *Election Commissioner, Vijiaawada*, AIR 1957 AP 339.
20. *Kistaw Sahu* v. *Thakur*, AIR 1972 Ori 158 (FB); *Aina Devi* v. *Bachan Singh*, AIR 1980 All 174; *Naladhar Mahatatra Sen* v. *Debya Seva*, AIR 1991 Ori 166.
21. *Chand Sultana* v. *Khurshid Begum*, AIR 1963 AP 365.
22. *Ramani Baladevi* v. *Kamallal Malakar*, AIR 1965 Tri 17.
23. *Balgopal Pande* v. *State*, 1990 CrLJ 1848 (Ori-DB).
24. *Dalip Kumar* v. *State*, 1995 Cr LJ 1742 (para 15) (Del).
25. *Rajasthan State Road Transport Corporation* v. *Nand Kishore*, AIR 2001 Raj 334 (para 7).
26. *Madanlal Jajodia* v. *State*, AIR 1958 Ori 1.
27. *Kabul Singh* v. *Ram Singh*, AIR 1986 All 75.
28. *Brajasunder Deb* v. *Rajendra Narain*, AIR 1941 Pat 260; *Ramlal* v. *Ghansham Das*, AIR 1923 Mad 150.
29. *Martand Rao* v. *Malhar Rao*, AIR 1928 PC 10.
30. *K. Pedda Jangaiah* v. *Mandal Revenue Officer, Moinabad*, 1996 AIHC 1006 (AP) (para 4).
31. *Narayanaswami* v. *Chinitalapati*, 22 MLJ 393.
32. *Manu Pujari* v. *State of Orissa*, AIR 1965 Ori 49.
33. *Karicherry Chardan Nair* v. *Edayillan Kunhambu Nair*, AIR 1982 Ker 232.
34. *Sivasubramanya* v. *Secretary of State*, (1884) ILR 9 Mad 285.

Permits issued under the Motor Vehicles Act.[35]

A pedigree contained in a note book which was prepared under Section 332 of U.P. Court of Wards Mannual.[36]

Money lender's register maintained in a Sub-Registrar's office.[37]

An entry in an assessment list register.[38]

A decree of the High Court of Clacutta in 1982 as a public document, can be proved by a certified copy under Section 65(*e*) and a presumption as regards the genuineness of the certified copy does not arise by virtue of combined operation of Sections 76, 77 and 79 and Section 86 does not stand in the way.[39]

A statement of a witness in a criminal court is a public document and a certified copy is admissible.[40]

'Base map' showing boundaries and limits of a municipal area is a public document and is admissible in evidence.[41]

Where disciplinary proceeding was initiated against the respondent for obtaining employment by showing higher percentage of marks in SCC examination but original documents like his application and the certificate were not available so the charge was proved on the basis of the extracts produced from "Z" Register and the oral evidence of another employee who was conversant with the practice of making entries in the Register, it was held that the said Register was a public document.[42] The documents indicating salary and allowances payable to the deceased on the date of his death in an accident, issued by the concerned department, do not require corroboration or any evidence to prove them.[43]

The following are not Public documents:

It has been held that the documents which consist of plaint, written statement, affidavits and petitions filed in a Court cannot be said to form such acts or records of acts as are mentioned in the section, and so they are not public documents.[44]

However The Madras High Court has held that plaints and written statements are public documents.[45] It is submitted that this view is probable as it accords with the view expressed by TAYLOR[46] and of BEST[47]. If plaints and other documents filed by the parties in Courts are treated as public documents, a certified copy would be admissible which would avoid the necessity of producing the original thereby avoiding the inconvenience to courts and the risk in transmitting the records to other courts.

Any petition filed for obtaining an order from the Court on affidavits filed in support of the petition.[48]

Copies of the execution petition or a counter affidavit filed in a Court.[49]

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35. In re : *Sabir Ahmed*, AIR 1960 MP 318.
36. *Shyam Pratap* v. *Collector*, AIR 1946 PC 103.
37. *Dwaraka Prasad* v. *Firn Bhagat Ambica Ram Lalchand*, AIR 1974 Pat 103.
38. *Damumal Handaldas* v. *Shevantibai Bai*, AIR 1965 MP 223 (FB).
39. *Hulasi* v. *Mohanlal*, ILR 1960 10 Raj; *Kishenlal* v. *Ramachandramal Jagannath*, AIR 1953 Raj 216.
40. *Saudagar Singh* v. *State*, (1974) 76 Pun JLR 57 : 1972 WLN 1116 (Raj).
41. *Asstt. Commissioner of L.A.O., Yadgir* v. *Mohd. Aziz Rahaman*, 1996 AIHC 4278 (para 8) (Kant).
42. *Union of India* v. *A. Nagamalleshwar Rao*, AIR 1998 SC 111.
43. *Subhadara Kumari* v. *Lallu Ram*, AIR 1996 Del 64 (para 1).
44. *Maliprasad* v. *Brijkishore Singh*, 1942 Oudh 309; *Manbodh* v. *Hirasai*, AIR 1926 Nag 339; *Akshoy Kumar* v. *Sukumar*, AIR 1951 Cal 320; *Gulab Chand* v. *Sheo Karan Lal*, AIR 1964 Pat 45; **following** *Tarkeshwer Prasad* v. *Devendra Prasad*, AIR 1926 Pat 180; *Usuf Hussan* v. *Raunaq Ali*, AIR 1943 Oudh 54; *Dr. Kamal Krishnan* v. *Kailash Chand*, ILR (1977) 1 Delhi 97.
45. *Narasimha Rama Rao* v. *Venkataramanayya*, 1940 Mad 168 (FB).
46. 10th Ed., Section 1534, Page 1108.
47. 8th Ed., Section 218.
48. *East India Trading Co.* v. *Badat and Co.*, AIR 1959 Bom 414.
49. *Venkatalingama* v. *Panaganti Parthsarathi*, AIR 1942 Mad 558.

A compromise deed executed by the parties.[50]

Post mortem report and the inquest report.[51]

The death certificate issued by a Police Station.[52]

Statement recorded by a Magistrate in his executive capacity, in departmental enquiry.[53]

The index of sales and the multiple derived on its basis by the land acquisition officer, for determining the market value of the land and so its certified copy is inadmissible.[54]

Statement of witnesses recorded by a police officer during investigation.[55]

A report made by a police officer in compliance with the provisions see 157 and 168, CrPC.[56]

A report of Naib Tahsildar on the basis of spot inspection.[57]

Statement of persons recorded under Section 74 of the Railway Property (Unlawfull Possession Act) of 1966.[58]

Original registered will.[59]

Affidavits and letters.[60]

Letter written by a manager of a District Co-operative Bank to a customer, unless it is shown that the manager is a public officer according to Section 2, *Cl.* (17)(*h*), C.P.C.[61]

A document which purports to be a letter or report of an executive official.[62]

Application for allotment of a site to the Improvement Trust.[63]

The notes prepared by the inspector of assessment for the purpose of assisting the executive officer in fixing the annual values of lands and buildings under the Calcutta Municipal Act.[64]

The translation of a private document maintained by a government office for its use.[65]

An award annexed to a petition.[66]

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50. *Saraswati Bala* v. *Surabala Dassi,* AIR 1957 Cal 57; *Govind Kesheo* v. *State,* AIR 1955 Nag 236; *Mangat Ram* v. *State of M.P.,* 1966 Cr LJ 967 (2) (Guj).
51. *State* v. *Gian Singh,* 1981 CrLJ 538 (Del); *Warrant issued by police—Kantilal* v. *State of Gujarat,* AIR 1968 Guj 100.
52. *Hardayal* v. *Aram Singh,* AIR 2001 MP 203 (para 11).
53. *Government of Bengal* v. *Santiram Mondal,* AIR 1930 Cal 370; *Parkash Rai* v. *J.N. Dhar,* AIR 1977 Del 73.
54. *P.R. Durg Modi* v. *Collector,* AIR 1975 MP 57.
55. *Sunil* v. *State,* AIR 1963 Cal 431; *Isab Mandal* v. *Emperor,* ILR 28 Cal 148; **See contra** *Natabar Jana* v. *State,* AIR 1955 Cal 138.
56. *Sunil* v. *State,* AIR 1963 Cal 431.
57. *Radhey* v. *Board of Rouenul,* AIR 1990 All 175 **following** *State of U.P.* v. *Ramsri,* AIR 1976 All 121.
58. *Babulal* v. *State,* 1977 CrLJ 2008 (All).
59. *Parsa Singh* v. *Parkash Kaur (Smt.),* AIR 1976 Punj 235; *Padaman* v. *Hanwanta,* AIR 1915 PC 111; *Pannammal Sundaram,* 23 Mad 499.
60. *Parkashrai* v. *J.N. Dhar,* AIR 1977 Del 73.
61. *Keshavrao* v. *Chandrabhan,* AIR 1980 Bom 380.
62. *Fazl Ahmed* v. *Crown,* 1913 PR No. 1 of 1914 (Cri).
63. *Krishna Rao* v. *Board of Trustees,* (1972) 1 Mys LJ 101.
64. *Jitendra Nath* v. *Makhanlal,* (1957) 61 Cal WN 175.
65. *Thakur Krishna* v. *Kanheryalal,* AIR 1961 All 206 **relied on** *Secretary of State* v. *Chimanlal,* AIR 1942 Bom 161; *Bihari Lal and dissended* v. *Rajendra Narayana Singh,* AIR 1932 Pat 157; *Katikineni Venkata Gopala Narasimha Rama Rao* v. *Chitluri Venkataramayya,* AIR 1940 Mad 768 (FB); *Naim Singh* v. *Tikam Singh,* AIR 1955 All 388; *Raja Gaundan* v. *Raja Gaundan,* ILR 17 Mad 134; *Munshi Ram* v. *Bai Sakhi Ram,* AIR 1947 Lah 355.
66. *East India Trading Company* v. *Badat and Company,* AIR 1959 Bom 414, **reversed** on other point in *Badat & Co.* v. *East India Trading Co.,* AIR 1964 SC 538.

Insurance policy.[67]

A certificate issued by the R.T.O. stating that no driving licence was issued to a certain driver, as the same was issued under no statutory rule, would remain a hearsay and not a public document.[68]

Report of a stamp expert as to the date of issue of the stamp.[69]

A letter to a Collector by the president of a public meeting giving details of the proceedings of the meeting.[70]

Where Civil Surgeon sent a memo reporting the age of the accused, in compliance with the magistrate's request, it was held that it was not an act of a record of his act as a public officer, as the memo contained the opinion of the Civil Surgeon as an expert.[71]

5. PUBLIC RECORDS KEPT OF PRIVATE DOCUMENTS [CLAUSE 2]

A true copy of account of election expenses lodged with the district election officer, under the Representation of People's Act, and the rules thereunder, is a public record of a private document.[72] A certified copy of the registered mortgage deed may be admissible in evidence under Section 65, C1. (*e*) of the Evidence Act, as secondary evidence, as it is a public record of a private document, but that does not dispense with the proof of actual execution.[73]

A memorandum of association, of a return in the custody of a registrar of Joint Stock Company would be a public record of a private document under Section 74(2). Secondary evidence by way of certified copy thereof is admissible.[74]

The original receipt executed by an individual, and registered under the Registration Act, is not a public record of a private document, as the original has to be returned to the party.[75]

It cannot be said that a private deed of trust which has been registered is a private document of which public record is required to be kept; as such, a certified copy of the deed cannot be admissible in evidence under section.[76]

A deed or a document which is registered, but the entry is made in a wrong book in the registar's office. The deed is properly registered.[77]

The register of firms containing forms or registers under the Partnership Act.[78]

The register maintained in the registrar's office wherein copies of documents registered are entered.[79]

The sale deeds or other documents which were filed alongwith by the plaintiff in a Court of law.[80]

6. RECORDS OF AN INCOME-TAX CASE

It is stated by the full bench of the Madras High Court. "It would be putting an unwanted restriction on words 'documents forming the acts or records of the acts' in Section 74, Evidence Act to say that they

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67. *New India Assurance Co. Ltd.* v. *Krishna Sharma*, AIR 1998 Del 386, **dissenting from** *United Insurance Company Ltd.* v. *Kamla Rani*, 1997 ACJ 1081 (P&H).
68. *National Insurance Company Ltd.* v. *Ajay Deshmukh*, 1998 AIHC 5011 (para 6) (MP). **See also** *National Insurance Company Ltd., Sultanpur* v. *Shashi Bala Gupta*, 2000 AIHC 2224 (para 2) (All).
69. *Kapil Charam Patuaik* v. *Artrbandhar Misra*, ILR 1965 Cal 1; *Baraik Karan* v. *Bikram Sahu*, AIR 1932 Pat 352.
70. *Collector* v. *Sarat*, 55 Cal LJ 558.
71. *Abdul Halim Khan* v. *Raja Saadat Ali*, AIR 1928 Oudh 155.
72. *Kandru Majhi* v. *Budnesher Majhi*, ILR (1972) 2 Cal 618.
73. *Subudhi Pradhan* v. *Raghu Bhavan*, AIR 1962 Ori 40 **dissention from** *Padmamabhachari* v. *Sectuapathi*, (1954) 1 MLJ (Andh) 75; *Saimuddin* v. *Abejaddin*, AIR 1979 Gau 14 (saledeed); *Fazalshek* v. *Abdur Rehman*, AIR 1991 Gau 17 (wakfdeed).
74. *Finani Properties Private Limited* v. *M. Gulamali*, AIR 1967 Cal 390. In re : *A.B. Patrika*, AIR 45 Cal 169.
75. *Gopaldas* v. *Thakurji*, AIR 1943 PC 83.
76. *Rabindra N. Das* v. *Santhosh Kumar Mitra*, AIR 1975 Cal 381.
77. *Satindranath* v. *Jatindranath*, AIR 1935 PC 165 : 62 IA 265.
78. *Kapurchand* v. *Laxaman Trimbak*, AIR 1952 Nag 57; *Chhotelal* v. *Md. Hussain*, 1955 VP 44.
79. *Rama Chandra Majhiji* v. *Hambai Majhi*, 1989 Ori 27.
80. *Jagadish Chandra* v. *State of Gujarat*, 1989 CrLJ 1724 (Guj).

should be confined to those parts of Income-tax records which the income-tax officer has himself prepared and to exclude documents which he has himself called for and which have been admitted to the record for purposes of the assessment. The record of an income-tax case must be regarded as the record of the income-tax officer in making his assessment and any document properly on record is just as much a public document as the final order and assessment. A profit and loss statement and a statement showing the details of not income filed by an assessee in support of his returns are public documents under Section 74 Evidence Act, of which certified copies would be admissible under 76.[81]

In the case of Income-tax returns the question arises whether secondary evidence can be produced of the return on the ground that it is a public document under Section 74, Evidence Act. In some cases it was held that Income-tax returns being made confidential under Section 54 of the Income-tax Act certified copies cannot be admitted in evidence.[82]

In *Devidatt* v. *Shriram,*[83] the reason given for inadmissibility of secondary evidence was that the assessee had no right to inspect the original documents in the custody of the Income-tax officer and the latter was not bound to give certified copies to the assessee on demand. It was considered that the words "right to inspect" in Section 76, Evidence Act excludes all such documents as a Government officer has a right to refuse to show on the grounds of State policy, privilege etc. However in *Venktramana* v. *Varalalu*[84] it was held that there was nothing in Section 54, Income-tax Act which precludes the admissibility of a statement made by the assessee on oath before the income-tax officer. But they held, agreeing with the Bombay High Court in *Devideth's* case[85], that the income-tax return is not a public document. In *Mythili* v. *Janaki*[86] the question whether the income-tax return is a public document was discussed at length and it was held that it was not a public document as it was made by an assessee. In their opinion to allow a person who comes into possession of a certified copy of a return to produce it and prove the contents would be defeating the express provisions of Section 54, Income-tax Act. After considering all these decisions, the full bench of the Madras High Court in *Venkata Gopala Narasimharao* v. *Venkataramanayya*[87] held that while Section 54 of the Income-tax Act prohibits the disclosure of matters connected with the assessment and prohibits a court from requiring a public servant to produce the return or other documents mentioned in that section, it does not follow that the court may not admit in evidence those documents. This will depend upon the provisions of the Evidence Act. The return and other documents are public documents and certified copies will be admissible under Section 65(*e*) read with Sections 74 to 77 of the Evidence Act. In *Promotha Nath* v. *Nirode Chandra Ghose,*[88] it was held that while there can be no objection to the sole assessee using certified copy of an assessment order in evidence, it would be a staring thing if a joint assessee were permitted to use a copy of his co-assessee.

They further held that as there is no provision giving an assessee a right to inspect the assessment order, it does not fall within Section 76 and the assessee has no right to demand a certified copy and they can not be produced in proof of the contents under Section 77. They relied on *Anwar Ali's* case[89] and *Devidatt* case[90]. In *Emperor* v. *Osman Chotani,* 1942 Bom 289 it was held that Section 54, I.T. Act does not prevent the assessee from disclosing the contents of the documents specified in Section 54, I.T. Act nor does it prevent a police officer who has lawfully seized the documents from income-tax authorities from producing them. All these cases were considered in *Tulsiram* v. *Smt. Annibai*[91]. The Supreme Court, affirming the decision in *Tulsiram* v. *Anni Bai,*[92] and held that the son of an assessee was entitled

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81. *Narasimha Rama Rao* v. *Venkataramayya,* AIR 1940 Mad 768 (FB); *Sreeramlu* v. *V.V. Raju,* ILR 1977 AP 267; *Kaka Ram Sohanlal* v. *Firm Thakurdas,* 1962 Punj 27.
82. *Anwar Ali* v. *Tafozal Ahmed,* AIR 1925 Rang 84 : ILR 2 Rang 391.
83. AIR 1932 Bom 291 : ILR 56 Bom 324.
84. AIR 1940 Mad 308.
85. ILR 56 Bom 324.
86. AIR 1940 Mad 161.
87. AIR 1940 Mad 768 FB.
88. AIR 1940 Cal 187.
89. AIR 1925 Rang 84.
90. AIR 1932 Bom 291.
91. AIR 1971 SC 671.
92. AIR 1963 Ori 11; *Venkata Gopala Narasimha Rama Rao* v. *Venkataramayya,* AIR 1940 Mad 768 (FB); *Emperor* v. *Osman Chotani,* AIR 1942 Bom 289; *Suraj Narain* v. *Seth Jhabhu Lal,* AIR 1944 All 114; *Buchi Bai* v. *Nagpur University,* AIR 1946 Nag 377.

to produce the assessment orders. It is submitted that the view taken by Madras High Court[93] and in other cases which hold the same view, is correct. The prohibition contained in Section 54, I.T. Act is only in regard to the officers of the income-tax department from producing the document, or give certified copies to strangers. It is always open to the assessee or his representatives either to inspect the assessment orders or the returns and to obtain certified copies. Hence, a certified copy obtained by the assessee or his representative would be admissible while a certified copy obtained by a stranger (obviously illegally) would not be admissible. The case of a joint assessee considered in[94] would stand on the same footing as a copy obtained by a stranger if sought to be relied on against the co-assessee. The Supreme Court while referring to that case also did not express any opinion on the question of production by third parties.[95]

Certified copies of public documents.

S. 76. Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorised by law to make use of a seal, and such copies so certified shall be called certified copies.

***Explanation.*—Any officer who, by the ordinary course of official duty, is authorised to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.**

SYNOPSIS

1. *Principle* ... 724
2. *Right to inspect* ... 725
3. *Some provisions giving right of inspection* ... 725
4. *Tangible Interest* ... 726
5. *Certified copies* ... 728

COMMENTS

1. PRINCIPLE

This section provides for the means of proof of public documents which any person has a right to inspect. There is a common law right of a person to take inspection of a document in which that person is interested for the protection of such interest.[96]

Under this section every public officer having the custody of a public document, of which any person has a right to inspect, shall give that person on demand a copy of it, on payment of legal fees together with his certificate with date, name and his official title and affixing his official seal, and it would be called a certified copy. So the three things that are important are that (1) The person giving a certified copy must be a public officer having the custody of the document. (2) The document is a public document (3) The person who applies for the copy must have a right to inspect the document. Then, on payment of necessary fees the official is bound to give the copy with certificate giving the date, name etc.

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93. *Narasimha Rama Rao* v. *Venkataramayya*, AIR 1940 Mad 768 (FB).
94. *Promoth Nath* v. *Nirodh Chandra Ghosh*, AIR 1940 Cal 187.
95. See *Rasipuram Union Motorservice* v. *Asst. Commissioner of I.T.*, AIR 1957 Mad 151 (DB); *Kader Kutty* v. *Ag. I.T. Officer*, AIR 1961 Ker 32, *Naim Singh* v. *Tikam Singh*, AIR 1955 All 388; *Somanna* v. *Subba Rao*, AIR 1958 AP 200; *Muniayammal* v. *Third Addl. I.T. Officer*, AIR 1960 Mad 366; *Vishamber Nath* v. *Dy. Director Consolidation*, 1976 Tax LR 1063 (All); *Hiralal* v. *Ramanand*, AIR 1959 Pat 515; *R. Vanmeeshiah* v. *Sundareswaran* 1967 Ker LJ 237; *Santi Ranjan* v. *Dasuram*, AIR 1957 Assam 49; *Allah Bux* v. *Ratan Lal*, AIR All 829 (assessment order of Sales Tax Officer); *Buchibai* v. *Nagpur University*, AIR 1946 Nag 377.
96. *Parashuram Detaram Shamduasani* v. *Sir Hugh Golding Cocke*, (1941) 43 Bom LR 961 : (1942) Bom 71.

The explanation to the section states that when an officer is authorised to deliver such copies he shall be deemed to have the custody of such documents. Public documents are little liable to correction or alteration because the whole community is interested in their preservation. If the production of the originals is insisted upon, great inconvenience would be caused, as the same document may be required in several places at one and the same time.

Secondly, there is the likelihood of the documents being lost or mutilated by frequent production and handling. To avoid these risks involved in the production of the original documents, this provision is made allowing the public officers to issue certified copies of the original.

The section requires that a copy of a public document given by a public officer should bear a certificate written at the foot of such copy that it is a true copy of such document. Where a copy bears no certificate and it is not supported by the evidence of the person who prepared it, it is not admissible in evidence.[1]

BEST ON EVIDENCE[2] observed: "The number of persons interested in public documents renders them much more frequently required for evidentiary purposes; and if the production of the originals were insisted on, not only would great inconvenience result from the same documents being wanted in different places at the same time, but the continual change of the place would expose them to be lost, and the handling from frequent use would soon ensure their destruction. For these and other reasons, the law deems it better to allow their contents to be proved by derivative evidence, and to run the chance, whatever that may be if errors arising from inaccurate transcriptions, either intentional or casual. It must also be remembered that, true to the principle of executing the best evidence that the nature of the matter afforded, the law requires "that this derivative evidence should be of a very trustworthy kind" and "the law has also defined, with much precision, the forms of it which may be resorted to in proof of different sorts of public writings".

Under this section the document must not only be a public document but the person concerned must have a right to inspect. It may be that document is a public document but it may not be open to inspection in which case a certified copy cannot be given, as proof of the document.

This section applies only to public documents falling under Section 74 of the Act and is not applicable to other documents.[3]

VARADACHARYAR J held that Section 76 is not an exhaustive provision, much less it is a provision declaring the grant of copies illegal in any particular case, and it is only an enabling section regarding issue of certified copies.[4]

The officer who is to issue the certified copy must be holding the office at the time when the copy was issued. Where a village *patwari* after his dismissal from service issued a certified copy of a document (*Khatouni*) it was held that it could not be treated as a certified copy, as the *patwari* had no authority to issue a certified copy after his dismissal.[5]

2. RIGHT TO INSPECT

Section 76 does not state under what circumstances a person would have a right to inspect. The right to inspect may be conferred by statute.

3. SOME PROVISIONS GIVING RIGHT OF INSPECTION

1. Order XX, Rule 20, C.P.C.: Certified copies of judgement and decrees shall be furnished on application, at the expense of the applicant.

2. Order XI, Rule 15, C.P.C.: Every party to the suit shall be entitled to inspect the documents and to take copies.

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1. *Khadim Ali* v. *Jagannath*, ILR (1940) 16 Luck 230.
2. 11th ED Section 485, p. 458.
3. *Krishna Subala Bose (Smt.)* v. *Dhanpati Datta*, AIR 1957 Cal 59, 63.
4. *Pentapati Venkararamana* v. *Pentapati Varahalu*, AIR 1940 Mad 308; **See also** *Anwar Ali* v. *Tafozal Ahmad*, AIR 1925 Rang 84; *Devidutt Rammiranjan Das* v. *Shriram Narayana Das*, AIR 1932 Bom 291.
5. *Nazir Ahmad* v. *Pothi Ram*, ILR 1950 All 300.

3. Under Section 363(5), Cr.P.C.: Any person affected by the judgment or order passed by a Criminal Court has a right to ask the Court to supply certified copies of the record which would necessarily imply the right to inspect.[6]

4. Under the Indian Registration Act, the registrar's office has to maintain five different books. Books 1 & 2 are open for inspection by any person, who can obtain copies.

In book No. 1 all documents relating to immovable property which are registered will be entered.

Book No. 2 contains the reasons, if some documents were refused to be registered.

Book No. 3 is in respect of wills and authorities to adopt and copies can be given only to the persons executing the documents of that type, or to their agents and, after the death of the executants, to any persons applying for such copies.

Book No. 4 consists of instruments other than the documents relating to immovable property. Copies can be given to the executants or persons claiming under the documents or their representatives or agents of such persons.

Book No. 5 consists of documents relating to the deposit of wills in sealed covers.

Copies can be given to the testator and, after his death, to other persons who are interested in the properties of the deceased.

5. Section 24 of Inventions and Designs Act 5 of 1888 gives a right of inspection. Under the Act a register of inventions has to be maintained.

6. Section 14 of Special Marriage Act 3 of 1872.

7. Section 19 of Registration of Societies Act 21 of 1860.

8. Section 44 of the Administrator General's Act of 1913.

9. A register of copyright about the books published in India and kept in the office of the secretary to the Government of India is open to inspection.

10. Registrar of Joint Stock Companies keeps the documents deposited with him, and they are open for inspection by any one.

11. Marriage register under the Christian Marriage Act 15 of 1872 mentions the persons entitled to inspect and obtain copies. Similarly register of marriage under the Parsee Marriage and Divorce Act 3 of 1936 as amended in 1940.

There is no general enactment conferring a right of inspection of all public documents.

LINDLAY L.J. observed: "when the right to inspect and to take a copy is not expressly conferred the extent of such right depends on the interest which the applicant has in what he wants to copy, and on what is reasonably necessary for the protection of such interest".[7]

Though Section 76 does not define or specify the expression 'person entitled to inspect the document.' It is well settled that the legislature intended to recognise the right generally for all persons who can show that they have an interest for the protection of which it is necessary that liberty to inspect such document should be given.[8]

4. TANGIBLE INTEREST

The accused who has a tangible interest in the matter, has a right to know the reason for his being committed to custody or prison.[9]

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6. *Parasuram* v. *Cockle*, AIR 1942 Bom 26.
7. *Muttar* v. *Eastern and Midlands Railway Company*, (1888) 38 Ch D 92. **See also** *Rex* v. *Justice of Strafforshire*, 6 Ad EL 84 at 99, 101 this principle has been applied on India also.
8. *Kaderkutti* v. *Agricultural I.T. Officer*, AIR 1961 Ker 32; *V.J. Thomas* v. *State of Kerala*, AIR 1970 Ker 273, *Emperor* v. *Armugam*, (1891) ILR 20 Mad 189 (FB).
9. *Circle Inspector Police* v. *Valu*, 1972 Ker LR 922 : ILR (1973) 1 Ker 50.

Where a person has a right to have his application for allotment considered in accordance with the rules and to see that his interest was not prejudically affected by violation of the rules he has right to inspect the records to the extent necessary for the protection of his interest.[10] In *Emperor* v. *Arumugan*[11] SHEPHARD J observed: "A right to inspect public documents, is however assumed in Section 76 I think it might be inferred that the legislature intended to recognise the right generally (the right to inspect) for all persons who can show that they have an interest for the protection of which it is necessary that liberty to inspect such document should be given."[12]

That a person's interest in some other matter would be better served by the inspection of the document would not be sufficient to give him a right to inspect.[13]

The interest should be direct and tangible interest and if a person makes out sufficient interest showing that inspection is reasonably necessary for the protection of his interest he should be entitled to a certified copy.[14] A party to a suit has a tangible interest to inspect the proceeding of the court *e.g.* the notes of evidence in a small cause suit.[15]

A copy of a power of attorney authenticated by the registrar under Section 37(1) of the Registration Act cannot be obtained by a person who is not a party to the deed.[16]

A partner or a person claiming to be a partner in a firm is not entitled to get disclosure of the contents of a statement filed by another partner.[17]

The Bombay H.C. held that the words "right to inspect" in Section 76 exclude all documents which the Government officer refuses to show, on the ground of State policy or privilege, as the Government officer has a right to refuse inspection of the document.[18]

However in *Katikineni Venkatagopala Narasimharao* v. *Chitluri Venkataramayya*[19] it was held that the ground of public policy is not a sufficient reason for not issuing a certified copy of a public document and for excluding from the evidence any document which is legally admissible under the Evidence Act and is not excluded by statutory prohibition.

In *Emperor* v. *Muthia Swamiyar*[20] it was held that the accused has no right to inspect or obtain certified copies of statements or confessions recorded under Section 164, Cr.P.C. before the charge sheet was filed. In a Calcutta case the Court had to deal with a statement recorded during investigation by the Excise Officer under the Bengal Excise Act. It was observed that Section 173(4), Cr.P.C. was not made applicable by Section 74 of the West Bengal Excise Act though Sections 160 to 171 of Cr.P.C., were made of application and hence there was no right to inspect or get a copy.[21] The accused is not entitled to inspect or receive the copies of a post mortem report or inquest report during investigation of the case.[22]

The records of acts of public tribunals such as Labour Courts are public records which the parties to the adjudication are entitled to inspect and of which they will therefore be entitled to obtain certified copies under Section 76.[23]

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10. *Krishna Rao* v. *Board of Trustees;* (1972) 1 Mys LJ 101.
11. (1897) ILR 20 Mad 189 FB.
12. *Chandicharan* v. *Boistab,* ILR (1903) 31 Cal 284 : 8 Cal WN 125; *Para Shuram* v. *Cocke,* AIR 1942 Bom 26.
13. *Muniyammal* v. *IIIrd Addl. Income-Tax Offfcer,* AIR 1960 Mad 366.
14. *State of Madras* v. *Krishnan,* ILR 1961 Mad 1; *Annamalai Trading Company* v. *Hariharan Transport,* 1965 MLJ (Crl) 702.
15. *Annamalai Trading Company* v. *Hariharan Transport,* 1965 MLJ (Crl) 702.
16. *Bishensarup* v. *M. Abdul Samed,* AIR 1931 All 649.
17. *Promatha Nath* v. *Nirode Chandra,* AIR 1940 Cal 187; *Somanna* v. *Subbarao,* AIR 1958 AP 200; *Katikineni Venkatagopala Narasinha Ramarao* v. *Chitluri Venkataramayya,* AIR 1940 Mad 768 (FB); *Buchibai (Smt.)* v. *Nagpur University,* AIR 1946 Nag 377; *Suraj Naraian* v. *Jhabbulal,* AIR 1944 All 114.
18. *Devi Datt Ramniranjan Das* v. *Shriram Narayan Das,* AIR 1932 Bom 291, 297.
19. AIR 1940 Mad 768 (FB).
20. 30 Mad 466.
21. *Sunil Kumar Datta* v. *State of W.B.,* AIR 1963 Cal 431.
22. *State* v. *Gian Singh,* 1981 CrLJ 538 (Del).
23. *Mahaboob Shahi Kulbarga Mills Company Limited* v. *Vittal Kamath,* AIR 1959 Mys 180.

If a person having no right to inspect the document produces a copy obtained illegally it is inadmissible in evidence.[24]

Under Section 123 of this Act the head of the department may refuse on the ground of privilege permission to inspect the unpublished official records relating to any affairs of the State provided the disclosures of such documents would be against public interest. Similarly, under Section 124 of this Act, no officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interest would suffer by the disclosure or allowing inspection of the documents.

An assessee has a right to inspect the order passed on appeal by the Appellate Assistant Commissioner of Income-tax. Whether any other person has a right to inspect the document is irrlevant. It is the person who has a right to inspect that is given the right to obtain a copy. Section 54 of the I.T. Act does not bar that right of inspection and obtaining copy.[25]

See also commentary in Section 74 under the head Income Tax returns and records.

5. CERTIFIED COPIES

The law has created a legal presumption in favour of the genuineness of a document when it is in substantial, though not in strict, compliance with the provisions for the certification of a copy as contained in Section 76. A carbon copy can be treated as a certified copy of the order though it does not contain the certificate that it is a true copy, and the appeal filed alongwith the carbon copy of the order appealed against can be treated as validly presented.[26]

In the case of a certified copy of the electoral roll or an entry therein which is required to be filed before the returning officer under Section 33(5) of the Representation of People's Act, 1951, it was held there is no reason or scope for attaching the attributes of a certified copy under Section 76 as the Act is not made applicable to it. The Representation of People's Act does not state that the certified copy should comply with the conditions laid down in Section 76.[27]

By long usage, the term "certified copy" has acquired a special meaning, in view of the provision in Section 76 and that term, when used in connection with an appeal and with reference to the order against which the appeal is filed, has always been understood as the copy which the party preferring the appeal obtains under Section 76, on payment of the necessary fee.[28] It is the copy of the order passed on appeal by the Assistant Commissioner, furnished to the assessee on his application that is the certified copy of the order under Section 76 and not the copy served on the assessee as required under Section 33(1) of the Income-tax Act even though both are copies of the same order.[29]

The accused is entitled to a certified copy of an F.I.R. on payment of legal fees at any stage. The fee for the certified copy of a judgement is payable only at the stage of applying for such copies.[30]

The person claiming interest in the specified land cannot be refused certified copies of the land records, '*pahanies*' and '*faisal patties*' on the ground that the land in question is classified in the revenue records as government land.[31]

In a petition challenging the procedure for consideration of advocates for being designated as Senior Advocates, the petitioner produced the copy of the recommendations made by the Screening Committee which was not a public document within the meaning of this section but refused to disclose the source of obtaining the said copy on which the Court did not insist, it was held that the said document was not

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24. *Banarsi Devi (Smt.)* v. *Janaki Devi (Smt.)*, AIR 1959 Pat 172. **See also** *Anwar* v. *Fazal*, AIR 1925 Rang 84 **dissented on** another aspect in *Katikeni Narasimha Rao* v. *Chitluri Venkatramayya* AIR 1940 Mad 768.
25. *Rasipuram Union Motor Service Limited* v. *Commissioner of I.T. Madras*, AIR 1957 Mad 151.
26. *Thatha* v. *Paru*, AIR 1986 Ker 196.
27. *Mohan Reddy* v. *N. Muralidhar Rao*, AIR 1958 AP 485.
28. *Malayalam Plantations Ltd.* v. *Commr. of I.T. Mysore*, AIR 1959 Ker 34.
29. *Rasipuram Union Motor Service Ltd* v. *Commissioner of I.T. Madras*, AIR 1957 Mad 151.
30. *Prasanna Gogai* v. *State of Assam*, AIR 1971 Assam 55 (FB); *Panchanan Mondal* v. *State*, 1971 Cr LJ 875 (Cal); *Shyam Lal* v. *State of U.P.*, 1998 Cr LJ 2879 (All).
31. *K. Pedda Jangaiah* v. *Mandal Revenue Officer, Moinabad*, 1996 AIHC 1006 (para 6).

confidential and passed through several hands in the process of preparing its copies, making it easy to obtain its copy and the petitioner was not disentitled for any relief.[32]

Proof of documents by production of certified copies.

S. 77. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

COMMENTS

1. PRINCIPLE AND SCOPE

The Privy Council in *Collector of Gorakhpur* v. *Ramsunder*[33] held that according to Section 76 the custodian of a public document, which any person has a right to inspect, shall give a certified copy on demand. Such certified copies are by the statutes deemed to be originals; and such certified copies (under Section 77) may be produced in proof of the contents of the public documents or parts, thereof. It is on the grounds of convenience that public documents which come within the purview of Section 74 of the Evidence Act, are allowed to be proved under this section by producing the certified copies which fulfil the conditions prescribed by Section 76.

The principle underlying this section is to obviate the production of original public documents for evidentiary purpose.[34]

2. PROOF OF PUBLIC DOCUMENTS

The Supreme Court in *Ramappa* v. *Bojjappa* [35] reversing[36] held that certified copies of public documents are admissible in evidence without being proved by calling witnesses.

The Supreme Court has held that the check memo which is required to be maintained by the officer in charge of the counting table (during elections) is a document forming record of the acts of a public officer and therefore, a certified copy thereof given by the collector in whose custody the document is kept, can be admitted in evidence in proof of the contents of the original documents.[37]

It was held that it can not be said that an admission contained in a maintenance application filed before, the Salar Jung Estates Committee, is not admissible, when a certified copy of the maintenance application was filed to prove the admission. The certified copy was granted by the Board of Revenue to which the original records of Salar Jung Trust Committee, an authority appointed under a statute enacted by the Hyderabad State Legislature, were transferred after the abolition of the Trust Committee and the records of the committee are public documents.[38]

A printed copy of an order signed by the President of the Indian Union, not purported to have been published by an order of the Government, is no proof of the order. Such an order, if not proved under Section 78, can be proved by production of the original or its certified copy under Section 77.[39]

There is a distinction between the record of the Court and the record of the act of the Court. It is only the record of the act of the Court, which is a public document. Therefore a compromise petition filed by the parties before a Court is not a public document. So also the pleadings of the parties before the Court are not public documents. But orders or decrees passed by the Courts are public documents as they are the record of the acts of the Court.[40]

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32. *Democratic Bar Association* v. *High Court of Judicature at Allahabad (FB)*, AIR 2000 All 300 (para 13) : 2000 AIHC 4303.
33. AIR 1934 PC 157.
34. *Parkash Rai* v. *J.N. Dhar*, AIR 1977 Del 73.
35. AIR 1963 SC 1633.
36. *Bajjappa* v. *Venkanna*, AIR 1960 AP 397.
37. *Banamali Das* v. *Rajendra Chandra*, AIR 1975 SC 1863.
38. *Chand Sultana* v. *Khurshid Begum*, AIR 1963 AP 365.
39. *Brahmeshwar Prasad* v. *State of Bihar*, AIR 1950 Pat 265.
40. *Mangat Ram* v. *State*, 1966 CrLJ 967 (2) (Guj) (a case of compromise petition); *Kantilal Ambalal* v. *State*, 1968 CrLJ 758 : AIR 1968 Guj 100; (a warrant issued by Police); *Gulabchand* v. *Sheo Karamlall*, AIR 1964 Pat 45; *Kewal*

A Register of Births and Deaths maintained by the Municipal Authorities, or by any public officer under the authority of a statute, is a public document and a certified copy of the extract issued by such authority is admissible to prove its contents.[41]

A notification issued under Section 18 of Travancore Forest Act is a public document and the certified copy issued by the Chief Conservator of Forests, competant authority to certify, may be produced in proof of it.[42]

Khasra girdawars are public documents and can be proved by producing certified copies.[43]

Valuation forms and line plans prepared by the custodian Department, being public documents, can be proved by production of certified copies.[44]

Where a certified copy of a registered document more than 30 years old, was issued by the registrar, it was held that mere production of a certified copy would not be enough to raise presumption of contents of the document under Section 90 as there is no presumption of execution of the document and the admission contained therein has to be proved.[45]

A document not required to be proved by calling evidence is to be marked at first hearing or the settlement of issues, Documents required to be proved by calling witnesses are to be admitted and marked when proved. This principle is also applicable to the documents led with permission of Courts after settlement of issues.[46]

Where a certified copy of a public document was proved without calling a witness and no objection was taken in the Trial Court it was held it was admisible.[47] The certified copies of FIR, Site Inspection Map, Site Inspection Memo, *Panchanama,* Injury Report or Post-Mortem Report and other relevant documents prepared by the police or doctor while discharging official duty are admissible in evidence without any formal proof[48]; and so is the certified copy of the registered agreement for sale.[49]

A certified copy of a private sale-deed is admissible in evidence but admissibility of a document is one thing and its probative value quite another. A document may be admissible but may not carry weight. A proof of document is something which is independent from the evidentiary value of the document. Hence, where the vendor denied the execution of the sale-deed, its execution must be proved as required under Section 67.[50] Where disciplinary proceeding was initiated against the respondent for obtaining employment by showing higher percentage of marks in SCC examination but original documents like his application and the certificate were not available so the charge was proved on the basis of the extracts produced from "Z" Register and the oral evidence of another employee who was conversant with the practice of making entries in the Register which was held to be a public document.[51]

Proof of other official documents.

S. 78. The following public documents may be proved as follows:—

(1) Acts, orders or notifications of the Central Government in any of its departments, or of the Crown Representative or of any State Government or any department of any State Government,—

Krishan v. *Kailash Chand,* ILR (1977) 1 Del 97. (Pleadings and grounds of appeal); *Md. Ayub Khan* v. *Abdul Samad Khan,* 1969 BLJR 932; (decree of a Court).

41. *Venajakshamma* v. *P. Gopala Krishana,* Birth Register extract AIR 1970 Mys 305.
42. *State of Kerala* v. *Adichan Sasi,* 1976 Ker LJ 839.
43. *Surajmal* v. *State,* 1959 Raj LW 381.
44. *Mannumal* v. *Prit Bai,* 1970 Raj LW 302.
45. *Rajeswari* v. *Varalaxshmamma,* AIR 1964 AP 284 **followed** *Basanth Sing* v. *Brijrajsaran,* AIR 1935 PC 132; *Harihar Prasad* v. *Deonarin Prasad,* AIR 1956 SC 305; *Padmanabha Chari* v. *Sithapathi Rao,* (1954) 2 MLJ 75; *Gopal Das* v. *Thakurji,* AIR 1943 PC 83.
46. *Thatithoi Chiru* v. *Ningampao Kabui,* AIR 190 Gau 7.
47. *M. Ramappa* v. *Bojjappa,* AIR 1963 SC 1633. **See also** commentary under Section 74.
48. *Rajasthan State Road Transport Corporation* v. *Nand Kishore,* AIR 2001 Raj 334 (para 8).
49. *State of Haryana* v. *Ram Singh,* AIR 2001 SC 2532 (paras 5 and 6).
50. *Manindra Kumar Dey* v. *Mahendra Suklabaidya,* 1999 AIHC 2147 (para 15) (Gau). **See also** *K.M. Shaffi* v. *Davamathi Bai,* 1999 AIHC 4071 (para 22) (Kant).
51. *Union of India* v. *A. Nagamalleshwar Rao,* AIR 1998 SC 111.

by the records of the departments, certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government or , as the case may be, of the Crown Representative;

(2) the proceedings of the Legislatures,—

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of the Government concerned;

(3) proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,—

by copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's Printer;

(4) the Acts of the Executive or the proceedings of the Legislature of a foreign country,—

by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some Central Act;

(5) the proceedings of a municipal body in a State,—

by a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body;

(6) public documents of any other class in a foreign country ,—

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of an Indian Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

STATE AMENDMENT

West Bengal.—New S. 78A, inserted by W.B. Act No. 20 of 1960, S. 3 (w.e.f. 5-1-1961).

"78-A. Copies of public documents, to be as good as original documents in certain cases.— Notwithstanding anything contained in this Act or any other law for the time being in force, where any public documents concerning any areas within West Bengal have been kept in Pakistan, then copies of such public documents shall, on being authenticated in such manner as may be prescribed from time to time by the State Government by notification in the Official Gazette, be deemed to have taken the place of, and to be, the original documents from which such copies were made and all references to the original documents shall be construed as including references to such copies".

SYNOPSIS

1. *Principle and Scope* ... 731
2. *Acts, Orders or Notifications of Governments [Clause (1)]* ... 732
3. *Proceedings of Legislatures [Clause (2)]* ... 733
4. *Proceedings of a Municipal Body [Clause (5)]* ... 734
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COMMENTS

1. PRINCIPLE AND SCOPE

This section specifies the various ways in which the contents of a public document can be proved. This section deals with six classes of documents and the mode of proof concerning those documents. The

documents referred in this section may be proved as mentioned in the section. The use of the word "may be proved" indicates that it is permissive and other modes of proof are not prohibited.[1] The word 'may' is used only as denoting a mode of proof other than the ordinary one, *namely*, the production of the original. For, when the original is a public document within the meaning of S. 74, a certified copy of the documents, but no other kind of secondary evidence, is admissible. Section 78 indicates only a mode of proof. Mere production of printed copy printed by the official printer is not conclusive as to its correctness.[2]

This section does not appear to have the effect of absolving the parties from any rules governing the proof of the facts on which they desire to rely.

2. ACTS, ORDERS OR NOTIFICATIONS OF GOVERNMENTS [CLAUSE (1)]

According to *Cl.* (1) all Acts, Orders, Notifications of the Central Government and State Governments in any of its departments, may be proved by the production of (1) the records of the departments certified by the heads of those departments, or (2) by the printed copies purporting to be printed by the order of any such Government. If such Acts, Orders, Notifications amount to laws in force, under Section 57, judicial notice can be taken.[3]

Art. 77 and Art. 166 of the Indian Constitution deal with orders and other instruments made and executed in the name of the President of the Indian Union and the Governor of a State respectively. Such orders and other instruments shall be authenticated in such manner as may be prescribed by the rules formed or made by the President or the Government and if they are so authenticated they shall not be called in question. A cyclostyled copy of typed notification attested by the Divisional Forest Officer is not an "authenticated copy" of the notification as a proof of a particular forest being reserved one. In making an act of authentication, the officer who makes it is to declare his authority to do so, his having been appointed properly by the authority for the purpose and has to say that the authenticated document is in due form of law.[4]

Court cannot take notice of an Amending Act, in the absence of an authentic copy as required under Section 78.[5]

A Gazette notification fixing the date for elections of a municipality was held to be sufficient proof of the date of elections.[6] A notification issued by a proper authority of the Government was held to be sufficiently proved under Section 78 if a copy of the Gazette notification is filed.[7] A notification published in a Government Gazette, cannot be said to be included in the definition of "Laws", and so the Court is not entitled to take judicial notice of it under Section 57. Proof can only be given under Section 78 by production of the Gazette printed under the authority of the Government.[8] But, in *State of M.P.* v. *Romchondsan*[9] **overruling** 1954 Nag 296, it was held that all statutory orders and notifications which are legislative in nature, amount to "Law" and the Court can take judicial notice. It was a case of notification under Section 7(1) of Telegraph Wires (Unlawful) Possession) Acts.

Extracts from official gazette, certified to be true copies by the District Medical Officer, are not admissible in evidence and the true copies should be certified by the head of the department concerned.[10]

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1. *Seodlul* v. *Joharmull*, AIR 1924 Cal 74; *Kalijiban Bhattacharjee VR*, AIR 1936 Cal 316; *Shivnarain* v. *Nag & Co.*, AIR 1982 All 44.
2. *Mottayan* v. *Thambuswami Padayachi*, (1970) 1 Mad LJ 137.
3. *State* v. *Ramchandson*, AIR 1977 MP 68 (FB).
4. *Chandra Naik* v. *State*, 1993 Cr LJ 2128 (paras 5 and 6) (Ori).
5. *Public Prosecutor* v. *A.K. Gopalan*, AIR 1953 Mad 66.
6. *Venkata Rao* v. *Padmanabha Raju*, AIR 1927 Mad 981.
7. *Pannalal* v. *State of M.B.*, AIR 1953 MB 84; *Baijnath* v. *State of M.B.*, AIR 1953 MB 196; *State of M.B.* v. *Gangaram*, AIR 1953 MB 244; (Notification of Textile Commer. fixing the controlled price under Essential Supplied (Temporary Powers Act 1946 u/s. 7); *Alipilla* v. *State of Kerala*, 1983 CrLJ (NOC) 185 (Ker); *Municipal Committee, Akola* v. *Madhawa Wasudeo*, AIR 1951 Nag 464.
8. *Mathuradas* v. *State*, AIR 1954 Nag 296; *Ramji Raja* v. *Puncham*, AIR 1959 MP 269; **see also** *Collector of Cawnpore Kishore* v. *Jugal*, AIR 1928 All 355; *Pyle* v. *State of Kerala*, 1966 Ker LJ 76 : 1966 Ker LT 102.
9. AIR 1977 MP 68 (FB).
10. *Sarjng* v. *State of Bihar*, 1973 BLJR 790.

A government notification can be proved by production of a copy certified by the head of the department which issued the same, as secondary evidence under Section 78 read with Section 65.[11] A notification under Section 18 of Travancore Forest Act declaring certain area as reserved forest may be proved by filing a certified copy thereof, issued by the Chief Conservator of Forests.[12]

A copy not certified by the head of the department is not a "certified copy" within the meaning of Section 78.[13] A cyclostyled copy of government rules with a cyclostyled covering letter, sent to various departments is not admissible as even secondary evidence of those alleged rules.[14] Any book published referring to any notification of the government was held not admissible to prove the existence of such notification.[15] The Court cannot act on a report regarding increase in dog-bites based on the subjective and personal opinion of the author and not on any impartial enquiry, investigation and collection of relevant materials and hold that the new scheme to control dog-bites was a failure.[16]

A printed copy of an order signed by the President of the India but not purporting to be published by the order of the Government,was held to be no proof of the order. If it is not proved u/Section 78 or by a certified copy according to Section 77, or by filing an affidavit of any responsible officer, it must be held that there is no proof of it.[17]

In a case there was a difference in the wording of Art. 177 of the Limitation Act, between what was contained in a book and what was in the gazette, the version in the book was preferred to that in the gazette.[18] The Lahore High Court has, on the other hand, held that the text published in the Gazette must be taken to be the authorized text of the Limitation Act under cl. (2) of this section.[19]

3. PROCEEDINGS OF LEGISLATURES [CLAUSE (2)]

This *clause* deals with the proceedings of Legislatures. They can be proved by the journals published by the Parliament, State Legislature or State Council or by published Acts or abstracts, or by printed copies purporting to be printed by the order of the Government.

The proceedings of Parliament may be proved under *cl.* (2) by the Journals of the House of Commons or by copies purporting to be printed by order of the Government.

Regarding Journals, the Federal Court held that "The proceedings of Parliament fall under either the second or fourth of the categories set out in this section; it may be said that the reference in the second category to proceedings of "the Legislatures" following immediately upon the first category which is confined to acts, orders or notifications of the Central Government in India, is to be taken as a reference to the legislatures of India only: "the Legislatures" to which the second category referes are intended to include all the legislatures which have the power to make laws for India or for any part thereof. The official parliamentary debates are not the journals of two houses of parliament in the narrower sense of that expression; each house publishes its own journals which contain a formal record of the business done and may be described as the minutes of their proceedings; and these journals may, in an English Court, be proved by copies thereof purporting to be printed by the printers to the Crown or by printers to either house of Parliament..... the expression 'journals', however, in Section 78 is plainly to be given a broad and general meaning, since it is not confined to the journals of the Houses of Parliament, but includes journals of other legislatures also; and there is no reason, therefore why, in its application to Parliament, it should necessarily be confined to the journals of the two Houses of Parliament above, if it can be shown that the Houses have authorised the publication of other official records of their proceedings and that these records are printed "by order of Government".[20]

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11. *Janu Khan* v. *State*, AIR 1960 Pat 213; *Public Prosecutor* v. *Kamakshi Ammal*, 1983 Mad LJ (Cri) 617; (Notification issued by Textile Commer).
12. *State of Kerala* v. *Adichan Sasi*, 1975 Ker LT 839; *Sadhu Patra & Sixars* v. *State of Orissa*, (1970) 36 Cut LT 395.
13. *Santokhi Rana* v. *State*, 1977 CrLJ (NOC) 113 : 1977 BLJR 79.
14. *Union of India* v. *Nirmal Singh*, AIR 1987 All 83.
15. *Md. Usman Gulam Mohiuddin* v. *Dhanshanker Jagannath Bhatt*, (1969) 10 Guj LR 374.
16. *J. Gopalan* v. *Municipal Corporation of Hyderabad*, AIR 1996 AP 371 (para 34).
17. *Brahmeshwar Prasad* v. *State of Bihar*, AIR 1950 Pat 265.
18. *Sheodoyal* v. *Joharmull*, AIR 1924 Cal 74 : ILR 50 Cal 549, 566.
19. *Gobind Das* v. *Rup Kishore*, ILR (1923) 4 Lah 367.
20. *Niharendu* v. *R.*, AIR 1942 FC 22 : 1942 FCJ 47.

The official report of the proceedings of the House of Lords was held to be proof of the fact that the proclamation of emergency declared by the Governor-General-in-Council under Section 102(1) of Government of India Act was approved by the House of Lords.[21]

Under Section 57 the court shall take judicial notice of the proceedings in Parliament and of the Legislatures in the State. Proceedings are normally published under the authority of the concerned Government in a book form, which can be referred to. In respect of the Acts which have been passed, they would be published in a book form besides their publication in the Government gazette. Both can be referred to by the court.[22]

Reports of proceedings of the State Legislative Assembly during the passage of impugned statutes are admissible as public documents under Section 78(2).[23]

Reports of the debates in the Legislative Assembly can only be evidence of what was stated by the speakers in the Legislative Assembly, and are not evidence of any facts contained in the speeches.[24]

PHIPSON[25] states "Neither *Hansard's* Debates, nor the *Authorised Parliamentary Debates* printed by the Government, are, however, admissible to prove the questions, answers, and speeches of members, these publications not having the authority of Parliamentary Journals".[26]

It was held by the Supreme Court that facts stated in the newspaper are in the nature of hearsay and no notice can be taken of such facts as the newspaper is not one of the documents referred to in Section 78(2) to prove the allegation of facts, unless the maker, publisher, or reporter who sent the report was examined in respect of that news item.[27]

4. PROCEEDINGS OF A MUNICIPAL BODY [CLAUSE (5)]

The proceedings of a Municipal Board can be proved under *clause* (5) by a copy of such proceedings, certified by the legal keeper, or by a printed book purported to have been published under the authority of such municipal body.[28] Mere production of the printed proceedings would not be sufficient unless it purports to be published under the authority of such municipal body.[29]

Where there was a resolution of the Municipal Council authorising the Municipal Commissioner who in turn gave authority in favour of Sanitary Inspectors who would be prosecution witnesses, it was held that the order of the Commissioner was not admissible as evidence of the Municipal Resolution under Section 78(5).[30]

Where there was a resolution of the Municipality authorising the Assistant Municipal prosecutor to institute and conduct prosecutions under the prevention of Food Adulteration Act, it was held that when the Commissioner of the Municipality authorised the head clerk of the central office to attest the copies, it was valid attestation, though it was not attested by the legal keeper of the records.[31]

5. PUBLIC DOCUMENTS OF ANY OTHER CLASS IN A FOREIGN COUNTRY [CLAUSE (6)]

As to Foreign Law Sections 38, 45 and 84 of this Act may be referred to, regarding foreign judgments Section 12, C.P.C., and the effect of them Section 13, C.P.C., and as to the certified copies of foreign judgments Section 14, C.P.C., may be referred to. Section 86 of this Act deals with presumption regarding certified copies of foreign records.

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21. *Bimal Protiva* v. *R*, AIR 1942 Cal 464.
22. *Subramania* v. *Shanmugan*, AIR 1926 Mad 65; *Brindaban* v. *Mahabir*, AIR 1927 Pat 142.
23. *Gajapati Narayan Deo* v. *State of Orissa*, AIR 1953 Ori 185.
24. *Rt Hon Gerald Lord Strick Land*, AIR 1935 PC 34; *Carmelo Mifsud Bonnici* **See** May's Parliamentary Practice 11th Ed. P.202.
25. 15th Ed. (2000), p. 881, (para 36.04).
26. **See also** observations od DARLING, J., in *Mc Carthy* v. *Kenneddy*, Times Mar 4, 1905.
27. *Laxmi Raj Shetty* v. *Tamil Nadu State*, 1988 SC 1274. **See also** *Hazarilal* v. *State of H P*, AIR 1953 HP 41.
28. *Akshay Kumar Chand* v. *Commer. of Bogra Municipality*, AIR 1923 Cal 675; *Sd. Syed Mokram Ali* v. *the Cuttack Municipality*, 17 Cal WN 531.
29. *Corp., of Calcutta* v. *Promotho Nath Mullick*, AIR 1915 Cal 428.
30. *Gopinathannar* v. *Thomas*, ILR 1960 Ker 1449.
31. *Tilo Ram Karam Chand* v. *State*, AIR 1967 Del 71. **See also** *Akshay Kumar Chand* v. *Commer of Bogra Municipality*, AIR 1923 Cal 675 : 37 CLJ 589.

SUBBARAO J., (Majority expressing no opinion) observed: "Section 78(6) of the Evidence Act makes it clear that, apart from the two certificates—one by the legal keeper of the original document and the other by the Consul General—there shall also be proof of the character of the foreign judgment according to the law of the foreign country before it can be admitted. It is a condition precedent. Proof of this condition can be by direct or circumstantial evidence. Proof can also be given by placing before the court facts giving rise to presumption rebuttable or irrebuttable. Section 86 of the Evidence Act lays down that a court may presume the genuineness and accuracy of any document purporting to be a certified copy of any judicial record of any foreign country, if such a copy is duly certified in a manner and according to the rules in use in the country for certification of copies of judicial records. To give rise to this presumption it is not necessary that the judicial record of the foreign country should have already been admitted in evidence. While Section 78(6) lays down three conditions for admitting a foreign judgment in evidence, the admission of the judgment is not a condition precedent for drawing the requisite presumption under Section 86. The presumption may be drawn before the said judgment is admitted and by virtue of presumption of genuineness of the copy of the judgment, arising under Section 86 the third condition under Section 78(6) *viz.*, the character of the document according to the law of the foreign country may be said to have been proved and the judgment may be admitted".[32]

The copy of a birth entry in a record of the Town Committee of a town situated in Pakistan was held not admissible in evidence, in the absence of attestation by the High Commissioner for India in Pakistan, to prove the date of birth before a court in India.[33]

It was held that, even if strict rules of evidence may be deemed to apply to the proceedings before the Rehabilitation Authorities, under the displaced persons. (Compensation and Rehabilitation) Act of 1954, the Authorities have no jurisdiction to ask for any other mode of proof for proving a public document of a foreign country than the one prescribed by Section 78(6).

Records of a court in Berlin authenticated as required by law were held admissible.[34]

The words 'diplomatic Agent' in Cl. (6), are very wide and *prima facie* cover the Resident of Hyderabad who was a political agent of the Government of India. A certified copy of a transfer certificate granted by the Head Master of a School certified by the Resident was held to be admissible.[35] Where the political agent had not certified the copy of the evidence in a civil court (Kutch court) in the manner required under Section 76, it was held not to be admissible and Section 86 of the Evidence Act did not exclude its proof.[36]

It is to be observed that the section does not say how any fact, historical or otherwise, is to be proved by the parties, but gives the court liberty to resort for its aid to appropriate books or documents of reference on matters of public history.[37]

A carbon copy of a Court order issued by official process, but not marked as "true copy" has been regarded as good evidence.[38] The landlord refused to receive the money sent by the tenant by money order. The post office issued a letter showing refusal. The letter was based on a public record and, therefore, held relevant.[39]

Once a document is held to be a "public document" within the meaning of Section 74, if it is properly proved under Section 78, the presumption in respect of the contents of public documents would apply irrespective of whether the public document is of British India or of a Foreign State.[40]

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32. *Badat and Co., Bombay* v. *East India Trading Co., Newyork*, AIR 1964 SC 358.
33. *Union of India* v. *Bakshshi Amrik Singh*, AIR 1963 Punj 104.
34. In the matters *Rudolf Stallmann*, ILR (1911) 39 Cal 164.
35. *Maharaj Bhanudas* v. *Krishhabai Chintaman Deshpandey*, AIR 1927 Bom 11.
36. *Vallabh Das Mulji* v. *Pran Shanker*, AIR 1929 Bom 24, 30; **following** *Haranuand* v. *Ramgopal*, ILR 27 Cal 639; **see also** *Shamsher Narain Singh* v. *Md. Sale*, AIR 1926 Pat 29(2); (attendance register in the office of Nizam of Hyderabad).
37. *"The Englishman" Ltd.* v. *Lajpat Rai*, ILR (1910) 37 Cal 760.
38. *Tha* v. *Peru*, AIR 1986 Ker 196.
39. *Shiv Narain* v. *M/s Nang & Co.*, AIR 1982 All 44.
40. *Lal Haribansha* v. *Nikunja Behari*, ILR 1960 Cut 230.

PRESUMPTIONS AS TO DOCUMENTS

Presumption as to genuineness of certified copies.

S. 79. The Court shall presume to be genuine every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer of the Central Government or of a State Government, or by any officer in the State of Jammu and Kashmir who is duly authorised thereto by the Central Government:

Provided **that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.**

The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

COMMENTS

1. PRINCIPLE AND SCOPE

Sections 79 to 90 deal with certain presumptions as to documents.

This section proceeds upon the *maxim omina proesumuntur rite esse acta* a (all acts are presumed to be rightly done). In fact all the following sections down to S. 90 inclusive, are illustrations of, and founded upon, this principle. But though the courts are directed to draw a presumption in favour of official certificates, it is not a conclusive presumption; it is rebuttable. It is but a *prima facie* presumption, and if the certificate, etc., be not correct, its incorrectness may be shown. On the same maxim stands the last *clause* of this section. It is very old law that where a person acts in an official capacity it shall be presumed that he was duly appointed.[41]

This section applies to certificates, certified copies or other documents which are duly certified, by an officer of the Central Government or of a State Government or by an officer in the State of Jammu and Kashmir who is authorised by the Central Government in that behalf, to be genuine.

This section imperatively directs the court to raise a presumption by using the words 'shall presume'.

Under this section a court is bound to draw the presumption that a certified copy of a document is genuine and also that the officer signed it in the official character which he claimed in the said document.[42]

The words 'shall presume' indicate that if no other evidence is given, the court is bound to find that the facts mentioned in the section exist. They occur in Ss. 79-85 and S. 89. These sections are, therefore, mandatory. On the other hand Sections 80 to 88 and 90 deal with matters which the court may presume. Apart from these Sections there is another Section 114 whereunder the court may presume certain facts and things. The sections which use the expression "may presume" are all permissive and there is wide discretion for the court to presume or not to presume, though such discretion must be judicially exercised.

STEPHEN in his introduction (p. 144) states "Where a document, purporting to be a certified copy of a record of evidence, is produced, it must, by Section 79, be presumed to be an accurate copy of the record of evidence; and, by Section 80, the facts stated in the record itself, as to the circumstances under which it was taken, e.g. that it was read over to the witness in a language which he understood, must be presumed to be true..... Many classes of documents that are defined in the Act are presumed to be what they purport to be, but this presumption is liable to be rebutted." At page 170, he observes "Many classes

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41. NORTON 260-261.
42. *Bhinka* v. *Charan Singh*, AIR 1959 SC 960.

of documents which are defined in the Act, are presumed to be what they purport to be, but this presumption is liable to be rebutted. Two sets of presumptions will sometimes apply to the same document. For instance, if what purports to be certified copy of a record of evidence is produced, it must by Section 79 be presumed to be an accurate copy of the record itself as to the circumstances under which it was taken, e.g. that it was read over to the witness in a language which he understood must be presumed to be true".

The expression "shall presume to be genuine" implies raising of a presumption of genuineness from the certified copy as to the correctness of the record, and also as to the genuineness of such copy.[43]

Where a document bearing a seal and signature of the officer mentioned that the officer named in it had authority to certify the copy, it was held that the document must be presumed to be duly certified.[44] A presumption of genuiness is attached to the entries in Birth and Death Registers maintained under a statute, as the registers are public documents, and a heavy onus lies on the party who wants to displace the presumption. Correctness of certified copy shall be presumed under Section 79.[45]

Certificate of Registration under Section 60 of the Registration Act must be presumed to be genuine.[46]

A certified copy of a document can be admitted without any formal proof in view of Section 63 and 79.[47]

In a divorce case, when a certified copy of the FIR, was tendered in evidence, it was held that it was admissible.[48]

A certificate signed by the visitors of a Lunatic Asylum or a Mental Hospital and the Superintendent of the hospital comes within Section 79 and no formal proof of the document is required.[49]

Certified copy of a revenue record raises a presumption of its genuineness.[50]

Entry in a register which is not required by law to be maintained, should be proved in the same manner as any other fact is to be proved, as no legal presumption is available to such an entry or the register.[51]

Where a plaintiff sent a letter to the *Nazir* department and it was filed in the records of the department it was held that the letter becomes a public document and if a photostat and not a certified copy was filed it was not admissible to prove the document.[52]

Where a carbon copy of an order of court contained necessary particulars indicating its authenticity as issued by a Court though not bearing a certificate of its being a true copy, it was held that the carbon copy can be treated as a certified copy and an appeal filed along with it was valid.[53]

Where the original sale deed was said to have been eaten away by white ants and a certified copy was marked as exhibit and the other side raised no objection, and a witness deposed as to the fact of sale, it was held that its genuiness cannot be agitated in appeal by raising objection as to the mode of proof. [54]

It was held by the Bombay High Court that Section 79 only raises a rebuttable presumption with regard to the genuineness of certified copies, if they are executed substantially in the form and in the manner provided by law; it was further held that in all cases of secondary evidence under Section 65 read

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43. *Budhu Ahir* v. *Ishwar Chand Pandey*, 1972 Cr LJ 1377 (All).
44. *Gurdit Singh* v. *Surjan Singh*, AIR 1950 Pepsu 56.
45. *Gopichand Arya* v. *Smt. Bedmo Kuer*, AIR 1966 Pat 231; *Banshi Ram* v. *Jit Ram*, AIR 1964 Punj 231; *Mst Komal* v. *Gur Charan Prasad*, AIR 1938 All 242; *Anwari Jan* v. *Baldua*, AIR 1936 All 218; *George* v. *State*, (1974) 1 CrLJ 550 (Ker).
46. *Govind Ram* v. *Abdul Wahab*, AIR 1963 Raj 234; *Md. Hassan* v. *Sohara*, AIR 1924 Lah 389.
47. *State of Kerala* v. *Adichan Sasi*, 1975 Ker LT 839; *Ganapti Chintamani* v. *Damodar Bhiku Bhutt*, 1960 MPLJ 424; *Narsingh Prasad Sah* v. *Mahendra Sah*, 2000 AIHC 723 (para 9) (Pat).
48. *Krishan Rani* v. *Chmi Lal*, AIR 1981 Punj 119.
49. *Kalidas Sarkar* v. *Emperor*, ILR 63 Cal 425.
50. *Budhu Ahir* v. *I.C. Pandey*, 1972 Cr LJ 1377 (All).
51. *Ram Prakash Kamlesh Kumar* v. *Commissioner of Sales Tax*, 1976 Tax LR 1955.
52. *Manorama Srivastava* v. *Saroj Srivastava*, AIR 1989 All 17.
53. *Thatha* v. *Paru*, AIR 1986 Ker 196.
54. *Bhadar Munda* v. *Dhuchua Oraon*, AIR 1970 Pat 209.

with Section 63 when a copy or an oral account is admitted as secondary evidence, the execution of the original is not required to be proved, but if the original itself is sought to be tendered, it must be duly proved and there is no reason for applying a different rule to public documents. Neither Section 67 nor Section 68, which lay down that the signature and the handwriting on a document must be duly proved, make any exception in the case of public documents.[55]

It can be shown that the officer who certified it, does not hold the official character which he claims.[56]

Where a letter purporting to be issued from the Chief Secretary to the Government of Bengal was signed by a Deputy Secretary, not in his official capacity, but "for the Chief Secretary," it was held that there was no legal proof that the Local Government had ordered or authorized a prosecution under Section 196 of the Criminal Procedure Code. The presumption under this section would have arisen if the letter had been signed by the Chief Secretary himself.[57]

2. INCOMPLETE DOCUMENT

Where the certified copy of a judgment bore no date and signature of the Judge and its final portion was missing, the said document, being incomplete, its certified copy was inadmissible in evidence.[58]

Presumption as to documents produced as record of evidence.

S. 80. Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statement as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

SYNOPSIS

1.	*Principle*	...	738	3.	*Identity of the deponant*	...	742
2.	*Statement*	...	740	4.	*Memorandum of identification*	...	742

COMMENTS

1. PRINCIPLE

This section dispenses with the necessity of formal proof of certain documents.

This section makes it obligatory on the part of a Court to draw a presumption of genuineness in respect of judicial documents *i.e.*, deposition of witnesses in a judicial proceeding, or before any officer authorised by law to take such evidence, or statements or confessions by a prisoner or accused person which are recorded in accordance with the provisions of law. The first part deals with depositions recorded in a judicial proceeding. The second part deals with depositions recorded by officers authorised by law to record the deposition. There is no general presumption that every officer is authorised by law to record evidence. The third part deals with statements or confessions of prisoners or accused persons recorded in accordance with law, purporting to be signed by a Judge or Magistrate or any other officer who is authorised by law to so record. Magistrates of first class, have generally the power to record

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55. *C H Shah* v. *Malpathak*, (1972) 74 Bom LR 505 : ILR 1973 Bom 14; **Dissenting from** *Sagar Mal* v. *State*, 1951 All 816; *S R of Legal Remembrancer* v. *Moazzem Mossain*, AIR 1947 Cal 318; **relied on see also** *Bishanath Prasad* v. *R*, AIR 1948 Oudh 1.
56. *Govind Ram* v. *Abdul Wahab*, AIR 1963 Raj 234.
57. *Md Oziullah* v. *Boni Madhab Chawdhuri*, ILR 1922 Cal 298 : 1922 50 Cal 135. But **see** *Kalipban Bhattacharjee* v. *Emperor*, ILR 63 Cal 1053 : AIR 1936 Cal 316.
58. *Mohmedbhai Rasulbhai Malek* v. *Amirbhai Rahimbhai Malek*, AIR 2001 Guj 37 (para 10).

statements or confessions. Magistrates of second class have to be specially empowered to record under Cr.P.C. As the Magistrates record statements or confessions or evidence in open court, they observe prescribed rules and formalities which afford sufficient guarantee for raising the presumption that it was correctly done. When such a document is placed before the court, this section says that it shall be presumed that the document is genuine, that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true; and such evidence, statement or confession was duly taken[59]. This section makes it unnecessary for any formal proof of such document noted in the section; this section has nothing to do with admissibility which is dealt with by other sections in the Evidence Act.[60]

The presumptions to be raised under this section are considerably wider than those under S. 79. They embrace not only the genuineness of the document, but that it was duly taken and given under the circumstances recorded in the document. The presumptions under this section are not conclusive; they may be rebutted.

In Section 4 definiting the expression "shall presume" it is stated that wherever it is directed by this Act that the court shall presume a fact, it shall regard that fact as proved, unless and until it is disproved. It follows that what is presumed under this section (or other sections wherein the expression 'shall presume' is used) is only a rebuttable presumption and what is presumed is not conclusive.

The word "Evidence" is defined in Section 3 of this Act. Order XVIII, Rules 5 to 13, C.P.C., and Sections 272 to 283, Cr.P.C., 1973, prescribe the mode of recording evidence. The Judges or Magistrates or other officers empowered to record evidence, statements or confessions are expected to observe the rules which prescribe the mode of recording.

An affidavit is not evidence as defined in the Act and so it cannot be presumed to be genuine udner this section.[61] No presumption of truth arises in favour of the entries made in the revenue records not in accordance with law.[62]

The word 'Judicial Proceeding' is not defined in the Act. There is a reference to judicial proceeding in Section 1 and 33. Section 4 of the Criminal Procedure Code defines a judicial proceeding as including a proceeding in the court of which evidence is or may be legally taken on oath.

This section will not apply to any statement failing to satisfy the provisions of S. 33.

Where on a deposition it is endorsed that the deposition was read out to the witness and admitted by him as correct, the Court is bound to accept it as correct under Section 80, until proved to be untrue. Even if it be that the deposition was not read over that would only amount to a curable irregularity.[63] It was held earlier that where the deposition of witness was not read over in the presence of the accused or his pleader according to Section 360, Cr.P.C. (Old), (Section 278, new Cr.P.C.) it is not admissible and no other evidence is admissible in proof of the statements in the deposition.[64]

But in *Elahi Baksh* v. *R*,[65] the Calcutta High Court observed: "I can see no reason why, even in a prosecution for perjury, failure to comply with the provisions of Rules 5 and 6 of Order XVIII, CPC should render a deposition entirely inadmissible in evidence or why, if Section 80 cannot be called in aid, the deposition should not be proved, for instance by a judge who takes it down, or by the admission of the deponent. If it can be proved in such way, Section 91 will have no application.[66]

The presumption under Section 80 arises only when a confession is recorded strictly in accordance with law; since no procedure has been prescribed in law for recording of the statements by customs authorities under Section 171-A of the Customs Act (1878), no presumption can be raised under Section

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59. *Hari Ram* v. *Emperor*, AIR 1926 Lah 122.
60. **See** *Padam Prasad* v. *R*, AIR 1929 Cal 617 (SB).
61. (1972) 1 Cut WR 318.
62. *Hari Singh* v. *Milap Chand*, 2000 AIHC 346 (para 6) (HP).
63. *Bhagwan Singh* v. *State of Punjab*, AIR 1952 SC 214. **See also** In re : *Muthukumara*, 9 MLT 325; *Queen* v. *Gonowsi*, 22 WR 2.
64. *Nalluri* v. *R*, ILR 42 Mad 561; *Kamatchinathan* v. *R*, ILR 28 Mad 308; *Kadir* v. *R*, 42 IC 326; *Mohendra Nath* v. *R*, 8 CrLJ 116; *R*. v. *Mungul*, (1875) 23 WR 28.
65. ILR 45 Cal 825.
66. **See also** *Md. Farooq* v. *Rex throlph Tufai Ahrmad* , AIR 1950 All 501; *Sheo Shankar* v. *R*, AIR 1940 Nag 410; *Feroz* v. *Mirza Amir*, AIR 1923 Oudh 119; *Mirabux* v. *R*, AIR 1923 Nag 39.

80 of the Evidence Act, when the recording of statement under Section 171-A is in English and there is failure to interpret it to the illiterate accused, conviction would be improper; that apart, it has to be decided on the facts and circumstances of the case whether the confession was free and voluntary.[67]

This section is not applicable to a statement taken by an officer who has no jurisdiction or whose appointment is *ultra vires*.[68]

Where Order XVIII, R. 5, C.P.C., has been complied with in recording evidence of witnesses, the court is bound to accept the evidence recorded, as correct under Section 80, until it is proved to be untrue. The court including a court of appeal cannot *suo motu* conduct an enquiry to examine its correctness.[69]

It was held that a declaration made under the proviso to *Cl.* 2 of Goa, Daman and Diu (Citizenship) Order (1962) is not covered by Section 80 and presumption of genuineness cannot be drawn.[70]

An accused after murdering his wife, went to the house of a *Tahsildar* exercising 2nd class Magisterial powers and confessed his guilt. The *Tahasildar* sent for the police. After the arrival of the head constable, the accused was arrested. Then the *Tahsildar* after recording the confession, handed him over to the head constable. The Supreme Court after finding that the *Tahsildar* exercising 2nd class Magisterial powers was not specially empowered to record any statement during investigation, held that no presumption can be drawn under Section 80, as it cannot be said that the confession was recorded in accordance with law.[71]

If the confession is recorded in gross disregard of the precaution prescribed by Section 164, Cr.P.C., it will be entirely inadmissible.[72]

The expression 'Judicial Proceeding' does not apply to a statement recorded under Section 164, Cr.P.C. by a Magistrate during the course of investigation from a person who is not an accused.[73]

The presumption under Section 80 cannot attach to the record of a court which is not competent to try the case. Such statements may however be proved during a fresh trial.[74]

2. STATEMENT

The use of the expression "statement" or "confession" in Section 80 in *juxta* position to a prisoner or an accused person and the context in which those words occur point out that it was intended that a statement as well as a confession of a prisoner or an accused duly taken by a Magistrate is to be presumed to be genuine. It is not correct to say that the word "statement" has reference to a statement of a witness as distinguished from a "confession" made by a prisoner or an accused person.[75]

As Section 80 authorises the court to presume that the document is genuine, that any statements as to the circumstances under which it was taken be true and if it is a confession it was truely taken in accordance with law, the examination of the Magistrate is generally unnecessary, though it may be necessary in some cases.[76]

The depositions and statements may be proved by the production of the document without any witness being called to prove it.[77] A dying declaration, which has been recorded by a Magistrate, can be tendered in evidence without the Magistrate who recorded it being called.[78] When a dying declaration is taken and a certificate is appended that it was read over to the deponent and is signed by the Magistrate,

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67. *State of Rajasthan* v. *Budhram*, AIR 1969 Raj 49.

68. *Emperor* v. *Ajit Kumar Ghoshe*, AIR 1945 Cal 159; *Anwar Ali Sarkar* v. *State*, AIR 1955 Cal 535.

69. **See also** *R.* v. *Viran*, ILR (1886) 9 Mad 224.

70. *G.Y. Bhandare* v. *Erasme Sequeira*, AIR 1972 Goa 25.

71. *Nika Ram* v. *State of H.P.*, AIR 1972 SC 2077; *State of U.P.* v. *Singhara*, AIR 1964 SC 358.

72. *Nazir Ahmad* v. *R.*, AIR 1936 PC 253(2) : 63 IA 372.

73. *R.* v. *Purshotham*, ILR 45 Bom 835 (FB) : AIR 1921 Bom 3; *Sheoraj* v. *State*, AIR 1964 All 290 (FB); *Mohammed* v. *R.*, AIR 1932 Lah 254.

74. *Anwar Ali Sarkar* v. *State*, AIR 1955 Cal 535.

75. *Ram Sanehi* v. *State*, AIR 1963 All 308.

76. *Madi Ganga* v. *State of Orissa*, AIR 1981 SC 1165; *Md. Ali* v. *Emperor*, AIR 1934 All 81. **See also** *R.* v. *Lalji*, AIR 1936 Pat 11; *Kheman* v. *Crown*, (1924) 6 Lah 58; *Nga San Baw* v. *Crown*, (1902) 1 LBR 340 (FB).

77. *Emperor* v. *Surajbali*, ILR (1933) 56 All 750.

78. *Emperor* v. *Surajbali*, (1933) 56 All 750.

there is a presumption under Section 80 that what is stated is true.[79] Confessional statement of an accused recorded in compliance with Section 164, Cr.P.C., can be admitted into evidence and made an exhibit even without examining the Magistrate who recorded it.[80]

The record of a statement made by a witness to a Police Officer during investigation is not a record of evidence, the police investigation is not a judicial proceeding within this section.[81]

Where there is substantial compliance of Section 164, reliance can be placed on Section 29 and 80 of the Evidence Act and any non-compliance may be regularised under Section 533 (new Section 463) Cr.P.C.[82]

So far as confessions are concerned, Section 24 of this Act places restrictions on the admissibility by stating that if it appears to the court, that making of the confession was by inducement, threat or promise it would not take it into consideration. Subject to such restrictions under Section 24, the presumption of genuineness under this section can be drawn and there is no inconsistency between Section 24 and 80.[83]

Where the confession of an accused was found as one induced by police by torture, though having been recorded by the Magistrate properly, it would be improper to draw presumption under Section 80.[84]

The Court will presume that a confession was duly recorded and that the circumstances under which the confession was recorded were such as had been set down in the record made by the Magistrate. It says nothing about there being any presumption regarding the voluntariness of the confession.[85]

Where a confession, made before a Magistrate, did not bear his certificate, stating his belief that it was freely and voluntarily made, as required by S. 164(3) of the Criminal Procedure Code, it was held that it could not be admitted under this section without proof of its having been so made.[86]

Where a person was charged for the offence of perjury under the Penal Code, as his deposition as a witness, contained a false statement, it was held that his deposition is to be produced in evidence not for purpose of proving its truth but for purpose of proving that he made it; that the Penal Code does not pay any regard to the question whether the deposition was read over or not to the witness as required under Section 360, Cr.P.C.[87]

Where the deposition of a witness was not signed by a judge no presumption can be drawn under Section 80 that he had signed on it. When the recordings of those depositions was not denied they are not invalid due to omission of judge's signature.[88]

The statement of a witness in the committal proceedings comes within the scope of Section 74 as public documents. So, certified copies can be granted under Section 76 and they can be produced as proof of the contents of the same under Section 77. Presumption of genuineness is also available in respect of the certified copies of their depositions under Section 80.[89]

Section 288, Cr.P.C. of 1973 (corresponding to Section 287 old Cr.P.C.) says "the examination of the accused duly recorded by or before the committing Megistrate shall be tendered by the prosecutor and read as evidence". If such evidence was placed before the court and if the witness is examined, the evidence recorded before the committing Magistrate may be treated as evidence for all purposes *i.e.*, for

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79. **In re** : *Karuppan Samban*, 31 IC 359.
80. *Bandhu Kichgi* v. *State*, 1976 CrLJ 325 (Ori); *Bisipati Padhan* v. *State*, AIR 1969 Ori 289 : 1969 CrLJ 1517 (Ori); *Kashmira Singh* v. *State of M P.*, AIR 1952 SC 159 : 1952 CrLJ 839; *Phatik Chandra Gogoi* v. *State of Assam*, AIR 1988 CrLJ 24 (Gauh) (though accused retracted the confession up Section 313 CrPC if it was corroborated on material particulars, though Magistrate was not examined, conviction can be based).
81. *Raghuvir Singh* v. *Emperor*, ILR 9C 455 at 458.
82. *Shanti* v. *State*, AIR 1978 Ori 19 (FB).
83. *R* v. *Panchkari*, ILR 52 Cal 67; *Nayeb* v. *R*, ILR 61 Cal 399; *Raggha* v. *R*, AIR 1925 All 627 (FB); *R.* v. *Jamuna Singh*, AIR 1947 Pat 305; *Bhukhin* v. *R*, AIR 1948 Nag 344.
84. *Based Sheikh* v. *King*, AIR 1950 Cal 331.
85. *Emperor* v. *Thakur Das Malo*, ILR (1943) 1 Cal 487 : AIR 1943 Cal 626
86. *Emperor* v. *Radha Halwai*, (1902) 7 CWN 220. **See** *Nadir* v. *Empress*, (1887) PR No. 36 of 1887 (Cr).
87. *Md Farooq* v. *R. Through Tufail Ahmed*, AIR 1950 All 501.
88. *Khaja Begum* v. *Abdul Hameed* (1967) 2 An WR 66; *Ramesh Chandra Das* v. *Emperor*, (1919) 46 C 895; **but see** *Md Yasin* v. *Emperor*, 52 Cal 431 : AIR 1925 Cal 782.
89. *Savda Gar Singh alias Sago* v. *State of Punjab*, (1974) 76 Punj LR 57.

contradiction or impeaching the credit under Section 145 or for corroboration under Section 157 of this Act or as substantive evidence, as the basis of finding a verdict.[90]

3. IDENTITY OF THE DEPONANT

Though there is presumption under Section 80 regarding the statements in a deposition in an earlier case as genuine, there is no presumption as to the identity of the deponent; when the certified copy is produced in a later proceeding and the identity of the deponent has to be proved.[91]

Though under Section 80 the presumption of genuineness is only in respect of a statement recorded and not to the identity of the deponent, the court can look into the deposition itself to find out whether there is inherent evidence as to the identity of the deponent. If the deponent comes and admits that his deposition was recorded on a particular date and in a particular matter, no further proof of identity is necessary.[92]

The Lahore High Court went to the extent of holding that not only a statement recorded in accordance with law by an officer authorised to record it and signed by him must be presumed to be genuine but also a statement made by the person concerned as expressly mentioned in the record of the statement. It may however be noted that in that case the identity was sufficiently proved by other evidence.[93]

In the case of a very old document this may create difficulty as it will be practically impossible to get evidence of the identity of the deponent. However one can turn to the deposition to find inherent evidence as to the identity.[94]

Where a Registrar's endorsement showed that a person presented a document for registration and was identified by two persons, it was held that there is presumption of the execution of the document according to the Registrar's endorsement but it has to be shown that the person who admitted the execution was not an impostor[95]

4. MEMORANDUM OF IDENTIFICATION

A presumption under Section 80 could only arise, if the memorandum of identification amounted to "evidence" within the meaning of Section 3 of the Act. Statements of the identifying witness recorded by a Magistrate in the identification memo under Section 164, Cr.P.C. are neither made by the witnesses in a judicial proceeding nor are they made on oath or affirmation, in order to amount to "evidence" within Section 3 of Act.[96]

A confession made by an accused before a Magistrate in a former Indian State cannot be admitted in evidence under this section. The Magistrate recording the confession must be examined to prove all the confession before it can be used as evidence.[97]

The section does not deal with admissibility. It merely dispenses with the necessity of formal proof in certain cases.[98]

The presumption under Section 80 applies as much to a certified copy of the deposition as to the original.[99]

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90. *Fakira* v. *R*, AIR 1937 PC 119.
91. *Mohammad Ali* v. *Emperor*, AIR 1934 All 81; *Brajabhallab* v. *Akhoy Bagdi*, AIR 1926 Cal 705; *Sulaiman* v. *King*, AIR 1941 Rang 301; *Abbasali Shah* v. *Md. Shah*, AIR 1951 MB 92; *R.* v. *Durga Sonar*, ILR (1885) 11 Cal 550; *Bhagwat Prasad* v. *Sher Khan*, AIR 1926 Oudh 489 (where Magistrate who recorded signed on it, it can be presumed as to the identity of the deponent).
92. *Abbas Ali Shah* v. *Md. Shah*, AIR 1951 MB 92.
93. *Hari Ram* v. *Emperor*, AIR 1926 Lah 122.
94. *A. Bhagawat Prasad* v. *Sherkhan*, AIR 1926 Oudh 489.
95. *Gopal Das* v. *Thakurji*, AIR 1943 PC 83.
96. *Ram Sanehi* v. *State*, AIR 1963 All 308; **relying on** *Nazir Ahmad* v. *R.*, AIR 1936 PC 253(2); and *Purshottam Ishvar Amin* v. *Emperor*, 1921 Bom 3 (FB); and **dissenting from** *Asharfi* v. *State* AIR 1961 All 153; *Sheo Raj* v. *State*, AIR 1964 All 290 (FB); **approving** *Ram Sanehi* v. *State*, AIR 1963 All 308 and **overruling** *Asharfi* v. *State*, AIR 1961 All 153; *Pritam Singh* v. *State*, AIR 1971 Raj 184; *Kanai Sheet* v. *State*, 1981 Cr LJ 527 (Cal); *Ramadhar* v. *State of Bihar*, 1986 Cr LJ 684 (Pat); *Gopi* v. *State of Rajasthan*, 1974 WLN 78; (A memo of test identification).
97. *Emperor* v. *Dhenka Amra*, (1914) 16 Bom LR 261 : AIR 1914 Bom 41.
98. *Queen* v. *Viran* (1886) 9 M 224; *Padam Prasad Upadhyaya* v. *Emperor*, AIR 1929 Cal 617.
99. *Sarabj* v. *Mata Din*, AIR 1920 Oudh 122 : 60 IC 437.

Under Order XVIII, Rule 15, CPC, the evidence of a witness should be read over to the witness. But there is no provision requiring the judge to certify that it has been so read over. Hence when in fact it is read over, the absence of such certificate does not render Section 80 inapplicable.[1] Where a deposition was not read over to the witness who read it himself it was held that there was substantial compliance with the relevant rule and the benefit of Section 80 of the Act is available.

Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents.

S. 81. The Court shall presume the genuineness of every document purporting to be the London Gazette or any Official Gazette, or the Government Gazette of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament of the United Kingdom printed by the Queen's Printer and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

SYNOPSIS

1. *Principle* ... 743
2. *Gazettes* ... 743
3. *Gazetteers* ... 744
4. *Newspapers or Journals* ... 744

COMMENTS

1. PRINCIPLE

This section deals with four sets of documents which shall be presumed to be genuine. They are:

(1) Gazettes

(2) Gazzeteers

(3) Newspapers or journals

(4) Every document directed by any law to be kept by any person, if that document is kept substantially in the form required by law and is produced from proper custody.

Section 57, Cl. (7) of this Act states that if the fact of appointment to any public office is notified in any official gazette, the accession to the office, names, titles, functions and signatures of the person, filling that public office, may be taken judicial notice of.

Section 37 of this Act provides that when the court has to form an opinion as to the existence of any fact of public nature, any statement of it made in an official gazette is relevant.

Section 78(3) refers to proclamations, orders or regulations issued by the King or Queen or the Privy Council in the United Kingdom and they may be proved by production of the extracts of the London gazette.

The latter part of Section 81 deals with most of the documents containing matters referred to in Section 35 and which are declared to be public documents under Section 74.

2. GAZETTES

Though a gazette is not a conclusive evidence of the facts contained therein, the Court may in conjunction with other evidence and circumstances take it into consideration in adjudging the dispute in question.[2] When orders and notifications of a Government are published in the Government gazette, the court is entitled to take judicial notice under Section 57 and presume their genuineness under Section 81.[3] Where the state of affairs as to governmental business is published in a Government publication, it shall be presumed to be correct and genuine, unless rebutted.[4]

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1. *Arjun Kurmi* v. *Emperor*, AIR 1927 Pat 100; *Bhagvat Singh* v. *Emperor*, AIR 1925 Pat 378; *Ramesh Chandra Das* v. *Emperor*, (1919) 46 Cal 895; *Emperor* v. *Jagat Ram*, (1918) 19 Cr LJ 972.
2. *Bala Shankar Maha Shankar Bhattjee* v. *Charity Commissioner, Gujarat*, AIR 1995 SC 167 (para 22).
3. *State* v. *Nilam Das*, AIR 1952 HP 74; *William Jacks and Co. Ltd., Calcutta* v. *State of Orissa*, AIR 1965 Ori 190; *Totavarri Sithar Om Chimakurty Kotlingam Firm* v. *State of A.P.*, ILR (1961) 1 AP 296; *Hasmukhlal Jagjivandas* v. *State*; ILR 1970 Guj 942; *Public Prosecutor* v. *Kamakshi Ammal*, 1983 Mad LJ (Cri) 617.
4. *R.S. Nayak* v. *A.R. Antulay*, AIR 1986 SC 2045 **relying on**; *Harpal Singh* v. *State of H.P.*, AIR 1981 SC 361 : 1981 SCC 560.

It was held by the Nagpur High Court that though *prima facie*, the genuineness of a particular order published in the gazette of India has to be presumed under Section 81, it is a rebuttable presumption. In that case when a document purporting to be the same order printed in the Government Press of India was produced with a covering letter from the Secretary of the Government of India, from proper custody, and was in different terms, it was held that the order published in the gazette was wrongly printed.[5]

3. GAZETTEERS

The Supreme Court held that where the question is whether the *Math* is "public" or "private" within the meaning of Section 6(7) of the Orissa H.R.E. Act 4 of 1939, the statements in the gazetteer can be relied on as providing historical material regarding the practice followed by the *Math* and its head.[6]

The statements in the final report on settlement operations stating on what basis entries were made in the Record of Rights, are more authentic and reliable than the statements made in the District gazetteers.[7] Though this section refers to production from lawful custody, the Lahore High Court held that, if the Court has the concerned gazette, it is enough for the court under Section 81 to draw the presumption though it is not tendered.[8]

There is no presumption of correctness attached to a copy of mutation record as to the date of death of the last holder.[9] Though the entries in the *Patwari's* annual report continued for 10 or 11 years, there cannot be any presumption under Section 81.[10] Regarding a report of a court of Enquiry appointed under Rule 75 of the Indian Aircraft Rules it was held that no presumption can be drawn under Section 81 and it has to be proved.[11]

In spite of the oral evidence to the contrary, a court can take judicial notice of existence of a fact from the original judicial record on its file and presumption under Section 81 shall be drawn as to its correctness.[12]

4. NEWSPAPERS OR JOURNALS

In *Laxmi Raj Shetty* v. *State of Tamil Nadu*[13] the Supreme Court held that facts stated in newspapers are hearsay in nature and are inadmissible unless the maker of the statement is examined; and that judicial notice cannot be taken of such facts.[14] The paper itself is not proof of its contents. Even if it is admitted in evidence without formal proof, it only amounts to an anonymous statement.[15]

HALSBURY[16] states that a witness may refresh his memory by refering to a newspaper report, if he read it at the time when he had recollection of the statement therein contained and knew them to be true; but a newspaper report is not generally admissible as evidence of facts recorded in it.[17]

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5. *Trimbk Shivrudra* v. *State*, AIR 1950 Nag 203.
6. *Mahant Shri Srinivas Ramanuj Das* v. *Surianarayan Das*, AIR 1967 SC 256.
7. *Kandon Soren* v. *Jitan Hembram*, AIR 1973 Pat 206.
8. *Bawa Sarup* v. *R.* AIR 1925 Lah 299. The High Court in appeal can admit in evidence an official gazette; *Nanakchand* v. *Emperor*, AIR 1931 Lah 273.
9. *Dalpat Singh* v. *Rajwant Singh*, AIR 1954 Punj 33.
10. 1950 All WR (Rev) 44 (All).
11. *Indian Airlines Corp.* v. *Madhuri Chowdhari (Smt.)*, AIR 1965 Cal 252.
12. *Arun Kumar Boral* v. *Nirmal Chandra Mukherjee*, ILR (1971) 1 Cal 47.
13. AIR 1988 SC 1274; *Krishnamma* v. *Government of Tamil Nadu*, 1999 Cr LJ 1915, at p. 1919 (Mad).
14. **See also** *Harbhajan Singh* v. *State*, AIR 1961 Punj 215; *Narayan Choudhury* v. *Radha Gobinda Dutta*, AIR 1971 Cal 53; *Nachhatar Singh* v. *State of Punjab*, (1985) 87 Punj LR 1 : 1985 Cr LJ (NOC) 115. *Khilumal* v. *Arjundas Tulsidas*, ILR 1959 Raj 524 : AIR 1959 Raj 280; *Sangappa* v. *Shivamurthi Swamy*, 1961 Mys 106; *Baba Sarup Singh* v. *Emperor*, AIR 1925 Lah 299; *Ramayhandra* v. *Emperor*, AIR 1930 Lah 371, *Ravinder Kumar Sharma* v. *State of Assam*, AIR 1999 SC 3571 (para 25); or in absence of any other reliable document, *Amal Kumar Chatterjee* v. *State of U.P.*, 1999 AIHC 3901 (para 3) (All).
15. *Bawa Sarup* v. *R.* AIR 1925 Lah 299.
16. 4th Ed., Vol.17 (para 223).
17. *Lord Rossmore* v. *Mowatt*, (1850) 15 Jur 238; **see also** *Ram Chandra* v. *R.* AIR 1930 Lah 371.

A person who heard a speech and who read it in a newspaper at or near the time of the transaction, may refresh his memory by refering to that newspaper; he can say that he knew it to be correct when he read it. It is immaterial that the document was not printed by him or in his presence.

Under Section 7 of the Press and Registration of Books Act 25 of 1867 on the production of an authenticated copy a declaration made under the Act is admissible to prove that the person mentioned in the declaration is the publisher of a journal or newspaper.

SUNDARA IYER J. observed: that it is very doubtful whether the language of the section supports the contention that Section 81 applies to public documents and not to newspapers; that the existence of a comma after the word "Journal" is against such contention; that even otherwise, the natural import of the words in the section do not appear to favour the view that the paper "printed by the Queen's printer" not only qualifies the expression "private Act of Parliament" but also "newspaper or journal;" that if once a person is proved to be a publisher of a newspaper, then a presumption under Section 81 can be drawn that what purports to be a newspaper of a particular name is that paper and that every copy of it was issued by the publisher of that paper; but the presumption under Section 81 does not include a presumption that it was printed and published by a person by whom it purports to be.[18]

Where a person was prosecuted for publication of defamatory matter in a newspaper and the question was whether the matter amounted to defamation, it was held that production of a copy of the newspaper raises a presumption of the publication by him and the burden shifts to the accused to disprove it.[19]

An extract of Government notification, in a newspaper is inadmissible[20] and so is the translated copy of a news item in absence of the whole newspaper having been filed.[21]

The Nagpur High Court in *Hasanali* v. *Dara Shah*[22] following *Cliquot's Champague's* case 3 Wall (U.S.) 114, held that a catalogue of a firm is good evidence of the price etc., of the goods, and it is not hearsay.

The Commercial Community would normally rely on market reports in newspapers which are based on general survey of the whole market. COOLEY J. observed: "Evidence of the state of the markets as derived from the market reports in the newspapers should not have been excluded..... As a matter of fact such reports which are based upon a general survey of the whole market and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries or individual sales or inquiries".[23]

Presumption as to Gazettes in electronic forms.

[24][S. 81-A. The Court shall presume the genuineness of every electronic record purporting to be the Official Gazette, or purporting to be electronic record directed by any law to be kept by any person, if such electronic record is kept substantially in the form required by law and is produced from proper custody.]

COMMENTS

1. THE INFORMATION TECHNOLOGY ACT, 2000 PRESUMPTION AS TO GAZETTES IN ELECTRONIC FORMS

The genuineness of the electronic records purporting to be the Official Gazette or purporting to be the electronic record directed by any law to be kept by a person shall be presumed, provided that it is substantially kept in accordance with the form required by the law and is produced from proper custody.

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18. *Jeremiah* v. *Vas*, ILR 36 Mad 457.
19. *Dilip Chakraborty* v. *Public Prosecutor*, 1976 CrLJ 1300 (Cal).
20. In re : *Kottapalli Raghauiah*, AIR 1953 Mad 780; *Motilal Nehru* v. *R*, AIR 1931 All 12.
21. *Binod Kumar Jain* v. *Gauhati Municipal Corporation*, AIR 1994 Gau 96 (para 11).
22. AIR 1949 Nag 282.
23. *Sisson* v. *Cleveland & Co.*, 14 Mich 496.
24. Inserted by the Information Technology Act, 2000, S. 92 and Sch. II (w.e.f. 17-10-2000)

Presumption as to document admissible in England without proof of seal or signature.

S. 82. When any document is produced before any Court, purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

COMMENTS

1. PRINCIPLE

This section enables the courts to recognise presumptions with regard to certain classes of documents which are recognized in English Courts. The Court must presume (*a*) that the seal or stamp or signature is genuine; and (b) that the person signing the document held, at the time when he signed, the judicial or official character he claims. Documents which, without proof of the seal or signature, or of the official character of the person by whom they purport to have been signed, are admissible in England, will be admissible in Courts in India.

LORD BROUGHAM'S Act of 1851 (14 and 15 Vic c. 99) Section 11 was in the following terms: "Every document which, by any law now in force or hereafter to be in force, is or shall be admissible in evidence of any particular fact in any court of Justice in England or Wales or Ireland without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purpose in any Court of Justice of any of the British colonies, or before any person having in any of such colonies, by law or consent of parties, authority to hear, receive and examine evidence, without proof of the seal or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same." Section 11 and Section 19 of the aforesaid Act which included India in the definition of "British colonies" were repealed by the Indian Evidence Act (see Section 2 of the Evidence Act, and the Schedule to the Act) and instead the present section has been enacted, whch substantially reproduces the repealed sections of LORD BROUGHAM'S Act.

Certified copies of the Probates granted by the Probate Division of the High Court of England, are admissible without proof under Section 82.[25]

A certificate issued by the Manchester Chamber of Commerce testifying about the existence of a strike of coal mines is not a document coming within Section 82.[26]

Presumption as to maps or plans made by authority of Government.

S. 83. The Court shall presume that maps or plans purporting to be made by the authority of the Central Government or any State Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

SYNOPSIS

1. *Principle* ... 747
2. *Maps or Plans made by Private Persons* ... 748
3. *Maps prepared for any cause* ... 748
4. *Consent or Waiver by parties* ... 748

25. *Black Wood and Sons Ltd.* v. *Parasuran*, AIR 1959 Mad 410.
26. *Girdhardas* v. *Kerawala*, AIR 1926 Bom 253.

COMMENTS

1. PRINCIPLE

According to this section maps and plans purporting to have been made by the authority of the Central or the State Government, shall be presumed to have been so made and be accurate. Other maps and plans which are made for the purpose of any cause or by any other agency must be proved to be accurate like any other fact. Where maps are prepared by private persons no presumption in favour of accuracy can be drawn under this section.

This section must be read with Section 36, which deals with statements in maps, charts and plans. These are provable under Sections 77 and 79 by the production of certified copies.

The presumption as to accuracy is limited only to maps or plans made under the authority of Government.[27] Such maps or plans contain the results of inquiries made under competent public authority. In all other cases proof of accuracy is needed.

There is a distinction between relevancy and accuracy of maps and plans. According to Section 36 of this Act the statements of facts made in maps or charts published and generally offered for sale, and in maps or plans made under the authority of Government (Central or State) are by themselves relevant facts. Unless the statement of facts made in maps or plans are held to be relevant for a decision of a fact in issue before the Court, no question of drawing a presumption under Section 83 would arise. Under Section 36 there is no mention of presumption as to the accuracy of the statement of facts made in maps or plans.[28]

The presumption under this section is not conclusive and is rebuttable. In the absence of evidence to the contrary, the court shall presume the accuracy of the maps and plans prepared by the authority of Central or State Government as they would be made on the results of certain enquiries by competent officers concerned with due publicity of matters in which the public are interested.[29]

Regarding maps printed and expressly bearing an endorsement of the Government, presumption of accuracy arises under Section 83.[30]

RENELL'S MAP in regard to road surveys and river surveys were held to be scientific and accurate and a presumption of accuracy should be drawn under Section 83. But the village sites shown in that map which was published before 1917 were held to be approximate.[31] Subsequently RENELL'S MAP was withdrawn from circulation by the Government and hence was held not admissible.[32]

Entries in the Cadastral survey map have presumptive value against the landlord of a neighbouring estate.[33]

Relying on a map published by the Government it was held that the revocation of a licence for the supply of electric energy given to a company was valid as the company supplied the electricity to an area outside the area of supply.[34]

In a case where a property in dispute was purchased from the Custodian Department, it was held that in the absence of evidence to the contrary, there was presumption of the accuracy in respect of the valuation forms and line plans prepared as per the rules made under the Displaced Persons (Compen-

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27. *Rahimatullah Khan* v. *Secretary of State for India*, (1913) PR No. 63 of 1913 (Civil); *Secretary of State* v. *Chunanlal Jamnadas*, (1941) 44 Bom LR 295 : (1942) Bom 357.
28. **See** *Ram Kishore Sen* v. *Union of India*, AIR 1965 Cal 282.
29. *Jagadindra* v. *Secretary of State*, 30 IA 44 : ILR 30 Cal 291 PC; *Tarakdas* v. *Secretary of State*, AIR 1935 PC 125.
30. *Balai Chandra Ghose* v. *Tarapada Ghose*, ILR (1966) 2 Cal 147.
31. *Haradas* v. *Secretary of State*, AIR 1917 PC 86, but Gujarat High Court has held to the **contrary** by holding that no presumption as to accuracy of survey maps and charts can be attached unless surveyors were examined, *Prabhatbhai Shankerbhai Parmar* v. *Mahijbhai Nanabhai Parmar*, 1998 AIHC 4395 (paras 14 and 15) (Guj). (It seems that the learned counsel failed to bring the view of the Apex Court to the notice of his Lordship); *Narash Narayan Roy* v. *Secretary of State*, AIR 1923 PC 1 : 50 IA 121; *Secretary of State* v. *Ananda Mohan Roy*, AIR 1921 Cal 661; *Nanda Lal* v. *Pramatha Nath*, AIR 1933 Cal 222 (concerning with village sites).
32. *Gadadhar Choudhury* v. *Sarat Chandra Chakrauarty*, AIR 1941 Cal 193.
33. *Radha Kishun* v. *Shyam Das*, AIR 1933 Pat 671.
34. *Electric Supply Co. of Burdwan* v. *State of West Bengal*, AIR 1958 Cal 85.

sation and Rehabilition) Act of 1954, as they are prepared under the authority of the Government [35] The development plan prepared in compliance with the statutory provisions whose validity was never challenged and presumption of its correctness never rebutted, will be taken to be accurate.[36]

2. MAPS OR PLANS MADE BY PRIVATE PERSONS

The Supreme Court in *Ram Kishore* v. *Union of India,*[37] held that in the case of maps prepared by private persons and not under the authority of the Government, no presumption in favour of the accuracy can be drawn under Section 83. Where a village was shown as being in a particular district in the maps prepared under the authority of the Government, a presumption shall be drawn as to its accuracy under Section 83 and no importance can be attached to the recitals in private documents to the contrary.[38]

Even if a map or plan is made under the authority of Government if it is not made for a public purpose but for private purposes it does not come within the meaning of this section. Where the Government was in possession of a *Mahal* merely as a private proprietor, a map prepared by an officer in charge of the *Mahal,* it was held the accuracy could not be presumed under this section.[39] Where a map was prepared at the instance of collector as a holder of a Trust Estate, it was held Section 83 has no application as it was a private document.[40] Where a collector ordered survey and drawing of a map of the disputed area of a river bed, it was held that as the map was prepared for a specific purpose, it would neither come under Section 36 nor under Section 83.[41]

3. MAPS PREPARED FOR ANY CAUSE

The Privy Council held that no presumption as to accuracy can be drawn in regard to a map prepared in a suit showing the limits of a particular Mahal as it was not prepared under any authority of the Government nor was it published generally for public sale nor was it related to any matter of public or general interest. Such private map is not admissible in evidence against the persons who are not parties to the prior suit unless proved to be accurate.[42] The accuracy of private maps or maps prepared for any cause has to be proved by the person who prepared it.[43]

The sketch map prepared on the basis of the cadastral map is not admissible in evidence.[44]

4. CONSENT OR WAIVER BY PARTIES

Where both parties relied on a map or plan and neither party raised any objection about the proof of its accuracy, it was held that proof of it was waived and it would be admissible without proof.[45]

Presumption as to collection of laws and reports of decisions.

S. 84. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country,

and of every book purporting to contain reports of decisions of the Courts of such country.

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35. *Mannumal* v. *Prit Bai,* 1970 Raj LW 302.
36. *Morvi Municipality* v. *Arunodaya Mills Ltd.,* AIR 1995 Guj 109 (Paras 11-13).
37. 1966 SC 644.
38. **See also** *Shibcharan* v. *Nil Kantha,* 17 CLJ 642.
39. *Junmejoy* v. *Dwarkanath,* 5 Cal 287; *Dinomani* v. *Brojomohini,* ILR 29 Cal 187 : 29 IA 24 (PC); *Upendranath* v. *Chairman, Calcutta Corporation,* 16 CWN 116; *Ramachander* v. *Banshidhar,* ILR 9 Cal 741; *Harihar Prasad* v. *Janak Dulari,* AIR 1941 Pat 118.
40. *Preonath* v. *Durgatarini,* 14 CLJ 578.
41. *Kanto Prashad* v. *Jaggut,* ILR 23 Cal 335; *Rahimuddin* v. *Bhabangana,* 19 IC 572.
42. *Kesho Prasad Singh Bhadur* v. *Bahuria Bhagogna Kuer,* AIR 1937 PC 69 : ILR 16 Pat 258; *Damodaran* v. *Karimba Plantation Co. Ltd.,* AIR 1959 Ker 358; **See also** *Ram Kishore* v. *Union of India,* AIR 1965 Cal 282, *Ram Kishore* v. *Union of India,* AIR 1966 SC 644.
43. *Damodaran* v. *Karimba Plantations Co. Ltd.,* AIR 1959 Ker 358; *Ram Kishore Sen* v. *Union of India,* AIR 1965 Cal 282.
44. *Coal India Ltd.* v. *Ananga Mohan Dutta,* 1998 AIHC 2877 (para 8) (Gau).
45. *Md. Sulaiman* v. *Badruddin,* AIR 1940 Lah 309; **see also** *Madhabi* v. *Gagancndra,* 9 Cal WN 111.

COMMENTS

1. PRINCIPLE

This section should be read along with Section 38, which makes relevant statements as to any law and rulings contained in officially printed books of any country. It dispenses with the proof of the genuineness of authorized books of any country containing laws and reports of decisions of courts. Section 57 authorizes the Courts to take judicial notice of the existence of all laws and statutes in India and in the United Kingdom. Section 74 recognizes statutory records to be public records. Section 78 lays down the method of proving the statute passed by the Legislature.

WIGMORE (Section 2151) says:—

The intolerable inconvenience of having to prove the genuineness of printed matter purporting to be published by the Government has led to general concession, by judicial decisions or by statute, that such purporting publications, at least when in the form of standard official documents constantly issued and referred to are assumed to be genuine.

The only effect of Section 38 and 84 read together is that the court may take judicial notice of a publication containing foreign law, if it is issued under the authority of the foreign government concerned, and may accept the law as set out in the publication as the law in force in the particular foreign country at the relevant time. But, such a publication can not be evidence, that what is contained in it, is the whole law, which can only be proved by calling an expert as provided by Section 45.[46]

The court has to give its reasons, after satisfying itself that it is necessary to consider the whole law of a foreign country for the decision of a case on hand and then call an expert to place the whole law of that country.[47]

So far as India is concerned the judicial decisions are being printed and published by the Government, as Indian Law reports under the India Law Reports Act 18 of 1875.

The report of a case in a newspaper is not within this section as the newspaper cannot be considered to be a book purporting to contain reports of decisions.[48]

Regarding the law of limitation which was made in Kota State prior to 1942, when the original record was not available, it was held that Hidayat Ghair Mansukhshuda, Singha Dawan, bearing Kota Coat of Arms, purporting to have been published under the authority of His Highness of Kota, should be presumed to be genuine, though it did not contain reference to the order of His Highness, as the presumption would be in favour of its validity.[49]

Presumption as to powers-of-attorney.

S. 85. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, Indian Consul or Vice-Consul, or representative of the Central Government, was so executed and authenticated.

COMMENTS

1. PRINCIPLE AND SCOPE

This section deals with the presumption in respect of a power of attorney regarding its execution and authentication by a notary public, or any court, Judge, Magistrate, Indian Consul or vice consul or representative of the Central Government. The above named persons are the authorities before whom the power of attorney is to be executed, and who, would authenticate them. When a power of attorney is so

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46. *Kumar Jagadish Chandra Sinha* v. *Commissioner of I.T., West Bengal,* AIR 1956 Cal 48.
47. *Hindustan Heavy Chemicals Ltd.* v. *Krebs & Cie S.A. Paris,* ILR (1972) 1 Cal 506.
48. *Superintendent and Remembrancer of Legal Affairs* v. *Sardar Bahadur Singh,* AIR 1969 Cal 451.
49. *Bhanwar Lal* v. *Lila Dhar,* 1959 Raj LW 323.

executed and authenticated and tendered in evidence the court shall presume the due execution and authentication.

This section is an extension of a provision contained in the Registration Act, with reference to a power of attorney executed for the purpose of procuring the registration of conveyances or other instruments.

WHARTON defines the word 'power of attorney' as:—"A writing given and made by one person authorising another, who in such a case, is called the attorney of the person (or donee of the power), approving him to do any lawful act instead of that person, as to receive rents, debts, to make appearances and application in court, before an officer for registration and the like. It may be either general or special i.e., to do all acts or to do some particular act". This expression is not defined in the Evidence Act.

Power-of-attorney includes any instruments empowering a specified person to act for and in the name of the person executing it.[50]

The word 'notary public' is defined by WHARTON in his LAW LEXICON as follows:—"A 'notary public' is an officer who takes notes of anything which may concern the public; he attests deeds or writings to make them authentic in another country, but is principally employed in mercantile affairs, to make protests of bills of exchange, etc".

Under Section 138 of the Negotiable Instruments Act, 26 of 1881, the Central Government is authorised to appoint notaries public within any local area. Under Section 2(d) of the Notaries Act of 1952 any person can be appointed as a notary and the duties of the notary are given in Section 8 of the said Act.

This expression 'notary public' occurs in Section 78, Cl. (6) of this Act and in Section 33 of the Registration Act, 1908.

Under Section 69 of the Registration Act 1908, a Register of the power of attornies is to be maintained by the registering officer. Under Section 74(1)(iii) of the Evidence Act, an entry in that register is a public document forming the act or record of the act of a public officer in the discharge of a statutory duty imposed upon him, a certified copy of the entry in that register would be admissible under Section 76 read with Section 63(1) and it would be proof of the original entry by virtue of Section 65(*e*) of the Evidence Act. Such entry would also be relevant under Section 35 of the Evidence Act. But what weight is to be attached to such an entry would depend upon the accuracy of the abstract of the power of attorney.[51]

Section 85 is mandatory though it is not exhaustive. Under Section 57(6) of this Act the court shall take judicial notice of the seals of the Notary public.[52] Where the notary put the seal on the document a presumption under Section 57(6) can be raised regarding the genuineness of the seal of the said notary.[53]

The Supreme Court in *Jugraj Singh* v. *Jaswant Singh*[54] observed: "Where the power of attorney was presented for registration and the endorsement of notary public shows that it had been subscribed and sworn before him, there is a presumption that he must have satisfied himself in discharge of his official duties, that the person executing it is the proper person; that the fact that the registrar does not say so in his endorsement, that he has satisfied himself, is not material". In the above Supreme Court case[55] the vendor of the property was in U.S.A., and he executed the power of atttorney which was found to be not duly authenticated. On the basis of that power a sale deed was executed in India by the power of attorney agent. The vendor executed a second power of attorney duly authenticated ratifying the earlier power of attorney; it was held by the Supreme Court that the second power of attorney validates the transaction of sale and registration eventhough both were earlier to the second power of attorney; that such ratification relates back to the date of the act done and the agent is put in the same position as if he had authority to do it at that date; that the illegality of the registration was thus cured by the second power of attorney.

The Calcutta High Court observed: "Registration is a solemn act, to be performed in the presence of a competent official appointed to act as Registrar, whose duty is to attend the parties during the

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50. Indian Stamp Act, S. 2(21).
51. *Pattu Kumari Bibi* v. *Nirmal Kumar Singh*, AIR 1939 Cal 569, 577.
52. *Performing Right Society Ltd* v. *Indian Morning Post Restaurant*, AIR 1939 Bom 347.
53. *Rajesh Wadhwa* v. *Sushma Govil*, AIR 1989 Del 144.
54. AIR 1971 SC 761.
55. AIR 1971 SC 761.

registration and see that the proper persons are present, are competent to act and are identified to his satisfaction and all things done before him in his official capacity and verified by his signature will be presumed to be done duly and to be in order. Of course it may be shown that a deliberate fraud upon him has been successfully committed; but this can only be on very much stronger evidence than is forthcoming here".[56]

As there is no prescribed or established form of the nature and manner of authentication by a notary public, the same has to be gathered from the tenor, facts and circumstances of the power of attorney and its authentication by a notary public.[57]

Two conditions have to be satisfied for applying the presumption under Section 85 in respect of the execution of a power of attorney:

(1) It must be executed before a notary public or any other person referred to in Section 85.

(2) It must be authenticated by the notary public or any person mentioned in Section 85. If one of the conditions is not satisfied Section 85 does not apply to raise any presumption in favour of that power of attorney.[58]

When a document purporting to be a power of attorney and to have been executed before, and authenticated by, a notary public is produced before a Court, it was held that an affidavit of identification that the person, purporting to make the power of attorney, was the person named therein, is unnecessary.[59]

Though there may not be any presumption under Section 85, in favour of a power of attorney, it does not follow that there is an opposite presumption that it has not been duly executed.[60]

B as a power of attorney agent of A executed a registered sale deed in respect of A's property in favour of C, C filed a suit to evict a tenant from the property and his suit was dismissed and it was confirmed by the appellate court as the power of attorney was found defective. During the pendency of the second appeal preferred by C a fresh pwoer of attorney duly executed by A and registered before the sub-Registrar validating all past transactions done by N, was filed in the second appeal. It was held that the second power of attorney is admissible in second appeal under Order XLI, Rule 27, C.P.C. without further proof and it must be taken to have cured the defect in the earlier power of attorney and validated the sale.[61]

The purpose of Sections 57(6) and 85 is to cut down recording of evidence. For such matters, like the due execution of a power of attorney in the present day of international commerce, there is no reason to limit the word 'notary public' in Section 85 or Section 57(6) to notaries appointed in India only. If the interpretation of the notary public is limited to notaries appointed in this country only it will become impossible to carry on commerce with foreign countries.[62]

The very purpose of drawing a presumption under Sections 57 and 85 of the Evidence Act, would be nullified if proof is to be had from the foreign country, whether a particular person who had attested the document as a notary of that country is in fact a duly appointed notary or not.[63]

A power of attorney in favour of a company's permanent delegate in Delhi was authenticated by a Judge of the foreign country. Its due execution and authentication was presumed.[64]

It was held by the Calcutta High Court that by reason of the absence of reciprocal arrangements between India and Pakistan regarding powers of attorney, it cannot be presumed in regard to a power of

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56. *Gangamoyi Debi* v. *Troilucyanath Chowdhry*, ILR 33 Cal 537.
57. *Punjab National Bank* v. *Parmesh Knitting Works*, AIR 1986 P&H 214.
58. *Electric Construction Equipments Co., Ltd.* v. *Jagjit Electric Works, Sirsa*, AIR 1984 Del 363.
59. In the *Goods of Mylne*, ILR 33 Cal 625.
60. *Ram Kailash Kunwar* v. *Ishwari Saran*, AIR 1936 All 475.
61. *Raja Ram* v. *Jagdish Prasad*, 1979 WLN 756 : 1980 Raj LW 223.
62. *National and Grindlays Band Ltd.* v. *Wovld Scienee News*, AIR 1976, Del 263.
63. *Rajesh Wadhwa* v. *Sushma Govil*, AIR 1989 Del 144.
64. *Rudnap Export-Import* v. *Eastern Associates Co.*, AIR 1984 Del 20.

attorney executed and authenticated in Pakistan executed before and authenticated by a notary public within the meaning of this section.[65]

However, the Allahabad High Court held that in view of Section 2(d) and Section 3 of the Notaries Act 53 of 1952, Section 85 applies not only to notaries public as defined in the Notaries Act, but also to notaries public functioning in other countries; that documents authenticated before notaries public functioning in other countries (Pakistan) must be presumed to have been duly authenticated within Section 85.[66]

2. AUTHENTICATION

It was held that the authentication under this section is not merely attestation, but it means that the person authenticating has assured himself of the identity of the person who has signed the instrument as well as the fact of execution, it is for this reason that the presumption under this section, unless rebutted, stands and the document can be admitted in evidence as a document executed by the person alleged to have executed it without any further proof.[67]

No particular form of authentication by a notary public is given under Section 85. Notary public need not use the word 'authentication' in the attestation made by him on the document. Attestation by a notary public stating 'subscribed and sworn to before me' is valid authentication.[68] As there is no prescribed or established form of the nature and manner of authentication by a notary public, the same has to be gathered from the tenor, facts and circumstances of the power of attorney and its authentication by a notary public.[69] The execution and authentication of a document cannot be doubted merely because the document had not been drafted or typed out by the executant before the Notary Public.[70]

A witness does not need a power of attorney or any authority in writing from the party calling him as its witness to depose about certain facts before a Court which are within his special knowledge.[71]

3. PRESUMPTION AS TO AUTHENTICATION

Where there was thumb impression of the executant of the power of attorney and the Magistrate used a rubber stamp and put his signature on the basis of the identification made by an advocate, it was held that the presumption under secion 85 may operate in favour of the party relying on a document and to the prejudice of the party alleging that the document is not a genuine one; that for the purpose of such presumption to operate, the authentication must be clear, specific, decisive and benefit of any doubt; if there is the slightest doubt the Court must not rely on the presumption under Section 85.[72]

Though a presumption of execution and the authentication is drawn under Section 85, the document itself is not sufficient to prove the statements contained in it. The statements are to be proved like any other facts.[73]

In re : *Sladen*[74] **dissenting from** the decision, in the goods of *A.J. Primrose* (deceased) (16 Cal 776), it was held that this section is not exhaustive regarding the proof of power of attorney and there are other modes of proving the execution of it, for example, by an affidavit. In the Madras case the power of attorney did not purport to have been executed in the presence of a notary public or any other of the

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65. *Haji Abdul Gaffar* v. *Madan L. Khandelwal* ILR (1966) 2 Cal 235; *D. Sardar Singh* v. *Pissumal*, AIR 1958 AP 107; *Nar Bhadur* v. *Anil Krishna*, AIR 1970 Manipur 57.
66. *Abdul Jabbar* v. *Second Additional District Judgearai*, AIR 1980 All 369 **dissenting from** *Sardar Singh* v. *Pissumal H. Bankers*, AIR 1958 AP 107 and *Nar Bhadur* v. *Anil Krishna*, AIR 1970 Manipur 57. **See also** *National and Grindlays Bank* v. *World Science News*, AIR 1976 Del 263.
67. *Wali Mohammad* v. *Jamaluddin*, AIR 1950 All 524; *Kulsumun-nisa* v. *Ahmadi*, AIR 1972 All 219.
68. *Jugraj* v. *Jaswantsingh*, AIR 1967 Punj 345; **confirmed in** *Jugraj* v. *Keswantsingh*, AIR 1971 SC 761. **See also** *Northland Traders* v. *Bank of Baroda*, AIR 1994 All 381 (para 11).
69. *Punjab National Bank* v. *Parmesh Knitting Works*, AIR 1986 P&H 214.
70. *Raj Kumar Gupta* v. *Des Raj*, AIR 1995 HP 107 (para 13).
71. *Chander Kanta Singhal* v. *M/s. Kapadia Exports*, 1998 AIHC 153 (paras 20-21) (Del).
72. *Mohanshet* v. *Jayashri*, AIR 1979 Bom 202.
73. *Siva Pratap Bhattadu* v. *Commissioner of I.T., Madras* AIR 1924 Mad 880; **relying on** *Salimatul Fatima* v. *Kovilashpoti Narain Singh*, ILR (1890) 17 Cal 903 (which **dissented** *Kristo Nath Koondoo* v. *T.F. Brown*, ILR (1886) 14 Cal 176; *Nar Bahadur* v. *Anil Krishna*, AIR 1970 Manipur 57, at 62; *Thama* v. *Govind*, (1907) Part II 9 Bom LR 401.
74. ILR 2 Mad 492

persons designated in Section 84, but one of the attestors gave a declaration before the notary public that he witnessed the execution of the power of attorney by one of the executants and the signature of the other attesting witness was genuine. That declaration was certified by the notary public. On these facts it was held the power of attorney was sufficiently proved.[75]

Genuineness of a power of attorney can be presumed if it is executed before a Notary Public, or any Court, or Judge, or Magistrate.[76]

Presumption as to electronic agreements.

[77]**[S. 85-A. The Court shall presume that every electronic record purporting to be an agreement containing the digital signatures of the parties was so concluded by affixing the digital signature of the parties].**

COMMENTS

1. THE INFORMATION TECHNOLOGY ACT, 2000
PRESUMPTION AS TO ELECTRONIC AGREEMENTS

S. 85-A inserted by the above mentioned Act says that every electronic record purporting to be an agreement containing digital signatures of the parties, so concluded by affixing the digital signature of the parties, shall be so presumed by the Court.

Presumption as to electronic records and digital signatures.

[78]**[S. 85-B. (1) In any proceedings involving a secure electronic record, the Court shall presume unless contrary is proved, that the secure electronic record has not been altered since the specific point of time to which the secure status relates.**

(2) In any proceedings, involving secure digital signature, the Court shall presume unless the contrary is proved that—

(*a*) the secure digital signature is affixed by subscriber with the intention of signing or approving the electronic record;

(*b*) except in the case of a secure electronic record or a secure digital signature, nothing in this section shall create any presumption relating to authenticity and integrity of the electronic record or any digital signature.]

COMMENTS

1. THE INFORMATION TECHNOLOGY ACT, 2000
PRESUMPTION AS TO ELECTRONIC RECORDS AND DIGITAL SIGNATURES

In any proceedings involving a secure electronic record, unless contrary is proved, the Court shall presume that such record has not been altered since the specified point of time to which the secure status relates and the secure digital signature was affixed by the subscriber with the intention of signing or approving the electronic record. There shall be no presumption relating to the authenticity and integrity of the electronic record or any digital signature.

For secure system, see S. 2(ze) of the I.T. Act.

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75. **See also** *Performing Right Society Ltd.* v. *Indian Morning Post Restaurant*, AIR 1939 Bom 347; *Yogesh Singh* v. *Niranjanlal*, AIR 1981 Del 222; *Punjab National Bank* v. *Parmesh Knitting Works*, AIR 1986 P&H 214.
76. *Sukhdeo* v. *Bhanwarlal*, 2000 AIHC 2461 (para 45) (Raj).
77. Inserted by the Information Technology Act, 2000, S. 92, Sch. II (w.e.f. 17-10-2000).
78. Inserted by the Information Technology Act, 2000, S. 92, Sch. II (w.e.f. 17-10-2000).

Presumption as to Digital Signature Certificates.

[79][**S. 85-C. The Court shall presume, unless contrary is proved, that the information listed in a Digital Signature Certificate is correct, except for information specified as subscriber information which has not been verified, if the certificate was accepted by the subscriber.**]

COMMENTS

1. THE INFORMATION TECHNOLOGY ACT, 2000 PRESUMPTION AS TO DIGITAL SIGNATURE CERTIFICATES

The Court has to presume, unless contrary is proved that the information listed in a Digital Signature Certificate is correct but it does not apply to the information specified as subscriber information which has not been verified, if the certificate was accepted by the subscriber.

Presumption as to certified copies of foreign judicial records.

S. 86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of India or of Her Majesty's Dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of the Central Government in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.

An officer who, with respect to any territory or place not forming part of India or Her Majesty's Dominions, is a Political Agent therefor, as defined in Section 3, clause (43), of the General Clauses Act, 1897, shall, for the purposes of this section, be deemed to be a representative of the Central Government in and for the country comprising that territory or place.

COMMENTS

1. PRINCIPLE AND SCOPE

This section deals with the presumption in respect of certified copy of any judicial record of a country, not forming part of India, or of the Dominions as genuine and accurate. The presumption contemplated under this section is permissive and a discretion is given to the Court whether to draw the presumption under the section or not, as the expression 'may presume' is used in this section. The definition of the expression "May Presume" is given in Section 4 of this Act.

The explanation in the last paragraph of this section was added by Section 4 of the Amending Act 5 of 1899, stating that an officer who is a Political Agent as defined in Section 3 of Cl. (43) of the General Clauses Act of 1897 of any territory or place not forming part of India or Her Majesty's Dominions; shall be deemed to be a representative of the Central Government in and for the country comprising the territory or place. The expression 'Political Agent' in Section 3(43) of the General Clauses Act is defined as:—"Political agent shall mean (a) in relation to any territory outside India, the principal officer by whatever name called, representing the Central Government in such territory; and (b) in relation to any territory within India to which the Act or Regulation containing the expression does not extend, any officer appointed by the Central Government to exercise all or any of the powers of a political agent under that Act or Regulation.

In a case under the Extradiction Act the expression 'Political Agent' was held to include as Assistant Political Agent.[80]

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79. Inserted by the Information Technology Act, 2000, S. 92, Sch. II (w.e.f. 17-10-2000).

80. *Hadibandhu Padhan* v. *Emperor*, AIR 1946 Pat 196.

This section has to be read with Section 14, CPC., which states "The court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgement, that such judgment was pronounced by a Court of a competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction".

In the absence of a certificate referred to in this section a foreign judgment is not admissible in evidence as the provision in Section 86 is imperative and must be complied with.[81]

The admission of a judgment is not a condition precedent for raising a presumption under Section 86. The presumption may be drawn before the judgment is admitted.[82]

This section is not exhaustive of the modes of proof of foreign judicial records.[83]

Uncertified copies of a foreign judicial record may be proved by a competent witness deposing to the correctness of the copies.[84]

A certified copy of a foreign judicial record may be proved by a witness deposing that it was sealed and certified by the Registrar of a foreign court.[85]

Where a certified copy of a deposition given in a Court in Kutch State was tendered in evidence and when it was found that the certification was not done in the manner required by Section 76, it was held that it is not inadmissible. As Section 86 does not exclude other proof. Section 114 may be applied for drawing the presumption that a copy is a correct copy of the record of the deposition.[86]

It was held that if the presumption is not available under one section, it can still be drawn under another section of the Evidence Act if available. It all depends upon the circumstances available in a case as applicable to a particular document.[87]

If a copy of a foreign judicial record purports to be certified in a given way, the Court may presume it to be genuine and accurate. It, however, does not exclude proof, for, under Sections 65 and 66, secondary evidence may be given of public documents, without notice to the adverse party, when the person in possession of documents is out of the reach of, or not subject to, the process of the court.[88]

Presumption as to books, maps and charts.

S. 87. The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for its inspection, was written and published by the person and at the time and place, by whom or at which it purports to have been written or published.

COMMENTS

1. PRINCIPLE

This section deals with the presumption in regard to books containing information on matters of public and general interest and also in respect of statements in any published map or chart. The presumption is only in respect of the authorship, time and place, but not with regard to the accuracy of the facts contained in such book, map, or chart.[89]

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81. *State* v. *Abdul Hamid*, AIR 1957 Punj 86; *Murali Das* v. *Achutt Das*, ILR 5 Lah 105 : AIR 1924 Lah 493; (A certificate required under this Section cannot be dispensed with on the ground that it can be obtained any time. '
82. *Badat and Co.* v. *East India Trading Co.*, AIR 1964 SC 538.
83. *State* v. *Abdul Hamid*, AIR 1957 Punj 86.
84. *Haranand* v. *Ramgopal*, ILR 27 Cal 639 : 27 IA 1 PC.
85. *Mrnomohiney* v. *Grees Chander* (1873) 8 Mad Journal 14.
86. *Vallabdas Mulji* v. *Pranshankar*, AIR 1929 Bom 24.
87. *Ramjas* v. *Surendra Nath*, AIR 1980 All 385 (FB).
88. *Haranund* v. *Ram Gopal*, (1899) 2 Bom LR 562 : 27 IA 1 : ILR 27 Cal 639; *Vallabhdas* v. *Pranshankar*, (1926) 30 Bom LR 1519 : AIR 1929 Bom 24. This section contains an instance which Section 65(f) seems to refer to.
89. *Brajraj Singh* v. *Yogendra Pal Singh*, AIR 1952 MB 146.

A map is nothing but statement of the maker thereof regarding the state of configuration of a particular site and objects standing thereon, by lines and pictorial representations, instead of by words of mouth, and admitting such a map in evidence without calling the maker thereof is admitting statements by a third party who is not called as witness and amounts to admitting hearsay evidence. So mere proof of the map by itself is only proof of the fact of the preparation of the map and apart from independent proof about the correctness of its contents it can not be said to have any bearing on the matters in issue and cannot be admitted into evidence unless shown to be admissible under any section of this Act. But a map and a *chitta* prepared under the orders of the defendants and filed along with collection papers showing collection on basis of the map and the *chitta* were held to be rightly admitted in evidence under Section 13.[90]

For the proper understanding of the scope of this section reference may be made to Sections 36, 57, 83, 90 and 114 of the Evidence Act. Section 36 states, when the statements of facts are made in a published map or chart generally offered for public sale, or when they are made under the authority of the Government, they would be relevant if such statements are of facts in issue or of relevant facts. Section 57(13) says that in regard to matters of public history, literature, science or art the court may resort for its aid to appropriate books and documents for reference. Section 83 says that the court shall presume the accuracy of the maps and plans purporting to be made by the authority of the Central or State Government, but not private plans or plans made for any particular purpose. Section 90 says that if it is an ancient document of over 30 years and produced from a proper custody the court may presume that the signature and every other part of the document purporting to be in the handwriting of a person is in his handwriting and that it was duly attested and executed. That section is applicable to a map or a plan which is also a document. Under Section 114 there a general presumption about the existence of any fact which is likely to have happened.

Where a charitable society in England published a pamphlet on schizophrenia for collecting funds to give treatment to diseased it was held as the authorship of the pamphlet was not established, it can not be treated as an authoritative pamphlet.[91]

The Privy Council in *Martand Rao* v. *Malharao*[92] held that the opinions expressed in the official reports should not be treated as conclusive in respect of matters requiring judicial determination but there cannot be any objection in referring to the reports for purpose of gathering historical facts which are not in issue.[93]

2. MAPS AND CHARTS

Though great weight may be attached to the accuracy of the survey maps, they are not conclusive, but in the absence of evidence to the contrary, they would be presumed to be accurate.[94]

Regarding revenue survey maps, the Privy Council held that as the revenue has to be conducted by a public officer in the discharge of his statutory duty and as he has to give opportunity to all persons interested so as to enable them to make their claims and produce evidence in support of their claims, the maps prepared after due enquiry are to be presumed to be correct unless they are shown to be wrong.[95]

The accuracy as to the information contained in a map must depend upon the source from which the information is obtained.[96]

Presumption as to telegraphic messages.

S. 88. The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

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90. *Dwijesh Chandra Roy Chaudhuri* v. *Naresh Chandra Gupta*, (1946) 1 Cal 149 : AIR 1945 Cal 492.
91. *Dastane* v. *Dastane*, ILR 1969 Bom 1024 : AIR 1970 Bom 312.
92. AIR 1928 PC 10 : 55 IA 45.
93. *Rajendra Malojirao* v. *State of MB*; AIR 1953 MB 97 (FB).
94. *Secretary of State for India* v. *Maharaja Birendra Kishore Manikya*, AIR 1916 PC 141.
95. *Tarakdas Acharjee* v. *Secretary of State*, AIR 1935 PC 125.
96. *Nana Akpandja* v. *Fiaja Egblomesse*, AIR 1939 PC 143.

COMMENTS

1. PRINCIPLE AND SCOPE

This section allows the Court to presume that a message forwarded from a telegraph office to a person corresponds with the message delivered for transmission and the same was delivered to the addressee, but there is no presumption as to the person by whom the message was sent or delivered for transmission. The presumption is based on the principle that official acts are regularly performed.

This section enables the court to accept the hearsay statement as evidence of the identity of the message delivered with that handed in.

The presumption under this section is available only if it is proved that the message has been delivered to the person to whom the message is addressed.[1]

In the absence of such evidence the telegram cannot be held to have been proved. A telegram is primary evidence of the fact that the same was delivered to the assessee on the date indicated therein.[2]

The presumption under this section is only with reference to the message that is transmitted to the addressee from the telegraph office. The last portion of the section is mandatory and the court shall not make any presumption as to the person by whom such message was delivered for transmission.[3]

The Supreme Court held: "It is true that under Section 88 there is a presumption only that the message received by the addressee corresponds with the message delivered for transmission at the office of origin. There is no presumption as to the person who delivered such a message for transmission. But proof of authorship of the message need not be direct and may be circumstantial. The contents of the message received in the context of the chain of correspondence, may well furnish proof of the authorship of the message at the dispatching end".[4]

Under Section 88 the presumption is limited to what is expressively provided in the section. The form handed over into the post office by the sender and not the form delivered by the post office to the addressee, is the original of the telegram. Either the original must be produced by an official from the post office concerned or proof of its destruction given before a copy can be admitted as secondary evidence.[5]

Where a sanction order for prosecution was communicated by a telegram from a Government Office, it was held that the telegram must be proved to have emanated from the Government Office as there is no presumption under Section 88 as to the person by whom such message was delivered for transmission.[6]

Where a party sent a telegram to a Court stating that he is ill and prayed for postponement of the case, it was held that the telegram is no evidence as there is no presumption under Section 88 as to the person who sent it and when the case was pending for a number of years due to dilatory conduct of that party the court is justified in not acting upon on the telegram.[7]

Where the original message is not proved to be in the handwriting of an alleged person, Section 88 is a bar for presuming that he is the sender of the message.[8]

Where there is no evidence regarding the signature appearing on the telegram showing the identity., the telegram cannot be presumed to have been sent by the accused.[9]

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1. *Thakur Singh* v. *Emperor*, 10 Cr LJ 520.
2. *Abba* v. *Suresh*, 1984 Delhi NOC 131.
3. *Kishore Chandra* v. *Ganesh Prasad*, AIR 1954 SC 316 : 1954 SCR 919; *Raghunath* v. *R.* AIR 1933 Pat 96; *Saila Behari* v. *State of Orissa*, AIR 1966 Ori 150.
4. *Mobarik Ali Ahmed* v. *State of Bombay*, AIR 1957 SC 857 : 1958 SCR 328.
5. *Punnakotaiah* v. *Kolikamba*, AIR 1967 AP 83; *Henkel* v. *Pape*, (1871) LR 6 EX 7; **see also** *R.* v. *Regan*, (1887) 16 Cox CC.
6. *Varadarajulu* v. *R.*, AIR 1920 Mad 928 : ILR 42 Mad 885.
7. *Mohanlal* v. *Indermal*, AIR 1954 Raj 238.
8. *Raghunath Pandey* v. *Emperor*, AIR 1933 Pat 96.
9. *Sudhir Chandra* v. *State*, AIR 1971 Tripura 8 : 1971 Cr LJ 86.

A telegram was sent by the police in South Africa to the Police in Bombay stating that certain bills of exchange were stolen on which basis Bombay police started their investigation. The Bombay High Court held that the telegraph office makes no enquiries and is in no way responsible regarding the identity of the person who delivers for transmission and much less responsible for its contents. A reasonable presumption under Section 114 of the Evidence Act can be drawn that the telegram emanated from South Africa, and so it cannot be rendered inadmissible under Section 88, if in reply to the telegram a reply is sent to the sender and is acknowledged by another telegram from the sender.[10] The contents of the telegram are not evidence of the facts stated therein.[11] The presumption under this section applicable to telegraph messages would also apply to radio messages.[12] Where an advocate conveyed a notice to quit through a phonogram, it was held that it was not a valid notice; as the appearance of the name of the advocate on the phonogram was of no importance, unless it is proved.[13]

The presumption arises when the original telegram which was destroyed, was delivered to the addressee mentioned therein, especially when the opposite party fails to produce any evidence by way of rebuttal.[14]

However, the contents of the message in a telegram in the context of a chain of correspondence may furnish proof of authorship.[15]

Presumption as to electronic messages.

[16][S. 88-A. The Court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the Court shall not make any presumption as to the person by whom such message was sent.

***Explanation.*—For the purposes of this section, the expressions "addressee" and "originator" shall have the same meanings respectively assigned to them in clauses (*b*) and (*za*) of sub-section (1) of Section 2 of the Information Technology Act, 2000.]**

COMMENTS

1. THE INFORMATION TECHNOLOGY ACT, 2000 PRESUMPTION AS TO ELECTRONIC MESSAGES

The Section 88A, inserted by the said Act, provides that the Court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee corresponds with the message as fed into his computer for transmission but there shall be no presumption as to the person by whom such matter was sent.

The explanation says that the terms "addressee" and "originator" will have the same meeting as is assigned to them in clauses (b) and (za) of sub-section 1 of S. 2 of I.T. Act.

Presumption as to due execution, *etc.*, of documents not produced.

S. 89. The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

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10. *Emperor* v. *Abdul Gani*, ILR 49 Bom 878 : AIR 1926 Bom 71.
11. *Judah* v. *Isolyne Saroj Bhashini Bose*, AIR 1945 PC 174.
12. *Saila Behari* v. *State of Orissa*, AIR 1966 Ori 150; as per DAS J.
13. *Shyam Narayan* v. *Raghunath*, AIR 1977 Pat 155
14. *Manchlal* v. *Shah Manikchand*, AIR 1988 Kant 221.
15. *Saila Behari* v. *State of Orissa*, 1966 Ori 150.
16. Inserted by the Information Technology Act, 2000, S. 92, Sch. II (w.e.f. 2000).

COMMENTS

1. PRINCIPLE AND SCOPE

This section states that when a document is called for from any person and he does not produce it after proper notice to produce it the Court shall presume that the document was duly attested, stamped, and executed. This section is based on the principle that no one shall be allowed to take advantage of his own wrong.

This section is based on the principle of necessity also.[17]

If it is shown that a document is in the person's possession or power and despite notice given to him to produce the document he does not produce it, the conduct of the party justifies an inference to be drawn against him and in that case the principle of necessity is invoked and the court is authorised to presume that the document which has not been produced must have been properly attested, stamped and executed in the manner required by law.[18]

In Section 65, it is stated that secondary evidence may be given of the existence, condition or contents of a document in possession of any person legally bound to produce it and when, after the notice mentioned in Section 66 such person does not produce it. Under Section 65 such notice to produce the document as is prescribed by law is to be given. Order XVI, Rule 6 of CPC of 1908 provides for issuing or serving notice on the opposite party. If such proceedure is followed for production of a document from a person and if he does not produce it then Section 89 would come into play and the court shall presume that the document so required was duly attested, stamped and executed in the manner prescribed by law.[19]

Though the section does not refer to the person who is called to produce the document, it is obvious that it is restricted to cases where the notice is given to a party and will not apply to a document which is in the possession of a stranger who refuses to produce it though summoned to do so. The presumption as to due execution, attestation, and stamping cannot arise in favour of a party, where notice to produce the document has not been given to the opposite party.[20]

The condition precedent for the application of Section 89 is that the original document must have been called and has not been produced after a notice was given to produce it. These conditions suggest that the statutory presumption arises under Section 89 in all cases which fall under Section 65(a) and Section 66 of the Evidence Act. Once a presumption is drawn under Section 89 it can not be easily rebutted by the production of the original document at a later stage.[21]

When the plaintiff's allegation that a document was in defendant's possession is found to be correct, the defendant without producing the document cannot be allowed to contend that it was not stamped according to law.[22]

Once the plaintiff execuses himself from the production of the original documents on the plea that they are not traced or are lost, the question of giving notice for production does not arise.[23]

The presumption under this section would not arise in respect of proper stamping of the document when it is admitted that the original document was unstamped.[24]

Where a document is shown to have remained unstamped for some time after its execution the party who relies on it must prove that it is duly stamped.

Before drawing any presumption under this section, it must be proved that the documents exist and have been in possession of the opposite party.[25]

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17. *Kashibai* v. *Vinayak*, AIR 1956 Bom 65.
18. *Dilip Singh* v. *Dhaniram*, AIR 1976 Bom 38.
19. *Jang Bhadur* v. *Chandraj Singh*, AIR 1971 Oudh 406.
20. *Mirabai* v. *Jaisingh*, AIR 1971 Raj 303.
21. *Kashibai* v. *Vinayak*, AIR 1956 Bom 65.
22. *Budheram* v. *Hira*, AIR 1953 HP 52.
23. *Manilal Chhagenslal* v. *Surat Municipality*, AIR 1978 Guj 193.
24. *Md. Ayub* v. *Rahim Buksh*, AIR 1922 Lah 401 (2); *Ladha Ram* v. *Harichand*, AIR 1938 Lah 90.
25. *Ladharam* v. *Harichand*, AIR 1938 Lah 90.

When a thirty years old registered gift deed was called for by issue of notice and was not produced, it was held the secondary evidnece of the original deed can be given by production of a certified copy and it is admissible under Section 65-A, and a presumption also can be drawn that it was duly executed, attested and stamped under Section 89. In view of Section 60(2) of the Registration Act, it can also be held that the executant admitted the execution of the deed before the Registrar.[26]

When the plaintiff filed a suit for redemption of a usufructuary mortgage and it was not disputed that the record of proceedings wherein a compromise petition bearing a stamp of Re. 1 was filed, was destroyed in the Mutiny, and when the plaintiff wanted to rely on a certified copy of the compromise petition mentioning the mortgage deed the defendants raised an objection that the contract was not enforceable as the document was not properly stamped, it was held that it may be presumed that the officer before whom the original mortgage deed was presented satisfied himself that it was properly stamped, and so a presumption can be drawn under this section.[27]

2. BURDEN OF PROOF

It is true that the onus of proving the fact that the document in question is in the possession or in the power of the opponent is initially on the party seeking to ask for permission to lead secondary evidence, but in the case of a registered mortgage, in the ordinary course, the deed of mortgage would be with the mortgagee and as soon as it is shown that the execution of the mortgage was admitted by the executant before the Sub-Registrar, the mortgagee or his heirs would be required to lead some evidence to show that the document was not with them nor was it in their power.[28]

There is no presumption under this section as to the contents of the document though under Section 114, it can be presumed that the contents are not favourable to the party who withholds the document.

Presumption as to documents thirty years old.

S. 90. Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

***Explanation.*—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.**

This explanation applies also to Section 81.

ILLUSTRATIONS

(*a*) *A* has been in possession of landed property for a long time. He produces from his custody deeds relating to the land, showing his title to it. The custody is proper.

(*b*) *A* produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(*c*) *A*, a connection of *B*, produces deeds relating to lands in *B*'s possession which were deposited with him by *B* for safe custody. The custody is proper.

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26. *Rajendra Jha* v. *Tarkeshwar Prasad Agarwal*, ILR (1978) 57 Pat 426.
27. *Ahmad Ali* v. *Syed Abid Husain*, AIR 1916 PC 41.
28. *Kashibai* v. *Vinayak*, AIR 1956 Bom 65.

STATE AMENDMENT

Uttar Pradesh.—Amendments made by U.P. Act No. 24 of 1954, S. 2 and Sch. (w.e.f. 30-11-1954).

In its application to the State of Uttar Pradesh, in Section 90—

(*i*) Renumber the existing section as sub-section (1) thereof, and

(*ii*) For the words "thirty-years', substitute the words 'twenty years', and

(*iii*) Insert the following as new sub-section (2):—

"(2) Where any such document as is referred to in sub-section (1) was registered in accordance with the law relating to registration of documents and a duly certified copy thereof is produced, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to have been executed or attested."

Section 90A.

New Section 90-A, inserted by U.P. Act No. 24 of 1954.

"**90-A.**—(1) Where any registered document or duly certified copy thereof or any certified copy of a document which is a part of the record of a Court of Justice, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the original was executed by the person by whom it purports to have been executed.

(2) The presumption shall not be made in respect of any document which is the basis of a suit or of a defence or is relied upon in the plaint or written-statement.

(The explanation to sub-section (1) of Section 90 will also apply to this section.)

SYNOPSIS

1. *Principle* ... 761
2. *Purporting or proved to be thirty years old* ... 762
3. *Proper custody—explanation* ... 763
4. *Document: See Commentary under Section 3* ... 765
5. *Presumption is as to signature in a document* ... 765
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COMMENTS

1. PRINCIPLE

This section is based on the principle of necessity and convenience.

The object of this section is not to make it too difficult for persons relying upon ancient documents to utilize those documents in proving their case. It is intended to do away with the insuperable difficulty of proving the handwriting, execution, and attestation of documents in the ordinary way after the lapse of many years.

When a document is or purports to be more than thirty years old, if it be produced from what the court considers to be proper custody, it may be presumed (a) that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and (b) that it was duly executed and attested by the person by whom it purports to be executed and attested.[1] It is not necessary that the signatures of the attesting witnesses or of the scribe be proved, for if everything was proved there would be no need to presume anything.[2]

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1. *Excowree Singh Roy* v. *Kylash Chunder Mookerji*, (1873) 21 WR 45; *Hari Dhangar* v. *Biru Dasru*, (1868) 5 BHC (ACJ) 135. Fifty-year old registered deed of gift; burden was on those who alleged that the deed was fraudulent. *Fatima Bibi* v. *Irfana Begum*, AIR 1980 All 394; *Mohmedbhai Rasulbhai Malek* v. *Amirbhai Rahimbhai Malek*, AIR 2001 Guj 37 (para 9).
2. *Raghubir Singh* v. *Thakurain Sukhraj Kaur*, ILR (1938) 14 Luck 393.

Documents of 30 years old produced from proper custody could be read as evidence without formal proof as a presumption can be drawn about its execution by the person by whom it purports to have been executed.[3] The principle underlying this section is that if a private document 30 years old or more, is produced from proper custody and is on its face free from suspicion the court may presume that it has been signed or written by the person whose signature it bears or in whose handwriting it purports to be and it has been duly attested and executed, if it purports so to be. In other words documents of 30 years old prove themselves. It is extremely difficult sometimes and impossible to prove the handwriting or signature or execution of ancient documents. It is therefore presumed that all persons acquainted with the execution of documents, if any, are dead and so the proof of those facts is dispensed with. Thus the presumption relates to the execution of the documents, i.e., signature, attestation etc., but not to the truth of its contents.[4]

2. PURPORTING OR PROVED TO BE THIRTY YEARS OLD

At least *prima facie* proof is necessary to show that the document is thirty years old, for raising the presumption under Section 90, though it is a rebuttable presumption.[5] Where the party opposing the document disproves it by convincing evidence, the Court is bound to call the party relying on it to prove it but when the opposite party fails to disprove it, its validity would be presumed.[6]

It is not necessary in every case to prove that the document is 30 years old if intrinsically it purports to be that old.[7] Where the fact of execution is not in dispute in respect of deed more than 30 years, no evidence is necessary to prove its genuineness.[8] No presumption can be raised where the document is undated.[9]

Where a mere look at the document shows that it is not free from suspicion though it purports to be more than 30 years old, the court must consider the evidence giving an opportunity to both parties before raising any presumption under Section 90.[10]

The rule embodied in Section 90 is based on the impossibility of obtaining living testimony to the signing or the handwriting of a document. It logically follows that the time should run from the date which the document bears whether it is a will or any other document. Therefore the period of presumption begins from the date of execution (in the case of Wills it runs not from the date of death of the testator on which date the will become operative).[11]

The period of thirty years is to be reckoned not from the date upon which the document is filed in court, but from the date on which, it having been tendered in evidence, its genuineness or otherwise becomes the subject of proof.[12] The period of 30 years is to be commuted **from** the date of its execution **to** the date on which it was sought to be put into evidence.[13]

A document dated August 3, 1888, was produced in Court of December 19, 1917, and its genuineness was not called in question up to August 12, 1918, when the first Court gave its judgment. It was only when the case came up to the appellate court that the defendants took objection that the document had not been proved. It was held that the period of thirty years should be reckoned from August 12, 1918, when the trial court gave its decision, and the due execution of the document could

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3. *Liladhar* v. *Siaram*, AIR 1976 All 213; *Boddu Veeraiah* v. *Aripirala Venkata*, AIR 1968 AP 276.
4. **See** *Ramakrishna* v. *Gangadhar*, AIR 1958 Ori 26.
5. *P. Lakshmaiah* v. *Venkateswarlu*, AIR 1977 AP 301.
6. *Suryadevara Pullayya* v. *Suryadevara Satyanarayana*, 2001 AIHC 2807 (para 17) (AP).
7. *Ayub* v. *Bhanwarchand*, ILR 1971 Raj 30.
8. *Gulab* v. *Md. Ismail*, AIR 1916 All 205. **See also** *Ramjiban Mahato* v. *Ganesh Prasad Malavya*, 2000 AIHC 3016 (para 20) (Pat).
9. *Veerbhadrayya* v. *Ramchandra*, AIR 1923 Mad 674.
10. *Kapurchand* v. *Lalchand*, AIR 1975 Raj 178 **following,** *Mansukh* v. *Trikamsbhai*, AIR 1930 Bom 39, *Shafiq-un-Nisa* v. *Shaban Ali Khan*, ILR 26 All 581 (PC).
11. *Sarachandra Mondal* v. *Panchanann Mondal*, AIR 1953 Cal 471; *Babu Nandan* v. *Board of Revenue*, AIR 1972 All 406.
12. *Mmu Sirkar* v. *Shedoy Nath Roy*, (1897) 5 CLR 135; *Surendra Krishna Roy* v. *Mirza*, AIR 1936 PC 15 ; *Mahammad*, (1935) 53 IA 85 , (1936) 38 Bom LR 330; *Bhanwaria* v. *Ramratan*, (1953) 4 Raj 145; *Konda Reddi* v. *Pichireddy*, AIR 1925 Mad 184.
13. *Kesarapu Manikyalu* v. *Venna Perumallayya*, 2000 AIHC 590 (para 8) (AP) : AIR 2000 NOC 20 (AP).

therefore be presumed.[14] In a case, the great-grandson of Mahatma Gandhi addressed a letter to the Chief Justice of India for securing the urn containing the ashes of his great-grand father lying in a safe deposit locker in the SBI, Cuttack so as to enable him to complete the last rites as per Hindu religious practice. The SBI confirmed its existence in the locker. The entry in safe deposit register showed that it was deposited by the then Secretary to the Chief Minister of Orissa on 29-11-1950. It was held that the entry in the safe deposit register cannot be doubted since it was an old entry of 1950 made in regular course of the business of the Bank.[15] In absence of any suspicious circumstances, the presumption that the document, executed 30 years before, proves itself, arises.[16]

A 30 year old unregistered sale-deed, by invoking this section, cannot be read for collateral purpose of the possession of the plaintiff which was not otherwise proved.[17] Where the document purported to be more than 30 years old was unregistered and its attestors were not examined, Section 90 could not be invoked for the validity of its execution on the ground of the evidence of the person who had seen the document being executed.[18]

Where the finding of fact was based on a document which was not more than 30 years old, the finding was held to be based on no evidence *i.e.* on no admissible evidence and was vitiated by error of law and could be interfered with.[19]

3. PROPER CUSTODY—EXPLANATION

"The proper custody of a document means its deposit with a person and in a place, where, if authentic, it might naturally and reasonably be expected to be found".[20] Where more than 30 year old document, bearing signatures of the executants and not looking *ex facie* suspicious was produced by the son of one of the executants at the first instance, the custody being proper, presumption could be drawn in favour of the document.[21]

'Proper custody' means the custody of any person so connected with the deed that his possession of it does not excite any suspicion or fraud.[22] It is not necessary that the document should be found in the best and the most proper place of deposit. The section insists only on a satisfactory account of the origin of the custody, and not on the history of the continuance. Possibly the origin of the custody was alone regarded as material because it is intelligible that ancient documents may be overlooked and left undisturbed notwithstanding a transfer of old, or creation of new, interests.[23] In illustrations (a) and (b) the documents are produced from their natural place of custody, in (c) A's custody is proper under the circumstances. The provisions of the section read with the Explanation insist on a satisfactory account of the origin of the possession being given by the party relying upon the documents. The custody, might not be in the strictest sense legal custody, but, whether it originated in right or wrong, the origin must be explained. The court must, therefore, examine the surrounding circumstances tending to establish the connection of the party producing the document with the person with whom the documents should naturally have been.[24]

It was held by the Bombay High Court that proper custody is custody proved to have had a legitimate origin or an origin the legitimacy of which the circumstances of the case render probable.[25] The presumption being based on the rule of expendiency, unless the surrounding circumstances satisfied

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14. *Ladha Singh* v. *Hukam Devi*, (1923) 4 Lah 233 : AIR 1924 Lah 145. **See also** *Lakhi Baruah* v. *Padma Kanta Kalita*, AIR 1996 SC 1253 (para 15); *Kartar Singh* v. *Collector, Patiala*, 1996 AIHC 1538 (para 5) (P&H); *Kesarapu Manikyalu* v. *Venna Perumallayya*, 2000 AIHC 590 (paras 4 and 8) (AP) : AIR 2000 NOC 20 (AP).
15. *Tushar Arun Gandhi* v. *State of Orissa*, (1997) 1 SCC 1.
16. *Ramesh* v. *Laxmamma*, 1999 AIHC 2090 (paras 21 and 22) (AP).
17. *Mohinuddin* v. *President, Municipal Committee, Khargone*, AIR 1993 MP 5 (paras 13-15 and 18).
18. *Dhandapani Chettiar* v. *Govindam*, 1999 AIHC 2935 (para 19) (Mad).
19. *State* v. *Veeranagouda Mallikarjunagouda*, AIR Kant 361 (para 12).
20. STEPHEN'S Digest, 7th Edn. Art. 88.
21. *Parkash Chand* v. *Hans Raj*, AIR 1994 HP 144 (paras 12, 14 and 15).
22. *Doedem Neale* v. *Samples*, (1838) 8 Ad & El 151.
23. *Sharfuddin* v. *Govind*, (1902) 5 Bom LR 144 : ILR (1902) 27 Bom 452.
24. *Rudragouda* v. *Basangouda*, (1937) 40 Bom LR 202 : AIR 1938 Bom 257.
25. *Sharfuddin* v. *Govind*, ILR 27 Bom 452.

the court that the document was produced from proper custody it would be unsound to admit it.[26] Where a party cannot properly explain how a document produced by him came into his possession, the custody of the document cannot be said to be clearly proved.[27]

When a person stated on oath that the document had been entrusted to him by the vendee of the property for the purpose of a certain case in court, it was held that the custody of such document cannot be said to be improper, and the court can raise a presumption as to its genuineness under Section 90.[28]

The factum of proper custody is not a matter for presumption but ought to be satisfactorily proved by adducing evidence *aliunde* to show that the document was produced from proper custody or by showing that the person who produced it was the depository of the document in question.[29]

The origin of the custody has to be explained by the person producing the document if he happens to be a person who is not normally supposed to have custody of the document. It is enough if the person is so connected with it that he may reasonably be supposed to be in possession of it.[30]

Where an order under the Rent Control Act fixing fair rent was produced by A and the document is thirty years old and purports to have been sent to A's father it was held that A's custody has to be considered proper and a presumption can be raised under Section 90.[31] Where a private document (*Anumathipatra*) was deposited a few days after the death of the executant in the collector's office and 54 years later it was produced from that office it was held that it was from proper custody.[32] Where thirty-year old document which is a compromise petition containing the thumb mark and signatures of the parties to the petition, the scribe and attestors is produced from the record room, where it has been kept as a part of the decree, the compromise petition can be taken as genuine and duly executed under Section 90 as it is produced from proper custody.[33] A sixty year old properly executed will produced by the only son of the testator was presumed to be genuine as it came from lawful custody. No separate proof was required to prove its execution.[34]

Where a private partition *chitta* more than 30 years old was produced from the record keeper through an officer of the collectorate, it was held that the officer was not the proper custodian of partition papers of private individuals and no presumption can be drawn.[35]

It must be shown that such a document was filed for adjudication of some matters in such a court.[36]

The rule is to compel the party who relies upon a document to show that it comes from proper custody in which it would naturally be expected to be kept when the concerned party did not adduce evidence that he was the depository of the document (will) in question. Section 90 would not be attracted.[37]

It is for the Court to decide in each case whether the custody from which the document is produced is or is not proper.[38]

When the old documents are produced as instance of particular customs and not as a foundation of title, such documents may be admitted in evidence irrespective of the fact whether they come from proper custody or not.[39]

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26. *Rudragouda* v. *Basangouda*, (1937) 40 Bom LR 202 : AIR 1938 Bom 257. Where the Court chooses to raise the presumption, no further proof of the fact is necessary under Section 69: *Mahendra Nath Surid* v. *Natai Charan Ghosh*, (1943) 1 Cal 392 : AIR 1944 Cal 241.
27. *Manmath Nath* v. *Anat Bandhu*, AIR 1919 Cal 482.
28. *Poonamchand* v. *Motilal*, AIR 1955 Raj 179.
29. *Ravjappa* v. *Nilkanta Rao*, AIR 1962 Mys 53; *C. Audilakshmamma* v. *A. Ramarao*, AIR 1973 AP 149; *Ramaswami Goundan* v. *Subbaraya Goundan*, AIR 1948 Mad 388.
30. (1971) 1 APLJ 350.
31. *M.N. Soi* v. *New Delhi Municipal Committee*, AIR 1975 Del 236 (FB).
32. *Rajendra Prasad* v. *Gopal Prasad*, AIR 1925 Pat 442.
33. *Savitri Devi* v. *Bhaskar*, AIR 1972 Ori 148. **See also** *Venkatachala Moopar* v. *Balsubramanian*, 2001 AIHC 4386 (para 15) (Mad).
34. *Acho Dominic* v. *Xavier*, 2000 AIHC 2210 (paras 7 and 8) (Ker).
35. *Purna Chandra* v. *Radhika*, AIR 1926 Cal 370.
36. *Sri Prasad* v. *Court of Wards, Balarampur*, AIR 1937 Oudh 194.
37. *Seshappa Chathra* v. *Govinda Chathra*, ILR (1980) 2 Kant 930.
38. *Imam Din* v. *Natha Singh*, AIR 1932 Lah 43.
39. *Dasondhi* v. *Milkhiram*, AIR 1939 Lah 152.

4. DOCUMENT : SEE COMMENTARY UNDER SECTION 3

The section also applies to accounts[40] and to books of account[41] as well as to all other documents public or private.

However, it was held by the Supreme Court that loose papers of accounts cannot have the same probative force of account books which are regularly kept in the course of business.[42]

5. PRESUMPTION IS AS TO SIGNATURE IN A DOCUMENT

Where the signature of a particular person is not in question or sought to be established, Section 90 does not apply.[43] The presumption under Section 90 applies only to signatures and handwriting.[44] The presumption applies only if the document in question purports to have been 'signed' by somebody or if it purports to be in the handwriting of somebody.[45] Where a document was signed by one H for D, it was held the presumption will be only in respect of the signature of H and not in respect of execution of the document by D.[46] The presumption permitted by this section in the case of a document purporting to be thirty years old, that it was duly executed by the party by whom it is purported to be executed, includes the presumption that when the signature of the executant purports to have been made by the pen of the scribe, the latter was duly authorised to sign for him.[47]

The Presumption under Section 90 can be raised only if the document itself shows in whose handwriting the contents are. This section does not lay down that there is any presumption regarding an anonymous document, the writer of which is not known. Where an ancient document was not signed by the person who wrote it and there was no material upon which one can say that a particular person had written it and there was only a general statement that the document was kept in the family records, it was held that the document cannot be taken to be proved and no presumption sender this section can be drawn.[48]

Signature includes a mark, a mark being a sort of symbolic writing. The presumption under Section 90 when it arises in favour of a party extends to the thumb marks put on the document indicating that the document was signed by the executant by way of symbolic writing which has to be taken as a signature in the absence of proof to the contrary.[49]

Where at the usual place of executant's signature the name of the illiterate executant was written along with the words *'Nisani'* and there is no mark or thumb mark impression of the executant; it was held that the document cannot be said to have been executed by him.[50]

The section makes no provision for any presumption in regard to seals nor can a seal be regarded as a signature within the definition of the word contained in the General Clauses Act.[51] No presumption can be drawn when the document does not bear any signature but only a seal, as the seal does not amount to

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40. *Foster* v. *Plumbers Co.*, (1900) 44 SJ 211.
41. *Durga Shankar* v. *Lala Ganga Sahai*, 1932 All 500.
42. *Ganesh Prasad* v. *Narendra Nath Sen*, AIR 1953 SC 431; **see also** *Province of Bengal* v. *Ramlal Oswal*, AIR 1942 Cal 308.
43. *Ganesh Prasad* v. *Narendra Nath Sen*, AIR 1953 SC 431.
44. *Bhagirathmal Kanodia* v. *Bibhuti Bhushan*, AIR 1942 Cal 309, but not to the contents *Mohiuddin* v. *President Municipal Committee*, AIR 1993 MP 5.
45. *Maheshwar Naik* v. *Sailendra Nayak*, AIR 1951 Ori 327.
46. *Kalika Prasad* v. *Jhenjho Kuer*, AIR 1964 Pat 241; *Maheshwar Naik Oswal* v. *Sailendra Narayan*, 1951 Ori 327.
47. *Haji Sheikh Bodha* v. *Sukhram Singh*, AIR 1925 All 1 : (1924) 47 All 31 FB; *Balkaran Singh* v. *Dulari Bai*, 'AIR 1927 All 231 : (1926) 49 All 55, **contra**. *Mohammad Azim* v. *Special Manager, Court of Wards, Balrampur*, (1936) 12 Luck 98.
48. *Kanhiyalal* v. *Jamna Lal*, AIR 1950 Raj 47; **See also** *Chandukutty Nambiar* v. *Rama Varma Raja*, AIR 1939 Mad 926; *Venkat Rao* v. *Venkateswara Rao*, AIR 1956 Andhra 1; *Nagaraja Rao* v. *Koothappan*, AIR 1941 Mad 602; *Kotiswar* v. *Paresh*, AIR 1956 Cal 205; *Naina Pillai* v. *Ramanathan*, 33 MLJ 84; *Amrita* v. *Sripat*, 1962 All 111; *Province of Bengal* v. *Ramlal Oswal*, AIR 1942 Cal 308.
49. *Sahilendra Nath Mitra* v. *Girijabhushan*, AIR 1931 Cal 596 : ILR 58 Cal 686.
50. *Durga Prosad* v. *Mario Galstaun*, AIR 1955 Cal 194; *Naina Pillai* v. *Ramanathan*, AIR 1918 Mad 932.
51. *Special Manager, Court of Wards, Balrampur* v. *Tirbeni Prasad*, AIR 1935 Oudh 289 : ILR (1935) 11 Luck 31; *Sri Prasad* v. *Special Manager, Court of Wards, Balrampur Estate*, (1936) 12 Luck 400.

a signature.[52] It was held that in the case of imaginary persons as in the case of *Inam* grants there can be no question of signature or handwriting and the presumption under Section 90 would not apply.[53]

6. PRESUMPTION REGARDING WILLS

Presumption under this section extends to testamentary documents. A will purporting to be thirty years old and produced from proper custody may be presumed to have been duly attested and executed. The court must, however, act with extreme caution and utmost circumspection.[54] The presumption under Section 90 can be drawn regarding actual execution and attestation of the will more than 30 years old and produced from proper custody.[55] Section 90 is applicable to wills produced in courts of probate and it is permissible to draw presumption that a will coming from proper custody and more than 30 years old was duly executed and attested.[56] Where a will was executed in 1917[57] a presumptiuon of ancient document under Section 90 was held available in the year 1950.

In a case based upon a will, the propounder or the plaintiff must plead that the document was properly executed and duly attested and was the last will of the testator. Where the plaintiff has not pleaded that the will was duly attested, there will be no question of presuming attestation under Section 90. Assuming that the presumption could be made for its valid attestation, the presumption could not extend to the will being the last will of the testator.[58]

Where a registered will over thirty years old was produced from proper custody it was held that it should be presumed as a valid and genuine document. Where all parties to the will except the beneficiary are dead and the signature of the scribe has been identified by his fellow document writer who was acquainted with the signature, it cannot be said that the will has not been proved, in the absence of evidence in rebuttal.[59] Where a will more than thirty years old was produced from proper custody it was held that the presumption that it was duly executed and attested, which could be drawn under S. 90 of the Indian Evidence Act, extended to the testamentary capacity of the testator. In the absence of any evidence as to the state of his mind, proof that he had executed a will rational in character in the presence of witnesses must lead to a presumption that he was of sound disposing mind. This presumption, which can be justified under the express provisions of Section 90 of the Evidence Act, since a will cannot be said to be "duly" executed by a person who was not competent to execute it, is fortified under the provisions of Section 114 of the Evidence Act, since it is likely that a man who performs a solemn and rational act in the presence of witnesses is sane and understands what he is about.[60]

7. COPIES

The presumption under this section can be raised only with regard to the original document if produced before the court. It does not apply to a certified copy when the original document is not before the court. The section requires the production to the Court of the particular document in regard to which the court may make the statutory presumption.

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52. *Maheshwar Naik* v. *Sailendra Narayan*, AIR 1951 Ori 327 : ILR (1949) 1 Cuttack, 312; *Inder Singh* v. *Board of Revenue*, ILR (1962) 12 Raj 83; *Kotishwar Mukherjee* v. *Paresh Nath Mukherjee*, AIR 1956 Cal 205; *Hiralal* v. *Parsattamdas*, AIR 1974 Guj 74.
53. *Mansoorali* v. *Taiubali*, AIR 1935 Nag 156.
54. *Dhanapal* v. *Govindaraja*, AIR 1961 Mad 262. The period of thirty years will run from the date of the will and not from the date of death of the testator. *Sarat Chandra Mondal* v. *Panchanan Mondal*, ILR (1955) 1 Cal 55; *Mahendra Nath Surul* v. *Netai Charan Ghosh*, AIR 1944 Cal 241 : ILR (1943) 1 Cal 392.
55. *Munnalal* v. *Kashibai*, AIR 1947 PC 15; *Kirpal Singh* v. *Aas Kaur*, AIR 1997 P&H 240; *Haradhan Mahatha* v. *Dukhu Mahatha*, AIR 1993 Pat 129 (paras 10, 12 and 15); *Kotayya* v. *Vardhamma*, AIR 1930 Mad 744; *Dhanpal* v. *Govindaraja*, AIR 1961 Mad 262.
56. *Silvabai Celertine* v. *Josephine Naronha Bai*, AIR 1956 Mad 566; *Mahendra Nath* v. *Netai Charan*, AIR 1944 Cal 241.
57. *Labany Perva Guha* v. *Balai Chandra Mukerjee*, ILR (1970) 2 Cal 241.
58. *Rangu* v. *Rambha*, AIR 1967 Bom 382.
59. *Radha Hota* v. *Dutika Satpathy*, ILR (1979) 2 Cut 130.
60. *Munnalal* v. *Kashibai*, AIR 1947 PC 15; *Venkata Rama Rao* v. *Bhaskararao*, AIR 1962 AP 29; *Mahendra Nath* v. *Netacharan*, AIR 1944 Cal 241; *Govinda Chandra* v. *Pulin Behari*, AIR 1927 Cal 102; *Rameshwar Prasad* v. *Krishnan*, AIR 1969 MP 4; *Dharanappa Adhikari* v. *Dharamasam Rajya*, ILR 1967 Mys 276; *Motilal* v. *Saradar Mal*, AIR 1976 Raj 40.

In *Basant Singh* v. *Brij Raj Saran Singh*[61] an appeal arising from the decision in *Brij Raj Saran Singh* v. *Basant Singh*[62] it was held by the Privy Council that if the document produced is a copy and was admitted under Section 65 as secondary evidence, and if the document is over thirty years old and produced from proper custody, then the signatures authenticating the copy may be presumed to be genuine, but the production of the copy is not sufficient to justify the presumption of the execution of the original under Section 90. The Privy Council overruled earlier decisions to the contrary.[63]

The Supreme Court observed "The presumption enacted in Section 90 can be raised with reference to original documents and not to copies thereof."[64] Further it was held that if the document purports to be signed by the agent of the person against whom the presumption is sought to be raised and there is no proof that he was an agent, Section 90 does not authorise the raising of a presumption as to the existence of authority on the part of the agent to represent that person.[65]

The above decisions of the Privy Council and the Supreme Court were followed in[66] *Kalidindi Venkata Subbaraju*. The court held that the production of a copy does not warrant the presumptions of due execution of the original. Supreme Court, however, came to the conclusion that apart from such presumption there was evidence from which the High Court could conclude that the will was duly executed and attested and that the executant was in a sound disposing state of mind. They, therefore, observed that the effect of the certified copy of the will having been rightly admitted, was as if the contents of the will were before the court. In support of this, they relied on the decision of the Privy Council in *Seethayya* v. *P. Subrahmanya Somayajulu*[67]. In that case the original grant which was 250 years old was lost. But a copy of it was produced from proper custody. It bore the endorsement of the predecessors of the respondents. "Originals have been retained by us and copies have been filed in 1858". The Privy Council held the copy was admissible as secondary evidence of the terms of the grant under Section 65 of the Act and the said endorsement authenticating the copy was evidence as a statement by a deceased person in a document relating to a relevant fact and also as an admission of the respondent's predecessors. The Privy Council also held that the copy being admissible as secondary evidence of the terms of the original grant, the court could proceed upon the footing that the terms of the said grant were before it.[68]

8. CERTIFIED COPIES

Where the plaintiff in a suit for redemption of mortgage relied on a certified copy of a statement made in the mutation proceedings for the purpose of showing the acknowledgement of the mortgage, and the original was not produced for examination, it was held by the Supreme Court that the certified copy could not serve as an acknowledgement of mortgage, and no presumption can be extended to certified

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61. AIR 1935 PC 132 **approved by** the Supreme Court in *Mahant Sital Das* v. *Santram*, AIR 1954 SC 606 and *Harihar Prasad* v. *Deonarain*, AIR 1956 SC 305; **see also** *Shamsunnissa Bibi* v. *Sh. Ali Asghar*, AIR 1936 Oudh 87; *Gopal Das* v. *Thakurji*, AIR 1936 All 422; *Amjad Hussain* v. *Raisunnisa*, AIR 1941 Oudh 433; *Sangamlal* v. *Gangadin*, AIR 1946 All 389; *Mumtaz Hussain* v. *Babu Bramhanand*, AIR 1936 All 298; *Venkataratnam* v. *G. Sitaramayya*, AIR 1950 Mad 634; *Motishah* v. *Abdul Gaffar Khan*, AIR 1956 Nag 38; *Kashibai Martand* v. *Vinayak Ganesh*, AIR 1956 Bom 65; *Mehatab Singh Gurbachan Singh* v. *Amrik Singh*, AIR 1957 Punj 146; *Jhunkaribahu Alias Kethrawati* v. *Phool Chand*, AIR 1958 MP 261; *Ramanna* v. *Sambamoorthy*, AIR 1961 AP 361; *Hansraj* v. *Banarasi Lal*, AIR 1937 Lah 920; *Sevugan Chettiar* v. *Raghunatha Dorasingam*, AIR 1940 Mad 273; *Rajeswari* v. *Varalakshmamma*, AIR 1964 AP 284; *Nagappa Jadiyappa* v. *Dy. Commissioner Belgaum*; *Md. Ahmed Amalia* v. *Nirmal Chandra Roy*, AIR 1978 Cal 312; *Acharu* v. *Rappai*, AIR 1979 Ker 34; (entry in marriage reigster an acnient one) *Kalu Nimbaji Shinge* v. *Bapurao*, AIR 1950 Nag 6; *Sardaram* v. *Sundarlal Baldev Prasad*, AIR 1968 All 363; *Vasa Thulasi Rao* v. *Peetea Pedda Anjanayya* (1967) 1 WR 176; *Jutha Prinji* v. *Faria*, AIR 1952 Kutchi 67.

62. AIR 1929 All 561.

63. *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno*, ILR 5 Cal 886; *Ishri Prasad Singh* v. *Lalli Jas Kunwar*, ILR 22 All 294; *Dwarka Singh* v. *Ramanand*, AIR 1919 All 232 : ILR 41 All 592; *Gopinath* v. *Mothi Chiwa*, AIR 1934 Nag 67; **overruled**.

64. *Harihar Prasad* v. *Deonarain*, AIR 1956 SC 305; *Harihar Prasad* v. *Must. of Munshi Nath Prasad*, 1956 SCR 1 **relying on** *Basant Singh* v. *Brij Raj*, AIR 1935 PC 132.

65. *Mahont Sital Das* v. *Sant Ram*, AIR 1954 SC 606 **followed;** *Bibo Devi* v. *Rattan Lal*, ILR (1972) 2 Del 699; *Kamalakshy* v. *Madhavi Amma*, 1980 Ker LT 493 (Ker); *Abdul Kadir* v. *Hazi Sayed Mohammed*, (1963) 1 Mys LJ 158.

66. AIR 1968 SC 947.

67. 56 IA 146 : AIR 1929 PC 115 on **appeal from** ILR 46 Mad 92.

68. **See also** *Koteshwar* v. *Parashnath*, (1956) Cal 205; *Hariharpal* v. *Sudhir Kumar Pal*, ILR (1988) Cal 687; *Vadlur Lakshmireddy* v. *Vadlur Subbareddy*, ILR 1963 AP 1085.

copies under Section 90[69] unless foundation is laid for admission of secondary evidence under Section 63.[70]

An entry in the register of a document writer as to the contents of the will was held to be a summarised copy of the will and howsoever old the register may be the presumption of the execution or attestation of the alleged document cannot arise.[71]

It was held that when the original Church Register was not produced and no explanation was offered for its non-production, the copies of the entries therein are not admissible.[72]

In the case of a certified copy of a registered document, Section 60(2) of a Registration Act is only confined to the endorsements made by the Registering Officer under Section 58 of that Act which provides for raising a statutory presumption or inference in respect of the said endorsements alone. Under Section 90, the presumption cannot be made as to the signature, handwriting, execution or attestation of the original document. Though the signature authenticating the copy may be presumed to be genuine under Section 90, the party who relies on it has to prove the execution of the original document, and also attestation if the document requires attestation under law.[73]

Where the certified copy shows that the original contained an endorsement by the Sub-Registrar under Section 60 of the Registration Act, it was held that it can be taken as the evidence of facts that the original document contained the testator's or executant's signature.[74]

Where the original was lost and if it is so proved, the certified copy is admissible to prove the contents of the original but not the execution of the original.[75]

In the case of registration copies of documents what is applicable is not Section 90 but Section 57(5) of the Registration Act.[76]

Where the document was a registered one, though mere registration may not by itself constitute sufficient proof of the execution of the document, in view of Sections 57 and 60 of the Registration Act, the certified copy and the certificate issued by the Registrar would constitute sufficient evidence to prove the contents of the document and also, to some extent, an evidence of execution of the document. It may be that proof of admission of execution before the Registrar may not satisfy completely the requirements of Section 67 of the Evidence Act which requires that the signature of the executant must be proved to be in his handwriting. If apart from the admission incorporated in the certificate of the registrar under Section 60(2) of the Registration Act, there is other evidence to corroborate the admission, the execution of the document can be considered as proved.[77]

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69. *Shivlal* v. *Chetram*, AIR 1971 SC 2342; **See also** *Tilak Chand Kureel* v. *Bhim Raj*, (1969) 3 SCC 367.
70. *Lakhi Baruah* v. *Padma Kanta Kalita*, AIR 1996 SC 1253 (para 17).
71. *Bibo Devi* v. *Rattan Lal*, ILR (1972) 2 Del 699.
72. *Alicia* v. *Percival Felix Pinto*, (1967) 2 Mys LJ 210.
73. *Kashibai Martand* v. *Vinayak Gomesh*, 1956 Bom 65; *Pandappa Mahabingappa* v. *Shivalingappa Murtcoppa*, AIR 1946 Bom 193; *Md Saheb* v. *Kamal*, AIR 1953 Bom 338; *Putti Lakshmayya* v. *Garlapati Thirupatamma*, AIR 1958 AP 720; *Vadhur Lakshmi Reddy* v. *Vadlur Subba Reddy*, AIR 1963 AP 1085; *Venkata Ratnam* v. *Sitaramayya*, AIR 1950 Mad 634; *Basant Singh* v. *Brij Raj Saran Singh*, AIR 1935 PC 132; *Sitaldas* v. *Santaram*, AIR 1954 SC 606; *Jhunkari Bahu* v. *Phoolchand*, AIR 1958 MP 261; *Mehtab Singh* v. *Amriksingh*, AIR 1957 Puj 146; *Subudhi Padhan* v. *Raghu Buwan*, AIR 1962 Ori 40; *Ramakrishna* v. *Gangadhar*, AIR 1958 Ori 26. *Ram Kishun* v. *Kausal Kishore*, AIR 1958 Pat 294; *Harihar Prasad* v. *Deonarain Prasad*, AIR 1956 SC 305; *Manilal Chhaganlal* v. *Surat Municipality*, AIR 1978 Guj 193; *Thulasirao* v. *P. Pedda Anjanayya*, (1967) 1 An WR 176.
74. *Gopaldas* v. *Thakurjee*, AIR 1943 PC 83; *Putti Kshmayya* v. *Galapati Tirupathamma*, AIR 1958 AP 720; *Hulri* v. *Mohanlal* **relied on.** ILR (1960) 10 Raj 94; *Indernath Modi* v. *Nand Ram*, ILR (1955) 5 Raj 955; *Tej Singh* v. *Hastimal*, AIR 1972 Raj 191.
75. *Kalu Nirbaji* v. *Bapurao Chinkaji*, AIR 1950 Nag 6; *Venkata Ratnam* v. *Sitaramayya*, AIR 1950 Mad 634; *Motishah* v. *Abdul Gaffar*, AIR 1956 Nag 38; *Amulya Charan Maity* v. *Satyeswar Maity*, ILR (1966) 1 Cal 395.
76. *Kamuppanna* v. *Kolandaswamy*, AIR 1954 Mad 486, *Shudasama Khodha Sortansan* v. *Chudasant Takha Tsang*, AIR 1922 Bank 477; *Sabiman* v. *Hakim Mukhdum Bux*, AIR 1928 All 394.
77. *Rajeswari* v. *Varalaxmamma*, AIR 1964 AP 284; **relying on** *Ihtishan Ali* v. *Jamna Prasad*, AIR 1922 PC 56; *Gopaldas* v. *Thakurji*, AIR 1943 PC 83; *Kalu Nimbaji* v. *Bapurao Chinkaji*, AIR 1950 Nag 6; *Indernath Modi* v. *Nandram*, AIR 1957 Raj 231, *Piara* v. *Fattur*, AIR 1929 Lah 711.

When the document purporting to be more than 30 years old is a registered one and it is produced from proper custody, the presumption under Section 90 can be drawn by the court, as to the purported signatures of the executants and execution by them and its due attestation.[78]

Where a registered gift deed of immovable property of about 50 years old was produced in evidence, it was held, it was a valid document duly registered and the burden is on the person challenging its validity to prove that it was a fraud on registration as a non-existent *Jamun* tree was included therein only to attract the jurisdiction of the Sub-Registrar. This is not a case of a presumption of due execution or attestation or of the signature of the executant and does not fall within Section 90. The reference to Section 90 in the head note is misleading as no reference to that section is made in the judgment.[79]

Where uncertified copies of ancient village accounts not kept in proper custody are produced, no presumption can be raised.[80]

Where an acknowledgement made in a deposition during the settlement enquiry was produced from proper custody and it is thirty years old, presumption can be drawn.[81]

Section 90 does not involve any presumption that the contents of the document are true or that it had been acted upon as such facts have to be proved by adducing proper and relevant evidence.[82]Though they may constitute an estoppel against the executant and will be relevant against him under Sections 17, 18, 21 and 32(2).[83]

Section 90 does not deal with any presumption about the legal effect of a document. Where a Hindu widow alienated the property and execution of the document was admitted by her, it was held no assistance can be derived from Section 90 as to the question whether she alienated only her life estate or made an absolute alienation.[84]

When all those who knew about an alienation made by a limited owner 39 years ago and could explain the circumstances are dead, it was held that the presumption arises that the alienation was for legal necessity. This presumption is not one coming under Section 90 and it is submitted that reference to Section 90 in the head note of the report is misleading, when there is no reference at all to that section in the judgement.[85]

Where a person executed a document on behalf of another, the authority of the executant to execute the document cannot be presumed under this section[86]; but when a grant has been in force for a long period unchallenged by the affected persons, the requisite authority to execute can be presumed.[87]

Where a person claiming to be *Guzaredar* claiming maintenance allowance under Section 10 Bhopal Abolition of *Jagirs* and Land Reformation Act and *Gujaredar* claimed to be in possession of a certain village in lieu of maintenance till the date of conversion of *Jagirs* into *Mansab* and produced documents over 30 years old from proper custody, it was held that the evidence coupled with the documents would give rise to the presumption under Section 90 and it was sufficient to prove that he was *Guzaredar* and was in possession of the village in lieu of maintenance.[88]

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78. *Tej Singh* v. *Hastimal*, AIR 1972 Raj 191; *Rajendrajha Prasad Agarwal* v. *Tarkeshwar Prasad Agarwal*, ILR (1978) 57 Pat 426; *Lakshmi Kanto Roy* v. *Nishi Kanto Roy*, (1967) 71 Cal WN 362.
79. *Fatmabibi* v. *Irfana Bagam*, AIR 1980 All 394.
80. *Maddukuri Patnam* v. *Alluri Veeranna*, (1962) 1 An LT 442; **following** *Seethaya* v. *Subramanya Somayajulu*, 1929 PC 115.
81. *Narayani Amma* v. *Padmanabha Pillai*, 1957 Tra/Co. 246.
82. *Kotiswar* v. *Paresh Nath*, AIR 1956 Cal 205; *Ajit Kumar* v. *Mukunda Lal*, AIR 1988 Cal 196; *Ramakrishna* v. *Gangadhar*, AIR 1958 Ori 26.
83. *Bai Sakinabai* v. *Gulam Rasul*, AIR 1981 Guj 142; *Ghurahu* v. *Sheo Ratam*, AIR 1981 All 3.
84. *Ramaji* v. *Manohar*, AIR 1961 Bom 169, **relying on;** *Venkata Reddy* v. *Rani Saheba*, AIR 1920 PC 64; *Kondama Naicker* v. *Kandasamy Goundar*, AIR 1924 PC 56; *Trambak Ramachandra* v. *Shaik Gulam Zilani*, ILR 34 Cal 329 (PC); *Harihar Parasad* v. *Deo Narain*, AIR 1956 SC 305; **and dissented from** *Bawa Magniram* v. *Kasturbhai*, AIR 1922 PC 163; *Annamalai Chetty* v. *Subramanian Chetty*, AIR 1929 PC 1.
85. *Dominion of India* v. *Firm Chhaganlal Premji*, AIR 1951 Nag 357; *Union of India* v. *Nand Kishore*, AIR 1966 HP 54, (70 years old regarding a grant of made by the ruler).
86. *Harihar Prasad* v. *Deonarain*, 1956 SCJ 279 at 283 : AIR 1956 SC 305.
87. *Tarakeshwar Pal* v. *Sirish Chandra*, AIR 1924 Cal 236.
88. *Bhupendra Singh* v. *G.K. Umath*, AIR 1970 MP 91.

There can, however, be no presumption as to who the person who executed the document was and what authority he had to execute the document,[89] and whether he had the requisite authority,[90] or whether the contents of the document are true,[91] or that the document has the legal effect that it purports to have.[92]

When a document is tendered in proof of relationship the document must be relevant under Section 32(5), before raising the presumption under Section 90.[93]

Where a confession contained a certificate of a memorandum at its foot as required by Section 164, Cr. P.C., it was held that a presumption arises under Section 90 that all the necessary formalities have been duly complied with and the statements contained in the memorandum are true and correct.[94] It is submitted that the reference to Section 90 for raising the presumption that all formalities were complied with is not correct. The conclusion may however be justified under Section 114 of the Act.

9. MAY PRESUME

The expression 'may presume' in this section indicates that the court has the discretion either to draw the presumption under this section or not.[95] The expression means that the trial court has a discretion either to presume a fact as proved or to call for proof of it[96] The presumption is discretionary and not obligatory. Even if the elements mentioned in the section are satisfied, the court may require the document to be proved in the ordinary manner. It is necessary for the court to consider the evidence external and internal of the document in order to enable it to decide whether in any particular case it should or should not presume proper signature and execution. The court may, but is not bound to, make the presumption merely because of the alleged age of the document.[97]

The presumption allowed by this section is not a presumption which the court is bound to make, and the Court may require the document to be proved in the ordinary manner[98]. It is in the discretion of a court whether it will raise the presumption in favour of a document for which this section provides, but this discretion is not to be exercised arbitrarily; it must be governed by principles, which are consonant with law and justice. And while on the one hand great care is requisite in applying the pre-sumption, on the other hand it is clear that very great injustice may be perpetrated, if an ancient document coming from proper custody is rejected by a Court capriciously or for inadequate reasons. "Because a document purports to be an ancient document and to come from proper custody, it does not, therefore, follow that its genuineness, is to be assumed. If there are reasonable grounds for suspecting its genuineness and the party relying upon it fails to satisfy the court of its due execution, there is an end of it. But if no such grounds exist, and it satisfies the conditions prescribed by S. 90 of the Indian Evidence Act, then proof of execution is dispensed with, and it is to be dealt with on the same footing as any other genuine instrument. If the authority or the title of the executant, for example, be not questioned, then, effect is to be given to it as though he had the requisite authority or title. If either be questioned, then of course the person on whom the burden of proof lies must adduce evidence to satisfy the court on the point, or he fails. When the genuineness of a document purporting to be an ancient document is put in issue, it appears to have been sometimes thought that any presumption in its favour is thereby excluded. But this would be to deprive the party producing it of the benefits of the presumption precisely in the circumstances in which he most stands in need of its aid. And there seems to be no difference in principle between cases in which due execution is traversed without more, that is, in which the party relying on the document is put to proof of it, and those in which it is alleged that the document is a forgery, except that in the latter case, the suspicion of the court may be aroused by the nature of the plea. But in the one case, as in the other, the presumption merely takes the place of the evidence which would, where modern

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89. *Sri Prasad* v. *Special Manager, Court of Wards, Balrampur Estate*, (1936) 12 Luck 400 : AIR 1937 Oudh 194.
90. *Ram Naresh Singh* v. *Chirkut*, (1932) 8 Luck 18 : AIR 1932 Oudh 227.
91. *Chandulal* v. *Bai Kashi*, (1938) 40 Bom LR 1262 : ILR (1938) Bom 97.
92. *Ramji* v. *Manohar*, AIR 1961 Bom 169 : (1960) 62 Bom LR 322.
93. *Sheojee* v. *Prema Kuer*, AIR 1964 Pat 187.
94. *Mathai Mathew* v. *State*, AIR 1952 Tra Co 305.
95. *Sital Das* v. *Santa Ram*, AIR 1954 SC 606.
96. *Rangu* v. *Rambha*, AIR 1967 Bom 382 : (1967) 69 Bom LR 559.
97. *Mansukh Shah* v. *Trikambhai Patel*, (1929) 31 Bom LR 1279.
98. *Musammat Shafiq-un-nisa* v. *Khan Bahadur Raja Shaban Ali Khan*, (1904) 6 Bom LR 750 : 26 All 581 : 31 IA 217; *Mansukh* v. *Trikambhai*, (1929) 31 Bom LR 1279; *Anur* v. *Nur Muhammad*, (1902) PR No. 82 of 1902 (Civil).

document is concerned, be necessary for the purpose of proving due execution. The court may decline to raise the presumption, in which case the party producing the document must fail, unless he is provided with evidence in support of it. But where the court thinks proper to raise the presumption, it must be met and rebutted in the same way as direct evidence of the execution in the case of a modern document. The proper rule is....well stated by Mr. Taylor.....He says (page 587, 8th Edition)—'An ancient deed, which has nothing suspicious about it, is presumed to be genuine without express proof, the witness being presumed dead, and if found in proper custody and corroborated by evidence of ancient or modern corresponding enjoyment or by the equivalent or explanatory proof, it will be presumed to have constituted part of the actual transfer of the property therein mentioned, because this is the usual course of such transaction."[1] Before a court is justified in making a presumption in favour of the genuineness of an ancient document it should be satisfied *aliunde* that there is good ground for accepting it as a true document.[2] If there are circumstances in the case which throw great doubt on the genuineness of a document more than thirty years old, even if it is produced from proper custody, the court may exercise its discretion by not admitting that document in evidence without formal proof, and reject it when no such proof is given.[3]

This section does not lay down that the court must always come to the conclusion that a document more than 30 years old and produced from proper custody is genuine.[4]

The language used in Section 90 indicates that the presumption raised is a permissive one. It is not obligatory on a court to raise the presumption, it is a matter of judicial discretion whether the court will make a presumption or call upon the party to offer other proof.[5] The mere fact that a party has led evidence to prove the execution of a document which is 30 years old or requested the court only towards the close of the trial to raise the presumption under Section 90 regarding the genuineness of a document, does not debar the court from raising the presumption.[6]

A party normally expects that a presumption would be drawn in its favour when the conditions under Section 90 are fulfilled. If the Court rules otherwise, then it is duty bound to give opportunity to the party to prove the execution of the document by direct evidence, if any. However, the party leading the direct evidence regarding the execution of the document is not permitted to rely on the presumption under this section.[7]

10. COURT MUST ACT WITH CAUTION

The rule of presumption of the genuineness of ancient document must be applied with exceeding caution and where circumstances throw suspicion on genuineness of the document, no presumption under Section 90 can be drawn. Although a mere recital in an ancient deed by itself cannot be proof of payment of consideration, still where the transaction happens to be an old one any little evidence in support of it would be enough to hold the recital as proved.[8]

The discretion for raising the presumption must be exercised in a judicial manner basing on the particular circumstances of each case.[9]

11. PRESUMPTION IS REBUTTABLE

A presumption drawn by the court under Section 90 it is rebuttable.[10]

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1. PER HILL J., in *Govinda Hazra* v. *Pratap Narain Mukhopadhya*, ILR (1902) 29 Cal 740, 747.
2. *Jesa Lal* v. *Mussammat Ganga Devi*, (1913) PR No. 81 of 1913 (Civil).
3. *Musammat Shafiq-un-nissa* v. *Khan Bahadur Raja Shaban Ali Khan*, (1904) 31 IA 217 : ILR 6 Bom LR 750 : 26 All 581; *Chariter Raj* v. *Kailash Behari*, (1918) 3 PLJ 306 : AIR 1918 Pat 537.
4. *Dadiraaddi Ramireddi* v. *Gunnala Chinnamma*, AIR 1958 An LT 561, **relying on** *Ramaswami Goundan* v. *Subbaraya Gaundan*, 1948 Mad 388; *Vidyanathaswami Iyer* v. *Natesa*, 1921 Mad 452; *Munshi Ram* v. *Thaker Dass*, 1951 Pepsu 87; *Dhanapal* v. *Govinda Raja*, 1961 Mad 262.
5. *Kotiswar* v. *Paresh Nath*, 1956 Cal 205; *N Ramaswamy* v. *C. Ramaswami*, 1975 Mad 88; *Ayub* v. *Bhanwar Chand*, ILR (1971) 21 Raj 30; *Rangu* v. *Rambha*, AIR 1967 Bom 382; *Ram Milan* v. *Sher Bahadur*, AIR 1976 All 251; *Shantamma* v. *Yellamma*, (1980) 2 Kant LJ 380; *Ali Hasan* v. *Matiullah*, AIR 1988 All 57.
6. *Lalit Kishore* v. *Laxminarayan*, ILR (1968) 18 Raj 171.
7. *Chanda Bai* v. *Anwar Khan*, AIR 1997 MP 238.
8. *Mimi Nagiah* v. *Venkiah*, AIR 1950 Hyd 50; *Dhanapal* v. *Govindaraja*, AIR 1961 Mad 262.
9. *Kunhamina Umma* v. *Spl. Tahsildar*, AIR 1977 Ker 41.
10. *Sarat Chandra* v. *Panchanan*, AIR 1953 Cal 471; *Ayub* v. *Bhanwar Chand*, ILR (1971) 21 Raj 30.

12. OBJECTION TO THE ADMISSIBILITY WHEN TO BE TAKEN

The absence of any objection at the time of the admission of the document will not preclude the opposite party from urging that there are special circumstances which prevent the presumption under Section 90 from being drawn.[11]

13. POWER OF THE APPELLATE COURTS

Once the discretion is exercised by the Court below, the High Court ought not to interfere without any compelling reason.[12] The appellate court will not interfere unless the discretion has been exercised by the trial court arbitrarily, capriciously or perversely or without due consideration of relevant facts and circumstances of the case.[13]

It is the trial court that should be asked to presume a document to be genuine under Section 90. One can not ask the High Court for the first time to draw the presumption under section. 90.[14] The appellate court should always be slow to interfere with the discretion of the trial court as to the raising or refusing to draw the presumption.[15]

Distinguishing the above decision, it was held that when the document purporting to be more than 30 years is a registered one and it is produced from proper custody, the presumption can be drawn by the court.[16]

Where the appellate court intends to take a different view from the trial courts discretion, an opportunity to adduce further evidence in support of the presumption ought to be given to the party producing the document.[17]

14. UTTAR PRADESH AMENDMENT

By the Uttar Pradesh Civil Laws (Reforms and Amendment) Act 34 of 1954, Section 90 was amended. According to that the main section was renumbered as 90(1) with a slight amendment substituting the words of "20 years", for the words "30 years". A new sub-sec. (2) was added which is as follows: "Where any such document as is referred to in sub-Section 1 was registered in accordance with the law relating to registration of documents and a duly certified copy thereof is produced, the court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to have been executed or attested.

Then another section with two *clauses* were added which are as follows:—

"90A(1). Where any registered document or a duly certified copy thereof or any certified copy of any document which is part of the record of a court of justice, is produced from any custody which the court in the particular case considers proper, the court may presume that the original was executed by the person by whom it purports to have been executed.

(2) This presumption shall not be made in respect of any document which is the basis of a suit or of a defence or is relied upon in the plaint or written statement. The explanation to sub-sec. (1) of Section 90 will also apply to this section".

It was held that the presumption under Section 90-A may be made only if the original shows on the face of it the name of the person by whom it purports to have been executed; the mere fact that it is 20 or

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11. *Ramakrushna* v. *Gangadhar*, AIR 1958 Ori 26.
12. *Ramakrushna* v. *Gangadhar*, 1958 Ori 26; *Amrita Devi* v. *Sripat Rai*, 1962 All 111; *Ayub* v. *Bhanwar Chand*, II R (1971) 21 Raj 30; *Bhaggal* v. *Rangi Lal*, AIR 1986 All 163.
13. *Chandri Begam* v. *Madharao*, AIR 1953 MB 28; *Rangu* v. *Rambha*, AIR 1967 Bom 382.
14. *Kanhiya Lal* v. *Jamna Lal*, AIR 1950 Raj 47.
15. *Nathu Lal* v. *Gomti Kaul*, AIR 1949 PC 160; *Vaidyanathaswamy* v. *Natesa*, AIR 1921 Mad 452; *Gomti* v. *Meghraj* AIR 1933 All 443; *Ravjappa* v. *Nilakanta Rao*, AIR 1962 Mys 53; *Rangu* v. *Rambha*, AIR 1967 Bom 382.
16. *Tej Singh* v. *Hastimal*, AIR 1972 Raj 191.
17. *Dadireddy Rami Reddi* v. *Gunnamma Chinnamma*, 1958 An LT 561; **relying on** *Rajendra Prosad* v. *Gopal Prasad* AIR 1929 Pat 51; *Radhe Kishun* v. *Basdeo Lal*, 1935 Oudh 482.

30 years old does not make it admissible without proof; the presumption under Section 90-A is with regard to the execution of a document; and it that respect Section 90-A is narrower in scope than Section 90 of the act under which a presumption may be made that a document is in the handwriting of a person by whom it purports to have been written; it is not without reason that the Legislature while amending Section 90 confined the scope of Section 90-A to raising the presumption regarding the execution, as, it has within its view not only a registered document but also certified copies of the document forming part of the record of a court of justice.[18]

The Sub-Registrar is not a court of justice within the meaning of Section 90-A; a certified copy of an application made to him cannot, therefore, be relied upon to draw a presumption that the original was executed by the person by whom it purports to have been executed.[19]

The effect of the presumption under Section 90 of the UP Amendment is that a formal proof of such document is dispensed with and the document is admissible in evidence.[20]

In *Ram Jas* v. *Surendra Nath*[21] **overruling**[22] was held that Section 90-A (2) does not override and nullify Section 90, even if the document is more than 20 years old is the basis of the suit or the defence or is relied upon in the plaint or written statement; Section 90-A is independent of Section 90; the presumption though not available under one section can still be drawn under another section.

It was held dealing with the UP Amendment Act of 1954 that:

(1) so far as the registered documents are cocerned all are not governed by Section 90-A including Section 90-A cl. (2); otherwise Section 90 would be redundant and superfluous; the presumption under Section 90 so far as it relates to registered documents applies to the documents which are more than 20 years old and this presumption is not subject to a condition similar to the one contained in Section 90-A (2); on the other hand the presumption available under Section 90-A (1) applies to registered documents or copies thereof which are not more than 20 years old and that is subject to the condition laid down in Section 90-A (2).

(2) It was further held that if the document is not the basis of the suit but simply relied on as a piece of evidence its genuineness can be presumed under Section 90, if it is more than 20 years old, and under Section 90-A (1), if it is a registered document or a duly certified copy thereof and is less than 20 years old.

A lady asserted herself to B the *Bhumidar* in consolidation proceedings. In proof of her claim she relied on a sale deed transferring ownership of certain plot, when she prefered a claim for that plot as the objector in the consolidation proceedings, it was held by the Allahabad High court that the sale deed cannot be said to be the basis of her suit claiming the plot, but only a piece of evidence in support of the claim.[23]

It was held that the presumption of due execution and attestation cannot be drawn in respect of a document less than 20 years old and not forming part of court records and which is the basis of claim of title of one of the parties.[24]

It was held that Section 90(2) was not controlled by 90-A(2). Thus a certified copy of a document is one in regard to which a presumption can be raised under Section 90-(1) as in the case of the original, provided the original document is more than 20 years old.[25]

The presumption under Section 90 is not subject to the exception given in Section 90-A(2), the correct interpretation of Section 90 as amended, and Section 90-A read together will be that in cases where a registered document or certified copy thereof is more than 20 yeras old, the same may be presumed without formal proof of execution and attestation, even though the said document or the certified copy is the basis of the suit or of defence. Whereas, under Section 90-A if the document is not more than 20 years old but is a registered document or a duly certified copy thereof a presumption about

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18. *Amrita Devi* v. *Sripath Rai*, AIR 1962 All 111.
19. *Surendra Pal* v. *Surendra Pal*, ILR (1976) 2 All 143.
20. *Babuna Ndan* v. *Board of Revenue*, 1972 All 406.
21. AIR 1980 All 385 (FB).
22. AIR 1974 All 389.
23. *Deo Chand* v. *Dy. Director of Consolidation*, AIR 1971 All LJ 992.
24. 1971 All WR (HC) 438.
25. *Risal* v. *Dy. Director of Consolidation*, 1970 All LJ 1161.

its due execution can also be made provided the document does not form the basis of the suit or defence.[26]

It was held in another case that the presumption which was by virtue of Section 90(1) available in respect of the original documents has now been by virtue of Section 90(2) extended even to certified copies of registered documents. There arises no occasion to raise a presumption under Section 90 till a case for reception of secondary evidence has been made out. After the amendment the presumption under Section 90 is to be made in respect of 20 years old document and the same may be extended to copies.[27]

Where a copy of the document from the record of a Court was produced only as a piece of evidence in support of certain factual allegation made in the plaint, it was held that the court could validly raise the presumption as it was executed by the parties by whom it purported to be executed and that sub-sec. (2) does not apply to such a document.[28]

Presumption as to electronic records five years old.

[29]**[S. 90-A. Where any electronic record, purporting or proved to be five years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the digital signature which purports to be the digital signature of any particular person was so affixed by him or any person authorised by him in this behalf.**

***Explanation.*—Electronic records are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they naturally be; but no custody is improper if it is proved to have had a legitimate origin, or the circumstances of the particular case are such as to render such an origin probable.**

This *Explanation* applies also to Section 81-A.]

STATE AMENDMENTS

Uttar Pradesh.—After Section 90, *add* the following as a new Section 90-A:

'90-A. (1) Where any registered document or a duly certified copy thereof or any certified copy of a document which is part of the record of a court of justice, is produced from any custody which the court in the particular case considers proper, the court may presume that the original was executed by the person by whom it purports to have been executed.

(2) This presumption shall not be made in respect of any document which is the basis of a suit or of a defence or is relied upon in the plaint or written statement.

The explanation to sub-section (1) of Section 90 will also apply to the section'.—*Vide* U.P. Act XXIV of 1954.

COMMENTS

1. THE INFORMATION TECHNOLOGY ACT, 2000 PRESUMPTION AS TO ELECTRONIC RECORD FIVE YEARS OLD

The new Section 90A says that where an electronic record, purporting to be or proved to be five years old, is produced from the custody which the Court considers proper in a particular case, it may presume that the digital signature which purports to be the digital signature of any person was so affixed by him or by any person authorised by him in that behalf.

The explanation defines "proper custody" saying that the electronic records are said to be in proper custody if they are in the place in which and under the care of the person with whom they would

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26. 1969 All WR (HC) 188.
27. *Sardaran* v. *Sunderlal Baldeo Prasad*, AIR 1968 All 363. **See also** *Shayama Devi* v. *Premvati*, AIR 1996 All 57 (para 23).
28. 1971 All WR 132.
29. Inserted by the Information Technology Act, 2000, S. 92, and Sch. II (w.e.f. 17-10-2000).

naturally be; but no custody is improper if it is proved to have a legitimate origin, or the circumstances of the particular case are such as to render an origin probable.

2. *DAKHALNAMA*

A *dakhalnama* which is not the basis of suit or defence, does not require proof and presumption under Section 90-A can be drawn safely in respect of it.[30]

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30. *Krishna Mohan* v. *Bal Krishna Chaturvedi*, AIR 2001 All 334 (para 37).

CHAPTER VI

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE

Evidence of terms of contracts, grants and other dispositions of property reduced to form of document

S. 91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

***Exception 1.*—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.**

***Exception 2.*—Wills admitted to probate in India may be proved by the probate.**

***Explanation 1.*—This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.**

***Explanation 2.*—Where there are more originals than one, one original only need be proved.**

***Explanation 3.*—The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.**

ILLUSTRATIONS

(*a*) If a contract is contained in several letters, all the letters in which it is contained must be proved.

(*b*) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(*c*) If a bill of exchange is drawn in a set of three, one only need be proved.

(*d*) *A* contracts, in writing, with *B*, for the delivery of indigo upon certain terms. The contract mentions the fact that *B* had paid *A* the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(*e*) *A* give *B* a receipt for money paid by *B*.

Oral evidence is offered of the payment.

The evidence is admissible.

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COMMENTS

1. PRINCIPLE AND SCOPE

When a transaction has been reduced to writing either by agreement of the parties or by requirement of law, the writing becomes the exclusive memorial thereof, and no evidence shall be given to prove the transaction, except the document itself or secondary evidence of its contents where such evidence is admissible. This rule is based on the principle that the best evidence, of which the case in its nature is susceptible, should always be presented....This rule does not demand the greatest amount of evidence which can possibly be given of any fact, but its design is to prevent the introduction of any which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud, for, when better evidence is withheld, it is only fair to presume that the party has some sinister motive for not producing it, and that, if offered, his design would be frustrated. The rule thus becomes essential to the pure administration of justice.[1] The best evidence about the contents of a document is the document itself and it is the production of the document that is required by this section in proof of its contents.[2]

Under this section (1) when the terms of (a) a contract, (b) a grant, or (c) any disposition of property have been reduced to the form of a document; or (2) when any matter is required by law to be reduced to the form of a document. Then (*a*) the document itself, or (*b*) secondary evidence of its contents, must be put in evidence.

The first part refers to transactions voluntarily reduced to writing. The second refers to those cases in which any matter is required by law to be reduced to the form of a document, *e.g.*, sale of immovable property of the value of one hundred rupees and upwards, mortgage for an amount of one hundred rupees or more, a lease of immovable property for any term exceeding one year, a trust of immovable property, a gift of immovable property etc.[3]

These are two exceptions to these provisions:

(1) When a public officer is required by law to be appointed in writing, and any officer has acted as such, the writing need not be proved;

(2) Wills admitted to probate in India may be proved by the probate.

The general rule laid down in this section is also subject to the exceptions laid down in the following Ss. 95 to 99. The section has no application when the writing is not evidence of the matter reduced to writing.

This section and S. 92 define the cases in which documents are exclusive evidence of transactions which they embody. They only apply when the document evidencing a contract appears to contain all the terms thereof. The inference that a writing was intended to contain the whole agreement may be drawn from the document itself as well as from extrinsic evidence.[4] Sections 93-100 provide for the interpretation of documents by oral evidence.

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1. TAYLOR, 12th Edn., S. 391, p. 272. **See** *Entisham Ali* v. *Jamna Prasad*, (1922) 24 Bom LR 675 : 48 IA 365, where secondary evidence of a sale deed was admitted.
2. *Hira Devi* v. *Official Assignee, Bombay*, AIR 1958 SC 448 : (1958) 60 Bom LR 932.
3. **See** *Chowgatta* v. *Chattar Singh*, (1877) PR No. 18 of 1878 (Civil); *Fattesh Singh* v. *Mian Singh*, (1883) PR No. 131 of 1883 (Civil).
4. *Chunanram Motilal* v. *Divanchand Govindram*, (1931) 56 Bom 180 : (1932) 34 Bom LR 26.

Illustration (b) refers to the first part of the section.

This section deals with exclusiveness of documentary evidence, whereas, Section 92 deals with conclusiveness of documentary evidence, though SIR. JAMES STEPHEN in his digest[5] deals with both the sections under one head "the parol evidence".

In *Bai Hira Devi* v. *Official Assignee of Bombay*[6] the Supreme Court pointed out the principle underlying Section 91 and the difference between Section 91 and 92. It was observed: "Section 91 is based on what is sometimes described as the "best evidence rule". The best evidence about the contents of a document is the document itself and it is the production of the document that is required by Section 91 in proof of its contents. It is after the document has been produced to prove its terms under Section 91 that the provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement, for the purpose of contradicting, varying, adding to or subtracting from its terms. Sections 91 and 92 in effect supplement each other. Section 91 would be frustrated without the aid of Section 92 and Section 92 would be inoperative without the aid of Section 91. The two sections, however, differ in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not, whereas Section 92 applies to documents which dispose of property. Section 91 applies to documents which are both bilateral and unilateral, unlike Section 92 the application of which is confined only to bilateral documents. Section 91 lays down the rule of universal application and is not confined to the executant or executants of the documents. Section 92 on the other hand, applies only between the parties to the instrument or their representatives in interest".

It is a cardinal rule in the Law of Evidence that the best available evidence should be brought before the court. Sections 60, 64 and 91 are based on this rule.[7]

PHIPSON states: "When a transaction has been reduced to, or recorded in, writing either by requirement of law, or agreement of the parties, the writing becomes, in general, the exclusive record thereof, and no evidence may be given to prove the terms of the transaction, except the document itself or secondary evidence of its contents". (PHIPSON on Evidence, 15th Edn. (2000), para 42.01, page 1157).[8]

In *Meer Mohammed Kajen Jowhurry* v. *Khetoo Debee*[9] it was observed, "the rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement.[10]

Where the terms of the contract are reduced to writing, Section 91 comes into play. The primary evidence from which the intention of the parties is to be gathered, is the document itself and surrounding circumstances. Subsequent conduct cannot be proved to show that the intention of the parties was different.[11] Where the original *sanad* which is an ancient grant was produced and when there is no ambiguity, it was held that the conduct of the parties cannot be looked into in interpreting the *sanad* by adducing evidence.[12]

The Supreme Court in *Fort Gloster Industries* v. *Sethia Mercantile Pvt. Ltd*[13] held that the Court could not refer to any evidence other than the documents relating to arbitration agreement for determining the question whether arbitration could be invoked for settlement of the dispute; that the terms of the arbitration contract required to be in writing (Section 33 of Arbitration Act 1940 and

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5. 7th Ed., Art. 90, P. 98.
6. AIR 1958 SC 448 **reversing** 1955 Bom 122.
7. In re.: *Vadlamudi Kutumba Rao*, AIR 1957 AP 595.
8. **See also** *Mansingh Mahtoon* v. *Bhaik Narain Mahtoon*, 7 IA 8 PC.
9. 10 WR 150.
10. **See also** *Sundarachariar* v. *Narayana Ayyar*, AIR 1931 PC 36; *Rachpal Maharaj* v. *Bhagwandas Daruka*, AIR 1948 Pat 251; *Jata Shanker* (L. Rs. since deceased) v. *Mavji Trikam* (L.Rs since deceased), AIR 1969 Guj 169; *Kangabam Bira Singh* v. *Manipur Drivers Union*, AIR 1957 Manipur 9; **relying on** *Charan* v. *Shyam Lal*, AIR 1950 Pepsu 34; *Ratan S. Naik* v. *Union of India*, 1980 Lab. IC 1140 (Goa).
11. *State of Madras* v. *Ramlingam & Co.*, AIR 1956 Mad 695 **reversed on** another point in *Ramalingam & Co.* v. *State of Madras*, AIR 1962 SC 1148.
12. *Somar Puri* v. *Shyam Narayan Gir*, AIR 1954 Pat 586.
13. AIR 1971 SC 2289.

Section 10 of the Contract Act) cannot be proved otherwise than by offering the document itself in evidence.

An arbitration agreement to refer a dispute to an arbitrator is a contract within the meaning of Section 91.[14] A contract to refer disputes to arbitration is different from the proceedings of the arbitrators in respect of the disputes. The Evidence Act is not applicable to the arbitration proceedings but will apply to the arbitration agreement.[15]

In a case where there was an agreement for sale of two ancestral houses jointly held by two brothers (defendant's 1&3) for a consideration of Rs. 2,250 out of which Rs. 200 was paid as earnest money and when a separate oral agreement was pleaded, it was held that neither Section 91 nor provisos 2, 3 Illus. (*g*) to proviso 6 of Section 22 would enable the plaintiff to lead evidence to spell out two different agreements in respect of the two houses by showing that the brothers were separated and houses were separately owned by them on the date of agreement.[16]

In a case of joint purchasers of property, it was held no amount of evidence could be led or considered for giving a finding of exclusive ownership of plaintiff over a passage.[17]

2. DOCUMENT MUST CONTAIN ALL THE TERMS

The Privy Council in *Mohammad Akbar Khan* v. *Attar Singh*[18] observed: "Before evidence is excluded under Section 91 and 92 Evidence Act, it must be proved that the document in question records or purports to record all the terms of the contract between the parties". It follows that when all the terms have not been reduced to writing oral evidence is not excluded.

In that case there was nothing in the document which explained how the money came to be received; and there was nothing to prevent the parties from showing that it was paid by way of loan, deposit, or on account of some joint venture. The use of the money might have been limited in various ways. The only terms which the document did express were as to the date of repayment of the money expressed to be received and as to the rate of interest. These terms the defendants did not seek to contradict, vary add to or subtract from. The Board therefore held that it could proceed to examine the evidence untrammelled by the restriction imposed upon themselves of having to disregard the receipt or evidence as to the actual transaction.

If the parties intended only to reduce to writing a portion of the terms of the contract, then they are entitled to give parol evidence of the terms which they did not intend to reduce to writing[19] Where parties to a contract agree to substitute a written instrument for an oral contract the ultimate contract is deemed to be contained in the instrument alone and no oral evidence of its terms can be given thereafter[20]

3. COMPROMISE—DOCUMENT

Where there was a written compromise between the parties and when it was sought to be enforced as a contract the introduction of a new term by way of oral evidence is not permissible in view of Section 91 and the proof of terms can be only by filing the compromise deed and not by oral evidence.[21]

A *wakf* can be created orally under Muhammadan Law, but when the terms of dedication are reduced to the form of a writing, no evidence can be given to prove the terms except the document itself or secondary evidence thereof.[22]

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14. *Radha Kishan* v. *Sapattar Singh*, AIR 1957 All 406 **overruling** *Babu Ram* v. *Lala Ram*, AIR 1929 All 415.
15. *Bengal Jute Mill Co.* v. *Lalchand Dugar*, AIR 1963 Cal 405.
16. *Shrikrishna, Keshav Kulkarni* v. *Balaji Ganesh Kulkarni*, AIR 1976 Bom 242.
17. *Chanderwati* v. *Lakshmi Chand*, AIR 1988 Del 13.
18. AIR 1936 PC 171.
19. *Jamna Doss* v. *Srinath Roy*, ILR (1889) 17 Cal 176, 177. **See** *Sangam Lal* v. *Mussammat Sikandar Jehan Begam*, (1889) PR No. 183 of 1889, FB (Civil); *Ram Gopal* v. *Tulshi Ram*, ILR (1928) 51 All 79, (FB); *Ghasilal* v. *Deobai*, (1953) MB 303; *State of Madras* v. *Ramalingam & Co.*, AIR 1956 Mad 695, 701.
20. *Nainsukhdas Sheonarayan Shop* v. *Goverdhandas*, ILR (1947) Nag 510.
21. *Md. Daud* v. *Abu Mohammad*, AIR 1961 Pat 310; *Hargyan* v. *Banwari Lal*, AIR 1968 All 275.
22. *Shaikh Muhammad Ibrahim* v. *Bibi Mariam*, ILR (1928) 8 Pat 484; *Mohammed Khan* v. *Sheo Bhikh Singh*, ILR (1929) 5 Luck 377.

4. TERMS

The expression "terms" in this section and S. 92 relates to statements, assertions or representations contained in a written contract which relate to the subject-matter of the contract and to something to be done or not to be done under the contract, and has no application to a provision in the nature of a condition precedent to the very existence or formation of a contract.[23]

Where a sale deed contained a term for the reconveyance of the property under certain conditions it was held that such stipulation can not be proved by oral evidence in view of the bar of Section 91.[24]

Where the tenant constructed a kitchen without the landlord's permission, it was held that in the absence of the proof of usage, a condition that the tenant shall not construct any other structures to the building is implied in the tenancy agreement, and that the tenant constructing the kitchen amounts to breach of a condition of the tenancy. Hence Section 91 is not attracted and the plaintiff can prove the breach of the condition.[25] In a contract of sale of property, it was held that the manner and time of payment of consideration can be proved by oral evidence.[26] In regard to a recital in a gift deed that there was no consideration, the Bombay High Court held that it is always open to the parties to prove that a certain recital which is a statement of fact is not correct and it can be shown that there was consideration and the document was a sale.[27]

Section 91 and 92 are a bar for any party to set up a case that consideration for sale is more than what was mentioned in the document and when it was not the case that the consideration was not paid or there was failure of consideration or the consideration agreed between the parties was of a different kind than what was mentioned in the document.[28] The price agreed upon is a term of the contract when such agreement is reduced to writing. Any oral agreement pleaded for paying a higher price cannot be admitted.[29]

Where the contract of sale of which specific performance is sought, is uncertain no oral evidence can be allowed to add to its terms.[30]

When a sale deed had been executed and registered, in a suit for possession by the vendee, it is not open to the vendor to let in oral evidence to show that the terms of the contract between the parties were different or were at variance with the terms contained in the document.[31]

The expression "terms" of a contract in Section 91 and the corresponding expression in Section 92 has no application to a statement contained in writing which is in the nature of a condition precedent to the very formation of that contract.[32]

The Privy Council in *Tyagaraja Mudaliyar and others* v. *Vedathanni*[33] observed: "Section 92, only excludes oral evidence to vary the terms of the written contract and has no reference to the question whether the parties had agreed to contract on the terms set-forth in the document. The objection must therefore, be based on Section 91 which only excludes oral evidence as to the terms of a written contract. Clearly under that section, a defendant suing as in the present case, upon a written contract purporting to be signed by him, could not be precluded in disproof of such agreement from giving oral evidence that his signature was a forgery". Thus the difference can be seen between an attempt to show that the terms

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23. *P.B. Bhat* v. *V.R. Thakkar*, (1972) 74 Bom LR 509.
24. *Bibi Anwarunisa* v. *Daulat Rai*, AIR 1988 Pat 229.
25. *Leena Roy Choudhary* v. *Indumathi Bose*, AIR 1980 Pat 120.
26. (1972) 2 Cut WR 1298.
27. *Bai Hiradevi* v. *Official Assignee Bombay*, AIR 1955 Bom 122; this was **reversed in** *Bai Heeradevi* v. *Official Assignee* AIR 1958 SC 448 and it was held that the parties to the document cannot lead evidence to show that there is **consideration but strangers to the document can lead such evidence.**
28. *Leelamma* v. *Narayanan*, AIR 1992 Ker 115; **relying on** *Md. Taki Khan* v. *Jang Singh*, AIR 1935 All 529 (FB); *Bai Hira Devi* v. *Official Assignee, Bombay*, AIR 1955 Bom 122 *Supra*; *Narasimhachari* v. *Indo Commercial Bank*, 1955 Mad 147; *Rajanna* v. *Dhondusa*, AIR 1970 Mys 270.
29. *Subhadra* v. *Kesavan*, 1962 Ker LJ 938 **relying on** *Maung Man* v. *Ma kin oh*, AIR 1928 Rang 47; *Mothy Krishnayya* v. *Md. Galeb*, AIR 1930 Mad 659.
30. *Phuljhari Devi* v. *Mithailal*, AIR 1971 All 494.
31. *Doddamallappa* v. *Gangappa*, AIR 1962 Mys 44.
32. *B. Bhatt* v. *V R. Thakkar*, AIR 1972 Bom 365.
33. AIR 1936 PC 70.

of a contract were different from those recorded in the document and an attempt to show that the contract as mentioned in the document was not the real contract between the parties, but something else.[34]

In the case of mortgagors also, it was held that one mortgagor can show that he was only a surety for the other mortgagors and they are liable to pay the amount which he was compelled to pay under the mortgage deed.[35]

Neither Section 91 nor Section 92 has application unless in the first instance there is a contract or a grant or any other disposition of property; evidence intended to show that there was no grant, contract or disposition of property does not offend the provisions of either section; notwithstanding the recital of payment of consideration in a document, evidence can be given to show that the consideration was not actually paid.[36] Where the deed of *Nikahnama* mentioned certain amount as prompt dower, it was held that Section 91 only excludes oral evidence as to the terms of the contract, but oral evidence is admissible to show that a document executed by a person was never intended to operate as an agreement and was brought into existence for the purpose of creating evidence about some other matter; Sections 91 and 92 will not debar a party, to show that there was no agreement between the parties.[37] In[38] the Privy Council held that where a document is signed only by one of the parties, it does not amount to a written agreement and hence oral evidence to prove that the real intention of the parties was different from that exposed by the terms of the document is admissible. The section does not preclude a party from proving that the real contract is different from what was found in the deed.[39] Where a partner's signature was not on the deed of partnership, it was held that evidence was not excluded by Section 91 to prove the fact of partnership.[40]

5. CONDUCT OF PARTIES

The Supreme Court held in *Bhaskar Waman Joshi* v. *Shri Narayan Rambilas Agarwal*,[41] that the form in which the deed is clothed is not decisive. In a sale coupled with an agreement to reconvey, there is no relation of debtor and creditor; nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified. The definition of a 'mortgage' by conditional sale itself contemplates an ostensible sale of the property. The question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the deed viewed in the light of surrounding circumstances. If the language employed is ambiguous, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law, be permitted to be adduced to show in what manner the language of the deed was related to the existing facts. Oral evidence of intention is not admissible in interpreting the covenants of the deed, but, evidence to explain or even to contradict the recitals as distinguished from the terms of the document may of course be given. Evidence of contemporaneous conduct is always admissible as surrounding circumstances, but evidence as to subsequent conduct of the parties is inadmissible.[42]

Where the terms of the document are unambiguous and envisage an out and out sale it was held that no oral evidence of the conduct of the parties or the surrounding circumstances could be admitted in evidence to vary or contradict its terms by indicating that the said document was not a sale, but a "*Viswas Bai*" which means a sale as a result of good feeling amongst the parties or because of the confidence that one reposes in the other.[43]

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34. **See also** *Syed Rasool* v. *Mohd. Moulana*, AIR 1977 Kant 173; *Hukum* v. *Shambhu*, AIR 1935 All 346.
35. *Sultan Md. Mohideen* v. *Amthul Jalal*, AIR 1927 Mad 1102; *Lakshmana Sahu* v. *Simachala Patra*, AIR 1941 Pat 211; *Khudawand* v. *Narendra*, ILR 58 All 548; *Ramayya* v. *Mannaru*, AIR 1930 Mad 590 (a case of transferees *interse*).
36. *Bhawanbhai Premabhai* v. *Bai Vahali*, AIR 1955 Bom 320; **following** *Tyagaraja Mudaliyar* v. *Vedathanni*, AIR 1936 PC 70.
37. *Kahiz Kasim* v. *Hadi Husain Khan*, 1977 All LJ 900 **relying on** *Asaram* v. *Ludheshwar*, AIR 1938 Nag 335.
38. *Egged Co-operative Society Ltd.* v. *Levi Geffen*, AIR 1947 PC 32.
39. *Arumoorthi* v. *S.E. Committee*, AIR 1962 Mad 360.
40. *Shiv Singh* v. *Ramji Das*, AIR 1955 HP 54.
41. AIR 1960 SC 301.
42. **See also** *Varasingerji Gyanagerji* v. *P. Parthasarathi*, AIR 1924 PC 226, *Rajat Chandra Deka* v. *Dhani Ram Deka*, AIR 1965 Asam 90; *Guru Basappa* v. *Gurulingappa*, AIR 1962 Mys 246.
43. (This principle may apply to mortgage also) *Guru Basappa* v. *Guru Lingappa*, AIR 1962 Mys 246 **relying on** *Maung Kyin* v. *Ma Shwe Law*, AIR 1917 PC 207; *Bolumal Dharmadas Firm* v. *Venkatachelapathi Rao*, AIR 1959 AP 612; *Chandra Shekar* v. *Mural Gope*, AIR 1957 Pat 673; *Ramlochan Singh* v. *Pradip Sing*, AIR 1959 Pat 230.

Where a document showed no sharing of profits but one person was required to pay a fixed sum periodically to the other and carry on business in his own name on the property of the other, the question was whether it was a partnership or lease. In deciding the question whether the transaction was a lease or a partnership, it was held oral evidence showing the transaction to be a lease could not be rejected and Section 91 was no bar.[44]

Section 159 of the Evidence Act states that a witness may during the examination in court refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned. He may also refer to any such writing made by any other person. Section 160 states that a witness may also testify to the facts mentioned in any document as is mentioned in Section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document. But before referring to those documents, it must be produced and shown to the adverse party if he so requires, or if the adverse party wants to cross-examine the witness on that document.

Where a contract was signed by the defendant personally and he attempted to lead oral evidence to show that he was contracting as an agent and that the name of his principal was disclosed at the time of the contract, it was held that such evidence was not admissible for the purpose of exonerating a contracting party from liability, for that would be substituting different agreement from that evidenced by the writing.[45]

Evidence is admissible to show whether a party contracted as an agent or in the capacity of a seller or buyer.[46] The Supreme Court while dealing with a rent note held that, by reading Section 91 with Section 92 proviso 4, of the Act, oral evidence is admissible to prove that the real tenant was other than the ostensible tenant appearing on the note.[47]

Relying on *Thyagaraja Mudaliyar* v. *Vedathanni,*[48] a division bench of the Allahabad Court held that Sections 91 and 92 do not preclude a party from giving evidence to show that the written agreement executed was never intended to operate as an agreement, but was brought into existence solely for creating evidence about some other matter.[49] In a suit for possession of a house on the strength of a sale deed the defendant sought to prove that the sale deed had not been executed, so as to operate as a sale deed, but was executed as a sequel to another transaction of agreement to sell which the defendant had entered into with the plaintiff regarding the sale of his land. It was held that such defence did not run counter either to Section 91 or Section 92.[50] Sections 91 and 92 do not preclude the defendants from showing by evidence that though the document was executed in the form of an agreement for sale of land, the real nature of the transaction was a loan for which the document was a security.[51]

Where the parties agree that a negotiable instrument shall be taken as conditional payment only and not as accord and satisfaction of the original debt, that term of the agreement will not be generally embodied in the negotiable instrument and in such cases Section 91 has no application.[52]

A collateral agreement between the parties that the sale deed between them is nominal and will not be acted upon, is not hit by Sections 91 and 92 and can be proved by direct and circumstantial evidence.[53] Oral evidence is admissible to determine the questions whether a gift deed was acted upon or not.[54]

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44. 1963 Cal LJ 75.
45. *Ebrahimbhoy Pabaney Mills Co. Ltd.* v. *Hassan Mamooji,* (1920) 23 Bom LR 767 : ILR 45 Bom 1242.
46. *Sohanlal* v. *Bilasray,* AIR 1954 Cal 179.
47. *Niranjan Kumar* v. *Dhyan Singh,* AIR 1976 SC 2400; *Ugni* v. *Chowa Mahto,* AIR 1968 Pat 302 (FB).
48. AIR 1936 PC 70.
49. *Yadav Ram* v. *Laxman Singh,* AIR 1978 All 123: **See also** *Kahiz Kasim* v. *Hadi Hussain Khan,* 1977 All LJ 900; *Bhuralal* v. *Bhuriya,* AIR 1963 MP 210; *Umrao Singh* v. *Raunak Singh,* AIR 1939 Pat 495.
50. *Bhuralal* v. *Bhuriya,* AIR 1963 MP 210; **relying on** *Tyagaraja* v. *Vedathanni,* AIR 1936 PC 70; *Umrao Singh* v. *Raunak Singh,* AIR 1939 Pat 495.
51. *Sukumar Bysack* v. *Sushil Kanta Banerjee,* AIR 1972 Cal 207; **following** *Tyagaraja Mudaliyar* v. *Vedathanni,* AIR 1936 PC 70; *Sukumar* v. *Hiralal,* AIR 1954 Cal 48; *Satish Chandra* v. *State,* AIR 1954 Cal 379; *Banku Behari* v. *Kalyani Debi,* AIR 1967 Cal 351.
52. *Maung Chit* v. *Roshan NMA Kareem Oomer and Co.,* AIR 1934 Rang 389 (FB).
53. *Ramjilal Tiwari* v. *Vijai Kumar,* 1970 Cr LJ 1176 : 1970 MPLJ 50; *Lok Nath* v. *Jagbir Suri,* 1982 Cr LJ 1328 (J&K).
54. *Gouranga Sahu* v. *Magunidei,* AIR 1991 Orissa 151.

Section 91 only excludes oral evidence of the terms of a document but not of existence of the contract or the relationship of landlord and tenant brought about by possession and payment of rent.[55]

When one of the brothers executed a pronote for a business which was carried on jointly with his brothers in partnership oral evidence was admitted to prove an assurance that the amount was taken for the joint business.[56]

The Supreme Court in *Mahindra and Mahindra* v. *Union of India*[57] held "It is true that a *clause* in an agreement may embody a trade practice and such a trade practice may have the actual or probable effect of restricting or destroying competition and hence they constitute a restrictive trade practice. To know the effect of such *clause* oral evidence can be adduced "to determine whether a particular trade practice set out in the agreement has or may have the effect of preventing, distorting or restricting competitions so as to constitute "a restrictive trade practice" under the Monopolies and Restrictive Trade Practice Act 1969 and that Sections 91 and 92 are no bar as it would not amount to contradicting varying, adding to, or subtracting from the terms of the document". The Supreme Court held that the decision in *Hindustan Liver Ltd., Bombay* v. *Monopolies and Restrictive Trade Practices Commission*[58] is not good law. In *Hindustan Lever* case[59] it was held that where the *clause*s of the agreement were clear and the meaning decisive, no oral evidence could be led to deduce their meaning or to vary it in view of Sections 91 and 92.

6. CONTRACTS

Where the endorsements by the next reversioners on the deed of alienation by the Hindu widow merely recite the fact that they knew the contents of the deed, the endorsements cannot be said to be the records of contracts entered into by the alienee with the reversioners for obtaining their consent to the transaction and hence oral evidence of the alienee regarding the consent of the reversioners is not rendered inadmissible under Section 91.[60]

In *Deepchandra* v. *Md. Sajjad Ali Khan*, a receipt showed that some amount of earnest money out of the sale consideration was received from the vendee through another person and that the sale deed would be executed within three months and in default the contract would be deemed cancelled and it bore the signature of the vendor. The contention of the plaintiff that the receipt in that case was concluded contract and that no oral evidence can be adduced by the defendant to show that because a *clause* regarding inflation was not incorporated it was not a concluded contract was negatived. AGARWALA J for himself and WANCHOO J observed at p. 105 "In order that Sections 91 and 92 should operate it must be proved (1) that there was a contract or a grant or other disposition of property and (2) that the terms of such contract, grant or other disposition of property were reduced to the form of a document. If either of these conditions is not fulfilled, the application of these sections is not attracted. The defence plea being that there is no concluded contract, neither of these sections can be said to bar the defence from proving their plea by oral evidence".[61]

Further it was observed "Plea of the Vendor (defendant) might either fall under Proviso 3 to Section 92 or it might be taken as a plea not converted by Section 92 at all. In both cases oral evidence is admissible in support of the plea. Thus the document did not preclude the Vendor from showing that the parties did not agree as to one of the terms in the sale deed and that there was no completed contract".

It was held that the liability of the insurer was to be ascertained from the express terms of the agreement if it a written agreement and no other evidence *de hors* terms of the agreement would be admitted.[62] Where a written settlement of the industrial dispute was arrived at between the parties, it was held that the same could not be varied or modified by an oral agreement.[63] Where a party as part of a

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55. *Ugni* v. *Chowa Mahto*, AIR 1968 Pat 302 (FB).
56. *Lalmani Pande* v. *Capal Sah*, AIR 1945 All 221.
57. AIR 1979 SC 798.
58. AIR 1977 SC 1285.
59. AIR 1977 SC 1285.
60. *Vishnoodhar* v. *Bishnoo Prasad*, AIR 1951 Nag 390.
61. AIR 1951 All 93 (FB).
62. *New India Assurance Co. Ltd.* v. *Kusumanchi Kameshwara Rao*, (1997) 9 SCC 179.
63. *Fabril Gasosa* v. *Labour Commissioner*, AIR 1997 SC 954; **see also** *T.N. Electricity Board* v. *N. Raju Reddiar*, AIR 1996 SC 2025 (para 7), **relied on** in *Hansalaya Properties* v. *Reservation Data Maintenance India Pvt. Ltd.* 2000 AIHC 2981 (para 5) (Del). *B.V. Venkataswamy* v. *P.S. Rukminiamma*, 1999 AIHC 1979 (paras 9 and 10) (Kant).

compromise filed a letter in Rent Control Proceedings agreeing to spend certain sums of money on the property of another and subsequently a registered document of lease came into existence in respect of such property and in the suit for damages relying on the earlier letter filed as a part of compromise it was held that such a letter was admissible to prove the damages and Section 91 is no bar.[64]

7. 'ANY MATTER IS REQUIRED BY LAW TO BE REDUCED TO THE FORM OF A DOCUMENT'

Where any matter is required by law to be reduced to the form of a document, then the document itself must be put in evidence, *e.g.*, deeds, conveyances of land, mortgages, wills, etc. No other evidence can be substituted so long as the writing exists. But where the matter is not required by law to be reduced to the form of a document, this section does not apply, *e.g.*, in 1866 an oral agreement with transfer of possession sufficed to create a mortgage and therefore a mortgage could be proved *aliunde* even if there was no registered document[65], but an unregistered memorandum of partition between the members of a joint family is inadmissible in evidence. However, it can be used for collateral purpose of proving the intention of the coparceners and oral evidence to prove partition can also be let in but[66] no oral evidence is admissible to prove the rent payable under a lease reduced to writing.[67]

A judgment of conviction has to be in writing. This is therefore a matter required by law to be reduced to the form of a document. Such matter can be proved either by the document itself or by secondary evidence when it is admissible. When there was no suggestion that the original judgment of previous conviction was lost, oral evidence cannot be led to prove the previous conviction.[68]

8. CONFESSION

A confession of an accused person made to a Magistrate holding an inquiry is a matter required by law to be reduced to the form of a document within the meaning of this section, and no evidence can be given of the terms of such a confession except the record, if any, made under S. 164 of the Code of Criminal Procedure.[69]

9. DEPOSITION

In a prosecution for perjury, the deposition is to be produced in evidence against the accused during his trial not for the purpose of proving its truth but for the purpose of proving that he made it. Section 91, Evidence Act deals with the production of a document to prove the truth of its contents and not to prove its existence. If the prosecution had to prove that the deposition made by the witness is correct, it would have to produce the deposition and Section 91 would bar any other evidence. But when the prosecution has simply to prove that the witness made the deposition, there is nothing in Section 91 to prevent this fact being proved without producing the deposition itself.[70]

The omission to read over his deposition to the witness, in accordance with Order XVIII, Rule 5, of the Civil Procedure Code, renders the same inadmissible in evidence against him at his subsequent trial for forgery and oral evidence of its contents is excluded by this section.[71]

The Madras High Court held that seeing or hearing an act of deposing is a physical act which can be proved by any one who heard or saw the person giving the deposition.[72]

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64. *Kannumuri Jagannadha Rao* v. *Chapa Saraswatamma* (1969) 2 An WR 33.
65. *Narsi* v. *Parshottam*, (1928) 30 Bom LR 1277 : 52 Bom 875; *H.H. Sir Sayaji Rao* v. *Madhavrao*, (1928) 30 Bom LR 1463 : 53 Bom 12.
66. *Krishna Bai* v. *Shivnath Singh*, AIR 1993 MP 65 (paras 6 and 7).
67. *Lal Rajendrasingh* v. *Mahant Hulasdas*, ILR (1944) Nag 704.
68. *City Board Sharanpur* v. *Abdul Wahid*, AIR 1959 All 695.
69. *Emperor* v. *Gulabu*, ILR (1913) 35 All 260.
70. *Mohammad Farooq* v. *Rex through Tufail Ahmad*, AIR 1950 All 501.
71. *Emperor* v. *Nabab Ali Sarkar*, ILR (1923) 51 Cal 236 : AIR 1924 Cal 705; *Chenchian* v. *King-Emperor*, ILR (1919) 42 Mad 561; *Taj Mahmud* v. *Crown*, (1927) 15 Lah 407; **See however**, *Kamla Devi* v. *Rudreshwar Prasad*, 1976 HLR 185.
72. *Ganapathi Iyar* v. *Sukharayappa Mudiliyar*, AIR 1929 Mad 187.

In PHIPSON ON EVIDENCE, 15th Edn. (2000), Page: 1169, para 42-17, it is stated: "The same rule applies to the statutory deposition of a witness in a civil or criminal proceeding which cannot be contradicted, or varied by extrinsic evidence. As to additions to the depositions, since the depositions do not necessarily give the whole statement of the witness or even necessarily his own words, there seems no valid reason why parol additions should not now, as formerly, be admitted, when the deposition is used to contradict the witness (although it would not be possible to give extrinsic evidence by way of addition or contradiction when the deposition is used in the absence of the witness, since the statutory conditions as to admissibility are not fulfilled)."

Section 91 does not refer to depositions recorded by the court during the course of judicial proceedings, it only refers to the terms of a document such as, contract, grant, or any other disposition of property reduced to writing.[73]

Contents of the confessional statements recorded by a Magistrate can not be proved except by producing the record of confession.

10. DOCUMENT

Section 91 at several places uses the word "document" by which, it must be taken, the legislature meant something purporting to have been executed by a party and signed by him in token of execution.[74]

Under Section 153-C (3) of the Companies Act of 1913 (as amended by Act 52 of 1951), a "consent in writing" is a condition precedent; the document itself should prove that consent has been given; no evidence either by way of affidavit or of oral sworn statement in court can be given under Section 91 to prove that such consent was given.[75]

Where the terms of a contract or disposition of property which were under an oral agreement previously, are reduced to the form of a document, it would take the place of the previous oral agreement or contract between the parties. No oral evidence can be adduced under Section 91 to prove the original terms except by producing the document.[76]

11. PROMISSORY NOTES—UNSTAMPED OR INSUFFICIENTLY STAMPED DOCUMENTS

Under Section 35 of the Indian Stamp Act no instrument chargeable with the duty shall be admitted in evidence for any purpose by any person unless such instrument is duly stamped. The Privy Council in *Ram Rattan* v. *Parama Nand*[77] held that the words "for any purpose" in Section 35 should be given their natural meaning and effect and would include a collateral purpose.

In the case of a negotiable instrument there is an unconditional undertaking by the maker to pay a certain sum of money. According to the definition in Section 4 of the Negotiable Instruments Act and the illustrations (*a*) & (*b*) thereunder the consideration mentioned in the promissory note may be a complete discharge or satisfaction of a loan. Illustration (*b*), to Section 91 of the Evidence Act says that if a contract is contained in a bill of exchange, the bill of exchange must be proved. Thus it covers only the case of complete discharge or satisfaction of the loan. A promissory note may come into existence for a pre-existing debt or a past liability, in which case the document would be only as a conditional discharge or payment of the loan, or a collateral security. But if the agreement between the parties is for a contemporaneous loan and it is reduced to writing and if the document (pronote) becomes inadmissible, no suit would lie on the original cause of action for the loan.

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73. *Kamla Devi* v. *Rodre Shwar Prasad Singh*, 1976 HLR 185 (Pat) (DB).
74. *Md. Tahir* v. *Mst. Sardar Bano*, AIR 1952 All 782.
75. *Makhan Lal* v. *Amrit Banaspati Company Ltd.*, AIR 1953 All 326.
76. *Radhabai* v. *N.J. Nayadu*, AIR 1951 Nag 285; *Chanan Singh Mehar Singh* v. *Sham Lal Ramji Dass*, AIR 1950 Pepsu 34; *Kangabam Bira Singh* v. *Manipur Drivers Union*, AIR 1957 Mani 9; *Belapur Co. Ltd* v. *Maharashtra State Farming Corporation*, AIR 1969 Bom 231; *Union of India* v. *Ram Kumar Agarwala*, AIR 1967 Pat 447 (Railway Rule Certificate issued under Section 24(2) of Railway's Act). *Mohan Singh* v. *Deota Ji Bharmol*, AIR 1956 HP 22; *Sumati Bala* v. *Narendra Kumar Das*, AIR 1975 Gau 43; *Rajan* v. *C.N. Gopal*, AIR 1961 Mys 29. *Tata Iron & Steel Co. Ltd.* v. *Ramanlal Kandai*, ILR (1971) 2 Cal 493.
77. AIR 1946 PC 51.

12. SUIT ON PROMISSORY NOTE INADMISSIBLE IN EVIDENCE

The rulings of the Indian High Courts on the question where money is lent to a person who executes a promissory note, but the note is inadmissible in evidence for want of sufficient stamp or for any other reason, may be classified into two classes lucidly enunciated by GARTH, C.J. in[78] where the question was whether a copy of a lost promissory note, which was itself inadmissible as being insufficiently stamped, could be received in evidence. The court held that it could not be received in evidence, GARTH, C.J., said: "When a cause of action for money is once complete in itself, whether for goods sold, or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person. In such cases the bill or note is said to be taken by the creditor on account of the debt, and if it is not paid at maturity, the creditor may disregard the bill or note and sue for the original consideration. But when the original cause of action is the bill or note itself, and does not exist independently of it, as for instance, when, in consideration of A depositing money with B, B contracts by a promissory note to repay it with interest at six months' date, here there is no cause of action for money lent, or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note and no other. In such a case the note is the only contract between the parties, and if for want of proper stamp or some other reason the note is not admissible in evidence, the creditor must lose his money". In a later case, however, the same High Court tried to explain away the above case and held in a suit brought on a *hatchitta* (promissory note) bearing an insufficient stamp and in which the defendant admitted the loan but pleaded payment, that the promissory note was not admissible in evidence but the plaintiff had a cause of action independently of it.[79]

Subsequently, in another case it laid down that the question, whether, when a bill or note is found to be inadmissible in evidence, the payee can sue on the original consideration, depends upon whether the cause of action with regard to the original consideration is one, which is complete in itself, and the debtor then gives a bill or note to the creditor for payment of the money at a future time. If this be so, then the plaintiff may disregard the promissory note, if he chooses, and sue upon the original debt. Where, however, the original cause of action is a bill or note itself and does not exist independently of it, then the plaintiff cannot disregard the note and sue for the original consideration.[80]

The Bombay High Court approved of the principle stated in *Sheikh Akbar* v. *Sheikh Khan*[81] in a case in which the plaintiff sued to recover from the defendant the balance of a debt due on an unstamped note passed to him by the defendant for a consideration of Rs. 38. The note recited that the defendant had received the amount, and would repay it after three months from the date of its execution. The defendant admitted, by his written statement, execution of the note and the receipt of Rs. 37 in the shape of paddy, but alleged that he had paid off the debt. He also contended that the note being unstamped could not be admitted in evidence. It was held that the document sued on was promissory note, and that the suit being brought on it as the original cause of action, the admission of its contents by the defendant did not avail the plaintiff, the document itself being inadmissible for want of a stamp and that the plaintiff could not recover irrespective of the promissory note, as he did not seek to prove the consideration otherwise than by the note, which was inadmissible in evidence and the admission contained in the defendant's written statement did not amount to an admission of the claim as for money lent.[82]

The distinction between cases in which a suit is brought solely on a promissory note or *hundi*, and cases in which there is and can be a claim to recover the original loan, has been acknowledged[83]. Where there is an independent admission of a loan by the holder of a *hundi*, bill or note, which is defective, and

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78. *Sheik Akbar* v. *Sheik Khan*, (1881) 7 Cal 256 at 259; *Radhakant Shaha* v. *Abhoychurn Mitter*, ILR (1882) 8 Cal 721.
79. *Pramatha Nath Sandal* v. *Dwarka Nath Dey*, (1896) 23 Cal 851, **following** *Golap Chand Marwaree* v. *Thakurani Mohokoom Kooaree*, ILR (1878) 3 Cal 314. It **is dissented from** by the Allahabad High Court in *Nazir Khan* v. *Ram Mohan*, ILR (1930) 53 All 114 (FB) : AIR 1931 All 183.
80. *Ranendramohan Tagore* v. *Keshabchandra Chandra*, (1934) 61 Cal 433, **See also** *Indra Chandra* v. *Hiralal*, AIR 1936 Cal 127; *Mahatabuddin Mia* v. *Md. Nazir Joddar*, AIR 1936 Cal 170.
81. ILR (1881) 7 Cal 256.
82. *Damodar Jagannath* v. *Atmaram Babaji*, ILR (1888) 12 Bom 443; *Jacob & Co.* v. *Vicumsey*, (1926) 29 Bom LR 432 : AIR 1927 Bom 437.
83. *Chenbasapa* v. *Lakshman Ramchandra*, ILR (1893) 18 Bom 369.

inadmissible in evidence for want of a stamp, may still sue on the consideration the person to whom he gave it, though he cannot use the bill in support of his suit.[84]

It was observed in *Jacob & Co.* v. *Viaimsey,*[85] that the transaction under a pronote may be of three kinds:—(1) Pronote containing all facts relating to it as shown in illu. (*b*) to Section 91 in which case if it is insufficiently stamped no suit would lie.

(2) The pronote may be regarded as a conditional payment of the loan amount in which case suit can be filed on the original contract for the loan.

(3) A pronote may be given as a security for the loan in which case the plaintiff need not sue on the pronote whether it is properly stamped or not, as he can bring a suit on the loan itself.

The Madras High Court has in a Full Bench case held that whether a suit lies on the debt apart from the instrument depends on the circumstances under which the instrument is executed. If the promissory note embodies all the terms of the contract and the instrument is improperly stamped no suit on the debt will lie. This section and S. 35 of the Indian Stamp Act bar the way. But if it does not embody all the terms of the contract, the true nature of the transaction can be proved and, where an instrument has been given as a collateral security or by way of conditional payment, a suit on the debt will lie. The fact that the execution of the promissory note is contemporaneous with the borrowing, cannot exclude the possibility of the instrument having been given as collateral security or by way of conditional payment. There is no presumption that the giving of a promissory note by a debtor to his creditor operates as a conditional payment only. A lender suing on the original consideration on the ground that the instrument was given by way of conditional payment must prove facts which warrant that inference.[86]

The promise to repay the amount of loan is certainly a term of the contract, and if there was a completed contract which existed upon the execution of the pronote, an action would lie on such contract even though the promissory note executed subsequently cannot be admitted in evidence for any reason.[87]

Where the opposite party admitted the fact of execution of the document, it was held that the document need not be proved even when the document in question is not admissible on account of any provisions of the Stamp Act.[88]

In *Lothumasu Sambasiva Rao* v. *T. Balakotaiah,* a full bench of seven judges of the Andhra Pradesh High Court discussed in considerable length the different points of view expressed by almost all the High Courts as also decisions of the Privy Council and the Supreme Court and held that the plaintiff can rely on the original cause of action where the suit promissory note is inadmissible in evidence under Section 35 of the Stamp Act, provided there is an allegation in the plaint and proof that the promissory note did not incorporate all the terms of the contract and that it was executed as a conditional payment or collateral security. JUSTICE ALLADI KUPPUSWAMI, in a separate judgment while agreeing with the first part of the decision observed that the right to fall back on the original consideration is not restricted to a case where the promissory note is executed by way of conditional payment or by way of collateral security.[89]

Where the debt and the pronote were simultaneous and there was neither a contract with the firm nor was it the intention of the parties to treat the promissory note as a part of the debt transaction, it could not be said that the pronote merely evidenced any previous concluded transaction.[90]

In *Chuni Lal Manga* v. *Mangat Rami,*[91] the Delhi High Court held that where the execution of a pronote follows the advance of money, but there is infirmity in the document, the plaintiff can rely on the

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84. *Krishnaji* v. *Rajmal,* (1899) 24 Bom 36 : 2 Bom LR 25; *Ranchhod* v. *Ravjibhai,* (1925) 28 Bom LR 631, *Jacob & Co* v. *Vicumsey,* (1926) 29 Bom LR 432; *Somabhai* v. *Kalyanbhai,* (1937) 40 Bom LR 174.
85. AIR 1927 Bom 437.
86. *Perumal Chettiar* v. *Kamakshi Ammal,* ILR (1938) Mad 933 (FB); *Rangaswami* v. *Dorai-swami,* AIR 1957 Mad 715, *Rudraraju Satyanarayana Raju* v. *Medidi Veerayya,* ILR 1970 AP 1125.
87. *Rangaswami* v. *Doraiswami,* AIR 1957 Mad 715.
88. *Ponuswami Chettiyar* v. *Kailasam Chettiar,* AIR 1947 Mad 422; *Alimane Sahiba* v. *Subbarayyuda,* AIR 1932 Mad 693.
89. *L. Sambasiva Rao* v. *T. Balakotiah,* AIR 1973 AP 342 (FB) **followed in,** *B. Venkataiah U.* v. *Venkata Ramana Reddy,* AIR 1985 AP 26.
90. *Rudraraju Satyannarayana Raju* v. *Medidi Veerayya,* ILR 1970 AP 1125.
91. ILR 1975 (2) Delhi 383.

advance of money as the two causes of actions being distinct and separate Section 91 is not a bar to an action on the original cause of action.

The Allahabad High Court has in a Full Bench case laid down that it is not open to a party who has lent money on terms recorded in a promissory note, which turns out to be inadmissible in evidence for want of proper stamp duty, to recover his money by proving orally the terms of the contract, in contravention of the provision of this section.[92] In a later Full Bench case it laid down that the entire terms of the contract were embodied in the promissory note in the above *Nazir's case*, but where all the substantial terms of the contract have not been embodied in the promissory note and where the promissory note is inadmissible in evidence for defect of proper stamp, it is open to the plaintiff to prove the terms of the contract. It is also pointed out by some of the Judges that the distinction laid down in *Nazir's* case between cases where the money passed contemporaneously with the execution of the pronote and where it was antecedent in time to the latter is unreal and artificial[93]. Where a loan was already existing, and part of it had been repaid and a promissory note was executed in favour of the creditor for the balance, it was held that the existence of the promissory note did not debar the creditor from resorting to his original consideration or exclude evidence of the oral acknowledgment of the debt.[94]

The Patna High Court has held that where the lending of money and the execution of a promissory note for repayment of it are contemporaneous, the plaintiff in a suit for recovery of the money, is entitled to adduce evidence other than the promissory note itself, in order to prove the loan. Where, therefore, a handnote bore a one-*anna* stamp instead of a two-*anna* stamp and was therefore inadmissible in evidence, it was held that the plaintiff was entitled to prove the loan by other evidence[95]. Every loan carries with it a contract to repay and if a handnote, which forms the evidence of the transaction cannot be accepted in evidence for some reason or other, there is nothing in law to prevent the plaintiff from giving other evidence as regards the loan and if he can satisfy the court as regards the truth of his version, he is entitled to a decree[96]. Where there is a partition deed which is inadmisssible in evidence for want of registration it is open to the defendants to prove a previous partition by any other evidence and this section will not operate as a bar to the admissibility of such evidence.[97]

The Lahore High Court has held that where a negotiable instrument taken on account of pre-existing debt is inadmissible in evidence, the creditor may sue for the original consideration, but when the original cause of action is the instrument itself and does not exist independently of it, the plaintiff cannot sue except upon the instrument. Whether there is a cause of action independent of the instrument upon which independent evidence may be given, depends upon the question whether the plaintiff can allege any contract as the basis of his suit which is not the contract reduced to the form of a document. Where the money advanced a short time before the actual execution of a *hundi* was advanced on the security of the *hundi* and the agreement between the parties was that the loan should be made in consideration of the *hundi*, it was held that there was no cause of action independent of the *hundi*, and as the *hundi* was inadmissible in evidence on the ground that it was insufficiently stamped, and no secondary evidence could be given under this section, the plaintiff must fail.[98]

The Rangoon High Court has laid down several principles in a Full Bench case. The giving of a negotiable security by a debtor to his creditor operates, *prima facie*, as a conditional payment only, and not as a satisfaction of the debt, unless the parties agree so to treat it. Such a conditional payment is liable to be defeated on non-payment of the negotiable instrument at maturity. If the negotiable instrument is given by the borrower to the lender and the negotiable instrument is itself the consideration for the loan, or if the instrument is accepted as an accord and satisfaction of the original debt, the lender is restricted to his rights under the negotiable instrument by which he must stand or fall. If it is agreed between the parties that the instrument shall be taken merely as collateral security for the repayment of the loan, the lender is entitled to sue upon the original consideration independently of the security, and without regard

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92. *Nazir Khan* v. *Ram Mohan Lal*, (1930) 53 All 114, FB : AIR 1931 All 138; *Gopi Nath* v. *Chameli*, (1938) All 741.
93. *Sheo Nath Prasad* v. *Sarju Nonio*, ILR (1943) All 610, 641 FB : AIR1943 All 220 **followed in** *Lakshmi Narain* v. *Aparna Devi*, AIR 1953 All 535; This view is in conflict with Perumal Chetty case 1938 Mad 785.
94. *Hiralal* v. *Datadin*, ILR (1881) 4 All 135; *Benarsi Das* v. *Bhikhari Das*, ILR (1882) 3 All 717.
95. *Dharishwar Sahu* v. *Ramrup Gir*, (1928) 7 Pat 843.
96. *Abdul Mohammad Khan* v. *Mahananda Upadhayaya*, ILR (1931) 11 Pat 135 : AIR 1931 Pat 293; **See** *Raja Lal Bahadersingh* **v.** *Sheikh Gulam Yasin*, (1932) 29 NLR 131.
97. *Ramjugeshwar* v. *Gajadhar*, ILR (1950) 29 Pat 980.
98. *Chandra Singh* v. *Amritsar Banking Co.*, (1921) 2 Lah 330 : AIR 1922 Lah 307.

to any rights that he may possess under the instrument. If all the terms the agreement under which the loan was made have been embodied in a negotiable instrument or in any other document, no evidence can be adduced in proof of the terms of the contract except the document itself, and if such document is for any reason inadmissible in evidence, the suit must fail. Normally and *prima facie* a lender is regarded as taking a negotiable instrument only as conditional payment and not in satisfaction of the loan. Where the handing over of the money and of the instrument is simultaneous it does not follow that the instrument is the repository of the terms of the agreement. It is not the time when, but the terms upon which, the loan was made that matters and that is a question of fact to be determined according to the particular circumstances obtaining in each case.[1]

In a Full Bench case, the former Chief Court of Oudh laid down that it was open to the party who had lent money on terms recorded in a promissory note, which turned out to be inadmissible in evidence for want of proper stamp duty, to recover his money by proving orally the advance of the loan although oral evidence to prove the terms of the contract was inadmissible.[2] Where a promissory note is not admissible in evidence being insufficiently stamped, the provision for interest alleged to have been contained in the promissory note cannot be proved and the party lending the money cannot be granted interest as interest, but he is entitled to some compensation for being deprived of his money and the amount of compensation can best be calculated in the same manner as interest is calculated.[3]

The terms contained in the pronote cannot be proved by oral evidence.[4] Where the oral evidence was that the father of the defendant was a worldly-wise man with ability to write the document in his own hand and on the date of payment, he was affected with brain tumour, it was held that variation in his signature in the endorsement on the promote was not inadmissible.[5]

Dealing with Marwar Stamp Act 15 of 1947, it was held that *hundis* not duly stamped cannot be admitted in evidence and the fact that the duty and the penalty were paid was of no consequence.[6]

In the case of an unstamped document which had been lost or destroyed no secondary evidence could be allowed. The contents of a document which is required to be executed on stamp paper, if not stamped or insufficiently stamped cannot be proved by secondary evidence. That Section 36 of the Stamp Act which provides for payment of stamp or deficit stamp with penalty for purpose of admitting it in evidence has no application to let in secondary evidence where the document itself is not produced.[7]

Where the execution of the pronote and passing of consideration was simultaneous, it was held the plaintiff cannot fall back on original consideration.[8]

Where on the case pleaded it was not possible to hold that a pronote is intended to constitute the contract or that the original contract of loan was merged in or was extinguished by the pronote, it was held that the original contract of loan could be proved apart from the pronote.[9]

There is a difference between inadmissibility of a document for want of proper stamp and the inadmissibility because of non-registration. In the former case if proper stamp and penalty are paid on the document then it can be admitted. In the latter case if it is unregistered, it is not admissible in evidence to prove the contents of it, though it can be used for a collateral purpose.[10]

Where a suit is based on the pronote, it must fail when the pronote is inadmissible in evidence being insufficiently stamped and payment of loan cannot be proved by other evidence.[11]

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1. *Maung Chit* v. *Roshan N.M.A. Kareem Oomer & Co.*, ILR (1934) : 12 Ran 500 (FB) : AIR 1934 Rang 389; **See** *Maung Kyi* v. *Ma Ma Gale*, (1919) 10 LBR 54 (FB).
2. *Kunwar Bahadur* v. *Suraj Bakhsh*, ILR (1932) 7 Luck 666 : AIR 1932 Oudh 235; (FB); **approving** *Nanhku Singh* v. *Girja Bux Singh*, ILR (1929) 5 Luck 225.
3. *Bhrigu Datt* v. *Gaya Prasad*, ILR (1933) 9 Luck 267.
4. *Ganga Ram* v. *Keshava Deo*, AIR 1960 Raj 10.
5. *Moturi Seeta Ramabrahmam* v. *Bobba Rama Mohana Rao*, AIR 2000 AP 504 (para 12).
6. *Pukhraj* v. *Jawerchand*, AIR 1957 Raj 47 **reversed** on another point in *Pukhraj Surana* v. *Jewere hand*.
7. *Champalal* v. *Pannalal*, ILR (1951) 1 Raj 190; **See also** *Md. Ayub* v. *Rahim Baksh*, AIR 1922 Lah 401(2); *Ladharam* v. *Harichand*, AIR 1938 Lah 90.
8. *Narayana Prasad Rai* v. *Ganshyamlal*, AIR 1961 MP 62.
9. *Lalchand Ramchand* v. *Pyare Dasrath*, AIR 1971 MP 245; **following** *Ananda Namdeo* v. *Pundalik Tukaram*, AIR 1936 Nag 225.
10. *Badri Prasad* v. *Bhagwan Das*, AIR 1956 MB 117.
11. *Rajkishore Sahu* v. *Khitish Chandra Sahu*, ILR 1976 Cut 634; *Ghulam Mohammed* v. *Habib Ullah*, AIR 1966 J&K 127.

Where the plaintiff filed a suit not only on the pronote but also on the transaction of the *Chit Fund* and the plaintiff explained under what circumstances the pronotes were drawn up it was held that though pronotes are inadmissible in evidence, the plaintiff can prove the actual trnasaction and the arrears of the amount of the *Chit Fund*.[12]

Where a bill of exchange or a pronote is given by a debtor to the creditor in satisfaction of his dues it was held that it is presumed to be a conditional payment and in case the creditor is unable to obtain satisfaction of the pronote he may fall back on the original debt and sue to recover the amount.[13]

The general trend of the decisions of the various high courts subject to a few exceptions may be summed up as follows. When a pronote is not taken in discharge of an oral contract of a loan but is taken only by way of conditional payment or collateral security, it will be presumed to have been so taken unless there is a contract to the contrary. Section 91 has no application to the case and the terms of the original contract of loan can be proved, if the pronote is not admissible in evidence or for any other reason cannot be proved. The fact that the pronote was executed simultaneously with the advance of loan or that the loan was advanced on the basis of the pronote or that the pronote contained all the terms of the contract of loan are all immaterial, provided only that the pronote is not in absolute discharge of the original contract of loan. When the pronote is given by way of conditional security or as collateral security for the loan, the original contract for the loan is provable by evidence and Section 91 is not applicable in such cases.[14]

A certified copy of the original document would not come within the scope of Section 36 of the Stamp Act, because it states that where an instrument has been admitted in evidence, such admission shall not, except as provided in Section 61 be called in question at any stage of the same suit or proceeding on the ground that the instrument had not been duly stamped and the expression "duly stamped" can only arise in regard to an original document and not to its certified copies, which does not require any stamp except some necessary fees for copying the same.[15]

In view of Sections 35 and 36, secondary evidence of the contents of an inadmissible document which is insufficiently stamped, by producing a copy of it is not admissible.[16]

Section 35 only deals with the original instrument. It is not concerned with any copy of an instrument. If Section 35 only deals with original instruments and not copies, Section 36 cannot be so interpreted as to allow secondary evidence of an instrument to have its benefit. In other words Section 35 imposed a bar on the reception of any but the original instrument and forbade the reception of the secondary evidence. Section 36 only lifted that bar in the case of an original unstamped or insufficiently stamped document to which no exception as to the admissibility was taken at the first stage. It did not create any exception in the case of secondary evidence which a copy would undoubtedly be.[17]

The dictum in *Satyawati* v. *Pallayya*,[18] that "Section 36 will also apply when secondary evidence of an instrument not duly stamped had been wrongly admitted" is not a good law.

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12. *Sketna Dev* v. *Firm of Srigiri Venkiah*, AIR 1953 Hyd 142.
13. *Mohanlal Jogani Rice & Aatta Mills* v. *Ramlal*, AIR 1957 Assam 133.
14. *Lakshmi Narain* v. *Mst. Aparna Devi*, AIR 1953 All 535; **See also** *Manklal* v. *Dhirendra Chandra*, AIR 1957 Tripura 28. *Gour Chandra Sahu* v. *Garib Kar*, AIR 1957 Ori 212; *Salimunnissa Begam* v. *Abdul Qayyum Ansari*, AIR 1956 Hyd 32; *Perumal Chettiyar* v. *Kamakshi Ammal*, AIR 1938 Mad 785 (FB); *Somabhai* v. *Kalyanbhai*, AIR 1938 Bom 286; *Sarajoo Pd.* v. *Rampayari Debi (Smt.)*, AIR 1950 Pat 493; *K. Anantharajaiah* v. *Shivaramaiah*, AIR 1968 Mys 148; *Ramaswami Pillai* v. *Murugiah Padayachi*, AIR 1936 Mad 179; *Chandra Sekhar Misra* v. *Gobinda Chandra Das*, AIR 1966 Ori 18; *Champalal* v. *Saligran*, AIR 1961 Raj 235; *Shah Chimanlal* v. *Khambhla Savji*, AIR 1955 Sau 74; *Saffia Khathoon* v. *Kunhambu*, ILR (1977) 1 Ker 701; *Chunni Lal Manga* v. *Mangat Ram*, ILR (1975) 2 Delhi 383; *L. Parmanand* v. *Satya Prakash Rastogi*, 1979 All LJ 1109; *Khitish Chandra Sahu* v. *Rajkishore Sahu*, AIR 1980 Ori 10 (DB); *L. Sambasivarao* v. *T. Balakotaiah*, AIR 1973 AP 342 (FB).
15. *Chimoyee Baxi* v. *Raja Sankari Prosad Singh*, AIR 1955 Cal 561; *Satyawati* v. *Pallayya*, 1937 Mad 431; *Venkateswar Iyer* v. *Ramanatha Deekshitar*, 1929 Mad 622; *Nirode Basini* v. *Sital Chandra*, 1930 Cal 577; *Noor Ahmad* v. *Irshad Ghaus*, AIR 1933 All 821; *Sheik Meera Sahib* v. *Venkatapathi Naidu*, AIR 1951 Mad 326; *Vishram Arjun* v. *Irukulla Shankariah*, AIR 1957 AP 784; *Jagdip Singh* v. *Firangi Singh*, AIR 1928 Pat 155.
16. *Jupudi* v. *Pulauarthi*, AIR 1971 SC 1070.
17. *Jupudi Kesava Rao* v. *Pulauarthi Venkatasubba Rao*, AIR 1971 SC 1070.
18. AIR 1937 Mad 431.

RANKIN C.J. in *Nirode Basini* v. *Sital Chandra*[19] held that under Section 36 it matters nothing whether it was wrongly admitted or rightly admitted or admitted without objection or after hearing or without hearing such objection. When a copy was admitted no objection can be raised on the ground of insufficiency or want of stamp or the original.

13. SECTIONS 17 & 49 REGISTRATION ACT AND SECTION 91 OF THE EVIDENCE ACT—EFFECT OF

Section 17 of the Registration Act refers to documents which are required to be registered. Section 49 provides that such of those documents which require registration, if not registered, shall not affect any immovable property comprised therein and shall not be received as evidence of any transaction affecting such property.

The Privy Council in *Moolla and Sons Ltd.* v. *Official Assignee Rangoon*[20] held that the Indian Registration Act only requires certain documents to be registered on pain of the consequences entailed by Section 49 whereas the Transfer of Property Act by Section 54 enacts that with a limited exception the sale of immovable property can only be made by a registered instrument. The provisions of the Registration Act by themselves would not operate to render invalid a mere oral sale.

Section 49(*c*) of the Registration Act excludes receiving in evidence an unregistered document which is required to be registered under the Registration Act, whereas Section 91 precludes the proof of only the terms of the contract, grant or other disposition of the property. When a party does not rely on the unregistered document and if the terms of the disposition of property embodied in that document are not sought to be proved by other evidence, the bar contained in Section 49(*c*) of Registration Act and Section 91 of Evidence Act would not come into effect.[21]

Where a document, itself legally inadmissible in evidence, was subsequently referred to and partly incorporated in a second document of similar import duty executed between the same parties and registered according to law, it was held that the earlier document might be referred to for the purpose of explaining and amplifying the terms of the second, and of arriving at a correct conclusion as to the true nature of the transaction into which the parties had entered.[22]

Where a partition deed contained an admission of both parties that they were joint till 1954 and the parties wanted to show that there was an oral partition in 1951 it was held that the court should not persuade itself to hold that there was an oral partition between the parties in the face of the admission in the partition deed as it amounts to contradicting the recital in the document.[23]

In a suit to recover possession of certain property as joint undivided property the defendant relied on an earlier unregistered partition deed to show that the property in dispute was not joint but separate. It was held that the partition deed was admissible in evidence as it was not intended to prove its terms but all that the court had been concerned with was to find out whether particular properties claimed by the plaintiff to be joint family property were at the date of the suit joint or separate.[24]

The Gauhati High Court in *Jabeda Khatun* v. *Moksed Ali*[25] held that a gift under Mohammedan Law does not create a disposition of property, and so oral evidence to prove such a gift is not hit by Section 91 and the decision of the Supreme Court, in *Bai Hira Devi* v. *Official Assignee Bombay*[26] is of no help in respect of gifts by Muslims.

The Madras High Court had held that where the instrument of partition, being unregistered, cannot be admitted as evidence of the transaction, oral evidence to prove the terms of the agreement is barred.[27]

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19. AIR 1930 Cal 577.
20. AIR 1936 PC 230.
21. *Kanna Reddy* v. *Venkata Reddy*, AIR 1965 AP 274 (FB).
22. *Moti Chand* v. *Lalta Prasad*, ILR (1917) 40 All 266.
23. *Gitabai* v. *Dayaram Shankar*, AIR 1970 Bom 160.
24. *Chhotalal* v. *Bai Mahakore*, AIR 1917 Bom 206 : (1917) 19 Bom LR 322 : II R 41 Bom 466; *Maung Po Kin* v. *Maung Shwe Bya*, (1923) 1 Ran 405; *Maung Tun Sein* v. *Ko Tu*, AIR 1928 Rang 196 : (1928) 6 Ran 337. *Subramanian* v. *Lutchman*, (1922) 50 Cal 338 : II R 25 Bom LR 582, 50 IA 77 : AIR 1923 PC 50
25. AIR 1973 Gau 105 (DB).
26. AIR 1958 SC 448.
27. *Subbu Naidu* v. *Varadarajulu Naidu*, ILR (1947) Mad 694 : AIR 1948 Mad 26.

Where two brothers divided their properties movable and immovable under a *Kararnama*, an unregistered document, and there were counter documents showing that each brother gave up his claim in respect of the movable and immovable property, it was held that the oral evidence of partition was hit by Section 91 of the Evidence Act and could not be adduced to prove the terms of the partition when the document itself is inadmissible for non-registration.[28]

In *Kale* v. *Dy. Director of Consolidation*[29] the Supreme Court held that a family arrangement may be even oral in which case no registration is necessary. The registration would be necessary only if the terms of the family arrangement are reduced to writing. Here also a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and is therefore not compulsorily registerable.[30]

Assuming that the said document was compulsorily registerable, the courts have generally held that a family arrangement being binding on the parties to it, would operate as an estoppel preventing the parties from resiling from the same. Even if the family arrangement was not registered, it could be used for a collateral purpose, namely, for the purpose of showing the nature and character of possession of the parties in pursuance of the family settlement and also for the purpose of applying the rule of estoppel which flowed from the conduct of the parties who having taken benefit under the settlement, keep their mouths shut for full seven years and later try to resile from the settlement.[31]

It was held by the Supreme Court that a subsequent memorandum of partition embodying the factum of partition would be only a family arrangement and its registration was not necessary.[32]

Under the proviso to S. 49 of the Indian Registration Act, an unregistered document affecting immovable property and required to be registered may be received as evidence of a contract in a suit for specific performance, or as evidence of part performance of a contract, or as evidence of any collateral transaction not required to be effected by a registered instrument. The proviso is declaratory of what was previously the law. An unregistered document, though inadmissible as evidence of a transaction affecting immovable property, was admissible as evidence of collateral facts.[33]

A document required by the law to be registered, if unregistered, though inadmissible as evidence of transaction affecting immovable property, can be admitted for a collateral purpose.[34] It was held that an unregistered partition deed is inadmissible to porve the terms of the partition but can be admitted in evidence for a collateral purpose having regard to the combined operation of Section 49 of the Registration Act and Sections 91 and 92 of the Evidence Act.[35] The unregistered document can be looked into for a limited purpose to know the character and nature of possession of the party to the document.[36] In *N. Varada Pillai* v. *Jeevaratnammal*,[37] dealing with an unregistered gift deed the Privy

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28. *Gerua Biswal* v. *Kahyama Biswal*, AIR 1962 Ori 107.
29. AIR 1976 SC 807.
30. *Auadh Narain Singh* v. *Narain Mishra*, AIR 1962 Pat 400.
31. *Ratanlal* v. *Hari Shanker*, AIR 1980 All 180 (case of a partition deed).
32. *Roshan Singh* v. *Zile Singh*, AIR 1988 SC 881.
33. *Ulfatennisa Elahijan Bibi* v. *Hosain Khan*, ILR (1883) 9 Cal 520, FB.
34. *M. Chellamayya* v. *M. Venkatratnam*, AIR 1972 SC 1121; *Vidhya Bhushan Singh Rana* v. *Ratisom*, 1969 UJ 86; *Ram Shankar* v. *M.G H.S. School*, 1979 All LJ 184 (All); *Ugni* v. *Chowa Mahato*, AIR 1968 Pat 302 (FB).
35. *Ramayya* v. *Achhamma*, AIR 1944 Mad 550 (FB); *Girija* v. *Girdhari*, AIR 1951 Pat 277; *Nagamma* v. *Madala*, AIR 1954 Mad 165; *Karshan* v. *Harkha*, AIR 1953 Saurashtra 56; *Ramlakxhmi Ranchedlal* v. *Bank of Baroda Ltd.*, AIR 1953 Bom 50; *Munshiram* v. *Thakurdas*, AIR 1951 Pepsu 87; *Umrao Chand* v. *Inder Chand*, ILR (1971) 21 Raj 823; *Motilal Fulchand* v. *Gita Rama*, AIR 1952 Bom 217; *Gopinath Sharma* v. *Hangsanath*, AIR 1950 Assam 129; *Kanna Reddy* v. *Venkata Reddy*, AIR 1965 AP 274 (FB); *Narasamma* v. *Venkata Narasireddi*, AIR 1954 Mad 282; *Tejraj* v. *Mohanlal*, AIR 1955 Raj 157; *Booraswami* v. *Rajakannu*, 1978 MLJ 248; *Rikhi Ram* v. *Sadaram*, AIR 1977 Punj 94.
36. *Rahimansa* v. *M.I.E. Institution*, AIR 1953 Mad 366; *Dammulal* v. *Mohmmad Bhai*, AIR 1955 Nag 306; (see other cases under the head parition); *Rajendra Singh* v. *Mahant Hulas Das*, AIR 1945 Nag 69; *Ramchander Naik* v. *Linga Ramachanderiah*, AIR 1971 AP 395; *Sardar Amarsingh* v. *Surinder Kaur (Smt.)*, AIR 1975 MP 230 **overruling** *Dhana Bai* v. *Kewara Bai*, AIR 1972 MP 100; *Ugni* v. *Chowa Mahto*, 1968 Pat 302 (FB); *Abdul Razak* v. *Narasamma Gopala Setty*, 1974 Mys 7.
37. AIR 1919 PC 44 : ILR 43 Mad 244.

Council held that the unregistered gift deed may be looked at to show the nature and character of possession held by the donee.[38] By an unregistered document, though inadmissible for want of registration, the transferee under the document can show by producing the document that he acquired title to the said property contained therein by continuing in possession for more than 12 years, *i.e.*, by adverse possession. A party can prove his title by adverse possession and limitation for the suit by showing the starting point from the date of his unregistered partition deed.[39] An unregistered document may be used to prove an admission contained therein.[40]

This section does not exclude oral evidence in respect of the nature of the contract or oral agreement. When the witnesses supporting a claim of oral sale of property deposed about the execution of a document also at the time of the oral sale, but that document had not been registered, it was held that the bar under this section is not attracted for proving that oral sale.[41]

For a detailed discussion of admissibility under Registration Act for a collateral purpose reference may be made to the under mentioned decisions.[42]

For proving character and nature of possession, see.[43]

14. DEEDS

Oral evidence can be adduced to show that the recitals in a deed were nominal or were not intended to be acted upon or that they were not meant to alter the existing state of affairs.[44]

15. LEASE DEEDS

Under Section 17(1)(*d*) of the Registration Act leases of the immovable property from year to year or for any term exceeding one year or reserving a yearly rent shall be registered. Under Section 117 of Transfer of Property Act a lease for agriculture purpose need not be by any written instrument and may be oral. But, if the transaction is reduced to writing then the provision of Section 17(1)(*d*) of the Registration Act would come into play if the lease is from year to year for any term exceeding a year or reserving a yearly rent and the lease deed should be registered. If it is not registered it would be inadmissible u/Section 49 of the Registration Act.[45]

The Bombay High Court has held that an unregistered lease can be looked into for a collateral purpose for finding out whether the entry of the tenant into the land was as a permanent tenant.[46]

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38. *Haranchandra Chakrabarti* v. *Kali Prasanna Sarkar*, ILR (1931) 59 Cal 396; *Maharani Janki Kuer* v. *Bir Bhikham Ojha*, ILR (1924) 3 Pat 349; *Thakore Fatesingji* v.*Bomanji A. Dalal*, ILR (1903) 27 Bom 515 : 5 Bom LR 274; *Jhamplu* v. *Kutramani*, ILR (1917) 39 All 696; *Ata Muhammad* v. *Shankar Das*, ILR (1925) 6 Lah 319.
39. *Appamma* v. *Chinmaueadu*, AIR 1924 Mad 292 : ILR 47 M 203; *Narayanaswamy* v. *Thangavelu*, AIR 1924 Mad 800 : 82 IC 67; *Venkatakrishnayya* v. *Rangayya*, AIR 1928 Mad 865 : 117 IC 720; *Sayyapureddi Abayya* v. *Sayam Apanna*, 123 IC 195 (Mad).
40. *Shailesh Chandra* v. *Bireswar Chatterjee*, AIR 1930 Cal 559 : 126 IC 715.
41. *Deopato Kuer* v. *Kamal Prasad Singh*, AIR 1976 Pat 18 (DB); *Ramdip Sharma* v. *Baldeo Singh*, AIR 1977 Pat 234; *State of Bihar* v. *Amitava Rai*, (1977) 25 BLJ 583; *Deep Chandra* v. *Md. Sajjad Ali Khan*, AIR 1951 All 93 (FB); *Mammadisa* v. *Asya Kuttyumma*, ILR (1967) 2 Ker 282.
42. *Ram Rattan* v. *Parma Nand*, AIR 1946 PC 51; *S. Lakshmaai* v. *S. Peddamallaiah*, AIR 1979 AP 275; *Ganpat Gangaji* v. *Namdeo Bhagwanji*, AIR 1941 Nag 209; *Girijanandan* v. *Giridharisingh*, AIR 1951 Pat 277.
43. *Mst Thekura* v. *Sukhraj Singh*, AIR 1953 All 350; *Amar Singh* v. *Surendar*, AIR 1975 MP 230 (FB); *Abdul Razack* v. *H K. Gopal*, AIR 1974 Mys 7; *Ugni* v. *Chowa Mahta*, AIR 1968 Pat 302 (FB); *Nadepena* v. *Saripalli*, ILR 47 Mad 203 (FB); *Rahimansa* v. *M.I.E. Institution*, AIR 1953 Mad 366; *Tara Pada* v. *Shyama Pada*, AIR 1952 Cal 579; *Permanand* v. *Lakshminarayan*, AIR 1955 MB 129; *Somali Singh* v. *Lukhalal*, 1965 MPLJ (Notes) 64; *Ram Shanker* v. *Mahatma Gandhi*, AIR 1979 All 184; For proving adverse possession *Sri Bhagwan Singh* v. *Rambasi Kuer*, 1957 Pat 157; **following** *N. Varada Pillai* v. *Jeevarathnammal*, AIR 1919 PC 44; **See also** *Subbu Naidu* v. *Varadarajulu Naidu*, AIR 1948 Mad 26; *Qadar Baksh* v. *Mangha Mal*, AIR 1923 Lah 495; *Purushattam* v. *S.M. Desouza*, AIR 1950 Ori 213; *Abdul Alim* v. *Abdul Sattar*, AIR 1936 Cal 130; *Keshwar Mahton* v. *Sheonandan Mahton*, AIR 1929 Pat 620.
44. *Hindu Public* v. *Rajdhani Puja Samithee*, AIR 1999 SC 964 (para 19).
45. *Sitamaharani* v. *Chhedi Mahto*, AIR 1955 SC 328; *Ram Nath Mandal* v. *Jojan Mandal*, AIR 1964 Pat 1 (FB); *Maharani Janki Kuer* v. *Brij Bhikhan* AIR 1924 Pat 641.
46. *Vishvanath* v. *Ranganath*, AIR 1942 Bom 268; **see contra** *Karimulla Khan* v. *Bhanupratap Singh*, AIR 1949 Nag 265.

Where the lessees executed a registered *Kabuliat* in favour of the lessor and the lessor accepted it and executed an unregistered *Amalnama* it was held that there is no valid lease as defined in Section 107, T.P. Act created by the *Kabuliat* and acceptance of the lessor cannot be proved either by producing unregistered *Amalnama* or by oral evidence.[47] It was held that a registered *Kabuliat* by a lessee is invalid as a lease as it does not create any interest in the immovable property, but it could be looked into to know the possession of the lessee and neither Section 49 of the Registration Act nor Section 91 of the Evidence Act operates as a bar to the admissibility of the *Kabuliat*.[48] An unregistered *Kabuliat* granting a right to pluck mango fruits and *Mahua* flowers for three years was held not admissible in a suit for recovery of rent; as the *Kabuliat* does not create any interest as it was executed by lessee.[49]

In respect of a contract to transfer the leasehold right, it was held that the unregistered deed though inadmissible, can be used as evidence of possession in persuance of the document u/Section 53(*a*) of Transfer of Property Act.[50]

Unregistered lease for a period of some years cannot be received and the terms of it cannot be proved by other evidence.[51]

Oral evidence to prove a contemporaneous oral agreement that the lease deed was executed only as a voucher or security for the loan and was not to be acted upon can be admitted.[52]

In a suit filed by the lessee against a trespasser for ejectment, it was held that an unregistered lease can be admitted to prove possession of the lessee and acceptance of rent to show that he was a lessee since the terms of the lease deed need not be proved in such a suit.[53]

An unregistered *Kirayanama* (rent deed) for three years reserving monthly rent for residential purposes was held not operative as a valid lease and Section 91 is a bar to lead oral evidence.[54]

If the document is not admissible for want of registration, as a permanent lease still it can be looked into for showing the permissive nature of possession over the land.[55]

16. SALE DEEDS

A sale of property of value less than Rs. 100/- was effected by delivery of possession. There was also an unregistered document showing the transaction, it was held that the sale is complete by delivery of possession to the vendee and the unregistered document can be looked into whether the possession was given or whether the vendor was in possession.[56] Where the question of title and possession had become interdependent, the Court would not be justified in receiving and admitting into evidence the unregistered sale deed on the basis of which the defendant was claiming title.[57]

In a suit for declaration of title based upon permanent lease deed and a subsequent sale deed, when the documents were not produced and the affidavits of the plaintiff vendee and the vendor were filed to prove title, it was held that the title is not supported by legal evidence and oral evidence cannot be admitted.[58]

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47. *Ramakrishna Jha* v. *Jainandan Jha*, AIR 1935 Pat 291 (FB).
48. *Chandranath Mukerji* v. *Chulai Pashi*, AIR 1960 Cal 40; *Birendra Nath Roy* v. *Sukumari Bakshi* (*Smt.*), AIR 1952 Cal 352; (such document can be taken as a written admission of the lessee that he is liable to pay rent for the land).
49. *Briksh Koeri* v. *Awadh Biharilal*, AIR 1961 Pat 308; **See also** *Hiralal Rewani* v. *Basti Olla Colliery Co. Ltd.*, AIR 1957 Pat 331.
50. *Md. Sadruddin Khan* v. *Gulam Mohiuddin*, AIR 1953 Hyd. 97.
51. *Iswar Dutt* v. *Sunder Singh*, AIR 1960 J&K 63.
52. *Keralal Udochand* v. *Amarnath*, 1957 MPLJ 399; **relying on** *Thayagaraja Mudiliyar* v. *Vedathanni*, AIR 1936 PC 70; *Walter Mitchell* v. *A.K. Tennent*, AIR 1925 Cal 1007; *Rowland Ady.* v. *Administrator General of Bumna*, AIR 1938 PC 198; *Umrao Singh* v. *Raunak Singh*, AIR 1939 Pat 495; *Ramjibun Serowgy* v. *Oghore Nath Chatterjee*, ILR 25 Cal 401.
53. *Naban Bewa* v. *Nabkishore Samal*, AIR 1964 Ori 16.
54. *Adit Prasad* v. *Chhaganlal*, AIR 1968 Pat 26.
55. *Ram Shanker* v. *Mahatma Gandhi School*, AIR 1979 All 184.
56. *Nagayya Baliah* v. *Sayanna Baliah*, AIR 1951 Hyd 42; *Parikhit Thapa* v. *Nidhi Thapa*, AIR 1954 Ori 31.
57. *Avula Sathaiah* v. *Avula Lingaiah*, AIR 2001 AP 400 (paras 9, 12, 16 and 17).
58. *Municipal Board Bulandshahr* v. *Omprakash*, 1964 All LJ 701.

Where the terms of a contract or of a grant or any other disposition of the property (here sale-deed) have been reduced to the form of a document, oral evidence to prove that document could always be allowed. It is not prohibited under Section 91.[59]

17. MORTGAGE DEEDS

The Supreme Court held in *Veeramachineni Gangadhara Rao* v. *Andhra Bank Ltd.*[60] that when the parties creating security by deposit of title deeds intend to reduce the contract to writing, such document must be registered. If the document is not registered, neither the document could be used in evidence nor the transaction could be proved by oral evidence in view of Section 91.[61]

In such cases the criterion is whether the document constitutes the bargain between the parties or is it merely the record of an already completed transaction as was pointed out by LORD CARSON in *Subramanian* v. *Latchman*[62]. If the memorandum in question is the bargain between the parties and if it is not registered no evidence is permissible. And such unregistered document has to be rejected, the reason being, as observed by COUCH C.J., in *Kedhar Nath Datt* v. *Shamlal Khetty,*[63], that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement.[64]

Where the document in question is merely a list of title deeds and does not indicate the terms of the agreement or the nature of the matter, such document does not require registration.[65] Where the document merely records what had taken place and the circumstances in which the title deeds were deposited, it was held that such document does not require registration and does not exclude oral evidence of the mortgage agreement.[66] Where the mortgage was already effected by the deposit of title deeds and the subsequent memorandum was only a record of the completed transaction, such record does not require registration, oral evidence can be adduced in respect of the debt and Section 91 is no bar in such cases.[67]

The Supreme Court held that in the case of mortgage by deposit of title deeds the three requisites are (1) debt (2) deposit of title deeds (3) an intention that the title deeds shall be security for the debt which can be gathered from the documents or coupled with oral evidence or by oral evidence only.[68]

The question whether oral evidence is admissible to establish or explain the circumstances in respect of deposit of title deeds, would depend on the question whether the writing itself would constitute the bargain between the parties.[69]

A mortgage deed cannot be varied by any declaration made in an affidavit that the rights transferred were not merely of those of the mortgagor but of a full owner.[70] In the case of an unregistered deed creating further charge on the mortgaged property, the document is not admissible and no oral evidence can be given regarding its contents in view of Section 91 the Evidence Act.[71] It was held that an unregistered mortgage deed can be referred for ascertaining the nature and character of possession and

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59. *Y. Ganganaidu* v. *M. Surkantam*, AIR 1993 AP 130 (para 4).
60. AIR 1971 SC 1613.
61. *Subramanian* v. *Lutchman*, AIR 1923 PC 50; *Kedar Nath Dutt* v. *Shamlal Khettry*, (1873) 11 Ben LR 405; *Shaw* v. *Foster*, 27 LT 281; *Kakaraparthy Bhavanarayana* v. *Official Receiver*, AIR 1971 AP 359; *Chief Controlling Revenue Authority, Madras* v. *Pioneer Spinners Pvt. Ltd.*, AIR 1968 Mad 223 (FB).
62. AIR 1923 PC 50.
63. (1873) 11 Beng LR 405.
64. **See also** *Hari Shankar* v. *Kedar Nath Saha*, AIR 1939 PC 167; *Velamakanya Krishnaiya* v. *Ponnuswami Aiyar*, ILR 47 Mad 298.
65. *Sundara Chariar* v. *Narayana Ayyar*, AIR 1931 PC 36; *Ibrahim Hazi Esmail* v. *Official Trustee*, AIR 1937 Cal 741.
66. *Ramachandra Laxman* v. *Bank of Kolhapur*, AIR 1952 Bom 315; *Rachpal Moharoy* v. *Bhagwan Das*, AIR 1948 Pat 251.
67. *Rachpal* v. *Bhagwandas*, AIR 1950 SC 272; *Sundaracharian* v. *Narayana*, AIR 1931 PC 36; *Veeranchineni Gangadhara Rao* v. *Andhra Bank Pvt. Ltd.*, AIR 1971 SC 1613; *Punjab & Sind Bank* v. *Jaswant*, AIR 1937 Lah 135; *Muthia* v. *Naidu*, 31 MLJ 347; *Gurnam Kaur* v. *R.K. Bennerjee*, AIR 1937 Rang 69.
68. *Nathan* v. *Maruthi*, AIR 1965 SC 430.
69. *Chief Controlling Rev. Authority* v. *Pioneer Spinners (P) Ltd.*, AIR 1968 Mad 223.
70. *Saligram* v. *Shri Thakurji*, AIR 1955 Ajmer 28.
71. *Sheo Bachan* v. *Madho Saran*, AIR 1952 Pat 73.

for determining the quantum of interest agreed by the defendant.[72] The factum of a mortgage can be proved by independent evidence as it is not a term of the mortgage even though the mortgage is inadmissible for want of registration.[73] In the case of an oral mortgage where the sum secured is Rs. 100 or upwards it is invalid and no evidence is admissible to prove such a mortgage.[74]

WORT AG. C.J., and MANOHAR J., took a different view and agreed with the view taken in[75].

Where a firm is not registered under Partnership Act oral evidence is not admissible to show the terms of it.[76]

In the case of an anomalous mortgage when a suit was filed to recover the amount acknowledged by the mortgagee on his personal liability to pay the debt which term was severable from the property obligation as a security for the debt and when the suit was not for enforcing the lien over the property or for possession of property, it was held that though the mortgage bond was not registered it can be received in evidence in support of the claim on money basing on personal liability.[77]

An unregistered document can be availed of for the purpose of showing character and nature of possession, if such possession is transfered under such a document. When the mortgage deed is invalid in view of the provisions of Transfer of Property Act and is inadmissible in evidence in view of Section 49 of the Registration Act, there can be no question of a mortgage coming into existence, and so acquisition of rights by prescription on the basis of 12 years possession by the mortgagee would not arise under the invalid mortgage, and if it were to be allowed it would be clearly going against the provisions of a statute.[78] Where the document containing a transaction is inadmissible for want of registration no other evidence of its contents can be received. Where in a suit for redemption of land, the plaintiff alleged that possession was given to the defendant by way of security for a loan of Rs. 100 or upwards but no registered deed was executed to evidence the transaction, oral evidence to prove the transaction was held inadmissible.[79]

Where the government grant (Order) specifically stating that certain land be granted to particular *Ziarat* permanently and when the recitals are clear and express in unmistakable terms, it was held that oral evidence to contradict the recitals of the document is hit by Sections 91 and 92.[80]

Refering to LORD CARSONIS' view, LORD TOMLIN observed: "While their Lordships do not think that the language of LORD CARSON conveys or was intended to convey the meaning that no memorandum relating to a deposit of title deeds can be within Section 17 Registration Act unless it embodies all the particulars of the transactions of which the deposit forms part, their Lordships are of the opinion that no such memorandum can fall within the purview of Section 17, unless on its face, it embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned it constitutes the agreement between the parties".[81]

18. FAMILY SETTLEMENT DEED

Where the terms of partition of family settlement between the parties have been reduced to writing in the registered deed of family settlement and has been proved, there is no question of any evidence in the nature of any oral agreement or statement in any suit for the purpose of contradicting, varying, adding to, or subtracting from the terms of the said deed of family settlement.[82]

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72. *Purushottam Das* v. *S.M. Desouza*, AIR 1950 Ori 213; *Rupa Nonia* v. *Ram Brich Pathak*, AIR 1959 Pat 164; *Mt Parsini* v. *Wasan Singh*, AIR 1951 Pepsu 109.
73. *Nand Singh* v. *Seva Singh*, AIR 1959 Punj 609.
74. *Ramprasad* v. *Kalyani*, AIR 1973 Raj 208.
75. AIR 1938 Pat 479.
76. *Chhotelal Darbarilal* v. *Md. Hussain*, 1955 V.P. 44.
77. *Amarji* v. *Joravar Singh*, AIR 1953 MB 9.
78. *Lachmi Narain* v. *Kalyan*, AIR 1960 Raj 1 (S.B.): **overruling** *Hansia* v. *Bakhtawarmal*, AIR 1958 Raj 102; and **dissenting from** *Bhukhan Mian* v. *Radhika Kumari*, AIR 1938 Pat 479.
79. *Maung San Min* v. *Maung Po Hlaing*, ILR (1925) 4 Ran 1 (FB).
80. 1974 J&K LR 301 : 1974 Kashmir LJ 331.
81. *Shri Harishankar Pal* v. *Kedarnath Shaw*, AIR 1939 PC 167.
82. *Satyanarayan Prasad Jaiswal* v. *Jamuna Prasad Jaiswal*, 1999 AIHC 2479 (para 20) (Gau).

19. LICENCE

Oral evidence to prove the contents of a licence is not admissible in evidence.[83]

20. CASES OF FRAUD

In cases of fraud on registration also this section does not apply. In cases of document required by law to be registered, where a party while selling or mortgaging one property situate in a particular district, added some nominal item situated in another district, to attract the jurisdiction of the other district for purpose of registration, evidence can be admitted and Section 91 is no bar, as such registration is a fraud on law according to Section 28 of the Registration Act and is invalid.[84]

Under the Amendment Act of 20 of 1929 the new Section 53-A was introduced in the Transfer of Property Act thereby introducing the equitable doctrine of part performance in a modified form, according to which the transferee cannot file a suit to enforce any right under the contract but he can only have a right to defend in order to protect his possession.[85] It was held that even if the transferee in possession loses his right to obtain specific performance of the agreement as such suit is barred by limitation, the doctrine of part performance can be availed as a defence in an action for ejectment filed by the transferor.[86] Oral evidence can be given to prove the existence of a document as contemplated in Section 53-A of the Transfer of Property Act as also secondary evidence of its contents under Section 65 of the Evidence Act.[87]

21. WRITTEN ORDER OF APPOINTMENT BY PUBLIC OFFICER NEED NOT BE PROVED [EXCEPTION 1]

This Exception is partly based on the *maxim omnia praesumumtur rite esse acta*. "It is a general principle, that a person's acting in a public capacity is *prima facie* evidence of his having been duly authorised so to do; and even though the office be one the appointment to which must have been in writing, it is not, at least in the first instance, necessary to produce the document, or account for non-production". "The admission on evidence contemplated in this exception rests "partly on the principle" that the law presumes in favour of the regularity of official acts and against misconduct and bad faith; and partly on the consideration that the invalidity of an act or appointment is more liable to detection when of a public, than when of a private nature."[88] Under exception (1) of Section 91 of the Evidence Act it is enough for the petitioner to prove that the successful candidate in an election acted as a *patel*, an office of profit under the Government and was therefore disqualified for standing as a candidate for election. It is not necessary to produce the order of appointment.[89]

22. WILLS ADMITTED TO PROBATE PROVABLE BY PROBATE [EXCEPTION 2]

Probate means the copy of a will certified under the seal of a court of competent jurisdiction with a grant of administration to the estate of the testator. (The Indian Succession Act (XXXIX of 1925). S. 2(f). Probate of a will is evidence of the contents of the will against all the parties interested thereunder. Probate is secondary evidence, but it is made admissible by this section.

Apart from the exceptions mentioned in this section, it is open to the legislature to provide in express terms exceptions to Sections 91 & 92 of the Act. For instance Section 12(1) of the Kerala Land Reforms Act provides that notwithstanding Sections 91 & 92 of the Evidence Act, it is open to prove that a

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83. *Rubyana* v. *State of Maharashtra*, 1996 Cr LJ 148 (para 8) (Bom).
84. *Collector of Gorakhpur* v. *Ramsundar*, AIR 1934 PC 157; *Venkatarama Rao* v. *Sobhanadri Appa Rao*, AIR 1936 PC 91; *Jageshwar* v. *Mulchand*, 1939 Nag 57 (FB); *Mathura Prasad* v. *Chandra Narayan*, AIR 1921 PC 8; *Ramnandan* v. *Chandradip*, AIR 1940 Pat 504; *Chandi* v. *Hrishikesh*, AIR 1946 Cal 465.
85. *Probadh Kumar Das* v. *Dantmara Tea Co. Ltd.*, AIR 1940 PC 1; **See also** *Manecklal* v. *Hormusji*, AIR 1950 SC 1.
86. *Meherali Khan* v. *Aratunnessa Bibi*, 25 Cal WN 905; *Sandu* v. *Bihk Chand*, 47 Bom 621; *Nagama* v. *Appalaraju*, AIR 1930 Mad 1021; *Salamat Uz-zamani* v. *Masha*, 40 All 187; *Ariff* v. *Jadunath Majumdar*, AIR 1931 PC 79.
87. *Bobba Suramma* v. *Peddireddi Chandramma*, AIR 1959 AP 568.
88. BEST ON EVIDENCE, 12th Edn., Section 356, pp. 313 & 314.
89. *Ram Sahai* v. *Gajja*, ILR (1959) 9 Raj 389.

document purporting to be a mortgage is in substance a *kanom* or a similar transaction granting fixity of tenure.[90]

23. NUMBER OF DOCUMENTS CONTAINING THE TERMS IMMATERIAL [EXPLANATION 1]

Illustration (*a*) to the section exemplifies this explanation. When parties negotiate at a distance by letters or telegrams, the entire mass of correspondence indicates the true nature of the agreement entered into by the parties.

"Instead of leaving the net effect of the negotiations to be gleaned from the mass of writings, a single document is finally drawn up to replace them and to embody their net effect, and is signed or otherwise adopted by the parties, this document will alone represent the terms of the act."[91]

Dealing with the evidentiary value of "bought and sold notes" it was held[92] that a broker is a common agent of both parties and when he closes the negotiation usually enters it in his business books and gives copy to each party of the entry or the memorandum of the transaction. The note or the memorandum given to the seller is called the "sold note" and the copy given to the buyer is a 'bought note'. They both do not constitute a contract of sale and they would serve only to record the transaction; in such cases the contract may be proved by any other legal means. Where the bought and sold notes did not agree and there being no other written memorandum of the contract there would be no sufficient proof within the Statute of Frauds.

In regard to "bought and sold notes" the Privy Council held that as the defendant had falsified the bought and sold note, the plaintiff was entitled to disregard them and to fall back on his original contract, that as regards the "bought and sold note" the only question is what weight should be given to them.[93]

24. ONLY ONE OF MANY ORIGINALS MAY BE PROVED [EXPLANATION 2]

Illustration (*c*) exemplifies the meaning of this Explanation. Section 62, Explanations 1 and 2, Bills of exchange and bills of lading have more originals than one.

25. STATEMENT, IN ANY DOCUMENT, OF A FACT, NOT REFERRED TO IN THIS SECTION PROVABLE [EXPLANATION 3]

Illustrations (*d*) and (*e*) exemplify this Explanation.

"When the contents of a document are in question, either as fact in issue or a sub-alternate principal fact, the document is the proper evidence of its own contents, and all derivative proof is rejected until its absence is accounted for. But when a written instrument or document of any description is not the fact in issue, and is merely used as evidence to prove some fact, independent proof *aliunde* is receivable." (BEST ON EVIDENCE, 2nd Edn., p. 282).

Thus, although a receipt has been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it. A receipt for sums paid in part liquidation of a bond hypothecating immovable property must be registered to render it admissible as evidence. Under illustration (*e*) to this section such payments may nevertheless be proved by parol evidence, which is not excluded owing to the inadmissibility of the documentary evidence.[94]

TAYLOR ON EVIDENCE (10th Ed., Section 405, p. 314) states the principle of this explanation 3 as follows. "Extrinsic evidence is admissible in substitution of any document intended by the parties to operate merely as a collateral or informal memorandum of a transaction, and not as a contract or other binding legal instrument, because, in such a case, the parties do not intend the writing to be complete and exclusively operate as regards such transaction.

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90. *K.K. Nambiar* v. *Pairu Kurup*, AIR 1970 Ker 16 (FB).
91. WIGMORE—*Evidence* 1905 Edn., Section 2425, pp. 1408, 1409.
92. *Silvewright* v. *Archibold*, 17 QB 115.
93. *Durga Prasad Sureka* v. *Bhajan Lal Lohea*, ILR 31 Cal 614 (PC).
94. *Dalip Singh* v. *Durga Prasad*, ILR (1877) 1 All 442; *Sukh Dial* v. *Mani Ram*, (1914) PR No. 29 of 1915, (Civil); *Sharaf Ali Khan* v. *Jagandar Singh*, (1916) PR No. 98 of 1916 (Civil).

In a suit, which was brought for the price of goods sold and delivered, the plaintiff swore to the fact of the sale and tendered in evidence a written admission of the defendant that the goods had been supplied to him. The writing was rejected, as unstamped, and the suit was dismissed. It was held that the judge should have allowed the plaintiff an opportunity of proving by oral testimony the delivery of the goods sold, and their value.[95] So although where the contents of a marriage register are in issue and verbal evidence of those contents is not receivable, yet the fact of the marriage may be proved by the independent evidence of a person who was present at it.[96]

A contract deals with the subject matter as well as the persons between whom it is entered into. The names of the parties insofar as they relate to the terms, which create obligations cannot be regarded as divorced from the terms of the contract. Evidence may be led to show that some other persons intended to incur obligations under the contract instead of the parties designated therein, in view of explanation (3) of Section 91.[97]

In view of explanation (3) and illus. (*e*) of Section 91 Evidence Act, when the pronote was not produced, the plaintiff must prove that he had lent the money to the defendant and it was repayable; that for such purpose oral evidence is admissible of the fact that the payment was made; that the terms on which the payment is made are covered by the provisions of Section 91 and require production of the document.[98]

Exclusion of evidence of oral agreement.

S. 92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

***Proviso* (*1*).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.**

***Proviso* (*2*).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.**

***Proviso* (*3*).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.**

***Proviso* (*4*).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.**

***Proviso* (*5*).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:**

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95. *Binja Ram* v. *Rajmohun Roy*, ILR (1881) 8 Cal 282.
96. *Balbhadar Prasad* v. *Maharaja of Betia*, ILR (1887) 9 All 351, 356.
97. *Shankar Bandu* v. *Shankar Babaji*, AIR 1956 Bom 165.
98. *Lila Singh* v. *Chajju Singh*, AIR 1952 All 877.

***Provided* that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.**

***Proviso* (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.**

ILLUSTRATIONS

(a) A policy of insurance is effected on goods "in ships from Calcutta to London". The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy cannot be proved.

(b) *A* agrees absolutely in writing to pay *B* Rs. 1,000 on the first March, 1873. The fact that, at the same time an oral agreement was made that the money should not be paid till the thirty-first March cannot be proved.

(c) An estate called "the Rampur Tea Estate" is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed cannot be proved.

(d) *A* enters into a written contract with *B* to work certain mines, the property of *B*, upon certain terms. *A* was induced to do so by a misrepresentation of *B*'s as to their value. This fact may be proved.

(e) *A* institutes a suit against *B* for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. *A* may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(f) *A* orders goods of *B* by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. *B* sues *A* for the price. *A* may show that the goods were supplied on credit for a term still unexpired.

(g) *A* sells *B* a horse and verbally warrants him sound. *A* gives *B* a paper in these words : "Bought of *A* a horse for Rs. 500". *B* may prove that verbal warranty.

(h) *A* hires lodgings of *B*, and *B* gives a card on which is written—"Rooms, Rs. 200 a month". *A* may prove a verbal agreement that these terms were to include partial board.

A hires lodgings of *B* for a year, and a regularly stamped agreement, drawn up by an attorney, is made between them. It is silent on the subject of board. *A* may not prove that board was included in the terms verbally.

(i) *A* applies to *B* for a debt due to *A* by sending a receipt for the money. *B* keeps the receipt and does not send the money. In a suit for the amount *A* may prove this.

(j) *A* and *B* make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with *B*, who sues *A* upon it. *A* may show the circumstances under which it was delivered.

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COMMENTS

1. PRINCIPLE AND SCOPE

(1) This section deals with several grounds of exclusion of extrinsic evidence.

Under this section

(1) When the terms of (*a*) a contract, (*b*) a grant, or (*c*) any other disposition of property, have been reduced to the form of a document, or

(2) When any matter required by law to be reduced to the form of a document has been proved by the production of the document or by giving secondary evidence of its contents,

no evidence of any oral agreement or statement shall be admitted as between the parties to any such document or their representatives in interest, for the purpose of (*i*) contradicting, (*ii*) varying, (*iii*) adding to, or (*iv*) subtracting from, its terms.

There are six exceptions to this—

(1) Any fact which would (*i*) invalidate any document, or (*ii*) entitle any person to any decree or order relating thereto may be proved, such as fraud, intimidation, illegality, failure of consideration, mistake in fact or law.

(2) Any separate oral agreement (*i*) as to any matter on which the document is silent, and (*ii*) which is not inconsistent with its terms, may be proved.

(3) Any separate oral agreement, constituting a condition precedent to the attacking of any obligation under the document, may be proved.

(4) Any subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property, may be proved, except when such contract or grant (*i*) is required to be in writing, or (*ii*) has been registered.

(5) Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to such contracts, may be proved if they are not repugnant to, or inconsistent with, its express terms.

(6) Any fact which shows in what manner the language of the document is related to existing facts, may be proved.

This section is supplementary to S. 91 and is, to some extent, implied in it. If the contract, grant or disposition has been reduced to writing, Section 91 says no evidence shall be given of it, except the document itself, and this rule would be in vain, unless, as is said in this section, it was also forbidden to contradict, vary, add to, or subtract from, its terms.[1]

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1. Markby 73, *Bhawanbhai Premabhai* v. *Bai Vahali*, (1955) 57 Bom LR 250.

When a transaction has been reduced to writing, either by requirement of law, or agreement of the parties, the writing becomes the exclusive memorial thereof; and no extrinsic evidence is admissible either to prove independently the transaction, or to contradict, vary, add to, or subtract from, the terms of the document, though the contents of such document may be proved either by primary or secondary evidence.

All parol testimony of conversations held between parties, or declarations made by either of them, whether before, or after, or at the time of, the completion of a contract, will be rejected, because such evidence would tend to substitute a new and different contract for the one really agreed upon. Extrinsic evidence as to what transpired subsequent to a written contract is not admissible for ascertaining its terms.[2]

"To admit inferior evidence when the law requires superior would be to nullify the law; and that when the parties have deliberately put their agreement in writing, it is conclusively presumed between themselves and their privies, that they intend the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith, or treacherous memory". Though on execution and registration of a sale-deed, the ownership and all interests in the property pass to the transferee, yet that would be on terms and conditions embodied in the deed indicating the intention of the parties. Such intention can be gathered by intrinsic evidence, namely, from the averments in the sale-deed itself or by other attending circumstances subject, of course, to the provisions of Section 92.[3]

The rule, however, is sometimes though to be based on the "best evidence" principle[4]; sometimes on the doctrine of estoppel, as the party is precluded by his acknowledgment in writing from disputing what is so acknolwedged; and sometimes on the substantive law purely. The rule applies when the document is accepted as a document operating in accordance with its terms.

Section 92 enacts that when the terms of all contracts, or grant or other disposition of property are reduced to writing, whether or not such contract or grant is compulsorily required to be reduced to writing and registered, no oral evidence shall be admitted to contradict, vary, add to or substract, from its terms.[5]

The section applies only where, upon the face of it, the written instrument appears to contain the whole contract.[6] If the parties have intended to reduce all the terms of the contract to writing, then no parol evidence is admissible; but if they intended only to reduce to writing a portion of the terms of the contract, then they are entitled to give parol evidence of the terms which they did not intend to reduce to writing.[7]

Where, however, a transaction is contained in more than one document the documents should be read and interpreted together and this section is not applicable.[8]

The bar of this section applies only when it is sought to be proved that the terms of the transaction were different and not that the transaction itself was different than what it purported to be.[9]

2. APPLICABILITY—EXCEPTIONS [SECTION 92]

It is given to the legislature by special legislation to exclude the operation of Sections 91 and 92. Section 12(1) of the Kerala Land Reforms Act, 1963 removes the trammels imposed by provisions of

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2. *Belapur Co. Ltd.* v. *Maharashtra State Farming Corpn.*, (1972) 74 Bom LR 246.
3. *Bishundeo Narain Rai* v. *Anmol Devi*, AIR 1998 SC 3006, **distinguishing** *Panchoo Sahu* v. *Janki Mandar*, AIR 1952 Pat 263 and *Hara Bewa* v. *Banchanidhi Barik*, AIR 1957 Ori 243 and **approving** *Shiva Narayan Sah* v. *Baidya Nath Prasad Tiwary*, AIR 1973 Pat 386; *Kamta Prasad* v. *Lachmi Sah*, AIR 1929 Pat 550; *Umeshwar Prasad Sinha* v. *Dwarika Prasad*, AIR 1944 Pat 5 : ILR 22 Pat 320; *Sarjug Saran Singh* v. *Ramchartar Singh*, (1968) 16 BLJR 74 and *Ramchandra Biharilal Firm* v. *Mathuramohan Naik*, AIR 1964 Ori 239 : ILR 1964 Cut 551.
4. *Guardhouse* v. *Blackburn*, LR 1 P&D 117; *Davis* v. *Symonds*, 1 Cox Ch 402; PHIPSON ON EVIDENCE, 13th Edn., **page 934 (para 38.02)**.
5. *Sumati Bala Majumdar (Smt.)* v. *Narendra Kumar Das*, AIR 1975 Gau 43 **relying on**; *Tyagaraja Mudaliyar* v. *Vedathanni*, AIR 1936 PC 70; *Asaram* v. *Ludheshwar*, 1938 Nag 335 (FB).
6. *Cutts* v. *Brown*, (1880) 6 Cal 328, 337.
7. *Jamna Doss* v. *Srinath Roy*, ILR (1889) 17 Cal 176n, 177.
8. *Chattanatha* v. *Central Bank of India*, AIR 1965 SC 1856.
9. *Heirs of Jatashanker* v. *Heirs of Mavji*, AIR 1969 Guj 169.

Evidence Act specially Sections 91 and 92 in the interpretation of documents. In cases, to which Section 12(1) will not apply, a document has to be interpreted subject to Sections 91 and 92 of Evidence Act.[10]

The provision contained in Section 6 of Hyderabad Land Alienation Restraint Act, is mandatory and cannot be whittled away. The policy of the Act being to create an exception to the general rule in Section 92, Evidence Act, any decree passed on admission of the defendant who is an agriculturist cannot come in the way of his raising a plea in any subsequent proceeding.[11]

The plea of estoppel under Section 115 of the Evidence Act would apply only when the representation is in writing, but would not help when it is oral in the face of Section 92. It is wrong to suppose that Section 115 is a substantive law, while Section 92 is only a procedural law. If the two are read together, both can operate. There is nothing in Section 115 to show that it overrides Section 92.[12]

However, it was held that the rule of estoppel must prevail against a pure rule of procedure contained in Section 92.[13]

An arbitration proceeding is not governed by the Evidence Act. In an arbitration proceeding, however, the principles of natural justice are bound to be followed. The principles embodied in Sections 91 and 92 of the Evidence Act lay down the principles of natural justice and the court in such a case of violation should come to the aid of the aggrieved party. In case reference proceeds and the arbitrator gives effect to the principle embodied in Sections 91 and 92 of the Evidence Act, the party who alleges the fraudulent manipulations in the written contract is bound to fail. Again, in case the reference proceeds, if the arbitrator ignores the principles of Sections 91 and 92 and the decision is in favour of the party and then the point is agitated in court, the court is bound to give effect to the principles of Sections 91 and 92 of the Evidence Act.[14]If evidence is proposed to be led to vary or modify the terms of a document or a writing, there must be a proper plea raised which brings the case within any of the provisions to Section 92.[15] This section has no reference to a question whether the parties agreed to the terms of the document set forth in it.[16]

Section 92 has nothing to do with offers made. It fully allows offers to be varied at the time of acceptance and being turned into regular contracts. Where a complainant seeks to prove the varying of the terms of offer at the time of concluding the contract, such evidence is not prohibited by Section 92 and hence cannot be excluded.[17] Where the agreement is partly oral and partly in writing the bar under Section 92 is not attracted.[18]

3. 'ANY MATTER IS REQUIRED BY LAW TO BE REDUCED TO'

Where any matter is required by law to be reduced to the form of a document, then the document itself must be put in evidence, *e.g.*, deeds, conveyances of land, mortgages, wills, *etc.* No other evidence can be substituted so long as the writing exists. But where the matter is not required by law to be reduced to the form of a document, this section does not apply, *e.g.*, in 1866 an oral agreement with transfer of possession sufficed to create a mortgage and, therefore, a mortgage could be proved *aliunde* even if there was no registered document.[19]

4. ADMISSION

The document wherein the party has made an admission and he has been confronted with the same in his examination, can be relied upon.[20]

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10. *K.K. Nambiar* v. *Kurup*, AIR 1970 Ker 16.
11. *Parasuram* v. *Pandu*, AIR 1956 Hyd 178 (DB).
12. *Ranbaxy Laboratories Ltd.* v. *Doon Apartments*, ILR (1979) 1 Del 84.
13. *State Bank of Indore* v. *Jasroop Baijnath*, AIR 1974 MP 193.
14. *Bengal Just Mills Co. Ltd.* v. *Lal Chand Dugar*, AIR 1963 Cal 405.
15. *Shankar Bandu* v. *Shankar Babaji*, AIR 1956 Bom 165.
16. *G.Y. Bhandare* v. *Erasme De Sequetra*, AIR 1972 Goa 25.
17. *Bindeshwari Singh* v. *K.K. Dutta*, AIR 1954 Cal 361; *Bindeshwari Singh* v. *K.K. Dutta*, 1954 Cr LJ 975.
18. *Anjali Das* v. *Bidyut Sarkar*, AIR 1992 Cal 47.
19. *Narsi* v. *Parshottam*, (1928) 30 Bom LR 1277 : ILR 52 Bom 875; *Sir Savaji Rao* v. *Madhavrao*, (1928) 30 Bom LR 1463 : 53 Bom 12. No oral evidence is admissible to prove the rent payable under a lease reduced to writing. *Lal Rajendrasingh* v. *Mahant Hulasdas*, ILR (1944) Nag 704.
20. *K.M. Rajendran* v. *Arul Prakasam*, AIR 1998 Mad 336 (para 13).

5. CONFESSION

A confession of an accused person made to a Magistrate holding an inquiry is a matter required by law to be reduced to the form of a document within the meaning of this section, and no evidence can be given of the terms of such a confession except the record, if any, made under Section 364 of the Code of Criminal Procedure.[21]

6. DEPOSITION

In a prosecution for perjury, the deposition is to be produced in evidence against the accused during his trial not for the purpose of proving its truth but for the purpose of proving that he made it. Section 91, Evidence Act deals with the production of a document to prove the truth of its contents and not to prove its existence. If the prosecution had to prove that the deposition made by the witness is correct, it would have to produce the deposition and Section 91 would bar any other evidence. But when the prosecution has simply to prove that the witness made the deposition, there is nothing in Section 91 to prevent this fact being proved without producing the deposition itself.[22]

The omission to read over his deposition to the witness, in accordance with Order XVIII, Rule 5 of the Civil Procedure Code, renders the same inadmissible in evidence against him at his subsequent trial for forgery and oral evidence of its contents is excluded by this section.[23]

7. CONTRADICTING—INTENTION

The Privy Council laid down in *Balkishen* v. *Legge*[24] that oral evidence of intention is not admissible for the purpose of construing a deed or ascertaining the intention of the parties to the deed. Oral evidence was not allowed, for example, to show whether a particular deed was intended by the parties to be a sale or lease.[25] A deed of sale of land for value was accompanied by a deed of agreement between the parties for purchase back by the vendor of the land on payment by him of money to the vendee on a future date fixed. The deeds were followed by transfer of possession to the vendee, and his receipt of the profits. The vendor did not exercise his right of re-purchase; but after many years, gave notice of his intention to redeem, and sued to enforce his right of redemption as upon a mortgage by conditional sale. The Privy Council held that oral evidence for the purpose of ascertaining the intention of the parties to the deeds was not admissible and that the case must be decided on the consideration of the contents of the documents themselves with such extrinsic evidence of surrrounding circumstances as may be required to show in what manner the language of the document was related to existing facts.[26] Even after this pronouncement of the Judicial Committee there was a conflict of views between the Bombay and the Madras High Courts on the one hand and the Calcutta High Court on the other on the question whether oral evidence as to acts and conduct of parties subsequent to a deed was admissible to show that what on the face of it was a conveyance of sale was in reality a mortgage. The High Courts of Bombay[27] and Madras[28] were of opinion that such evidence was not admissible. The former Chief Court of Lower Burma[29] and the former Judicial Commissioner's Court of Upper Burma[30] followed this view. On the other hand, the Calcutta High Court[31] was of opinion that such evidence was admissible. The

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21. *Emperor* v. *Gulabu*, ILR (1913) 35 All 260.
22. *Mohammed Farooq* v. *Rex*, AIR 1950 All 501.
23. *Emperor* v. *Nabab Ali Sarkar*, ILR (1923) 51 Cal 236; *Chenchian* v. *King-Emperor*, ILR (1919) 42 Mad 561; *Taj Mahmud* v. *Crown*, ILR (1927) 15 Lah 407. **See**, however, *Kamla Devi* v. *Rudrew Shwar Prasad Singh*, 1976 HLR 185.
24. (1899) 2 Bom 523, 27 IA 58, 22 All 149.
25. *Satyanarayan Shah* v. *Star Co.*, AIR 1984 Cal 399.
26. *Balkishen* v. *Legge*, (1899) 2 Bom LR 523, 27 IA 58, : ILR 22 All 149; *Maharu* v. *Khandu*, (1924) 26 Bom LR 742 PC; *Vithoba* v. *Narayan*, ILR (1942) Nag 592; *Kesarbai v.Rajabhau*, (1944) Nag 141.
27. *Dattoo* v. *Ramchandra*, ILR (1905) 30 Bom 119 : 7 Bom LR 669; *Abaji Annaji* v. *Luxman*, ILR (1906) 30 Bom 426 : 8 Bom LR 553.
28. *Achutaramaraju* v. *Subbaraju*, ILR (1901) 25 Mad 7.
29. *Maung Bin* v. *Ma Hlaing*, (1906) 3 LBR 100 (FB).
30. *Mi Gywe* v. *Kesha Ram*, (1908) 2 UBR (1907- 1909) (Evi) 15.
31. *Preonath Shaha* v. *Madhu Sudan Bhuiya*, ILR (1898) 25 Cal 603 FB; *Khankar Abdur Rahman* v. *Ali Hafez*, ILR (1900) 28 Cal 256; *Mahomed Ali Hossein* v. *Nazir Ali*, ILR (1901) 28 Cal 289.

former Chief Court of the Punjab[32] had adopted the view of the Calcutta High Court. This conflict has been set at rest by the Privy Council in *Maung Kyin's* case, above referred to, in which it has expressly overruled the decisions of the Calcutta High Court and approved those of the Bombay and the Madras High Courts. It has held that as between the parties to an absolute conveyance this section precludes the giving of oral evidence to prove that the transaction was intended to be a mortgage.[33]

Though this section precludes oral evidence of intention for the purpose of construing deeds or proving the intention of the parties, it merely prescribes a rule of evidence, and does not fetter the court's power to arrive at the true meaning and effect of a document in the light of all the circumstances surrounding the transaction[34]. When it is said that a court should look into all the circumstances to find an author's intention, it is only for the purpose of finding out whether the words apply accurately to existing facts. But if the words are clear in the context of the surrounding circumstances the court cannot rely on them to attribute to the author an intention contrary to the plain meaning of the words used in the document.[35]

Where a document has to be construed, the intention must be gathered, in the first place, from the document itself. If the words are express and clear, effect must be given to them and any extraneous enquiry into what was sought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of the words which they used. If, however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended.[36]

8. ORAL EVIDENCE INADMISSIBLE TO CONTRADICT WRITTEN TERMS

In a suit for a declaration that an apparent sale-deed executed by the plaintiff was a mortgage and for redemption, the lower courts allowed the plaintiff to adduce evidence to prove that the defendant at the time of the execution of the sale-deed represented to the plaintiff that the sale-deed would not be enforced as such. It was held that no evidence of a contemporaneous agreement, or promise, or representation inconsistent with the written document could be admitted.[37] In a suit for a decree for sale for the mortgage due under an admittedly usufructuary deed mortgage the defendants contended that there was a contemporaneous oral agreement to treat the usufructuary deed as a simple mortgage and that transfer of possession was never intended. On the question whether evidence in support of the oral agreement could be allowed to be let in, it was held that the Courts should give effect to the intention expressed in the document and that the contemporaneous oral agreement was inadmissible in evidence.[38] Where in a written agreement of sale, the relevant clause therein expressly contemplated that the possession would remain with the vendor until completion of the sale, oral evidence to prove an oral agreement pertaining to handing over the vacant possession of the ground floor of the building in question, thereby contradicting the written agreement, was held to be inadmissible.[39] Where a registered document on the face of it without any ambiguity is a pure and simple mortgage, the parties to the transaction or their successors-in-interest cannot be allowed under Section 92 to prove by parol evidence that it was intended to operate as a deed of sale.[40]

In the case of ambiguous language of a document admitting variety of meanings, the court can consider subsequent conduct of the parties.[41]

Where a document purports to be an absolute sale, a contemporaneous unregistered agreement giving the vendor the right of redemption is inadmissible to prove that the deed of sale is in reality a mortgage.[42]

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32. *Abdul Ghafur Khan* v. *Abdul Kadir*, (1901) PR No. 72 of 1901 (Civil); *Bulaki Mal* v. *C.J. Floyd*, (1911) PR No. 27 of 1911 (Civil).
33. *Maung Kyin* v. *Ma Shwe La*, (1917) 44 IA 236, 20 Bom LR 278; *Maung Shwe Phoo* v. *Naung Tun Shin*, ILR (1927) 5 Ran 644.
34. *Baijnath Singh* v. *Hajee Vally Mahomed*, (1924) 27 Bom LR 787 : ILR 3 Ran 106 PC.
35. *Kamla Devi* v. *Takhatmal*, AIR 1964 SC 859.
36. *Chunchun Jha* v. *Ebadat Ali*, AIR 1954 SC 345 : 1954 All LJ 546 : 1954 SCJ 469 : 1955 SCR 174.
37. *Dagdu* v. *Nana*, (1910) 12 Bom LR 972; *Namdev* v. *Dhondu*, (1920) 22 Bom 979 : ILR 44 Bom 961; *Ramlochan* v. *Pradip Singh*, AIR 1959 Pat 230.
38. *Vasudevan Namboori* v. *Poranchu Devassi*, (1956) TC 704.
39. *Hira Mistan* v. *Rustom Jamshedji Noble*, 2000 AIHC 1543 (para 24) (Bom).
40. *Ram Narain* v. *Manki Singh*, ILR (1954) 33 Pat 638.
41. *Raj Kumar Rajendra Singh* v. *State*, AIR 1990 SC 1833.
42. *Kondiram* v. *Gundappa*, 1955 Hyd 400.

The Privy Council held reversing the judgment of the High Court that Section 92 barred parol evidence for the purpose of showing that a deed of sale was in reality intended by the plaintiff to be deed of gift.[43]

The plaintiff's father conveyed the family properties to his sister's husband for a stated amount as consideration, the consideration being the obligation which the vendee undertook to discharge the family debts for that amount, and the vendee sold some of the properties and discharged the debts, and the plaintiff sued the vendee for the recovery of the properties left, and for an account of his management of the properties conveyed. It was held that the plaintiff was precluded from establishing an oral agreement to reduce an out-and-out sale into a trust so as to take away the right of the vendee to enjoy the properties, as such an agreement would be hit by this section.[44]

Evidence to show that a possessory mortgage is in reality a simple mortgage according to the intention of the parties is inadmissible under this section.[45]

In *Sara Veeraswami* v. *Talluri Narayya*[46] the registered sale deed executed by the appellant plaintiff and his father effected an out right and unconditional sale of certain properties. On the same day the vendee leased the properties in favour of the father-in-law of the appellant-plaintiff. At the same time there was an oral agreement of sale that if the price was paid by the plaintiff within a period of five years, the vendee agreed to reconvey the properties. The plaintiff filed the suit for reconveyance. The Privy Council held that the oral agreement as to reconveyance did not contradict, vary or subtract from the terms of the sale deed within the meaning of Section 92 and was therefore admissible in evidence. The Privy Council also held that the words "adding to" which are part of Section 92 must receive their due weight, but in the opinion of their Lordships they do not suffice to exclude the oral agreement relied upon by the appellants. It is, of course, literally correct to say that as the agreement for reconveyance related to the lands sold, it added a further stipulation respecting those lands. That, however, is not an appropriate test of the applicability of the section which is concerned to defeat the modification of a particular document. It is not enough to ask if the oral agreement relates to what has been sold. To be excluded it must bear, in some one or more of the ways specified in the section, upon the terms of sale a contained in the instrument. To add a stipulation which is quite unconnected with the terms of sale is not, in the view of their Lordships, an addition of the kind struck at the section.[47]

Evidence in respect of an oral agreement to return the property which has been conveyed under a registered sale deed is inadmissible.[48] Section 92 bars proof of an oral agreement not to charge interest when the mortgage bond in its terms provided for payment of interest.[49] Where the partition deed contains an admission that the parties were joint till 1954, oral evidence that there was an oral partition in 1951 cannot be allowed.[50]

In a suit for redemption of registered *Zarpeshgi* of 1929, the defence was that by an oral settlement of the same land in 1942 with the defendants they had discharged the liability under the *Zarpeshgi* of 1929. It was held that oral evidence to prove the oral settlement in discharge of the *Zarpeshgi* of 1929 could be admitted because this was a case of total extinguishment of the *Zarpeshgi* and not a case in which the subsequent transaction set up by the defendants amounted to or had the effect of varying or rescinding the agreement between the parties resulting in the transaction of *Zarpeshgi* of December, 1929. In such circumstances, of course the law requires that when the original contract is in writing it may not be proved to have been abrogated except by a document in writing but this is altogether different from an arrangement between the parties subsequent to a contract whereby accepting the rights and liabilities accuring thereupon they seek to fulfil the obligations arising therefrom and thereby discharge the liability of one party as against the other; that would be an extinction of the previous

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43. *Hanif-un-nisa* v. *Faiz-un-nisa*, 39 IA 85 : ILR 33 All 340 (PC).
44. *Rakkiyana* v. *Chinnu*, AIR 1954 Mad 84 : ILR (1954) Mad 271.
45. *K.S. Mian Feroz Shah* v. *Sohbat Khan*, AIR 1954 Mad 84 : 1933 PC 178 : 60 IA 273; *Collector of Etah* v. *Kishorilal*, AIR 1930 All 721.
46. AIR 1949 PC 32.
47. *Sara Veeraswami* v. *Talluri Narayya*, AIR 1949 PC 32; **See also** *Sisir* v. *Naran*, 33 Cal WN 591; *Harkishandas* v. *Bai Dhanu*, ILR 56 Bom 566; *Sahadeo* v. *Namdeo*, AIR 1949 Nag 15.
48. *Thatha Rao* v. *Jummarlal*, ILR (1952) Hyd 373. **Also see** *Fabril Gasosa* v. *Labour Commissioner*, AIR 1997 SC 954.
49. *Radha Soami Satsang Sabha Dayal Bag* v. *Hans Kumar Kishanchand*, AIR 1959 MP 172.
50. *Gita Bai w/o. Sriniwas* v. *Dayaram Shankar*, AIR 1970 Bom 160.

contract by performance and not by concealing it or avoiding it. This is the distinction between the two.[51]

However, the Calcutta High Court in *Ramavtar* v. *Tulsi*[52] held that a subsequent oral agreement giving a diffrent mode of payment of discharge or providing a means for the satisfaction of the amount under the mortgage by putting the mortgagee in possession of the property mortgaged or a portion of it to enjoy the profits therefrom, oral evidence can be permitted to prove such oral agreement.[53]

A plea that, notwithstanding the recitals in the promissory note for interest, the parties at the time of its execution agreed that no interest should be charged comes within the mischief of Section 92. It is a collateral agreement altering the legal effect of an instrument.[54] An agreement as to implied warranty regarding the correctness of the extent of the property sold should be established on the terms of the sale deed and it is not open to the plaintiff to travel outside the deed and to adduce to prove that there was a warranty *de hors* the instrument.[55] Mere mention of commission in a contract is not in any way inconsistent with the relation being between principal and a principal and statement of the defendant contradicted by the plaintiff that it was a condition that there was to be no liability on their part, cannot be allowed to displace the ordinary results which a contract between principals entails.[56] Once it is admitted or proved that a party executed a sale deed, no oral evidence can be led for contradicting, varying, adding to or substracting from its terms unless a case falling under any proviso to Section 92 is specifically pleaded.[57]

The Supreme Court in *Mahindra and Mahindra Ltd.* v. *Union India*[58] while disapproving of the decision in *Hindustan Lever Ltd.* v. *M.R.T.P.*[59] observed: "Sections 91 and 92 of the Evidence Act do not come into the picture at all while considering whether a particular trade practice set out in an agreement has or may have the effect of preventing, distorting or restricting competition so as to constitute "a restrictive trade practice; it is the actual or probable effect of the trade practice which has to be judged in the light of the various considerations and there is no question of contradicting, varying, adding to or substracting from the terms of the agreement by admitting any extrenuous evidence for that purpose".

Where in a petition for eviction of one S and the appellants from the shop on the ground that S who, was the tenant of the shop in his personal capacity, had unlawfully sublet the shop to a firm, oral evidence was led by the appellants before the rent controller that S had acted as an agent on behalf of the firm of which he was a partner. It was held the description of a person in the lease as 'lessee' or 'tenant' does not necessarily negative agency and evidence may be given that the person so described was acting as an agent.[60]

In *Leena Roy Choudary* v. *Most. Indumati Bose*[61] a suit for eviction by a landlord was compromised between the landlord and tenant. According to the compromise decree the tenant gave up possession of a part of the premises. Thereafter tenant constructed a kitchen, a permanent structure without the landlord's permission. Compromise did not expressly authorise the construction of the kitchen. Hence landlord again filed a suit for eviction. It was held that the construction of a permanent structure namely kitchen without the permission of the landlord is a breach of conditions of tenancy contained in Section 108, T.P. Act. The covenants set out in Section 108, T.P. Act are implied in every lessee in the absence

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51. *Punit Mahton* v. *Mahabir Mahton*, AIR 1959 Pat 531; **following** *Ariyaputhira Pada Yachi* v. *Muthu Kumara Swami Padavachi*, AIR 1914 Mad 489; *Ramachandra Sau* v. *Kailash Chandra Patra*, AIR 1931 Cal 667; and **dissenting from** *G.P. Mallappa* v. *Natam Naga Chetty*, AIR 1919 Mad 833; *Mohammed Niaz Ahemd Khan* v. *Nanhe Mal*, AIR 1929 All 615.
52. 16 Cal WN 137.
53. *Ramavatar* v. *Tulsi*, 16 Cal WN 137; *Kamala* v. *Babunandan*, 11 CLJ 39; *Tarapada* v. *Hajia*, AIR 1956 Cal 625; *Balam* v. *Sadireddi*, AIR 1928 Mad 233; *Narain* v. *Mahanth*, AIR 1952 Pat 421; *Lakshmi Narasimha Rao* v. *Raghavamma*, AIR 1936 Mad 380; *Madari* v. *Baldep*, ILR 27 All 351 (FB); *Ram Baksh* v. *Durjan*, 9 All 392; *Indrajit* v. *Lalchand*, **Affirmed in** 22 All 370 in 16 All 168; *Ariyaputhira* v. *Muthu Kumarasami*, ILR 37 Mad 423.
54. *T.K. Shanmuga Sundara Mudaliar* v. *S.C. Sivalinga Mudaliar*, AIR 1952 Mad 675.
55. *Chacko Joseph* v. *Varghese Markose*, AIR 1957 Ker 181 (DB) : ILR 1957 Ker 475, **relying on** *Delli Gramani* v. *Ramachandran*, AIR 1953 Mad 769.
56. *Balthazar* v. *Firm, E.M. Abowath*, AIR 1921 PC 129.
57. *Lekhraj Diddi* v. *Sawan Singh*, AIR 1971 MP 172; *Jaswant Rai* v. *Abnash Kaur*, ILR (1974) 1 Del 689.
58. AIR 1979 SC 798.
59. AIR 1977 SC 1285.
60. *Niranjan Kumar* v. *Dhyan Singh*, AIR 1976 SC 2400.
61. AIR 1980 Pat. 120.

of a contract or local usage to the contrary. It was further held that merely because the terms of the lease are contained in a document, Sections 91 and 92 of the Evidence Act would not prohibit the Court from importing into the lease the covenants or conditions implied in Section 108, T.P. Act.

A provision of law is neither a statement of a witness nor a document produced for inspection of Court. In importing the conditions of Section 108 the Court is not admitting any evidence.

There is nothing in Section 92 which prohibits the Court from considering the evidence regarding other terms and conditions which are not in conflict with the terms of the contract, if the document does not record or purport to record all the terms of the contract between two parties. The plaintiff's own oral evidence is admissible to establish the defence case of invalidity of the document concerned.[62]

It is open to a judgment-debtor to plead a pre-decretal agreement which does not attack the decree but which states that the decree cannot be executed under certain conditions or it can be executed only in part. Such an agreement is not affected by Section 92, Evidence Act, as it does not amount to a modification, alteration or variation of the decree.[63]

In a case of a possessory mortgage and rent note, where the rent was equivalent to the interest on the mortgage, where the mortgagor filed a suit for eviction and arrears of rent, and the mortgagee contended that there was no relationship of landlord and tenant, as the two documents constituted a single transaction of mortgage. It was held that the bar of Section 92 applies only when it is sought to be proved that the terms of the transaction were different and not that the transaction itself was different than what it purported to be. Both Sections 91 and 92 are based on the best evidence rule. Section 92 is only supplementary to Section 91. If there is no inconsistency and if the language of the document is not ambiguous or obscure and the case does not fall in any of the six provisos to Section 92, the document would have solely to be construed on its own terms. The oral evidence as regards intention would therefore always be admissible to prove the real nature of the transaction. The real question being what is the true nature of the transaction, the same would have to be found out by looking at the contents of the document, the surrounding circumstances and by resorting even to the oral evidnce of the parties. Looking at the rent note there were two different relationships with two different legal consequences and following the rule of harmonious construction, both the documents could be given effect to at the same time. When there was no inconsistency, there could also be no question that earlier part of the transaction, *viz.*, the mortgage would prevail over the subsequent part, the lease, because both the parts could be given effect to. In such a case there would be no room for application of any of the provisos to Section 92 and the bar would remain absolute. The documents must be construed on their terms.[64]

The rights of the legatees under a will cannot be established by varying or adding up to the terms of agreement by adducing oral evidence.[65]

9. DISCHARGE OF LIABILITY

Where a suit was filed on the basis of a demand pronote, the defendant pleaded a collateral agreement to receive the usufruct of certain plots in repayment of the debt, it was held that oral evidence of the collateral agreement to prove the discharge of liability was admissible.[66] Where a partnership was formed by a registered deed for five years oral evidence to prove dissolution of the partnership much earlier and payment to the partners or one of the partners in accordance to their respective share was held admissible.[67] If the oral agreement does not contradict the main terms of the written contract but a change is made as to the mode of discharge of his obligation to suit the convenience of the parties, it is not hit by Section 92.[68] In a suit to enforce a mortgage, it is open to the mortgagor to plead discharge on the basis of an oral agreement by which the mortgagee undertook to take a portion of the mortgaged

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62. *Sitaram Lal* v. *Jameswar Das*, AIR 1995 Ori 260 (para 8).
63. *Perumalswami Chettiar* v. *Rajammal*, AIR 1955 Mad 339 (DB) **following** *Adappa Papamma* v. *Darbha Venkayya*, AIR 1935 Mad 860 (FB).
64. *Heirs of Late Jata Shankar Fulchand Mehta* v. *Heirs of Late Mavji Trikam*, AIR 1969 Guj 169.
65. *Mohanlal Dungarmal Futnani* v. *Vishanji Dungarmal Futnani*, AIR 2001 Cal 122 (para 22).
66. *Ram Jatan* v. *Chandra Bali*, **dissenting** in AIR 1960 All 746; *Chhaganlal* v. *Jagjiwandas*, AIR 1940 Bom 54; *Vishnu Ramachandra* v. *Ganesh Krishna Sathe*, AIR 1921 Bom 449.
67. *Liladhar* v. *Sunderlal*, AIR 1932 Nag 32.
68. *Kunjuvaried* v. *Radhalekshmi Naithiyaramma*, AIR 1955 Tra Co. 69 (FB).

property for sale in full discharge for the mortgage debt.[69] When a mortgagee filed a suit for sale of mortgaged property, an oral agreement was set up stating that some persons interested in the plaintiff brought about an agreement that mortgage amount should be settled for Rs. 9,000/- and a certain portion of the mortgage property should be sold to the plaintiff, in full discharge of the claim, it was held that the mortgagor (defendant) can adduce oral evidence in proof of oral agreement.[70] Where in the case of a simple mortgage the parties by a subsequent oral agreement, put the mortgagee in possession of the mortgaged lands for recovery of interest, it is merely an agreement creating a machinery for discharging interest and it is not hit by Section 92.[71]

When the separate agreement does not have the effect of varying or contradicting or adding to the terms of the deed between the parties, oral evidence is permissible. But, if it varies, contradicts or adds to the terms of the deed, oral evidence cannot be permitted.[72]

10. VARYING

The executant of a promissory note cannot be permitted to prove a separate agreement according to which the sum specified in the note was not, as expressed therein, payable on demand, but only after the adjustment of some accounts between the parties.[73] This case has been dissented from in a subsequent case in which the same High Court held that evidence to show that an instrument like a promissory note, the title to which generally passes by delivery, was delivered conditionally or for a special purpose only, and not for the purpose of transferring absolutely the property therein, is not only admissible but is precisely the class of evidence contemplated by Section 46 of the Negotiable Instruments Act and this section.[74] No oral evidence is admissible to vary the amount of price fixed in a registered sale-deed,[75] or the terms of a cheque which is a negotiable instrument[76] or the rate of interest different[77] from that in the written contract. An out and out gift cannot be altered by oral evidence into a will which has to take effect after the death of the donor, as it amounts to varying the term of the gift which comes into existence as and when the deed is executed.[78] It is not open to a party to a document to prove by oral evidence a variation in the terms of the document or as to the amount of consideration shown in the document. The oral agreement would then amount to a modification of the original contract and is inadmissible under Section 92.[79] Tenure or period of service or employment being an express term in writing any oral evidence contradicting or varying the same is not admissible.[80] Proof of implied warranty must rest on the terms of the sale deed and it is not open to travel outside the deed.[81] One member gave security for a loan raised by other members of a joint family, describing that the property belongs to him. It was held that no oral evidence can be given to vary the recital by showing that it was joint family property.[82] Under Section 128, Contract Act, the liability of a surety is co-extensive with the principal debtor, unless otherwise provided in the contract. Oral evidence is inadmissible to show that one of the executants was only a surety.[83] The Rangoon High Court has dissented from this view and

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69. *Krishnaswami Rao* v. *Srinivasa Desikan*, AIR 1937 Mad 261; *Krishnaji* v. *Kashirao*, AIR 1926 Nag 220; **contra** *Suklal Rambakas* v. *Jetha Opajishet*, AIR 1928 Bom 522 :
70. *Krishnaswamy Rao* v. *Srinivasa Desikan*, AIR 1937 Mad 261; **see contra** *Md. Niaz* v. *Nanhe Mal*, AIR 1929 All 615.
71. *Patel Kempegowda* v. *Channaveeraiah*, ILR (1957) Mys 277 : AIR 1958 Mys 43 (DB); *Kailash Chandra Deb* v. *Jogendra Chandra Datta*, AIR 1956 Tri 6; *Padam Dasi* v. *Saraswati Bewa*, ILR 1969 Cut 580.
72. *Punit Mahaton* v. *Mahabir Mahaton*, AIR 1959 Pat 531.
73. *Sri Ram* v. *Sobha Ram Gopal Rai*, ILR (1922) 44 All 521.
74. *Sheo Prasad* v. *Gobind Prasad*, ILR (1927) 49 All 464; *Bhogi Ram* v. *Kishori Lal*, ILR (1928) 50 All 754.
75. *Adityan Iyer* v. *Rama Krishna Iyer*, ILR (1913) 38 Mad 514. **See also** *Mohammed Sheriff Alnahary* v. *K.T. Kunjumon*, 2001 AIHC 4305 (paras 12 and 13) (Mad).
76. *Walter Mitchell* v. *A.K. Tennent*, ILR (1925) 52 Cal 677.
77. *Fitz-Holmes* v. *Bank of Upper India Ltd.*, ILR (1923) 4 Lah 258.
78. *Mottayappan* v. *Palani Goundan*, ILR 1938 Mad 226; *Benode Kishore Goswamy* v. *Asuthosh Mukhopadhya*, 16 Cal WN 666.
79. *Mathai* v. *Krishnasami Iyar*, 1960 Ker LJ 962 **relying on** *Beharilal* v. *Allahabad Bank Ltd.*, AIR 1929 All 664, *G.P. Mallappa* v. *Matam Naga Chetty*, AIR 1919 Mad 833 (FB), *Motilal Singh* v. *Mt. Fulia*, AIR 1958 Pat 61, *Fabril Gasosa* v. *Labour Commissioner*, AIR 1997 SC 954.
80. *Bikash Chandra* v. *Macniel*, ILR (1972) 1 Cal 157.
81. *M. Delli Gramani* v. *C.R. Rama Chandra*, AIR 1953 Mad 769 (DB).
82. *Manjula Bai* v. *Manikchand*, ILR (1977) Bom 833 (DB).
83. *Hodges* v. *Delhi & London Bank*, ILR 23 All 137; *Radha Kishen* v. *Durga*, ILR 59 Cal 106; *Khumaji Gojaji & Co.* v. *Damaji*, AIR 1934 Bom 39; *Krishayya* v. *Karneda*, AIR 1935 Mad 643.

held that oral evidence to show that one of the executants of a monetary bond to the knowledge of the money-lender signed it only as a surety is not admissble.[84] The Privy Council has held that oral evidence is inadmissible to show that the person who has signed a promissory note is not liable but someone else is[85]. Oral evidence was not allowed to contradict the contents of a written deed of liability to a bank.[86]

If in a suit based on promissory note the court finds that substantially the plea taken by the defendant is a variation of the terms of written contract *viz.*, the promissory note, oral evidence to prove the plea is excluded. If, however, the plea amounts to a complete discharge then perhaps oral evidence relating to discharge is admissible and the matter will have to be gone into on that basis.[87]

Where a lease deed is in favour of X and Y, Section 92, of the Evidence Act, 1872, is clearly a bar to the plea by X that Y is merely a surety.[88]

One of the executants cannot also show that his liability would arise only on the failure of the other executant to pay the amount.[89]

The words 'between the parties to any such instrument' do not preclude one of two persons in whose favour a deed of sale is purported to have been executed from proving by oral evidence in a suit by the one against the other, that the defendant was not a real but a nominal party only to a purchase, and that the plaintiff was solely entitled to the property to which it related. M conveyed certain houses and premises to plaintiff and defendant jointly by a sale-deed. Plaintiff sued defendant for ejectment from the premises, alleging that he alone was the real purchaser, and that the defendant was only nominally associated with him in the deed. It was held that this section did not preclude the plaintiff from showing by oral evidence that he alone was the real purchaser, notwithstanding that the defendant was described in the sale-deed as one of the two purchasers.[90] An oral agreement not to execute a decree, entered into between the parties after the filing of the suit and before the passing of the decree, provided the defendant did not contest the suit, is admissible in evidence as it does not vary the terms of the decree, and can be pleaded in bar of execution.[91]

In *Kochu Varki* v. *Cochin Thirumala Devaswam*[92] the land leased comprised of partly garden land and partly paddy lands. A suit was filed for the lease amount. In respect of garden lands, the lease amount was claimed. One of the contentions raised was that there was no *"pattom"* fixed in respect of the garden land separately. The *Devasthanam* contended that *pattom* was fixed in respect of garden land and paddy land separately though it was not so mentioned specifically in the contract of lease and referred to both oral and documentary evidence. The defendant wanted to show that the *pattom* shown in the document was the sum total of the *pattom* separately fixed in respect of, garden and paddy lands and how it was arrived at. It was held that this did not amount to varying, contradicting, adding to or substracting from the terms of the document and hence it was held Section 92 was not a bar.

Varying the terms of mortgage deed by unregistered deed for seeking possession would be of no avail as the said unregistered deed would not be admissible.[93]

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84. *Maung Ko Gyi* v. *U. Kyaw*, ILR (1927) 5 Ran 168.
85. *National Bank of Upper India Limited* v. *Bansidhar*, (1929) 5 Luck 1, 32 Bom LR 136, 57 IA 1; *Khumaji Gajaji & Co.* v. *Damaji*, (1933) 35 Bom LR 1197 : AIR 1934 Bom 39.
86. *Janki* v. *Ganesh Ram*, AIR 1984 All 219. An altered deed cannot be put in evidence because it amounts to variation. *Suresh Chandra* v. *Satish Chandra*, AIR 1983 All 81.
87. *C.K. Kuppuramulu* v. *A. Varadarajulu*, AIR 1973 Mad 479.
88. *Mulchand* v. *Madho Ram*, ILR (1888) 10 All 421; *Gopaldoss Family Trust Estate* v. *Michaelswani Pillai*, ILR (1964) 1 Mad 443 **following** *Mulchand* v. *Madho Ram*, ILR 10 All 421; **dissenting from** *Arumoorthi Chettiar* v. *Secandary Education Committee*, AIR 1962 Mad 360.
89. *Narasimna* v. *Ramaswami*, 24 MLJ 91; *Maneekjee* v. *Mg Po*, AIR 1925 Rang 83.
90. *Mulchand* v. *Madho Ram*, ILR (1888) 10 All 421. **See** *Pokal Gungayah* v. *Ismail Mohomed Madaree*, (1895) 2 UBR (1892-96) 354.
91. *Papamma* v. *Venkayya*, ILR (1935) 58 Mad 994, (FB); **disapproving** *Rajah of Kalahasti* v. *Venkatadri Rao*, ILR (1927) 50 Mad 897; *Goseti Subba Row* v. *Varigonda Narasimham*, ILR (1903) 27 Mad 368; *Chidambaram Chettiar* v. *Krishna Vathiyar*, ILR (1916) 40 Mad 233 (FB); *Laldas* v. *Kishordas*, (1896) 22 Bom 463 (FB). **contra** *Benode Lal Pakrashi* v. *Brajendra Kumar Saha*, ILR (1902) 29 Cal 810; *Hassan Ali* v. *Gauzi Ali Mir*, ILR (1903) 31 Cal 179.
92. AIR 1952 TC 387 FB.
93. *M.K. Seetharama Naidu* v. *Poovammal*, AIR 2001 Mad 343 (para 10).

11. ADDING TO

The Privy Council in *Sara Veeraswami* v. *Narayya,*[1] while approving *Harkisan Das Bhagwan Das* v. *Bai Dhanu*[2] and the decision in *Ma Nan Shein* v. *U. Yaing*[3] at page 494 in[4] observed: "In their Lordships' opinion the correct way of stating the proposition is to say that the agreement reached covered several matters but that the intention was that each of these should be effected as a separate and independent transaction. There was to be an outright sale and that, upon the happening of a certain event, was to be followed by a reconveyance of what had been sold. The second transaction, by its very nature, promised the previous completion of the first. Both, it is true, may be taken as arranged at the same time and agreement upon the part of the bargain may well have promoted agreement as to the rest, but such considerations do not necessarily affect the final result of the bargaining. The determining factor lies in the ultimate shape of the agreement rather than in the process by which it is reached. An oral stipulation may be purely collateral to the written agreement which it has induced, and that though both touch on a common subject matter—such being the character of the agreement in question—their Lordships find it impossible to hold that it contradicted, varied, or substracted from the terms of the sale deed. On the contrary, it left those terms and the interest passing thereunder to the purchaser entirely unaffected. Can it then be said to have added to the terms of the sale deed? The words "adding to" which are part of Section 92, must receive their due weight, but in the opinion of their Lordships, they do not suffice to exclude the oral agreement relied upon their appellant. To add a stipulation which is quite unconnected with the terms of sale is not, in the view of their Lordships, an addition of the kind struck at by this section.[5]

An agreement as to implied warranty regarding the correctness of the extent of the property sold should be established on the terms of the sale deed and it is not open to the plaintiff to travel outside the deed and to adduce evidence to prove that there was a warranty *de hors* the instrument.[6] In an agreement to sell joint family property, signed by a member of the joint family, there was no stipulation that the person signing the agreement would get the sale deed signed by the brothers also. Oral evidence to add this fact to terms of agreement was held to be barred by Section 92.[7]

Where prior to the execution of the sale deed it was agreed between the parties to the deed that the purchaser would pay the amount of *taccavi* loan due from the vendor to the Government in case it was recovered from him but there was no reference to this agreement in the deed of sale and a suit was brought to enforce the agreement, it was held that proviso (1) to Section 92, did not apply to the case as no question of want or failure of consideration of the deed of sale arose; nor was proviso (2) applicable as the deed was not silent on the point of consideration. The court could not, therefore, go behind the deed of sale which embodied the terms and enforce the agreement.[8]

Specific performance is an equitable relief and the contract of which specific performance is sought, must be precise and no oral evidence is admissible to add to the terms or contents. If the terms are uncertain it must be held as void under Section 29 of the Contract Act.[9]

12. ITS TERMS

The question whether oral evidence can be admitted to explain contents of document depends upon the degree of formality of document.[10]

The expression 'terms' of a contract in Section 91 and the corresponding expression in Section 92 have no application to a statement, contained in a writing which is in the nature of a condition precedent to the very formation of that contract.[11]

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1. ILR 1949 Mad 487 : AIR 1949 PC 32.
2. AIR 1926 Bom 497 : ILR 50 Bom 566 (FB).
3. AIR 1927 Rang 314.
4. ILR 1949 Mad 487.
5. **See also** *Lakshmichand* v. *Yashoda bhai,* 1954 Nag LJ 293, 295.
6. *Delli Gramani* v. *Ramachandran,* AIR 1953 Mad 769.
7. *Hari Singh* v. *Umrao Singh,* AIR 1979 All 65; *Shri Krishna Keshav Kulkarni* v. *Balaji Ganesh Kulkarni,* AIR 1976 Bom 342.
8. *Mokhelal* v. *Seth Kisanlal,* AIR 1950 Nag 44.
9. *Phulhari Devi (Smt.)* v. *Mithai Lal,* AIR 1971 All 494.
10. *N. Chellaperumal* v. *N.M. Jayarathnam,* AIR 1960 Mad 314.
11. *P.B. Bhatt* v. *V.R. Thakkar,* AIR 1972 Bom 365.

Normally, a person, who subscribes to a deed must be bound by all the recitals contained therein. Nevertheless, a lessee is not precluded from showing that despite the recitals to the contrary in the deed of settlement to which he is a signatory, he was not put in possession and occupation of the lands which he took under the settlement. Nor is the lessor precluded from showing that he had not received his outstanding part of the *nazrana* money due from the lessee although the deed contained a recital that it had been paid by the lessee.[12]

Where a person enters into a contract for purchase of an agricultural land for building purposes on the representation of the seller that the permission of the authorities for conversion of the land to building sites was expected shortly, the representation cannot be regarded as a term of the contract and therefore, oral evidence as to the representation cannot be excluded.[13] A recital in the sale deed concerning encumbrances is not a term of the sale deed and therefore, evidence to prove that the purchaser was aware of defect is not inadmissible under Section 92.[14]

13. NATURE OF THE DOCUMENT

In *Tyagaraja Mudaliyar* v. *Vedathanni*,[15] it was held that if the parties to a written agreement, wish to establish that they never agreed to contract on the terms set forth in the document, or that they did not intend to act upon the document, oral evidence could be adduced to establish the same.[16]

It is open to A to prove that he executed a sale deed *benami* in favour of B in order to defeat the claims of a creditor. In such a case, if the contemplated fraud was not carried out and was not effected in whole or in part, there is nothing preventing the plaintiff from repudiating the transaction as being *benami* and recovering possession of the property. In such a case, the question is not one under Section 92 regarding proof of a collateral oral agreement under which B is to hold the property for the benefit of A but is really a case where the transferor seeks to establish by attendant circumstances that he did not intend by his deed to dispose of the beneficial interest in the property to the transferee and that therefore he must hold the property for his benefit.[17] Where there is no dispute that the actual contract between the parties was one recorded in the deed, it is not thereafter open to the parties to let in oral evidence to prove that its terms were different from what is contained in the deed. Section 92 precludes such a course. But it does not preclude the parties from showing that the real nature of the transaction was different from what the document purports to show.[18] Parol evidence is admissible to show that a contract embodied in a document was never intended to be acted upon but was made for some collateral purpose.[19] Oral evidence to prove that deed was not to operate as agreement but was brought into existence for creating evidence of such matter, is permissible.[20] In order to attract the provision of Section 92, there should be a contract in existence. When a party pleads that there was no contract at all or that an instrument which had been brought into existence earlier was only a sham one not intended to be acted upon, it would be open to him to establish by oral evidence that there was no intention on the part of the parties to bring into existence a contract or an effective document.[21] Sections 91 and 92 do not preclude a party from giving evidence to show that the written agreement executed was never intended to operate as an agreement, but was brought into existence solely for creating the evidence of some other matter, or there was no agreement between the parties and there was no valid contract as per the terms of embodied therein.[22]

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12. *Pura Nand Puri* v. *Kamala Sinha*, 1965 Pat 39.
13. *Anant Shamrao* v. *Nensukh Bherulal Kucheriya*, AIR 1956 Bom 252. **See also** *Mohan Rai* v. *State of Bihar*, AIR 1994 Pat 42 (paras 6 and 7).
14. *R. Muninarayana Reddy* v. *C.P. Chinnaswamy*, AIR 1952 Mys 120.
15. 1936 PC 70 : 59 Mad 446 (PC), **followed in** *Bimbadhar Rout* v. *Kuna Senapati*, AIR 1995 Ori 258 (para 4).
16. **See also**, 7 Mad HC 196.
17. *Rakkiyana* v. *Chinnu* AIR 1954 Mad 84.
18. *Arumoorthi Chettiar* v. *Secondary Education Committee of Vallalasanpari of Vadugupatti*, AIR 1962 Mad 360; *Sidramappa Basappa* v. *Bipinchand Fulchand Gandhi*, ILR (1978) Bom 344; *Sukumar Bysack* v. *Sushil Kanta Banerjee*, 1972 Cal 207 (DB).
19. *Sumati Bala Majunder (Smt.)* v. *Narendra Kumar Das*, AIR 1975 Gau *43*; *Tyagaraja Mudaliyar* v. *Vedathanni*, AIR 1936 PC 70; *Asaram* v. *Ludheshwar*, 1938 Nag 335 (FB).
20. *Bhuralal* v. *Bhiriya Awaroop Singh Deshmali*, AIR 1963 MP 210.
21. *Syed Rasool* v. *Mohammad Moulana*, AIR 1977 Kant 173.
22. *Yadav Ram* v. *Laxman Singh Bisht*, AIR 1978 All 123 (DB); *Tyagaraja Mudaliyar* v. *Vedathanni*, AIR 1936 PC 70; *Baikoli Divya* v. *Harihar*, ILR 1966 Cut 236.

As a broad and distinct rule of law, extrinsic evidence of every material fact which will enable the court to ascertain the nature and qualities of the subject matter of the instrument or to identify the persons and things to which the instrument refers, must be necessarily received.[23]

It is open to a party to prove that a particular transaction was not consented to by him; Section 92 excludes oral evidence to vary the terms of the written contract, but has no reference to the question whether the parties agreed to contract on the terms set forth in the document.[24]

One cannot be allowed to show that a pronote was not really executed in favour of the plaintiff or that he discharged the debt by payment to another really interested.[25] But in the case of partnership, where its partner executed a pronote in his own name, it was held that the promisee can show an independent contract to bind all the partners and the normal rule that the maker can only be held liable is not applicable.[26]

Section 92 does not exclude oral evidence to prove that the transaction evidenced by a written instrument is fictitious or *benami* or was not intended to be acted upon and was executed to defeat the claims of some creditors and it was not intended by his deed to dispose of the beneficial interest in the property to the transferee.[27]

However it was held, that it is not open to the parties to prove that a lease is a *benami* transaction as the same would amount to varying the terms of the contract itself.[28]

It is submitted that this decision is contrary to the decision of the Privy Council in Thyagaraja's case and also to an earlier bench decision of the Patna High Court.[29]

Regarding the question whether the document was a sale or mortgage oral evidence regarding the intention of the parties is not permissible.[30] Evidence is not permissible to show that a deed was intended to be a mortgage deed though it purported to be a sale deed.[31] Section 92 does not preclude defendant from showing by oral evidence that rent mentioned in rent note was only device for payment of interest on loan as interest was in contravention of Section 25(2) of Bombay Money Lenders Act of 1947.[32] Extraneous evidence to prove that the deed of gift is not what it purports to be cannot be admitted in evidence.[33]

The subsequent conduct of a transferee in dealing with the transferred property may be relevant only if it is of material assistance in establishing the nature of the transaction or the intent of the transferor in entering into that transaction. But subsequent conduct may also be the result of a subsequent change in design in which case such subsequent conduct will not adversely affect the validity and genuineness or minimise or nullify the operative effect of a *bona fide* transaction made earlier.[34] Though oral evidence of intention is excluded under Section 92, which prescribes a rule of evidence, it does not fetter the court's power to arrive at the true meaning of a document in the light of all the circumstances

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23. *Bank of New Zealand* v. *Simpson*, AIR 1900 AC 182, 188: *Charrington* v. *Wooder*, AIR 1914 AC 71.
24. *Tyagaraja Mudaliyar* v. *Vedathanni*, **following** AIR 1936 PC 70; *Shrinarayan Rambilas* v. *Bhasker Waman*, AIR 1954 Nag 193 (DB); *Dominion of India, New Delhi* v. *Ram Rakha Mall & Sons*, AIR 1957 Punj 141 (DB); *Ramachandraji* v. *Devendra Singh*, ILR (1966) 1 All 430.
25. *Subba Narayanavathias* v. *Ramaswami Aigar*, ILR 30 Mad 88 (FB); *Madan Lal* v. *Lalchand*, AIR 1927 All 463.
26. *Venkatachalapati* v. *Ramakrishnayya*, AIR 1930 Mad 168; *Kara Abdulla* v. *Jiwanji*, AIR 1914 PC 132 (PC); *Shanmuganatha* v. *Srinivasa*, ILR 40 Mad 727 (PC).
27. *Thyagaraja Mudliar* v. *Vedathanni*, AIR 1936 PC 70; *Gangabai* v. *Chhabubai*, AIR 1982 SC 20; *Noor Mohammad* v. *Piru*, AIR 1958 Raj 280; *Ramnarayan* v. *Kedarnath*, AIR 1965 Pat 463; *A. Rakkiyana Gounder* v. *Chinnu Gounder*, AIR 1954 Mad 84 (DB); *Syed Rasool* v. *Md. Moulana*, AIR 1977 Kant 173; *Asaram* v. *Ludheswar*, AIR 1938 Nag 355.
28. *Ranvijaya Shahi* v. *Bala Prasad*, AIR 1978 Pat 91.
29. *Ram Narayan* v. *Kedarnath*, AIR 1965 Pat 463 (DB).
30. *Chuttu* v. *Abdul Jabbar*, AIR 1956 Bhopal 59; *Narsingadas* v. *Radha Kisan*, AIR 1952 Bom 425.
31. *Irappa Channappa Gondi* v. *Tirkappa Hanamanthappa Baski*, (1963) 1 Mys LJ 592; **relying on** *K.S. Mian Feroz Shah* v. *Sohbat Khan*, AIR 1933 PC 178; *Kondiram* v. *Gundappa*, AIR 1955 Hyd 179; **dissenting from** *Narayanappa* v. *Latchmakka*, AIR 1958 Mys LJ 476.
32. *Sidramappa Basappa* v. *Bipinchand Fulchand Gandhi*, ILR 1978 Bom 344.
33. *Kanak Sunder Bibi* v. *Ramlakhan Pandey*, AIR 1955 Pat 458 (DB).
34. *Md. Sabir Ali* v. *Tahir Ali*, AIR 1957 All 94 (DB) : ILR (1954) 2 All 556.

surrounding the transaction [35] The rule as to "surrounding circumstances" cannot be excluded to enable a party to prove that when he wrote one thing he meant something totally different [36]

In case the validity is impeached the court is not precluded from inquiring into the real nature of the transaction between them. The proviso declares that any fact may be proved which would invalidate any document [37] Where a document showed that the transfer of property was by sale, but Section 92 is no bar to prove it to be not a sale but a gift or family arrangement.[38] If a sale and agreement to reconvey are not embodied in one and same document, the seller is not precluded from showing that transaction was not an out and out sale.[39]

Where the language of the written instrument evidences an outright and unconditional sale, oral evidence to show that it was only intended to operate as a mortgage or a trust deed is not admissible, as it would amount to contradiction, variation, addition or substraction from the written grant.[40]

14. SURROUNDING CIRCUMSTANCES

The question whether the document is a mortgage by conditional sale or a sale with condition for retransfer, is one of determination of real character of the transaction to be ascertained from provisions or document viewed in light of surrounding circumstances.[41]

The evidence of the surrounding circumstances under which the document was brought about may, be given to show that the transaction is not what it appears to be and that the apparant tenor is not its real character.[42]

Where any part of the consideration has not been paid to the vendor, and the property is not delivered to the vendee and the sale deed is in the custody of the vendor himself, it cannot be held that the title to the property has passed to the vendee, as there are telling circumstances to show that it was not the intention of the parties that title would pass irrespective of non-payment of consideration.[43]

Evidence of contemporaneous conduct is always admissible as a surrounding circumstance but evidence of subsequent conduct of the parties is inadmissible.[44]

Extrinsic evidence can be considered in construction of a sale deed.[45]

It was held that under Section 5, Mysore Agriculturists' Relief Act, plaintiff can show that alleged usufructuary mortgage was a simple mortgage.[46]

15. TERMS

(a) Benami transaction.—This section applies only to the terms of a transfer and does not preclude the admission of any evidence to show the *benami* character of the transaction.[47] The Supreme Court

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35. *Baijnath* v. *Hajee Valley Mohammad*, 30 CWN 242 : AIR 1925 PC 75.
36. *Afshar M.M. Tacki* v. *Dharamsey*, AIR 1947 Bom 98.
37. *Beni Madhab Dass* v. *Sadasook Kotary*, ILR (1905) 32 Cal 437 (FB); *Ma Thin Myaing* v. *Maung Gyi*, ILR (1923) 1 Ran 351.
38. *Mania (Smt.)* v. *Dy. Director of Consolidation U.P.*, AIR 1971 All 151; **following in** *Baijnath Singh* v. *Vally Mahomed Hajee Abba*, AIR 1925 PC 75; *Munna Singh* v. *Narain Singh*, AIR 1929 Nag 91.
39. *Pt. Krishna Chandra Sharma* v. *Ms. Ram Gulam*, AIR 1958 MP 295 (DB); *Janki Bai* v. *K. Subba Rao*, 1962 Mys LJ (Sup) 534.
40. *Cheriyathu Mathai* v. *Thomas*, AIR 1956 Tra/Co 193 (DB); **relying on** *Maung Kyin* v. *Ma Shwe La*, AIR 1917 PC 207; *K.S. Mian Feroz Shah* v. *Sohbat Khan*, AIR 1933 PC 178; *Balkishendas* v. *Legge*, ILR 22 All 149 (PC).
41. *P.L. Bapuswami* v. *N. Pattay Gounder*, 1966 SC 902; *Mt. Qayum Unissa* v. *Rashidul Malik*, AIR 1952 All 200 (DB); *Jhanda Singh* v. *Sheik Wahiduddin*, AIR 1916 PC 49 : ILR 38 All 570.
42. *Balumal Firm* v. *Venkata Chelapathi Rao*, AIR 1955 Mad 78; **dissenting from** *Martand Trimbak* v. *Amritrao*, AIR 1925 Bom 501.
43. *Ramchandra Biharilal, Firm* v. *Mathuramohan Naik*, AIR 1964 Ori 239 : (1964) Cut 551.
44. *Shyamlal* v. *Shyam Narain*, AIR 1973 All 234.
45. *Becharbhai* v. *Md. Patel Khushalbhai Ravjibhai*, AIR 1975 Guj 98; **relying on** *Abdulla Ahmed* v. *Animendra Kissen Mitter*, AIR 1950 SC 15; *Chunilal* v. *Mehta V.C.S. & M. Co. Ltd.*, AIR 1962 SC 1314; *Bhusawal Municipality* v. *A.e. Co Ltd.*, AIR 1966 SC 1652; **distinguished** *Gurunath* v. *Suryakant*, AIR 1940 Bom 225; **dissented from** *Basudev* v. *Somenath Das*, AIR 1964 Ori 63.
46. *Marasimial* v. *Venkatappa*, AIR 1957 Mys 86 (DB).
47. *Richard Taylor* v. *Rajah of Parlakimedi*, ILR (1909) 32 Mad 443, 454; *Pathammal* v. *Syed Kalai Ravuthar*, ILR (1903) 27 Mad 329.

allowed oral evidence to show that the real tenant was someone other than the ostensible tenant.[48] Section 92 does not exclude oral evidence to show who are real contracting parties as they are the authors of the terms of the contract and not the terms.[49] When the question is whether under the terms of contract, a contracting party acted for himself or as agent for some other principal, Section 92 does not apply and parol evidence is admissible.[50] A contract note is not conclusive of the real relation of the parties to the contract and evidence can be given to prove whether a party contracted as agent or in the capacity of seller or buyer in the transaction.[51]

Where a particular place in a route is or is not covered by permit has to be determined by the Transport Authority by having recourse to the permit itself. Oral admission by the operator on this matter is inadmissible, unless he is entitled to give secondary evidence of the contents of the permit.[52]

A different view has been taken in the under mentioned cases where a party makes an agreement in writing in his own name and contributes his signature, he cannot produce evidence to show that he merely acted as a third party's agent and the plaintiff had knowledge of the same.[53]

Contract.—Oral agreement to liquidate the loan under the pronote from out of the usufruct of the land possession of which was given to plaintiff, can be proved to show the discharge of the loan under proviso 3 to Section 92 if it is not a case of a collateral agreement when by the plaintiff would be compelled to recover the consideration in a way different from the recitals in the promissory note in which case the oral agreement would be inadmissible as contrary to the terms.[54] A usufructuary mortgagee has a right to show that he has not been put into possession of the mortgaged property.[55] It does not prevent a party to a contract from showing by oral evidence that the consideration is different from that described in the contract. It is therefore open to a party to show that the part of the consideration as to rent payable in terms of a lease represented a past debt for rent and not a future liability arising under the contract.[56] Oral evidence can be adduced as to what exactly was the nature of consideration.[57] It is open to establish by evidence that the consideration was really different from the consideration recited in the deed as it is not a term of the sale deed.[58]

Proving absence or failure of consideration is different from proving different amount of consideration *i.e.*, something other than what was mentioned in the document. In the latter case evidence is not permissible as it will contradict the term regarding consideration. But in the former case it is not so; under Proviso 1 evidence may be adduced to prove want or failure of consideration. This is however, totally distinct from the amount of consideration. A statement in a document that a consideration has been paid is really a recital in a deed and does not constitute one of the terms of the contract. But the amount of consideration is obviously a term of the sale deed and, therefore, it is not open to a party to prove a variation in the amount of consideration.[59] Section 91 and 92 are a complete ban to any party to set up a case that the consideration for the sale is more than what was mentioned in the document, when it is not the case of the party that the consideration was not paid or that there was failure of consideration or the consideration agreed between the parties was of different kind than what was mentioned in the

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48. *Niranjan Kumar* v. *Dhyan Singh*, AIR 1976 SC 2400. Oral evidence was allowed to show as to who were the parties to a *benami* transaction. *Raj Ballav Das* v. *Haripada Das*, AIR 1985 Cal 2.
49. *Ram Narayan Pandey* v. *Kedarnath Tewari*, AIR 1965 Pat 463; *Guru Dayal Prasad* v. *L. Raghunath Prasad*, ILR 31 Mad 45; *Sohanlal Pachisia & Co.* v. *Bilasray*, AIR 1954 Cal 179; *Raj Ballav Das* v. *Haripada Das*, AIR 1985 (Cal) 2.
50. AIR 1953 Sind 34.
51. *Sohanlal Pachisia & Co.* v. *Bilasray Khemani*, AIR 1954 Cal 179.
52. *Shantilal Shivkumar* v. *Transport Appellate Tribunal, Rajasthan*, 1967 Raj 138.
53. *Ibrahmibhoy* v. *Hasan*, AIR 1921 Bom 81; *Rohtas* v. *Maharaja*, ILR (1951) 1 Cal 420; *Sitaram* v. *Chimandas*, ILR 52 Bom 640 (Agent of an undisclosed principal).
54. *Ram Jatan* v. *Chandra Bali*, AIR 1960 All 746.
55. *Kanduri Naik* v. *Sapani Naik*, AIR 1971 Ori 218.
56. *Abdullakin* v. *Maung Ne Dun* ILR (1929) 7 Ran 292 : AIR 1929 Rang 240.
57. *State Bank of India* v. *Premco Saw Mills*, AIR 1984 Guj 93.
58. *Rakkiyana* v. *Chinnu*, AIR 1954 Mad 84 (DB).
59. *Ananda Charan* v. *Hargobinda*, AIR 1923 Cal 570 : 27 Cal WN 495; *Motilal* v. *Fulia*, AIR 1958 Pat 61; **dissenting from** *Nabinchandra Chakravarthi* v. *Shuna Mala Ghose*, AIR 1932 Cal 25; *Muhammad Taqi Khan* v. *Jang Singh*, AIR (1935) All 1 (FB); *Narasimhachari* v. *Indo Commercial Bank*, AIR 1965 Mad 147; **relying on** *Adityam* v. *Ramakrishna*, ILR 38 Mad 514 : AIR 1915 Mad 868; *Lala Singh* v. *Basdeo*, AIR 1923 All 429.

document.[60] The recital in a sale deed that there are no encumbrances on the property sold is not a term of contract and evidence to prove that the vendee was aware of certain liability on the property and purchased it subject to such liability is admissible.[61]

Where the document consists of two parts namely, one, preamble or preliminary recital of a past fact and the other relating to terms of disposition of property. Section 92 of the Evidence Act prohibits only the varying of terms of the documents, not the memoranda or recitals of facts, bereft of dispositive terms, particularly when the correctness of the whole or any part of the recital is in question. It is settled law that a clear intimation by a co-parcerner to the other co-parcerner of his intention to sever the joint status need not be in writing. For these two fold reasons, the bar in Section 92, Evidence Act against the admissibility of extrinsic evidence for the purpose of showing that the insertion of the words 'for your maintenance' in the recitals was wrong, unreal, unmeaning and the coinage of the executant's own brain is not attracted.[62]

Oral evidence of intention is not admissible in interpreting the covenants of the deed but evidence to explain or even to contradict the recitals as distinguished from the terms of the documetns may, of course, be given.[63]

These words when read with the words "as between the parties to any such instrument" which follow them, refer to bilateral instruments only and not to unilateral instruments, such as wills and powers-of-attorney. Oral evidence as to the 'terms' of a written contract is excluded. There is nothing to exclude oral evidence that there was no agreement between the parties and therefore no contract.[64]

Plaintiffs sued for specific performance of an agreement in writing, which set forth, *inter alia*, that defendants had agreed to sell, *etc.*, under "certain conditions as agreed upon". The defendants alleged that the written agreement did not contain the whole of the agreement between the parties and offered parol evidence in support of their contention. It was held that the parol evidence was admissible to show what was meant by the *clause* "certain conditions as agreed upon".[65]

Section 92 applies only to concluded contracts and has nothing to do with negotiations before a written contract is concluded. Even if there is a concluded contract, it is always open under Section 92 provisos 2&6 to show how the terms of a document are related to the existing state of things.

Where a document was a record of the terms of a validly concluded contract for sale between the parties the fact that it was described and called as receipt was immaterial. It was held, further that the document did not preclude the vendor from showing that the parties did not agree as to one of the terms in the sale deed and that there was no completed contract and the plea might either fall under proviso 3 or it might be taken as a plea not covered by Section 92 at all, namely that there was no contract at all.[66]

If a *hath-chitha* is one, which contains only an acceptance of a liability and promise to pay a previous debt, there is no escape from the conclusion that it is an informal document, which need not contain all that had been agreed to between the parties. Therefore, it was open to the plaintiff to lead evidence to show a contemporaneous agreement between the parties in respect of payment of interest.[67]

Section 92 does not debar the party to a contract from adducing evidence for the purpose of contradicting recitals of facts mentioned in the document. The bar imposed by this section applies only when a party seeks to rely upon the document embodying the terms of transaction. Consideration cannot be said to be a term of contract though it is interwoven with it.[68]

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60. *Leelamma* v. *Narayanan*, AIR 1992 Ker 115; **relying on** *Md. Taki Khan* v. *Jang Singh*, AIR (1935) 50 All 1 (FB); *Bai Hiradevi* v. *Official Assignee*, AIR 1955 Bom 122; *S. Rajamma* v. *S.M. Dhondusa*, AIR 1970 Mys 270; *Nabin Chandra* v. *Shuna Mala* AIR 1932 Cal 25.
61. *Munninarayan Reddi* v. *Chinnaswamy Gownder*, (1953) Mys. 29.
62. *Krishna Bai Ganpatrao Deshmukh (Smt.)* v. *A T. Nimbalkar*, AIR 1979 SC 1880.
63. *Sohansingh (Mrs.)* v. *State Bank of India*, AIR 1964 Punj 123 (DB).
64. *Tyagaraja Mudaliyar* v. *Vedathanni*, 63 IA 126, ILR 59 Mad 446 : AIR 1936 PC 70.
65. *Cutts* v. *Brown*, ILR (1881) 6 Cal 328.
66. *Deep Chandra* v. *Rukhuddrulla Shamsher Jang Nawad Mohammed Sajjad Ali Khan*, AIR 1951 All 93 (FB).
67. *Rajendra Prasad* v. *Gaya Prasad Sah*, AIR 1975 Pat 312; **following in** *Nabin Chandra* v. *Devendra Mohan*, AIR 1917 Cal 210; **dissenting from** *Banwarilal* v. *Jagarnath Prasad*, AIR 1916 Pat 406 (1); *Moti Biswas* v. *Haripada Pal*, AIR 1923 Cal 402.
68. *K.M. Rajendran* v. *Arul Prakasam*, AIR 1998 Mad 336 (para 15).

The mere fact that both the parties have not signed a contract will not make the agreement oral within the meaning of Ss. 91 and 92, because these sections only require the terms to be reduced to writing and not the whole contract in the sense of signatures and dates and so forth. Even where signatures are absent on an agreement or the proposal and acceptance are not entered in it, it would still be hit by Ss. 91 and 92 provided the "terms" meaning all the terms, are embodied in the written agreement. The absence of signatures could be used as good evidence of the fact that the document was not intended to be final and binding. But the mere absence of signatures would not prevent the document from being the final depository of the intention of parties, any more than the presence of signatures would operate to bind if it could be established that the signing was conditional.[69]

(b) Deed of adoption.—Where a party admits the existence of a deed of adoption and of its non-production in the court, his admission would not render oral evidence inadmissible to prove the adoptions it is not by virtue of the deed of adoption that a change of status of a person is effected. The adoption deed is only a piece of evidence and the failure of party to produce such a document does not render oral evidence in proof of adoption inadmissible.[70]

16. APPLICABILITY TO DECREES

Section 92 cannot refer to a decree which is imposed upon one of the parties by force. Then is no mutuality about a decree which is passed in accordance with the wishes of one party and contrary to the wishes of the other. Section 92, therefore, cannot bar the setting up of a pre-decretal oral contract.[71]

17. WILLS

It was held that a registered will can be revoked by an unregistered will and Section 92(4) is no bar, as the will is neither a contract nor a grant nor a dispossession of property and it operates only after the death of the testator.[72]

18. 'HAVE BEEN PROVED ACCORDING TO THE LAST SECTION'

The provisions of the section come into force when the written instruments referred to in the section have been proved in accordance with the provisions of S. 91, that is, either by the production of the document itself, or by the production of the secondary evidence of it.

Court can, on facts and circumstances of a case, consider whether two or more documents formed part of one and the same transaction and construe them accordingly.[73]

19. SURETYSHIP

A loan transaction was contained in more than one document, a pronote by three including one B and deed of hypothecation, by two were executed in favour of a bank. It was held that both the documents are to be read together to satisfy the conditions of Section 126 of the Negotiative Instrument Act and that B was a surety and not a co-obligant as he was not setting up any oral agreement in derogation of the pronote and Section 92 did not apply.[74]

It is open to the parties to a sale deed reciting the consideration as Rs. 1000/- to prove that the consideration was more than thousand relying on a prior agreement of sale in writing as what is precluded is only an oral agreement under Section 92.

Evidence was sought to be adduced by answers to interrogatories which contained an admission. Such evidence was held to be not admissible in evidence in view of Section 92 as the same is at variance or in contradiction of the terms of the registered document.[75]

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69. *Abdullakin* v. *Maung Ne Dun*, ILR (1929) 7 Ran 292 : AIR 1929 Rang 240.
70. *Jahuri Sah* v. *Dwarika Prasad Jhunjhunwala*, AIR 1967 SC 109.
71. *Narain* v. *Basdeo*, AIR 1950 All 437.
72. *Md. Yunus* v. *Abdul Sattar*, AIR 1938 Mad 616.
73. *Sidrapnappa Basappa* v. *Bipinchand Fulchand Gandhi*, ILR (1978) Bom 344.
74. *Chattanatha* v. *Central Bank of India*, AIR 1965 SC 1856.
75. *State Bank of India* v. *Mrs. J.K. Sohan Singh*, AIR 1963 Punj 27.

This section is applicable only to cases as between parties to an instrument or their representatives-in-interest. Where, however, the dispute is between a stranger to an instrument and a party to it or his representative in interest, this section is inapplicable, and both the stranger and the party or his representative are at liberty to lead evidence of oral agreement notwithstanding the fact that such evidence, if believed, may contradict, vary, add to, or subtract from, its terms.[76] A stranger can show by oral evidence that the document is void or not valid. The section forbids the admission of evidence of an oral agreement for the purpose of contradicting, varying, adding to, or substracting from, the terms of a written document as between the parties to such document or their representatives in interest. The rule of exclusion laid down in the section does not apply to the case of a third party who is not a party to the document. On the contrary, S. 99 distinctly provides that persons who are not parties to a document may give evidence tending to show a contemporaneous agreement varying the terms of the document[77]. Extraneous evidence to show that the parties to a sale-deed had no intention of conveying a particular item of property included in the deed is admissible where the person challenging the transfer is not a party to the deed.[78] Where the grantee took knowing that a third person was the owner of the property and the grantor was only a mortgagee, and that the intention of all parties was merely to transfer the mortgage, oral evidence of the third party's rights was admissible to prove the real nature of the transaction.[79] Section 92, Evidence Act, excludes the admission of any oral agreement or statement as between the parties to an instrument or their representatives-in-interest, the pre-emptor in a pre-emption suit is not such a party. Hence, the provisions of Section 92 have no application.[80] In a suit for declaration that certain properties were joint family properties of the plaintiff and their deceased father and their father had no right to dispose of the property by will, documents were executed by the father reciting that there was no property of the joint family; it was held evidence to contradict the recital in the documents was not precluded by Section 92 as the dispute in the suit did not arise between the parties to the documents but between persons who claimed under the executant of the document.[81]

It is not open to the parties on the one side of the document, to prove as against each other that the document was a mortgage though it purports to be a sale.[82] Where a father executed a sale deed in favour of his daughter, the daughter contended that it was a gift in her favour but the father contended that it was a *benami* sale deed, it was held that oral evidence was admissible to prove that it was a gift, as the father and daughter could not be treated as parties contracting with each other.[83] Where an official assignee filed a suit for declaration that the gift deed executed by the insolvant in favour of his sons, as void, it was held that official assignee can lead oral evidence as he was not a party to the document nor a person representative in interest of the insolvant; the donees who are not contracting parties to the document can lead evidence to show it was a transaction for consideration as they are outside the scope of Section 92. The representative-in-interest of the insolvent can avoid the application of Section 92 and are entitled to lead oral evidence in support of the plea raised by them.[84]

A subsequent purchaser from a party who was the vendor in a prior sale deed of the very same property will be a representative-in-interest of his said vendor within the meaning of Section 92, of the Evidence Act and he would be precluded from contending that the first sale deed was only a mortgage and not a sale deed.[85]

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76. *Bai Hira Devi* v. *The Official Assignee of Bombay*, AIR 1958 SC 448 : 1958 SCR 1384, 60 Bom LR 932; *Rangubai* v. *Govind Laxman*, ILR 1949 Nag 70 : AIR 1949 Nag 243.
77. *Bageshri Dayal* v. *Pancho*, ILR (1906) 28 All 473.
78. *Ram Sundar Mal* v. *Collector of Gorakhpur*, AIR 1930 All 797 : ILR(1930) 52 All 793.
79. *Maung Kyin* v. *Ma Shwe La*, AIR 1917 PC 207 : (1917) 44 IA 286 : 20 Bom LR 278 : ILR 45 Cal 320.
80. *Jana Bibi Mst.* v. *Qadir Beg*; **followed in** AIR 1960 J&K 28 (DB); *Bhullen Singh* v. *Kushi Ram*, AIR 1924 All 229(2); *Hirayi* v. *Vishnu*, AIR 1923 Bom 429; *Sheikh Usman* v. *Md. Shafi Khan*, AIR 1927 All 204; *Marimal* v. *Sharifan*, 1949 Cal 194.
81. *R. Viswanathan* v. *Abdul Wajid*, AIR 1963 SC 1; *Vishwanathan* v. *Abdul Wajid*, (1963) 3 SCR 22.
82. *Muthu Kumaraswami* v. *Govinda*, AIR 1932 Mad 218; *Ma Aye* v. *Daw*, AIR 1941 Rang 99; **see contra** *Lakshmana Sahu* v. *Simachala Patra*, AIR 1941 Pat 211; *Khudawand* v. *Narendra*, ILR 58 All 548; *Md. Sultan* v. *Ambhul Jalal*, AIR 1927 Mad 1102.
83. *Pathammal* v. *Kalai*, ILR 27 Mad 329.
84. *Bai Hiradevi* v. *Official Assignee of Bombay*, AIR 1958 SC 448; **reversing** *Bai Hiradevi* v. *Official Assignee.*, AIR 1955 Bom 122 (DB); **see also** *Haramani* v. *Bauri*, AIR 1970 Ori. 203.
85. *Nabakumar Singh* v. *Haridas Singh*, AIR 1960 Manipur 11.

The words "between the parties to any such instrument" occuring in Section 92 properly speaking, refer to the persons who come together to make the contract and do not apply to questions raised between the parties on one side only of a deed regarding their relations to the other under the contract to show that one of them is only nominally added as purchaser and the other is the real purchaser entitled solely to the property.[86] The section is limited to a party to a document. It, therefore, cannot be invoked by a person who is not party to a declaration made under Cl. 2 of Proviso of Goa, Daman and Diu (citizenship) Order, 1962 for preventing the maker thereof from producing evidence to vary its terms, though the declaration is a matter required by law to be reduced to writing in the form of a document.[87]

Section 92 does not bar a party to a sale deed as against a third party to the document from letting in oral evidence to show that the real consideration was different from what was shown in the sale deed.[88] Plaintiff sued to recover one-fourth of the price of a house alleged to have been sold by the first defendant to the second defendant, the claim being based upon a local custom. The transaction between the defendants was ostensibly not a sale but a usufructuary mortgage. It was held that the plaintiff, not being a party to the transaction, was entitled to give evidence to show that what purported to be a usufructuary mortgage was not in reality such, but was in fact a sale.[89] Where both grantor and grantee are dealing with the property of an owner who is a third person and not, in the language of Section 92, either party to the instrument or a representative-in-interest of a party to the instrument, there is no bar under Section 92 as to the admissibility of the evidence which is sought to be led in regard to the real nature of the transaction between the original parties.[90]

The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties.[91]

20. ANY FACT WHICH WOULD INVALIDATE ANY DOCUMENT [PROVISO (1)]

This proviso applies to cases where evidence is admitted to show that a contract is void, or voidable, or subject to reformation, upon the ground of fraud, duress, illegality, etc., in its inception[92]. See illustrations (d) and (e). The instances given in the proviso are not exhaustive. They are set out by way of illustration only. If the validity of a written agreement is impeached, it is no defence to point to the apparent rectitude of the document and to claim protection from inquiry under a rule which exists against the contradiction and variance of the terms only of those instruments the validity of which is not in question. In such cases, the Court is not bound by what has been described as the mere paper expressions of the parties and is not precluded from inquiring into the real nature of the transaction between them. The proviso declares that any fact may be proved which invalidates any document.[93]

In TAYLOR'S EVIDENCE (10th Ed., Section 1135, P. 814) it is stated "The rule contained in the section is not infringed by the admission of parol evidence, showing that the instrument is altogether void, or never had any legal existence of binding force, either by reason of forgery or fraud or of

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86. *Urban Co-op. Bank Ltd.* v. *Mst. Gokal Devi*, ILR (1963) 13 Raj 377 **relying on** *Mulchand* v. *Madho Ram*, ILR (1888) 10 All 421; *Pathammal* v. *Syed Kalai Ravuthar*, ILR (1903) 27 Mad 329, **dissenting in** *Ma Aye Tin* v. *Daw Thant*, AIR 1941 Rang 99; which **dissented in** *Chatar Singh* v. *Ganpatlal*, AIR 1951 Ajmer 79.
87. *G.Y. Bhandare* v. *Erasmo de Sequetra*, AIR 1972 Goa 25.
88. *Dhoddiah Chettiar* v. *M.E. Tea Factory*, (1974) 1 Mad LJ **relying on** *Bai Hira Devi* v. *Official Assignee of Bombay*, AIR 1958 SC 448; *Parattakath Mayan* v. *Mammad Kunhi*, AIR 1949 Mad 852; **Distinguished** *Motilal Singh* v. *Mt. Fulia*, AIR 1958 Pat 61.
89. *Bageshri Dayal* v. *Pancho*, ILR (1906) 28 All 473; *Rahiman* v. *Elahi Baksh*, ILR (1900) 28 Cal 70, **dissented from** *Ganu* v. *Bhau*, (1918) 20 Bom LR 684, ILR 42 Bom 512; *Kumara* v. *Srinivasa*, ILR (1887) 11 Mad 213, 215.
90. *Narsingdas Takhatmal* v. *Radha Kisan*, AIR 1952 Bom 425.
91. *Gangabai Smt.* v. *Chhabubai Smt.*, AIR 1982 SC 20 : (1982) 1 SCC 4, **relied in** *Mahmooda Begum* v. *Badrunisa Begum*, 1999 AIHC 2126 (para 20) (AP) and *Bhargavi Amma* v. *Parukutty Amma*, 1999 AIHC 4553 (para 6) (Ker), **relying on** *Thyagaraja* v. *Vedathanni*, AIR 1936 PC 70.
92. PER GARTH, C.J., in *Cutts* v. *Brown*, ILR (1880) 6 Cal 328, 338.
93. *Beni Madhab Dass* v. *Sadasook Kotary*, ILR (1905) 32 Cal 437 (FB); *Ma Thin Myaing* v. *Maung Gayi*, ILR (1923) 1 Rang 351.

illegality of the subject-matter, or for want of due execution and delivery.....", "Parol evidence may be given to show that the contract in writing was really made for objects forbidden by law, that such writings were obtained by improper means as duress, that the party was incapable of contradicting by reason of some legal impediment, such as infancy, coverture, idiocy, insanity, or intoxication; or that the instrument came into the hands of plaintiff without any absolute final delivery by the obligor or party charged." (at page 816).

PHIPSON ON EVIDENCE (15th Ed. (2000), para 42-33, page 1182) states "Extrinsic evidence is admissible to prove any matter which by substantive law affects the validity of a document, or entitles a party to any relief in respect thereof, notwithstanding that such evidence tends to vary, add to, or, in some cases contradict the writing, *e.g.* defective or conditional execution, contractual incapacity, fraud, forgery, duress, undue influence, illegality of subject-matter, mistake, or want or failure of consideration".

Receipt of notice under Section 80, C.P.C. was acknowledged by defendant. If the defendant wants to prove that it was defective it is for the dependent to produce the notice and show that it does not fulfil the requirements of law. The contents of the notice cannot be proved by oral evidence in view of Section 92.[1]

Oral evidence to invalidate a document is admissible to show that document was never intended to operate according to its terms.[2]

In *Venkata Rama Rao* v. *Appa Rao*[3] it was held that if the question which has to be decided, is the intention of the parties, evidence must be admissible. If that evidence shows that the document did not relate to the land within the jurisdiction of the Sub-Registrar who registered it, such evidence tends to render the document invalid, as it amounts to fraud on registration law and so such evidence is admissible u/proviso 1 of Section 92.[4]

Evidence to show that a person who signed as a partner is not a partner and he signed on behalf of another who was the only partner is not admissible. Proviso 1 and 6 are not applicable were the language of the document (partnership deed) are clear.[5]

The illustration in this proviso 1 is not exhaustive by the use of the words "such as".[6]

Oral evidence of the witnesses in the proceedings of the Board in a Court Martial case are admissible in evidence.[7]

21. FRAUD AND MISREPRESENTATION

It has been observed that it would constitute fraud only where either there has been a promise made without any intention of performing it or where there has been an active concealment of fact by one having knowledge or belief of the fact.[8]

Under Proviso (1) to Section 92 only a fact which would invalidate a document such as fraud can be proved which clearly means the fraud as committed in the execution of the document or that a document which was not intended to be executed was executed fraudulently in favour of the defendants.[9]

In cases of fraud the important thing that has got to be proved is the intention to defraud. It would constitute fraud only where either there has been a promise made without any intention of performing it or where there has been an active concealment of fact by one having knowledge or belief of the fact.[10] Where one party induces the other to contract on the faith of representations made to him any one of

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1. *Mast Ram* v. *Deputy Commissioner Bahraich*, AIR 1968 All 321.
2. *Baikali Dibya* v. *Hari Chakravarty*, ILR (1966) Cut 236.
3. AIR 1936 PC 91.
4. **See also** *Gopinath* v. *Rup Ram*, AIR 1930 All 786.
5. *Shankar Bandu* v. *Sankar Babaji*, AIR 1956 Bom 165.
6. *Pandurang* v. *Viswanath*, AIR 1939 Nag 20; *Benimadhab* v. *Sadasook Kotary*, ILR 32 Cal 437 (FB).
7. *General Court Martial* v. *Anitej Singh Dhaliwal*, AIR 1998 SC 983 : 1998 Cr LJ 1402.
8. *Yeshwant Deo Rao* v. *Walchand Ramachand Kothari*, AIR 1951 SC 16; *Dagadu Valad* v. *Nana*, ILR 53 Bom 93
9. *Thatha Rao* v. *Jummarlal*, AIR 1953 Hyd 179 (DB); **relying on** *Yeshwant Deo Rao* v. *Walchand Ramachandra*, AIR 1951 SC 16; *Dagadu Valad* v. *Nana*, ILR 53 Bom 93.
10. *Thatha Rao* v. *Jummarlal*, ILR (1952) Hyd 373.

which is untrue, the whole contract is in a Court of Equity considered as having been obtain ! fraudulently.[11]

In order to plead fraud effectively the particulars of fraud must be given by the party, and in the absence of such particulars, there cannot be any proper averment of fraud. The fraud which is alleged must be such as enters into the transaction itself and enables the party to avoid the transaction. It must be fraud within the meaning of the term as used in S. 17(3) of the Indian Contract Act, and unless and until the allegations amount to that, there cannot be any valid plea of fraud which can be taken up by a party.[12]

The section does not prevent proof of a fraudulent dealing with a third person's property or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance.[13]

Where one party to a contract does not agree to any of its stipulations and the other party induces him, not indeed to agree to it, but to agree to its formal insertion in the written contract, by representing that the stipulation in question would be in reality treated by him as a dead letter, it cannot be enforced because the party induced had never assented to it and its inclusion in the written contract was the result of misrepresentation[14]. Where, at the time of executing a document, a representation is made that the document though in form a sale-deed will not be enforced as against the executant as a sale-deed, and where on the faith of that representation the executant executes the document, the sale-deed cannot be upheld as a sale-deed as against him.[15]

The fraud which is contemplated by Proviso 1 of Section 92 is at the very inception a fraud which vitiates the transaction itself, and not any subsequent conduct or representation of the party or his representative-in-interest, which, however reprehensible it may be, is not enough to vitiate the transaction. Evidence of such conduct or representation cannot be led under the proviso. It must be fraud within the meaning Section 17(3) of the contract Act.[16]

When fraudulent mis-representation was pleaded, oral evidence is admissible to prove it.[17] In a case relating to an agreement to sell the seller pleaded that the agreed consideration was more than the stated one in the agreement. He admitted all the other terms in the agreement and did not allege any misrepresentation or fraud. He led no evidence except his oral testimony as to the value of the property. The valuation of the property given by the seller himself in a loan application belied his case. It was held that he had failed to prove that the agreed consideration was higher.[18]

Extraneous evidence apart from the compromise petition was admissible for the purpose of proving fraud. In most of the cases of fraud it can be established only by introducing extraneous conditions and circumstances.[19]

22. ILLEGALITY

Oral evidence is admissible to prove that the real object or consideration of an agreement in writing is unlawful and that therefore the agreement is void.[20] (Section 23 of the Indian Contract Act).

23. WANT OF DUE EXECUTION

The term 'execution' means the last act or series of acts which completes a document. It is formal completion of a document. Thus, execution of deeds is the signing, sealing and delivery of them in the

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11. *Abaji* v. *Laxman*, ILR (1906) 30 Bom 426 : 8 Bom LR 553.
12. *Narsingdas Takhatmal* v. *Radhakisan*, (1951) 54 Bom LR 492.
13. *Maung Kyin* v. *Ma Shwe La*, (1911) 13 Bom LR 797, ILR 38 Cal 892. 28 IA 146.
14. *Sangira* v. *Ramappa*, (1909) 11 Bom LR 1130, ILR 34 Bom 59.
15. *Navalbhai* v. *Sivubai*, (1906) 8 Bom LR 761.
16. *Narsingadas* v. *Radhakisan*, AIR 1952 Bom 425 (DB), **relying on** *Dagdu* v. *Nana* AIR 12 Bom LR 972
17. *Balaramireddigari* v. *Thippa Reddi*, AIR 1949 Mad 301; *Survanaravana* v. *Alwandarao*, AIR 1946 Mad 111
18. *K.M. Rajendran* v. *Arul Prakasam*, AIR 1998 Mad 336 (paras 13 and 16).
19. *Niranjan Samal* v. *Tirilochan Kuar*, AIR 1956 Orissa 81 (DB).
20. *Kashi Nath Chukerbati* v. *Brindaban Chukerbati* ILR (1884) 10 Cal 649, *Anupchand Hemchand* v. *Champsi Ugerchand*, ILR (1888) 12 Bom 585.

presence of witnesses. Execution of a will includes attestation[21]. Writing, stamp, registration, attestation are all formalities necessitated by statutes.

24. WANT OR FAILURE OF CONSIDERATION

Want of consideration, or failure of consideration, or difference in the kind of consideration may be proved. But parol evidence to vary the consideration is not admissible.[22] The want or failure of consideration contemplated by the proviso is a complete want or failure of consideration.[23] It was held that it is open to a party to what was nominally a sale deed for consideration to show that no consideration did pass, and that what was a nominal sale was a real gift.[24] Though the sale deed may recite that the consideration has been paid, this is nothing to prevent the parties from adducing evidence to show that the recital is untrue and in fact the consideration was not paid.[25] Statement of a fact in a written document is not a term of the contract and hence would not come within the purview of Section 92 and oral evidence may be given to prove that the amount mentioned in the document to have been paid, has not been paid.[26]

If this was not so, facilities would be afforded for the grossest frauds. It is no infringement of this section for a Court to accept proof that by a collateral arrangement between the vendor and the purchaser, the consideration money remained with the purchaser under the conditions agreed upon between them[27]. The section does not say that no statement of fact in a written instrument may be contradicted by oral evidence, but that the terms of the contract may not be varied[28]. Where a part of the sale consideration is on the face of the document still outstanding and to be paid by the vendee, it is not open to him to produce evidence to show that there was a separate contemporaneous oral agreement that this sum would not be payable and was merely fictitious[29]. The amount of sale consideration is a term of a deed of sale and no evidence of any oral agreement can be given for the purpose of varying the amount. An agreement made without consideration is void except in the three cases specified in S. 25 of the Indian Contract Act. When it is brought to the notice of a Court that the consideration for a contract which it is asked to enforce is, in whole or in part, an unlawful consideration, such Court is bound to give effect to the fact thus brought to its notice, notwithstanding that the contract may appear upon the face of it to be a perfectly legal contract, and that the unlawfulness of the consideration was never pleaded by the defendant.[30]

Where in a suit for possession the plaintiff based his title on a registered sale deed executed in his favour and the defendant based his title on subsequent sale deed in his favour alleging that the previous sale deed in favour of the plaintiff was without consideration and that the same was subsequently cancelled by the vendor, it was held that the onus was on the defendant to prove the absence of consideration for the sale in favour of plaintiff, the defendant having admitted the execution of the sale deed.[31] It was held that proviso (1) to Section 92 did not apply to the case as no question of want or failure of consideration of the deed of sale arose.[32] Evidence of failure of consideration can always be

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21. *Bhawanji Harbhum* v. *Devji Punja*, ILR (1894) 19 Bom 635, 638.
22. *Motilal Singh* v. *Mt. Fulia*, AIR 1958 Pat 61; *K.S. Narasimha* v. *Indo Commercial Bank*, AIR 1965 Mad 147.
23. *Keshavrao* v. *Raya*, (1906) 8 Bom LR 287.
24. *Hanif-un-nisa* v. *Faiz-un-nisa*, ILR 33 All 340 (PC); **relying on** the decision in *Balkishnen Dass* v. *Legge*, ILR 22 All 149 (PC); **see also** *Chunni Bibi* v. *Basanta Bibi*, ILR 36 All 537.
25. *Panchoo Sahu* v. *Janki Mandar*, AIR 1952 Pat 263 (DB); **relying on** *Md. Mumtaz Hussain* v. *Abdul Rahman*, AIR 1949 Pat 364; and *Radhamohan Thakur* v. *Bipin Behari Mitra*, AIR 1938 Pat 505; *Irpan Ali Laskar* v. *Jogendra Chandra Das*, AIR 1932 Cal 708; *Md. Taki Khan* v. *Jang Singh*, AIR 1935 All 529; *Baloramireddigari* v. *Thippa Reddi*, AIR 1949 Mad 301; *Bhawanbhai* v. *Vahali*, AIR 1955 Bom 320; *Ramaswami Chettiar* v. *Lodd Govindass*, AIR 1926 Mad 35; *Munna Singh* v. *Narain Singh*, AIR 1929 Nag 91; *Baldeo Singh* v. *Dwarika Singh*, AIR 1978 Pat 97; on the consideration was agreed to be paid in a different manner, *Indrajit* v. *Lalchand*, ILR (1895) 18 All 168.
26. *B N Venkataswamy* v. *P S Rukminiamma*, AIR 1999 AIHC 1979 (paras 9 and 10) (Kant).
27. *Irfanali Laskar* v. *Jogendrachandra Das Patni*, ILR (1932) 59 Cal 1111.
28. *Shah Lal Chand* v. *Indrajit*, (1900) 2 Bom LR 553 : 27 IA 93 : ILR 22 All 370; *Lala Dholan Das* v. *Ralya Shah*, (1899) PR No. 85 of 1898 (Civil); *Mussammat Zohra Jan* v. *Mussammat Rajan Bibi*, (1915) PR No. 48 of 1915 (Civil).
29. *Muhammad Taqi Khan* v. *Jang Singh*, ILR (1935) 58 All 1, FB.
30. *Alice Mary Hill* v. *William Clarke*, ILR (1904) 27 All 266.
31. *Michhu Kumar* v. *Raghu Jene*, AIR 1961 Orissa 19; **relying on** *Bhagwan Singh* v. *Bishambar Nath*, AIR 1940 PC 114.
32. *Nokhelal* v. *Kisanlal*, AIR 1950 Nag 44.

adduced under proviso 1 of Section 92 passing of consideration in a document is not a term of the contract.[33] If it appears on the face of the document that the consideration is no more than nominal, evidence can be given to show the real circumstance and the true consideration.[34]

Where a renewed pronote was executed for the amount due under a prior pronote, the defendant was allowed to prove that he paid some amount under the prior pronote and thereby to that extent his liability under the renewed pronote should be proportionally reduced.[35] The Karnataka High Court held that it is permissible to prove either that no consideration as set out in the document had been received or that a portion thereof above had been received.[36] Evidence to show that non-receipt of consideration is admissible.[37] In the case of *Shahjog Hundi* under Section 118(*a*) of Negotiable Instrument Act, the defendant was held entitled to prove want or illegality of consideration.[38] Where in the documents executed in connection with the contract for sale there was a recital with regard to the payment of earnest money by the plaintiff to the executant, it is open to the defendants successors-in-interest of the executant, in a suit for specific performance, to show that the payment of earnest money was never made. In order to explain how and why that amount was not paid it is open to plead a collateral oral agreement to the effect that the amount was to be paid by the plaintiff not in cash to the executant but to the mortgagee of the property and in fact no such payment was ever made by the plaintiff either to the executant or to the mortgagee.[39] Though the sale deed recited that the consideration was paid, there is nothing to prevent the parties from adducing evidence to show that the recital is untrue and that in fact the consideration was not paid, and such evidence is not barred by Section 92 of the Evidence Act.[40] In a pre-emption suit intention of the parties can be gathered from the evidence led by the parties as well as their conduct in terms of Section 92 of the Evidence Act, the vendor is not prevented from adducing evidence to show that recitals in the said deed to the effect that consideration has been paid is incorrect and in fact no consideration was paid to him.[41]

Evidence may be admitted to prove that there was mutual mistake in the working of an agreement and to prove what the real intention of the parties was, and such evidence as to the alleged mistake may be given not only in a suit for the rectification of the mistake brought under S. 31 of the Specific Relief Act, but also in a suit based upon the agreement itself.[42] The combined effect of this proviso and S. 31 of the Specific Relief Act is to entitle either party to a contract, whether plaintiff or defendant, to protect his right by proving a mistake in a written contract *i.e.*, a mistake in the description of the property sold by given a wrong survey number to the same. Mistake in the belief of a party to a document may be pointed out under this proviso.[43]

Under the terms of the proviso (1) of the Section 92, it will not be competent for the party to a contract to prove the variation of the consideration recited in the consideration.[44]

25. MISTAKE OF FACT

A mutual mistake relating to the survey number in the document, can be corrected by allowing evidence.[45]

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33. *Mutyalu* v. *Veerayya*, AIR 1946 Mad 452; *Mahalakshmi Amma* v. *Krishna Holla*, AIR 1938 Mad 320; *Mohafazul Rahim* v. *Babulal*, AIR 1949 Nag 113; *Nagendra Nandni Dasi* v. *Bholanath*, 41 Cal WN 734; *Pandurang* v. *Vishwanath*, AIR 1939 Nag 20.
34. *Turner* v. *Forwood*, (1951) 1 All ER 746; *Clifford* v. *Turrel*, 14 L.J. Ch 390; **followed in** *Kasturi Bai* v. *Ramlal*, 66 Cal WN 8.
35. *Balasubrahmania* v. *Venkatarama*, 67 MLJ 650.
36. *Karidasmma* v. *Patel Sangappa*, (1980) 2 Kant LJ 409; *S. Ranjanna* v. *S.M. Dhondusa*, (1970) 1 Mys LJ 489.
37. *Hiralal Seal* v. *Sankarlal Sharma*, ILR (1969) 2 Cal 503.
38. *Kundal Mal* v. *Ratanlal*, AIR 1950 Ajmer 54.
39. *Md. Sulaiman Mian* v. *Israil*, 1964 BLJR **following;** *Motilal Sahu* v. *Ugrah Narain Sahu*, AIR 1950 Pat 288; *Panchoo Sahu* v. *Janki Mandar*, AIR 1952 Pat 263; *Dhanasajagirji* v. *Parthasaradhi*, AIR 1924 PC 226.
40. *Baldeo Singh* v. *Dwarika Singh*, AIR 1978 Pat 97.
41. *Savitri Devi* v. *State of Bihar*, AIR 1989 Pat 327.
42. *S. Narayanswamy* v. *James D. Rodrigues*, (1906) 3 LBR 227; *Janardan* v. *Venkatesh*, (1938) 41 Bom LR 191, ILR (1939) Bom 149 : AIR 1939 Bom 149.
43. *Tani Mahesha* v. *Secretary of State for India in Council*, (1894) PR No. 67 of 1894 (Civil).
44. *K.M. Rajendran* v. *Arul Prakasam*, AIR 1998 Mad 336 (para 20).
45. *Baluswami Aiyar* v. *Lakshmana*, AIR 1921 Mad 172 (FB); *Mahadeva* v. *Gopala*, ILR 34 Mad 51; *Abdul Hakim* v. *Ram Gopal*, 44 All 246 : AIR 1922 All 42; *Kurpal* v. *Shamrao*, 47 Bom 589; *Sabhaji* v. *Nawal Singh*, AIR 1928 Nag 4.

Where by a written contract A sold goods to B to arrive 'Ex Peerless, from Bombay' and there proved to be two ships of that name each party intending a different one, extrinsic evidence was allowed to show that the parties were not really *ad idem*.[46]

A party who has entered into a wrong contract and thereby represented to the other parties to the document that he intends to be bound by the terms thereof is not entitled to give evidence that in fact he intended something else. If that were so, there would be no finality in written contracts.[47] The Court can act on the intrinsic evidence on the face of the document itself that there was a mutual mistake. The parties can also prove about their concurrent intention at the time of execution of the document and that it failed to give effect to their concurrent intention.[48]

The mistakes contemplated in this section are genuine and accidental mistakes just as misdescription of property. Evidence can be allowed to know whether a particular land was conveyed under the document.[49]

Though oral evidence can be admitted for correcting, a typing error which have crept in while expressing the contract between the parties, if it would amount to changing the entire contract, in interpreting the word parol evidence cannot be given. In the instant case it was found that for the word "sock" the word "rock" was typed, it was a typographical mistake and held that it can be corrected.[50] It is open to the Court to allow oral evidence of mutual mistake of fact to vary the terms of a deed. Oral evidence will be admissible even if the mistake is due to innocent misrepresentation.[51] A mistake induced by innocent misrepresentation by the opposite party comes within the proviso. Where a document written a language which a person could not read was signed by him on a assurance by the opposite party that it contained all the terms agreed upon but in fact it contained only some of the terms. It was held that oral evidence was admissible to prove the terms agreed upon and not contained in the memorandum.[52] Where a promissory note stated that the interest was payable at the rate of rupees two per *mensem* and in a suit on the promissory note the plaintiff contended that the interest agreed upon was two per cent, per *mensem* and that the words "per cent" had been omitted by mistake, it was held that oral evidence was admissible to prove that the rate of interest agreed upon was two per cent, per month.[53]

The proviso is not limited in its application to a suit for rectification of instrument. A defendent may plead and prove any mistake in the expression of the contract notwithstanding that he had not filed a suit for rectification and can resist a suit on the ground that what was sold to him was different from what the document described. Oral evidence is thus admissible to prove the same.[54]

Where it is established that there was a mistake as to the description of the property in the sale deed, a third person, who being aware of such mistakes and intending to take advantage of it, subsequently purchases that property from the original vendor, cannot plead that he acquires his right in good faith in answer to a claim made by the first purchaser.[55]

A person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable, continued concurrently in the minds of all the parties down to the time of its execution, and

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46. *Raffles* v. *Wichelhaus*, (1864) 2 H&C 906; *Preston* v. *Luck*, 27 Ch D 497.

47. *Kamalamma* v. *Kenche Gowda*, AIR 1972 Mys 184; *Santi Ranjan Das* v. *Dasuram Mirzamal Firm*, 1957 Assam 49 (DB); *Shiddappa* v. *Rudrappa*, AIR 1954 Bom 463 (DB); **see also** *Janardan* v. *Venkatesh*, AIR 1939 Bom 149; *Siddappa* v. *Rudrappa*, AIR 1954 Bom 463; *Sayamma* v. *Venkata*, AIR 1931 Mad 785.

48. *Nooruddin* v. *Md. Umar*, AIR 1940 Bom 321; **following** *Shipley U.D.C.* v. *Bradford Corp.*, (1936) 1 Ch 375; *Fitzgerald* v. *F.*, 1 I.R. 477.

49. *Rikhiram Pyarelal* v. *Ghasiram*, AIR 1978 MP 189; *Haji Khan* v. *Chotthu Ram*, AIR 1936 Pesh 41; *Arya* v. *Daundi*, AIR 1940 Lah 236; *Mohendra* v. *Jogendra*, (1897) 2 Cal WN 260.

50. *Gujarat Electricity Board* v. *S.A. Jais & Co.*, AIR 1972 Guj 192.

51. *Chimanram* v. *Divanchand*, (1931) 34 Bom LR 26 : ILR 56 Bom 180 : AIR 1932 Bom 151.

52. *Chimanram V. Divanchand* v. *Diwanchand*, ILR 56 Bom 108 : AIR 1932 Bom 151.

53. *Kamla Prasad Pandey* v. *Hasan Ali Khan*, ILR (1939) All 329 : AIR 1939 All 308.

54. *Rajaram* v. *Manik*, AIR 1952 Nag 90 **relying on** *Mohendra Nath Mukherjee* v. *Jogendra Nath Roy Choudary*, (1897) 2 CWN; *Rajaram* v. *Manik*, AIR 1952 Nag 90; *Balaprasad* v. *Asamabi*, AIR 1954 Nag 328 (DB); *Santi Ranjandas Gutpa* v. *Dasuram Mirzamal Firm*, AIR 1957 Assam 49; *Rangaswami* v. *Sowri*, ILR 39 Mad 792 : AIR 1916 Mad 519; *Munalal* v. *Kharsetiji*, ILR 30 Bom 395; *Sooramma* v. *Venkayya*, AIR 1938 Mad 589.

55. ***Rikhiram Pyaraelal* v. *Ghasiram***, AIR 1978 MP 189.

also must be able to show exactly and precisely the form to which the deed ought to be brought[56]. The mistake referred to in proviso (1) refers to both unilateral as well as a mutual mistake.[57]

However a different view was expressed in the under mentioned cases. The mistake which can be proved by oral evidence under this proviso must be one which would found a claim for rectification of cancellation of the instrument. Since unilateral mistake is not a grant, for rectification or cancellation evidence of such a mistake does not come within the proviso.[58]

Oral evidence is admissible to fill a blank which has been left in the document by fraud or mistake.[59] Oral evidence is admissible to prove that the name of A in a document is mistaken for the name of B.[60]

Under the Indian Contract Act an agreement is not voidable because it was caused by a mistake as to any law in force in India, but a mistake as to law not in force in India has the same effect as a mistake of fact (s. 21). But Courts do relieve against mistakes in law as well as mistakes in fact, in cases where there is some circumstance which makes it inequitable that the party who has received the money of other party should retain it.

26. PRINCIPLE, SCOPE OF THE PROVISO (2)—ORAL AGREEMENT CONSISTENT TO TERMS OF DOCUMENT

This proviso 2 has to be read with illus. (*f*), (*g*) & (*h*).

In TAYLOR'S Evidence (10th Ed., Section 1049, P. 929). It is stated "The rule as to the inadmissibility of parol evidence to vary the terms of a document is not infringed by proof of any collateral parol agreement, which does not interfere with the terms of the written contract, though it may relate to the same subject- matter.....The rule as to the exclusion of parol evidence to vary written instrument does not prevent parties to a written contract from proving that, either contemporaneously or as a preliminary measure, they entered into a distinct oral agreement on some collateral matter".

Under this proviso evidence of any collateral parol agreement which does not interfere with the terms of the contract may be given. See ills. (*f*), (*g*) and (*h*). Parties can prove that, either contemporaneously or as a preliminary measure, they entered into a distinct oral agreement on some collateral matter. The only case in which oral evidence will be admitted under this proviso is where the instrument is silent on the matter sought to be proved and the agreement to be proved is consistent with the terms of the document. It is allowable to urge an oral agreement which will have the effect of leaving matters otherwise than if they had depended on the written agreement alone, but such oral agreement must be clearly proved and the onus lies on him who sets it up.[61]

Proviso (2) to Section 92 authorises the Court to admit and go into oral or other evidence for the purpose of explaining the real intention of the parties to the documents.[62]

Where the plaintiff agreed on an oral agreement to advance a certain amount to one H on some specified dates and H along with another defendant had to execute a pronote, and accordingly he advanced money and H and another defendant executed the pronote acknowledging the debt, it was held that evidence of such an agreement was admissible under proviso (2) of Section 92, being a separate agreement on a matter on which the pronote was silent and not inconsistent with its terms.[63]

Where the document does not record all the terms of the contract between the parties, oral evidence is admissible to explain the real nature of the transaction.[64] An incomplete agreement was entered into in terms of a Court decree, external evidence was allowed to supply its missing links.[65]

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56. *Rajaram* v. *Manik*, (1951) Nag 948 : AIR 1952 Nag 90.
57. *Sateri Shiddappa* v. *Rudrappa Shettepa*, AIR 1954 Bom 463 : (1953) 56 Bom LR 394.
58. *Savamma* v. *Venkata* ILR 54 Mad 793 : AIR 1931 Mad 785; *Janardhan* v. *Venkatesh* AIR 1939 Bom 149.
59. *Maung Re Gye* v. *Hakim Ally*, ILR 2 Rang 113 : AIR 1924 Rang 345.
60. *Ajaiz Hussain* v. *Ram Sarup*, AIR 1931 Oudh 54.
61. *Motabhoy Mulla Essabhoy* v. *Mulji Haridas*, AIR 1915 PC 2 : (1915) 42 IA 103, 17 Bom LR 460, 39 Bom 399; *Badal Ram* v. *Jhulai*, (1921) 44 All 53 : AIR 1922 All 165.
62. *B.B. Lohar* v. *Prem Prakash Goyal*, AIR 1999 Sik 11 (para 9).
63. *Motabhoy Mulla Essabhoy* v. *Mulji Haridas*, ILR 39 Bom 399 : AIR 1955 PC 2.
64. *Sir Mohammad Akbar Khan* v. *Attar Singh* AIR 1936 PC 171 : (1936) 38 Bom LR 739 : 17 Lah 557, 63 IA 279.
65. *Leena Roy* v. *Indumati*, AIR 1980 Pat 120.

If there is a rule of law which requires the transaction to be in writing, any separate agreement must also be in writing.

The amount of the price agreed to be paid is an essential term of a contract of sale; and consequently no evidence of an oral agreement at variance with the provisions of a registered sale-deed as to the amount of the price fixed for the sale is admissible[66]. Evidence that a sale-deed was not intended by the parties thereto to be operative for the purpose of passing title is inadmissible[67]. This section does not bar oral evidence to transactions which were intended to be something else.[68] The two vendees in a transaction can vary the contents as between themselves.[69]

Where parties enter into a sale-deed, it is not competent to them to prove a contemporaneous oral agreement to reconvey the property sold on payment of the sum advanced, in the absence of fraud, misrepresentation, or failure of consideration, *etc.*, rendering the sale invalid.[70]

27. ON WHICH THE DOCUMENT IS SILENT

Sections 91 and 92 do not bar giving evidence of a separate oral agreement when parties enter into a written agreement on one matter and a separate oral agreement on another matter.[71]

Oral evidence is permitted by the proviso-2 as to "any matter" on which the document is silent. Any separate oral agreement as to such matter should not be inconsistent with "the terms" of the document. Hence, if consideration is to be regarded as one of terms of the transaction, no oral evidence under the proviso-2 can be permitted of a matter which would be to any extent inconsistent with the said terms of the document. If document actually states or sets out the consideration for the contract or for the transaction, it is not permissible by oral evidence to contradict, vary add to or substract from the same. It is of course permissible to prove either no consideration as set out in the document had been received or that satisfaction has been received in respect of consideration in a manner otherwise than set out in the document. But those are matters, which come more appropriately under the first proviso.[72]

When there is a document in writing which does not contain the entire agreement between the parties, but embodies only some of the conditions, oral evidence to prove some other terms which had been agreed upon and which are not inconsistent with the written instrument is clearly admissible in evidence.[73]

It is well-settled that where the document is a formal one no oral evidence relating to any contemporaneous agreement inconsistent with the terms of the document would be permitted. The same cannot however be said in respect of an informal document. If a *hath chitha* is one, as in the present case, which contains only an acceptance of a liability and promise to pay a previous debt there is no escape from the conclusion that it is an informal document which need not contain all that had been agreed to between the parties. Therefore, it was open to the plaintiff in the present case to lead evidence to show a contemporaneous agreement between the parties in respect of payment of interest.[74]

Where a separate oral agreement pleaded by the party, was on a distinct and collateral matter, although it might have been a part of the same transaction, and if the instrument was silent on that point which is the subject matter of the agreement, such oral agreement would fall within the proviso (2), and oral evidence is admissible.[75]

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66. *Adityam Iyer* v. *Rama Krishna Iyer*, AIR 1915 Mad 868 : ILR (1913) 38 Mad 514.
67. ***Lachman Das* v. *Ram Prasad***, (1927) 49 All 680 : AIR 1927 All 422.
68. *Habeeb Khan* v. *Valasula Devi*, AIR 1997 AP 53.
69. *Mohan Lal* v. *Board of Rev.*, AIR 1982 All 273.
70. *Sangira Malappa* v. *Ramappa*, (1909) 11 Bom LR 1130 : ILR 34 Bom 59.
71. *Loknath* v. *Jagbir Suri*, 1982 Cr LJ 1328 (J&K).
72. *S. Rajanna* v. *S.M. Dhondusa*, AIR 1970 Mys 270; *Narasimhachari* v. *Indo Commercial Bank*, AIR 1965 Mad 14; **dissenting** *from Ranbahadur Singh* v. *Awadhbehari Prasad*, AIR 1939 Pat 411.
73. *Balaram Agasti* v. *Ramesh Chandra Mohanty*, AIR 1973 Ori 13; *Rati Singh* v. *Ram Prasad Singh*, AIR 1971 Pat 156.
74. *Rajendra Prasad* v. *Gaya Prasad Sah*, AIR 1975 Pat 312; *Asad Ali Tahsildar* v. *Answar Ali*, AIR 1959 Tripura 40; **following in** *Afsar Shaik* v. *Saurava Sundari Dasi*, (1917) 217; **Dissenting in** *Banwarilal* v. *Jagar Nath Pershad*, AIR 1916 Pat 406(1); *Moti Biswas* v. *Haripada Pal*, AIR 1923 Cal 402.
75. *Nagendra Nandini Dasi* v. *Bholanath Khonsa*, (1917) 41 Cal WN 734, 736; *Kunja Behari* v. *Raman Behari*, AIR 1937 Cal 619; *Nokhelal* v. *Seth Kishanlal*, AIR 1950 Nag 44.

28. DOCUMENT SILENT AS TO CERTAIN MATTERS

Where there was a contract in writing that the defendant having a tea estate has to supply *Pasupara* 'A' dust for 12 months but was silent as to the quantity to be supplied every month, it was held that Cl. (i) of the contract providing for the sale of the entire out put of *Pasupara* 'A' dust produced in the estate for 12 months had reference to whatever was produced as a dust, subject to the exercise of the discretion under *clause* IX of the contract given to the defendant to make any portion of the tea produced into leaf grade. A fixation of the quantity of *Pasupara* 'A' dust to be supplied to the plaintiff would, therefore, be inconsistent with the express liberty given to the defendant under Cl. (ix). Hence, the oral agreement was inadmissible in evidence.[76] Where a contract of sale is alleged to be by sample and the contract reduced to writing between the parties is silent about a sample being exhibited or about the quality conforming to a sample shown at the time of the contract, no evidence can be given to determine whether the contract was by sample.[77] A mortgage deed reciting that entire consideration money was received by mortgagor. The mortgagee admitted that only part of it was paid to the mortgagor. Extrinsic evidence was held admissible to prove that a duty was cast on mortgagee to pay off dues of mortgagor as the document was silent on the point.[78] Document has to be treated as a mere acknowledgement when it is silent as to interest. Hence oral evidence as to interest should be allowed.[79] Where a member of Hindu Joint Family executed an agreement to sell joint property, oral evidence is admissible to prove the character of the execution *i.e.*, the member executed the document as *Karta* of the family, when the agreement itself is silent on the point.[80] Where cattle seized from the accused were put in safe custody of another person who undertook that he will produce them when so ordered by court, pending the trial and there was no provision for expenses for keeping cattle, it was held oral understanding to that effect can be proved under Section 92, Proviso 2.[81] Where a deed of transfer is silent on the point of consideration, parol evidence may be allowed to be given in order to show that the transfer was for consideration.[82]

Where an agreement of partnership is silent as to the liability to pay income-tax due in respect of the profits of the partnership, Section 92, Evidence Act, would not prevent the partners from proving that the intention was that the tax should be paid on the individual profits of the partners and not on the profits of the business.[83]

29. IMPLIED WARRANTY

Though there was a written contract between the parties, it contained nothing which exempted B from his liability for breach of contract with regard to the quality of goods. An oral agreement which contained the guarantee of quality and formed a separate agreement was held admissible in evidence under Section 92, Proviso 2 of the Evidence Act.[84]

When a registered mortgage deed did not mention any kind of interest simple or compound, it was held that the mortgagee, was not prevented from showing that the interest was compound and he is entitled to plead on oral agreement and to prove on the strength of the account stated that the interest agreed upon between the parties was really compound. It was held that that would not be a variation of the original mortgage bond but would be an independent agreement.[85]

Where a deed of possessory mortgage also provides for a lease back to the mortgagor on a monthly rent corresponding to the monthly interest on the mortgage debt and a rent note is executed giving effect to the lease, effect must be given to each deed according to its terms and the court can not by reading the two together spell out a transaction totally different in character. Their being component parts of the same transaction does not mean that the two deeds are inconsistent with each other. Nor are the circumstances that rent is liable to be appropriated towards interest, which like rent was payable every

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76. *A.V. Thomas & Co. Ltd.* v. *M.P. Fernandez*, 1952 Tra/Co. 117 (FB).
77. *Mahadev Ganga Prasad* v. *Gouri Shankar*, AIR 1950 Ori 42 (DB).
78. *Ram Rup Singh* v. *Jang Bahadur Singh*, AIR 1951 Pat 566 (DB).
79. *Briji Kishore Rai* v. *Lakhah Tewari*, AIR 1978 All 314.
80. *Harisingh* v. *Umrao Singh*, AIR 1979 All 65.
81. *Jagannath Harlal* v. *State*, AIR 1953 MB 192.
82. *Kanak Sunder Bibi* v. *Ram Lakhan Pandey*, AIR 1955 Pat 458 (DB).
83. *Manilal Bachartal Sanghvi* v. *Keshabji Pitamber*, AIR 1952 Pat 33 (DB).
84. *Indian Textiles Co. Ltd.* v. *Kanhaiya Lal Agarwalla*, AIR 1959 Pat 378.
85. *Sital Prasad Jag Mohan Singh* v. *Kusban Hussain*, AIR 1952 Nag 25 (DB).

month, inconsistent with the transaction being a lease. Thus, in a suit for eviction by the mortgagee based on the rent-note which is executed as a sequel to the mortgage deed, it is not open to the mortgagor to plead that he is not in fact a tenant.[86]

A lessee under a registered lease wanted to prove an oral agreement regarding his preferential right to purchase the leased property if it was brought for sale. The lease was silent on the point. It was held that under Section 92, evidence of such a collateral contract, if there were such, would not be excluded, though it would be strange to omit such a condition if it had been agreed.[87]

30. NEGOTIABLE INSTRUMENTS

Where a promissory note was silent as to where money under it was payable and evidence was sought to be given on that point, it was held that the proviso-2 of Section 92 allowed proof of any separate oral evidence about any matter on which a document was silent and which was not inconsistent with its terms. The creditor was, therefore, entitled to prove that the parties agreed that the promissory note was to be paid at a specified place.[88]

Where on the date of execution of a pronote, there was collateral agreement giving ten months time for repayment of the debt, it was held that under Section 63 of the Contract Act an agreement to give time is operative in India and the English decisions to the contrary were inapplicable.[89]

An agreement is not admissible in evidence when there is no stipulation regarding interest on the *hundi* (promissory note). In such cases the payee of the *hundi* is entitled only to interest at the rate of six per cent, per annum as provided by S. 80 of the Negotiable Instruments Act[90]. If there is a collateral written agreement, fixing the rate of interest in accordance with the custom prevailing in the district, the interest is recoverable at the rate agreed upon between the parties.[91]

Where the customers of a bank used to overdraw from their account and give a letter in a printed form agreeing to pay interest on the daily balances in the account and the fact that the bank charged compound interest with monthly rests was shown in their pass books, it was held that Section 92 would not prevent from proving an agreement to pay compound interest which could be implied from the customers long acquiesence in such a method of calculation of interest.[92]

A receipt which purported to show that simple and not compound interest was to be charged (though the mortgage-bond contained provision for the payment of compound interest), was held to be admissible in evidence[93]. The receipt did not require registration and was therefore admissible in evidence. It operated as a waiver.

31. AND WHICH IS NOT INCONSISTENT WITH ITS TERMS

Where there was an oral arrangement between the parties to a mortgage, to the effect that the mortgagee was to be put in possession of the mortgaged property and the profits arising from it should be taken in satisfaction of the interest, it was held that such an oral arrangement did not vary contradict, add to the terms of the mortgage deed and it provided for the satisfaction of one of the conditions of the deed, evidence was admissible under proviso (2) of Section 92.[94]

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86. *Trustees of Motidas Beragi Sadhu Ratlam Trust Board* v. *Ramjatan Ram Prasad Sonar*, AIR 1963 MP 265 (IB); **relying on** *Abdullah Khan* v. *Basharat Hussain*, ILR 35 All 48 (PC); *Commer. of I.T. Bihar & Orissa* v. *Kameshwar Singh*, AIR 1935 PC 172; *Mian Feroz Shah* v. *Sohbat Khan*, AIR 1933 PC 178; *Abdul Khadir* v. *Subrahmanya Pattar*, AIR 1940 Mad 946 **dissenting from** *Haji Muhammad (Dr.)* v. *Shah Akhtar Hussain*, AIR 1960 Pat 106; *Harilal Bhagwanji* v. *Shastri Hemshanker*, AIR 1958 Bom 8.

87. *Jehangir Shapoorji Taraporevala* v. *Reverand Swarkar*, AIR 1932 PC 231; Secretary of the Bombay Tract and Book Society, AIR 1932 PC 231.

88. *J.N. Saham* v. *State of M.B.*, AIR 1954 MB 184 (FB) : ILR 1954 MB 343.

89. *Annamalai* v. *Valayudu*, ILR 39 Mad 129 (FB).

90. *Banwari Lal* v. *Jagannath Prasad*, (1916) 1 PLJ 71; *Fathuma Bivi* v. *Hanumantha Row*, (1907) 17 MLJ 296; *Kishor Chand* v. *Guram Ditta Mal*, (1911) PR No. 52 of 1911 (Civil). **See**, however, In re.: *Sowdamonee Debya* v. *A Spalading*, (1882) 12 CLR 163.

91. *Goswami Sri Ghanshiram Lalji* v. *Ram Narain*, (1906) 34 IA 6, 9 Bom LR 1 : ILR 29 All 33.

92. *Haridas* v. *Mercantile Bank*, AIR 1920 PC 61; **also** *Sital Prasad* v. *Kurhan Hussain*, AIR 1952 Nag 25, 28; (a case of mortgagee proving compound interest).

93. *Kailash Chandra Nath* v. *Sheikh Chhenu* , AIR 1951 Cal 513 (1).

94. *Bal Govind Babu* v. *Ram Singh*, AIR 1946 All 283; *Sukh Lal* v. *Murari Lal*, AIR 1926 Oudh 273; *Sahib Din* v. *Dhanush Dhariji*, AIR 1948 Oudh 129; *Jagatpal Singh* v. *Harnam Singh*, AIR 1916 Oudh 313.

Oral evidence to prove that pronote is by way of security is not admissible.[1]

32. EXISTING ORAL AGREEMENT, PROVABLE [PROVISO (3)]

Under this proviso a contemporaneous oral agreement to the effect that a written contract was to be of no force or effect and that it was to impose no obligation at all until the happening of a certain event, may be proved. In a sale of property, payment of consideration was a condition precedent. Failure of consideration was allowed to be proved by independent evidence.[2] See ills. (*i*) and (*j*).

Oral evidence to prove some other terms which have been agreed to and which constitute a condition precedent to the obligation under the written agreements and not inconsistent with written agreement, is admissible.

TAYLOR on Evidence (10th Ed., Section 1135, P. 814-15) observed "The rule against the admissibility of parol evidence contained in the section does not exclude evidence of oral agreement, which amounts to a condition subject to which the written agreement had been entered into, and subject to which the performance of the written agreement is to depend, *e.g.*, that a bill or mortgage was only to stand as security for certain moneys or otherwise to show the real nature of the transaction. Thus, it may be shown by parol evidence that an instrument, apparently executed as a deed, had really been delivered simply as an escrow, or it may also be shown that the document was really meant to be conditional on the happening of an event which had never occured".

The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible. There is no rule of law to estop parties from showing that a paper purporting to be a signed agreement, was in fact signed by mistake, or that it was signed on the terms that it should not be an agreement till money was paid or something else was done[3] or that is was intended to be a sham and not operative.[4]

GARTH C.J., observed "The proviso is intended to introduce into the law of evidence of this country the rule which is well-established and understood in England and treated in Section 1038 (11th Ed, Section 1135) of MR. TAYLOR'S book on Evidence. That rule is that, when at the time of a written contract being entered into, it is orally agreed between the parties that the written agreement shall not be of any force or validity until some condition precedent has been performed, parol evidence of such oral agreement is admissible to show that the condition has not been performed and consequently the written contract has not become binding. Until the condition is performed, there is, in fact, no written agreement at all.....But this rule can never apply to a case where the written agreement had not only become binding, but had actually been performed as to a large portion of its obligation".[5]

The true meaning of the words "any obligation" is any obligation whatever under the contract, and not some particular obligation which the contract may contain.[6]

Where, at the time of the execution of a written contract, it is orally agreed between the parties that the written agreement shall not be of any force or validity until some condition precedent has been performed, parol evidence of such oral agreement is admissible to show that the condition has not been performed, and consequently, the written agreement has not become binding. This rule will not apply to a case where the written agreement had not only become binding, but had actually been performed as to a large portion of its obligations.[7]

In *Rowland Ady & Others* v. *Administrator General of Burma*[8], the Privy Council observed that the accompanying or collateral agreement which was the condition of the execution of the promissory note was a written agreement and therefore outside Section 92. Even if the collateral agreement was an oral

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1. *N. Chella Perumal Chetty* v. *N.M. Jayarathnam Chettiar*, AIR 1960 Mad 314.
2. *Ganesh Pd.* v. *Deo Nandan*, AIR 1985 Pat 94. **See also** *Satyanarayan Prasad Jaiswal* v. *Jamuna Prasad Jaiswal*, 1999 AIHC 2479 (para 20) (Gau).
3. *Pym* v. *Campbell*, (1856) 6 El & Bl 370, 371.
4. *Gangabai* v. *Chhabubai*, AIR 1982 SC 20.
5. *Jugtanand* v. *Nerghan*, ILR (1880) 6 Cal 433.
6. *Jugtanund Misser* v. *Nerghan Singh*, ILR (1880) 6 Cal 433; *Radhakissen Chamaria* v. *Durga Prasad Chamaria*, (1931) 59 Cal 106 : AIR 1932 Cal 328; *Tirvenagada* v. *Rangasami*, ILR Mad 19.
7. *Jugtamund Misser* v. *Nerghan Singh*, ILR (1880) 6 Cal 433; *Walter Mitchell* v. *A K. Tennent*, ILR (1925) 52 Cal 677 : AIR 1925 Cal 1007; C.W. *Kinlock* v. *Asa Ram*, (1877) PR No. 51 of 1877 (Civil); *Khuda Baksh* v. *Budhar Mal*, (1882) PR No. 186 of 1882 (Civil).
8. AIR 1938 PC 198.

agreement so as to come within Section 92, it would fall within Proviso (3) of the section which states the Indian Law in terms which are in accord with English Law. They further observed that it is necessary to distinguish a collateral agreement which alters the legal effect of the instrument from an agreement that the instrument should not be an effective instrument until some condition is fulfilled or to put it in another form, it is necessary to distinguish an agreement in defeasance of the contract from an agreement suspending the coming into force of the contract contained in the promissory note. In their Lordships judgment, this collateral agreement came under the latter description and was within the proviso.

The promissory note, by its express terms provided that the amount was payable on demand, that is at once. The obligation under the note attaches immediately. But the agreement not to make a demand until the specified condition is fulfilled has the intention and effect of suspending the coming into force of that obligation, which is the contract contained in the promissory note. Thus the oral agreement constitutes a condition precedent to the attaching of the obligation and is within the terms of the Proviso (3) of Section 92.[9]

In *Narandas* v. *Papammal*[10] where a pronote was executed and the parties entered into a collateral oral agreement to the effect that no demand for payment was to be made until certain specified condition was fulfilled, the Supreme Court, following the decision of the Privy Council in *Rowland Ady.* v. *Administrator General of Burma*[11] held that though under the pronote by its express terms payable on demand, the obligation to pay attaches immediately, the parol agreement of the parties to suspend the coming into force of the obligation until the specified condition is fulfilled constitutes a condition precedent to the attaching of the obligation and it is open to the plaintiff to adduce evidence of oral agreement under the 3rd proviso.[12]

This proviso presupposes that the contract, grant or disposition of property itself remains intact, but the condition precedent pleaded must in its very nature be extraneous to the contract, grant or disposition itself and as agreed must come into existence before the obligation attaches thereunder.[13]

If the oral agreement pleaded was one stating that the amount was to be adjusted in the making up of partnership accounts, it was held that proviso (3) was not applicable as the oral agreement had the effect of total denial of the legal liability under the pronote.[14]

Evidence of oral contract regarding the debt embodied in a promissory note was allowed. The note was taken as a collateral security for the debt.[15]

33. CONDITION PRECEDENT

Where there is a sale-deed by A in favour of B an oral agreement, that the sale was to be effective only in case A dies of illness without paying the expenses incurred by B, can be admissible.[16] Evidence of a contemporaneous oral agreement to suspend the operation of a written contract of sale until an agreement for re-sale is executed is admissible.[17] An oral agreement that the execution of a deed of reconveyance should be a condition precedent to the execution of the sale-deed in pursuance of the written contract to sell immovable property can be proved under this proviso.[18] Where the contract was to sell property for Rs. 30,000 which sum was erroenously stated to have been paid, it was competent for the vendor, without infringing any provision of the Act, to prove a collateral agreement that the

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9. **See also** *Narandas Morardan* v. *S P A.M Papammal*, AIR 1967 SC 333; *Bhogiram* v. *Kishorilal*, ILR (1928) 50 All 754 : AIR 1928 All 289; *Ali Jawad* v. *Kulanjan Singh*, ILR (1922) 44 All 421 : AIR 1922 All 262; *Donolatram* v. *Vasdeo*, (1942) Kar 516.
10. AIR 1967 SC 333.
11. AIR 1938 PC 198.
12. *Rowland Ady* v. *Administrator General of Burma*, 1938 PC 198; *Balaram* v. *Ramesh*, AIR 1973 Ori 13; *Dungarmull Kissen Lal* v. *Sambhu Charan Pandey*, AIR 1951 Cal 55; *Satyanarayana* v. *Anjaneyulu*, AIR 1935 Mad 310; *Sk Jamu* v. *Md. Ibrahim*, AIR 1926 Nag 194.
13. *Chhaganlal Kalyandas* v. *Jagjiwandas Gulabdas*, (1939) 41 Bom LR 1263 : AIR 1940 Bom 54.
14. *Chhaganlal* v. *Jagjiwandas*, AIR 1940 Bom 54; *Dowlatram Mohandas* v. *Vasdeo*, AIR 1943 Smd 67; *Dungarmull* v. *Sambhu*, AIR 1951 Cal 55.
15. *Khitish Chandra* v. *Rajkishore Sahu*, AIR 1980 Ori 10.
16. *Syed Noor* v. *Qutbuddin*, AIR 1956 Hyd 114 (DB) : ILR (1956) Hyd. 328.
17. *Dada Honaji* v. *Babaji Jagushet*, (1865) 2 Bom HCR 38; *Rowland Ady.* v. *Administrator-General of Burma*, AIR 1938 PC 198 : (1938) 40 Bom LR 1075.
18. *Sahdeo* v. *Namdeo*, (1949) Nag 15.

purchase-money should remain in the vendee's hands for the purposes and subject to the conditions alleged by the vendor[19]; because the section does not say that no statement of fact in a written instrument may be contradicted by oral evidence but the terms of the contract may not be varied, *etc.* Separate oral agreement to the effect that the contract was subject to the condition that the vendor was to persuade the lessee in possession to surrender his possession within the time specified for the sale, is a condition precedent to the arising of obligations under the contract for sale and has not the effect of varying or contradicting the terms of the contract. Evidence of that agreement which falls within the proviso (3) to Section 92 can be given, since its effect is to prove the nature of the contract, *viz,* that it is a contingent contract.[20] Where the defendant challenged the surrender deed executed by her on the ground of playing fraud by giving empty promises that she would be paid Rs. 300/- and half of the lands would be settled on her grandchildren, it was held that it would fall under provisos (1) and (3) of Section 92 and extrinsic evidence is admissible for proving fraud.[21]

Oral agreement set up in defence that if sale deed was not presented for registration on the same day on which it was written and if consideration was not paid before the Sub-Registrar, sale deed should be regarded as cancelled, null and void. It was held that such agreement does not fall under any of the provisos of Section 92 and could not be allowed to be proved. It is submitted that the decision is not correct.[22]

In respect of written agreement which has come into force forthwith and has been partly acted upon, there can be no condition precedent and therefore oral evidence against the terms of contract cannot be adduced.[23]

34. DECREE

The understanding between the parties was to the effect that the compromise, filed in the suit according to the terms embodied in the decree itself, would have force or effect only on conditions that all other civil and criminal litigations were withdrawn. Withdrawal of other cases was manifestly a condition precedent to the attaching of any obligation under the contract of the compromise and the case falls within the language of provisos (1) & (3) to Section 92 Evidence Act.[24]

35. ESCROW

An escrow is a document deposited with the third person to be delivered to the person purporting to be benefitted by it upon the performance of some condition, the fulfilment of which is only to bring the contract into existence. Oral evidence is admissible under proviso to Section 92 to show that the deed was executed or delivered conditionally as an escrow. Escrow has also been explained as an intended deed after sealing and any signature required for execution as a deed, to be delivered as an escrow, that is as a simple writing which is not to become the deed to the party expressed to be bound by it until some condition has been performed. Escrow has also been defined to mean that where an instrument is delivered to take effect on the happening of a specified event or upon condition that it is not to be operative until some condition is performed then pending the happening of that event or the performance of the condition, the instrument is called an escrow.[25]

36. EXISTING ANY DISTINCT SUBSEQUENT ORAL AGREEMENT [PROVISO (4)]

This proviso is based on the principle—"Nothing is so agreeable to natural equity as that a thing be unbound in the manner in which it was bound." Under this proviso a prior written contract may be varied by a subsequent verbal one, in cases in which the law does not require the contract to be in writing. Where the original contract is of such a nature as that the law requires it to be in writing or where its execution has been followed by the formality of registration, the only way of proving the rescission or

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19. *Sah Lal* v. *Inderjit,* (1900) 2 Bom LR 553, 27 IA 93 : ILR 22 All 370.
20. *Kochuvareed* v. *Mariappa Gounder,* 1954 Tra/Co. 10.
21. *Ullasmoni Dasi* v. *Sukhomani Dasi,* AIR 1945 Pat 311; *Niranjan Samal* v. *Trilochan Kuar,* AIR 1956 Ori 81.
22. *Shama Rao* v. *Patel Kanake Gowda,* AIR 1962 Mys 203; **relying on** *Walter Mitchell* v. *A.K. Tennent,* AIR 1925 Cal 1007; *Jugtanand* v. *Nerghan Singh,* ILR 6 Cal 433.
23. *Palaniappa* v. *P.T. Kandaswamy,* (1971) 1 Mys. LJ 258.
24. *Niranjan Samal* v. *Tirlochan Kuar,* ILR 1955 Cut 95 : AIR 1956 Ori 81.
25. *Hira Mistan* v. *Rustom Jamshedji Noble,* 2000 AIHC 1543 (para 25) (Bom).

modification of the original contract must be by proof of an agreement of the like formality and not by an oral agreement.

Only those agreements come within the proviso which affect the terms of the previous transaction directly by virtue of the consensus of those who alone are competent to rescind or modify the original contract, *viz.*, all the parties concerned or all their representatives[26]

TAYLOR'S EVIDENCE (10th Ed., Section 1142, p. 820) observed: "After an agreement has been reduced to writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or substract from, or vary or qualify the terms of it, and thus to make a new contract, which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms, engrafted upon what will thus be left of the written agreement. The rule against varying or contradicting a written instrument by parol evidence, does not exclude verbal evidence adduced to prove, that the written agreement has been totally waived or discharged".

Where a later registered deed did not mention the consideration for the sale which was however mentioned in the earlier unregistered transfer deed of the same property and the later registered deed was intended to supersede the earlier unregistered deed, it was held relying on 1969 SC 136 that the earlier deed is not admissible as the terms of a registered deed cannot be varied by an unregistered deed.[27]

It was held that, it was open to the appellants to lead evidence to show that there was, apart from the rent note, a distinct subsequent oral agreement under which the terms of the oral contract or grant was modified and that the partners of the firm, both before and after its recomposition were the real tenants of the shop.[28]

Where there was a lease, the lessor can recover enhanced rent on the basis of a subsequent oral agreement. Oral evidence is permissible of the subsequent oral agreement, as the original lease was neither by law required, to be in writing nor to be registered.[29]

This proviso does not exclude evidence of a subsequent oral agreement substituting a new contract for one reduced to writing and registered according to law, the said proviso only refers to a subsequent oral agreement to rescind or modify such contract.[30] The distinction between a substituted new agreement by novation and the mere alteration of an old contract is that in the former case the old contract is extinguished, while in the latter it remains binding subject to the alteration which the parties have agreed to.[31] According to the Rangoon, the Lahore and the Bombay High Courts a judgment-debtor can set up a new verbal agreement with the decree-holder to accept some variation or a new contract in substituting of the original decree[32] but not according to the Allahabad High Court.[33]

Where the terms of the registered document were ambiguous, oral evidence could be permitted to be adduced in order to determine the true intention of the parties.[34]

37. MORTGAGE

An oral agreement, subsequent to the registered mortgage deed, entered into to take less amount than due under the mortgage deed was held inadmissible as the oral agreement modified the terms of the written deed.[35] No unregistered agreement varying terms of the mortgage could be recognised.[36]

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26. *Goseti Subba Row* v. *Varigonda Narasimham*, ILR (1903) 27 Mad 368, 370.
27. *S. Rajanna* v. *S.M. Dhondusa*, AIR 1970 Mys 270.
28. *Niranjan Kumar* v. *Dhyan Singh*, AIR 1976 SC 2400.
29. *Abdul Kadir* v. *Noor Mohammed Sait*, AIR 1959 Ker 400.
30. *Jaggat Singh* v. *Devi Dutta Mal*, 1883 PR No. 169 of 1883 (Civil).
31. *Lakhu Ram* v. *Amir Khan*, (1888) PR No. 14 of 1889 (Civil).
32. *Ma Shwe Pee* v. *Maung San Myo*, ILR (1928) 6 Ran 573; *Abdul Karim* v. *Hakam Mal Tani Mal*, (1933) 14 Lah 688; *Kalyanji Dhana* v. *Dharamsi Dhana & Co.*, (1934) 37 Bom LR 230.
33. *Lachhman Das* v. *Baba Ramnath Kalikamliwala*, ILR (1921) 44 All 258.
34. *B.R. Mulani* v. *A.B. Aswathanarayana*, AIR 1993 Kant 257 (para 22).
35. *Mallappa* v. *Matam Nagu Chetty*, ILR 42 Mad 41 (FB); *Jagannath* v. *Shankar*, AIR 1920 Bom 115; **see also** *Narayan Singh* v. *Keshosa*, AIR 1930 Nag 235; *Md. Niaz* v. *Nanhe Mal*, AIR 1929 All 615; *Yegnanarayana* v. *Suppan Chetty*, AIR 1927 Mad 1111; *Chundooru Lakshmana Setti* v. *Duygisetty Chenchuramayya*, (1918) 34 MLJ 79.
36. *Chimanlal* v. *Amar Chand*, 1965 Raj 3 : ILR (1964) 14 Raj 1096.

Subsequent oral agreement allowing usufructuary mortgagee to remain in possession for a further period in lieu of interest on debt incurred subsequent to mortgage is not administrable.[37] In a suit for redemption, the mortgagees pleaded that the mortgaged property was subsequently sold to them verbally for the mortgage debt and a further loan. It was held that the mortgage being by a registered deed, evidence of a subsequent oral agreement of sale was inadmissible under this proviso.[38] The Bombay and the Lahore High Courts have held that a subsequent agreement to take less than is due under a registered mortgage-bond is an agreement modifying the terms of a written contract and oral evidence is inadmissible in proof of it[39]. In another suit for redemption of mortgage, the mortgagee contended that the document in question was not a mortgage but a lease. It was held that nomenclature of a document was not conclusive and oral evidence as regards the intention of the parties was not barred by virtue of Section 92.[40] The Calcutta and the Madras High Courts have held that oral evidence is admissible to prove the discharge and satisfaction of a mortgage bond[41]. The Bombay High Court has subsequently held that where all that the defendant wants to prove, is some fact tending to show that the obligation has been discharged, either by payment, or by remission of anything that was due, such fact may be proved as not amounting to a modification of the conditions of the mortgage but relating mainly to the discharge of the contract, and not involving any question of its terms.[42] A Full Bench of the Allahabad High Court has held that an agreement between parties to a mortgage deed cannot be proved by oral evidence to show that on payment of a sum of money less than what would be due on calculating the correct amount of principal and interest at the stipulated rate entered in the mortgage deed the debt would be discharged. Such evidence would be admissible to prove the satisfaction of the debt, as resulting from a mutual agreement by which the mortgagee accepted, in full discharge of the obligation, payment of a part of the sum due and remitted the balance. A plea of such agreement and satisfaction is not one setting up an agreement contradicting, varying, adding to or subtracting from the terms of the contract of mortgage and does not contravene the provisions of this section[43]. A debtor cannot prove that his creditor agreed verbally to take less, but he can prove that the creditor actually did accept less in full satisfaction.

Where the agreement was that the mortgagee is to enjoy the proifts by keeping possession of one of the items of mortgaged property for 5 years, in full satisfaction of the mortgage debt, it was held that such agreement can be proved because it was in fulfilment of the obligation under the mortgage and not in any way altering the terms of the deed.[44] The fact that the mortgagee actually came into possession of the mortgaged property, after the execution of the mortgage deed, can be proved by evidence as it would not come under proviso (4) and as such evidence is not to vary add or contradict the terms of the mortgage deed.[45]

38. LEASE

Any variation of rent reserved by a registered lease deed must be made by another registered instrument. The agreement between the landlord and the tenant by which the rent was increased being in variation of a written contract evidence of it was barred under Section 92.[46] A lease contained a covenant for renewal of the lease whereby if the lessee desired to renew the lease he should give three months' notice in writing of his intention to do so. The lessee, however, failed to observe this covenant and relied on an oral agreement between himself and his lessors for renewal of the lease. It was held that evidence

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37. *Vishwanatha* v. *Fatima Bi*, AIR 1952 Hyd 5.
38. *Maung Myat Tun Aung v.Maung Lu Pu*, ILR (1925) 3 Ran 243.
39. *Jagannath* v. *Shankar*, ILR (1919) 44 Bom 55 : 22 Bom LR 39; *Ghanaya Lal* v. *Rallia Ram*, ILR (1928) 9 Lah 597; But **see** *Sukhlal* v. *Jetha*, (1928) 30 Bom LR 1455.
40. *Hathika* v. *Puthiapurayil Padmanabhan*, AIR 1994 Ker 141 (paras 9 and 14).
41. *Ramlal Chandra Karmokar* v. *Gobinda Karmokar*, (1900) 4 CWN 304; *Mahim* v. *Ram Dayal*, (1925) 42 CLJ 582 : 30 CWN 371; *Bhaba Sundari* v. *Ram Kamal Dutta*, (1925) 44 CLJ 269; *Balasundra Naiker* v. *Rangantha Aiyar*, ILR (1929) 53 Mad 127; *Manuswami Mudaliar* v. *Govindaraja Chettiar*, ILR (1934) 58 Mad 371
42. *Sukhlal* v. *Jetha*, (1928) 30 Bom LR 1455, 1462.
43. *Collector of Etah* v. *Kishori Lal*, ILR (1930) 53 All 157, FB; *Jwala Prasad* v. *Mohan Lal*, ILR (1926) 48 All 705, **disapproved.**
44. *Lakshmi Narasimha Rao* v. *Raghavamma*, AIR 1936 Mad 380; *Tarapada Mandal* v. *Hajia Khatum Bibi*, AIR 1956 Cal 625, **following in** *Afsar Sheik* v. *Saurawa Sundari Dasi*, AIR 1917 Cal 217.
45. *Narain Mishra* v. *Mahanth Mishra*, AIR 1952 Pat 421 : (1972) 1 Cut WR 355.
46. *Raval & Co* v. *K.C. Ramachandran*, AIR 1974 SC 818.

of such oral agreement was not admissible.[47] Oral evidence was similarly not allowed to shown that another person than the one mentioned in the deed was intended to be lessee.[48] Though no writing is ordinarily necessary for surrendering a tenancy, if the original lease is registered, the surrender of a portion of the tenancy with an abatement of rent can only be effected by a registered instrument as in such a case surrender involves a variation of the original contract of tenancy. Oral evidence as regards such surrender is inadmissible under Section 92 of the Evidence Act.[49] A stipulation in a registered lease deed about payment of certain amount of rent is a term of the contract and no oral evidence is admissible to contradict or vary the rent when the lease is intended to be an operative transaction, except under another registered document.[50]

39. SALE

Where the registered sale deed was for the land and the super structure thereon and the vendee under contemporaneous unregistered agreement agreed to pay compensation in case he failed to build hospital on land sold, it was held that unregistered agreement cannot be enforced and agreement is not admissible.[51] Where a sale deed is registered and on the date it was executed money was paid by the purchaser and was received by the seller and it was the intention of the parties that it should be an effective transaction, a subsequent unregistered document concelling the sale cannot prevail over the sale deed.[52] An agreement to convey, though reduced to writing, need not be registered under the Indian Registration Act. The agreement can therefore be validly modified by an oral agreement entered into between the parties[53] but where the vendor accepted the fact of the execution of the sale-deed and the case was not that any fraud was played by the vendee but the vendor only named it a sham transaction, oral evidence could not be permitted to be considered to vary the terms of the deed which had been recorded in writing.[54] A lessor can never enhance rent on the basis of a subsequent agreement when the original lease is either required by law to be in writing or to be registered.[55]

Where the plaintiff specifically pleaded that the transaction evidenced by the sale-deed in question was nominal, that it was executed by way of security of the amount borrowed by the plaintiff from the defendant and the defendant was to reconvey the suit plot to him on return of the money with interest, it was held that the plaintiff was entitled to lead oral evidence to prove that the document was sham and not to be acted upon by the parties.[56]

Sections 92 and 115, Evidence Act must be read together. When the alleged oral representation made by a party is not provable under Section 92, Section 115 cannot be invoked to support oral representation. Hence oral consent by landlord is not enough to validate sub-tenancy under Section 16(3), Rent Act and Section 115 will not help to prove sub-tenancy.[57]

40. GIFT

Where the family arrangement was by registered deed where under ¼ share of properties were given to their mother to be enjoyed for her life, her right to proportionate compensation cannot be defeated by an unregistered compromise deed under which she agreed to forgo her interest and such compromise

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47. *Mark D'Cruz* v. *Jitendra Nath Chatterjee*, ILR (1919) 46 Cal 1079; *Karampalli Unni Kurup* v. *Thekku Vittil Muthorakutti*, (1902) 26 Mad 195.
48. *Roshanlal* v. *Munshi Ram*, AIR 1981 P&H 73; *Ram Chander* v. *Mangal Singh*, AIR 1981 P&H 94.
49. *Ahmed Mara caur* v. *Muthu Valliappa Chettiar*, AIR 1961 Mad 28; *Kadavannoor Illath Subramanian Nambudiri* v. *Kallu Veettil Present Karanavan Madhavan Nair*, AIR 1971 Ker 333.
50. *K.S. Narasimha Chari* v. *Indo Commercial Bank Ltd.*, AIR 1965 Mad 147; *Mayandi* v. *Oliver*, ILR 22 Mad 261; *Karampalli* v. *Thekku*, ILR 26 Mad 195; *Preonath* v. *Madhusudhan*, ILR (1898) 25 Cal 603 (FB); *Adityam Iyer* v *Ramkrishna Iyer*, ILR 38 Mad 514; **dissenting from** *Jyagaraja* v. *Vedathanni*, AIR 1936 PC 70.
51. *Ram Kumar Himat Singha* **v.** *Gajendra Chandra Bora*, AIR 1957 Assam 68.
52. *Doddamadiah* v. *Mallappa*, 1953 Mys 6.
53. *Hutchi Gowder* v *Bheema Gowder*, AIR 1960 Mad 33 (DB) : ILR 1959 Mad 552.
54. *Neelagangavva* v. *Ningana Gowda*, 1996 AIHC 3124 (para 14) (Kant).
55. *Abdul Kadir* v. *Noor Mohammed*, 1959 Ker 400.
56. *Shankarlal Ganulal* v. *Balmukund Surajmal Bharuka*, AIR 1999 Bom 260 (para 4). **See also** *Mahadev Prasad* v. *Mumbai*, 1999 AIHC 4696 (paras 15, 16 and 19) (MP); *Ishwar Dass Jain* v. *Sohan Lal*, AIR 2000 SC 426 (para 18).
57. *Ramboxy Laboratories* v. *Doon Apartments*, ILR (1979) 1 Del 84.

deed could not be put in evidence by virtue of proviso (4) to Section 92.[58] Registration of a contract, whether compulsorily registrable or not, is a complete bar to acceptance of oral evidence in proof of modification thereof.[59] A contract reduced to writing and registered, either voluntarily or as required by law, can be modified or rescinded only by a registered instrument and no evidence of subsequent oral agreement to modify or rescind the contract is permissible.[60]

The intention of the legislature in enacting proviso (4) to Section 92 appears to be that registration of a document should imply and carry with it a certain solemnity and that when parties enter into the formality of registration even though the formality may not be obligatory, they should be confined to the terms and conditions of their agreement. The view that it is only when a document is compulsorily registrable that proviso (4) can come into operation is erroneous in view of the wording of this proviso.[61]

41. SETTLEMENT DEED

Where the settlement deed executed by the father was required to be written and was in writing, parol evidence to substantiate any subsequent arrangement, having the effect of modifying the earlier written deed, could not be permitted.[62]

42. WHERE, SUCH CONTRACT, GRANT OR DISPOSITION OF PROPERTY IS BY LAW REQUIRED TO BE IN WRITING OR HAS BEEN REGISTERED [EXCEPTION]

Where there is a registered sale, and a subsequent unregistered agreement stating that the vendee or his heirs will not alienate or dissipate or fritter away the land, it was held that no proof of the unregistered agreement is admissible under Section 92 and the sale can not be revoked and the bar of estoppel or waiver would not operate against the vendee.[63]

43. ANY CUSTOM OR USAGE PROVABLE [PROVISO (5)]

"This proviso is based on the following Maxims:

(*i*) *Consuetudo loci est observanda* (*i.e.*) the custom of the place is to be observed.

(ii) *Magister rerum uses* (*i.e.*) use is the master of things (*i.e.*) usage is a principal guide in practice.

(iii) *Optimus interpres rerum usus* (*i.e.*) usage is the best interpreter of things.[64]

"The reception of evidence of usage is often not only justifiable in principle, but absolutely necessary; and without it, the intention of the parties would be often defeated.....The rule, for admitting evidence of usage must be taken always with this qualification that the evidence proposed is not repugnant to or inconsistent with the written contract. It sought never to be allowed to vary or contradict the written instrument either expressly or by implication"..... "where the incident sought to be annexed to a contract is of such a nature" that the parties are not themselves competent to introduce it by express stipulation, such an incident cannot be annexed by the tacit stipulation arising from usage."[65]

Parol evidence of usage or custom is admissible in aid of the construction of a written instrument. Such evidence is received for explaining or filling up terms used in commercial contracts, policies of insurance, negotiable instruments, and other writings of a similar kind,—when the language, though well-understood by the parties, and by all who have to act upon it in matters of business, would often

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58. *Kamal Mukhi Devi* v. *Siya Raman Prasad*, AIR 1962 Pat 215; **distinguishing** *Vyranan Chetti* v. *Subramanian Chetti*, 1920 PC 33.
59. *Idris Alli* v. *Abdul Samad Barbhuva*, AIR 1973 Gau 132.
60. *Madan Mohan Jena* v. *Srinath Samal*, AIR 1973 Ori 22; *Dr. Harish Chandra Ray* v. *K.C. Singh*, AIR 1977 Ori 76; *Ramboxy Laboratories* v. *Doon Apartments*, ILR (1979) 1 Del 84; *Subayya Chowdary* v. *Garikapati Veerava*, AIR 1957 AP 307; *Hindu Khandan Mushtarka* v. *Shri Hem Raj*, AIR 1962 J&K 41; *Bhan Singh* v. *Gokal Chand*, AIR 1919 Lah 42; **dissenting from** *Devi Prasad Ram Dayal* v. *Manohara Sundarpal*, AIR 1953 MB 157 (GB); *Bhola Nath Rastogi* v. *Santosh Prakash Arya*, AIR 1975 Pat 336; *Balwant Singh Walia* v. *Maya Devi*, 1979 Cur LJ (Civil) 7; *Madina Rice Mills* v. *V. Sampangirmaih*, AIR 1953 Mys. 66 (DB) : ILR 1952 Mys 230.
61. *Chatar Singh* v. *Ganpatlal*, AIR 1951 Ajmer 79 (II).
62. *S. Saktivel* v. *M. Venugopal Pillai*, AIR 2000 SC 2633 (paras 5, 6 and 8).
63. *Brahama Nand* v. *Roshani Devi*, 1989 HP 11.
64. BEST ON EVIDENCE (9th Edn., Section 228, P. 211).
65. BEST ON EVIDENCE (9th Edn., Section 228, P. 212).

appear to the common reader scarcely intelligible, and sometimes almost a foreign language. The terms used in these instruments are to be interpreted according to the recognised practice and usage with reference to which the parties are supposed to have acted; and the sense of the words, so interpreted, may be taken to be the appropriate and true sense intended by the parties.[66]

"When the words of a document are used in relation to places or people where, or amongst whom, established usages prevail, proof of such usages may be given to construe the document, although the words themselves are unambiguous[67] and where particular terms have a double meaning, the one common and the other local or peculiar, similar evidence may be given to explain such terms, although their ordinary meaning might also apply. Evidence of usage, however, cannot be given to vary the statutory meaning of words[68] nor where it is expressly excluded by, or is inconsistent with, the terms of the document; nor where there is nothing in the context or surrounding circumstances pointing to a peculiar use of the words.[69] .....Such usages, when not judicially noticed, are provable by witnesses; but they raise an inference for the jury merely, and not a conclusion of law that the parties used the words in the conventional sense."[70]

A trade usage is a usage so general and well known and properly understood in fact with reference to the business that the parties are presumed to have their contract with tacit reference to it and to have intended to be governed by it the same way and to the same extent as other like persons in like cases.[71]

The Supreme Court in *Mahindra and Mahindra* v. *Union of India*[72] held "It is true that a *clause* in an agreement may embody a trade practice and such a trade practice may have the actual or probable effect of restricting or destroying competition and hence they constitute a restrictive trade practice. To know the effect of such *clause* oral evidence can be adduced "to determine whether a particular trade practice set out in the agreement has or may have the effect of preventing, distorting or restricting competitions so as to constitute "a restrictive trade practice" under the Monoplies and Restrictive Trade Practice Act 1969 and that Sections 91 and 92 are no bar as it would not amount to contradicting varying, adding to, or substracting from the terms of the document." The Supreme Court held that the decision in *Hindustan Liver Ltd., Bombay* v. *Monopolies and Restrictive Trade Practices Commission*[73] is not good law.

Where there is a custom and practice in trade, of supplying free meals to passengers in air travel, it was held that it is not repugnant to or inconsistent with the printed terms and the custom and practice is admissible in evidence.[74]

Recently it was decided by a consumer forum that supply of dinner to Railway passengers included supply of drinking water also.

In respect of sale of liquid molasses, by "F.O.R." or "Ready Delivery" contracts, evidence is admissible to prove usage as to who should procure tank wagons at the siding for pumping the liquid.[75]

Interest, though not expressly stipulated in a written contract, may be claimed on the ground of usage.[76]

Mercantile usage need not be ancient. It is sufficient if it is so well known and acquiesced in that it may be reasonably presumed to have been an ingrediant tacitly included in the contract.[77]

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66. PHILIPS. 407.
67. *Dashwood* v. *Magniac*, (1891) 3 Ch 306 (usage of a district admissible to show that trees are included in the term "timber" in a particular county); *Mysers* v. *Sarl*, 3 E&E 306 (Building trade usage admitted to show "weekly accounts" meant accounts of day work only, and not of measured work).
68. *Smith* v. *Wilson*, (1832) 3B & Ad 728; *O' Donnell* v. *O'Donnell*, 13 L.R. Ir. 226.
69. *Holt* v. *Collyer*, (1881) 16 Ch 718; *Malcomson* v. *Morton*, 11 Ir.L.R. 230; *Abbott* v. *Bates*, 33 LT 491.
70. PHIPSON ON EVIDENCE 15th Edn. (2000), paras 43-59, Page 1241.
71. *Ram Deo* v. *Firm Birdhichand Sumermal*, ILR (1970) 20 Raj 427.
72. AIR 1979 SC 798.
73. AIR 1977 SC 1285.
74. (1977) 2 Cal LJ 108.
75. *Bejoy Krishna* v. *N.B. Sugar Mills Co.*, 1949 Cal 490.
76. *Juggo Mohan Ghoss* v. *Kaisreechaud*, 9 MIA 256.
77. *Juggamohan* v. *Manikchand*, 7 MIA 263 (PC).

In *K.M.P.R.N.M. Firm* v. *Somasundara*[78]; it was held that according to custom, piece-goods merchants in godown street Madras in respect of sales, known as "*Thavanni*" charge 3/4% per month after 60 days. It was held that if the custom pleaded is well known locally and to the parties to it, it may be presumed to have been an ingredient tacitly imported by the parties into the contract.

In the case of custom or usage it is permissible to import into contract such custom even though a party to the contract was not actually aware of the custom or usage. But in the case of a practice, it must be shown that it was known to the person whom it is sought to bind and that he tacitly agreed to its being a term of the contract.[79]

44. ANNEXING OF SUCH INCIDENT IS NOT REPUGNANT OR INCONSISTENT WITH THE EXPRESS TERMS OF THE CONTRACT

But the rule for admitting evidence of usage must be taken always with this qualification, that the evidence proposed is not repugnant to, or inconsistent with, the written contract. It ought never to be allowed to vary or contradict the written instrument, either expressly or by implication... where the incident sought to be annexed to a contract is unreasonable or illegal, it cannot be annexed to the contract by evidence of usage".[80]

Evidence of custom in respect of tenancies is inadmissible where the custom alleged is contrary to the terms of the written contract. Where there is an express term in the *kabuliat,* that the tenant had no right of sale, gift or transfer in any manner, no evidence of custom on the question of transferability and heritability, is admissible.[81]

The inconsistancy may be evinced by the express terms of the written instrument or by implication therefrom.[82] Oral evidence of a custom that when the due date of performance of a contract falls on a holiday, the contract may be performed on the next working day, is admissible.[83]

45. ANY FACT SHOWING HOW THE LANGUAGE OF A DOCUMENT IS RELATED TO EXISTING FACTS [PROVISO (6)]

The proviso is a substantive provision laying down the law relating to the admissibility of extrinsic evidence as an aid to the construction of a document in cases in which it is necessary to find out how the document is related to the existing facts.[84]

The Bombay High Court observed "that is one of the provisos which is the despair of the Judge and the joy of the lawyers. Where a document itself is a perfectly plain, straight forward document, no extrinsic evidence is required to show in what manner the language of the document is related to existing facts. There may be cases where such extrinsic evidence is required, and it will therefore be admitted. But it can only be in such cases where the terms of the documents themselves require explanation, evidence can be led within the restrictions laid down by proviso".[85]

Proviso (6) to Section 92 is not an exception to the rule laid down in the main part of the section. it is a substantive provision itself laying down the law relating to the admissibility of extrinsic evidence as an aid to the construction of a document in cases in which it is necessary to find out how the document is related to existing facts. Proviso (6) to Section 92 does not take away or qualify anything that would, but

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78. AIR 1925 Mad 161 : 48 Mad 275.
79. *Mana Vikram* v. *Rama Pathar,* ILR 20 Mad 275.
80. BEST, 12 Edn., S. 228, p. 213; *Lu Gale* v. *Maung Mo,* (1904) 2 LBR 268; *K.M.P.R.N.M. Firm* v. *Somasundara Chetty & Co.,* AIR 1925 Mad 161 : ILR (1924) 48 Mad 275.
81. *Md. Ayesuddin* v. *Prodyot,* AIR 1921 Cal 741; **see also** *Holmes Wilson & Co.* v. *Bata Kristo Dc,* ILR 54 Cal 549 : AIR 1927 Cal 688; *Chandanmull* v. *National Bank of India,* 51 Cal 43 : 1924 Cal 552 *Morris* v. *Panchananda* (1870) 5 MHC 135.
82. *Smith* v. *Ludna Dhalla Damodar,* ILR (1892) 17 Bom 129.
83. *Kasiram Pania* v. *Hurnundroy Roy,* AIR 1921 Cal 809.
84. *Belapur Co.* v. *Maharashtra Farming Corpn.,* (1968) 74 Bom LR 246 : AIR 1969 Bom 231. **See also** *P.B. Bhat* v. *V.R. Thakkar,* (1971) 74 Bom LR 509 : AIR 1972 Bom 365.
85. *Ganpatrao Appaji* v. *Bapu Thakaram,* 1920 Bom 143.

for that proviso, have fallen within the substantive portion of that section unlike the main portion of Section 92. Proviso (6) is not restricted to extrinsic evidence of an oral agreement or statement.[86]

Under Section 92, proviso (6) extrinsic evidence is admissible for the purpose of showing the circumstances in which the document came to be prepared and executed with a view to arrive at the true effect of the transaction to which the document relates.[87]

Where meaning is doubtful, the surrounding circumstances can be looked into as to the creation of the document and subject matter to which it was designed and intended to apply.[88]

Oral evidence regarding the intention of the parties is only excluded. But the surrounding circumstances and conduct of parties can be shown in what manner the language was used relating to the existing facts and to arrive at the true meaning of the document.[89]

For considering whether a specification of a prior invention describes the invention claimed by the subsequent inventor is a question of construction and parol evidence is only admissible for the purpose of explaining words or symbols of art and other alike technical matters, and of informing the court of relevant surrounding circumstances.[90]

46. INTENTION OF PARTIES

Extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning. Evidence of the acts done under it is a guide to the intention of the parties in such a case and particularly when acts are done shortly after the date of the instrument.[91] Objection that the proceedings for possession by the landlord after the expiry of the tenancy period were camouflage and the real intention was to create a general tenancy, could not be raised after the expiry of the period of tenancy.[92] The rule of construction in this proviso enables the Court to examine the facts and surrounding circumstances to which the language of the document may be related and is applicable when the words of the document taken by themselves are not so clear in their meaning and the Court cannot understand the true intent of an indenture, but only by the words of indenture.[93]

47. ACTS AND CONDUCT OF PARTIES

In the case of an ambiguous instrument, there is no reason why subsequent interpreting statement should be inadmissible. Extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning and evidence of the acts done under it is a guide to the intention of the parties particularly, when acts are done shortly after the date of the instrument. When the terms of the document are ambiguous, the right of the parties may be determined by a reference to the subsequent statements or conduct of the parties.[94]

Where the question was whether some properties attached in execution, were included in the trust deed, it was held that the ambiguity was latent and proviso (6) was applicable to know the conduct of the parties in construing the expression used in the deed.[95]

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86. *Belapur & Co. Ltd.* v. *Maharashtra State Farming Corporation*, AIR 1969 Bom 231.
87. *Bhat* v. *V.R. Thakkar*, 1972 Bom 365 PB; *Buddhu Shaw* v. *Mongal Shaw*, ILR (1966) 2 Cal 641.
88. ***Sobhadroyamma*** **v.** ***Venkatapati Raju***, AIR 1924 PC 162.
89. *Husson Ally* v. *Tribhowandas*, AIR 1921 PC 40; *Baijnath* v. *Haji Vally Mahomed*, AIR 1925 PC 75; *Narasingherji* v. *Parthasaradhi*, AIR 1924 PC 226.
90. *Canadian General Electric Co. Ltd.* **v.** *Fada Radio Ltd.*, AIR 1930 PC 1.
91. *Abdulla Ahmad* v. *Animendra Kisser*, AIR 1950 SC 15; **see also** *Becharbhai* v. *Khushalbhai*, 1975 Guj 98 : 1950 SCR 30; *Madalsa Devi* v. *Mridula Chandra*, AIR 1994 Pat 91 (paras 17 and 18); *Hindu Public* v. *Rajdhani Puja Samithee*, AIR 1999 SC 964 (para 19).
92. *Sunil Puri* v. *Modi Spinning & Weaving Mills Company Ltd.*, AIR 1994 NOC 336 (Del) : (1993) 50 DLT 257.
93. *S.T. Industries, Surat* v. *Chief Controlling Revenue Authority (SB)*, AIR 1994 Guj 153 (paras 18-20).
94. *The Godhra Electricity Co. Ltd.* **v.** *State of Gujarat*, AIR 1975 SC 32; *New Garage Ltd.* **v.** *Khuswant Singh*, AIR 1952 Punj 82 (DB); *Abdulla Ahmed* **v.** *Animendra Kesser*, AIR 1950 SC 15; *B.N. Sinha* v. *Midnapore Zamindary Co.*, 1922 Cal 300.
95. *Subramania Iyyar* v. *Rajan Rajeshwari Dorai*, 40 Mad 1016; **following** *Tulsi Pershad Singh* v. *Ramnarain Singh*, ILR 12 Cal 117 (PC).

48. IS RELATED TO

Where there was a misdescription of the officer who authorised to file a complaint, it was held that extraneous evidence was admissible under Section 95 and proviso (6) to Section 92, Evidence Act, to understand in which sense the language used in the complaint had been used. The language used in the complaint was plain in itself, but was unmeaning in reference to existing facts, there being no Municipal Board which was replaced by Nagar Maha Palika Board many months before. Evidence could, therefore, be admitted to understand in which sense the unmeaning words had been used, and extraneous evidence is admissible to prove that the complaint was made by a duly authorised person.[1]

If the recitals in the document are indecisive and ambiguous, then only the courts will take into consideration surrounding circumstances and the conduct of parties in deciding the passing of title.[2]

It is always open to show how the terms of a document are related to existing state of things, it is therefore always open to prove that the terms of a particular document are those given to a sub-contractor though the word sub-contractor has not been used in the document. Oral evidence is such cases is not excluded.[3]

Where the language of a surety bond though plain in itself, is unmeaning with reference to the existing facts and circumstances, extraneous evidence is admissible to show the actual intention of the parties thereto and as to contingencies contemplated by them while executing the bond.[4]

In a Fire Insurance Policy-Description of building contained in policy was vague and not exhaustive, oral evidence by agent explaining intention of parties while filling proposal form neither contradicting, varying, adding to or substracting from terms of policy is not excluded by Section 92.[5]

The ruler of erstwhile Chamba State had by a deed, made an *inam* grant of certain land along with *Namasi* in favour of G and her son D. During regular settlement operation, the cultivable land granted under the deed was mutated in the ownership of D, but *Namasi* was not mutated in his name and it was recorded as owned by the State Government. And only the name of the forest was specified. Where the deed contained the words 'along with *Namasi*' after the description of the cultivable lands, those words indicated that besides cultivable land. *Namasi* was also granted. Though the word '*namasi*' was vague and did not by itself lead to the inference that any area, in *Namasidhar* forest, was granted but that ambiguity about '*namasi*' was a latent one and extrinsic evidence was admissible, under proviso (6) of Section 92, for resolving the ambiguity and for showing that the word *Namasi* related to some existing state of things.[6]

When the words of a written instrument are free from ambiguity and where external circumstances do not create any doubt or difficulty as to the proper application of the words, such instrument is always to be construed according to the strict plain common meaning of the words themselves and evidence *de hors* the instrument for the purpose of explaining it according to the surmises or alleged intention of the parties to the instrument is utterly inadmissible. The cases in which parol evidence when objected to is, apart from fraud or mistake, receivable to correct written instruments are cases, where, for example, the evidence supplements, but does not contradict, the terms of the deed; where the provisions of the deed leave the question doubtful whether merely a mortgage and not an out-and-out sale was intended or where the language sought to be explained in evidence is language in an ordinary conveyancing form not exhaustively accurate but without an actual misstatement of fact.[7]

While construing a written contract, the court will be erring in approaching the question of what formed the subject matter of the negotiations which preceeded the written contract between the parties, without first settling to what extent the contract was so ambiguous as to justify resort to evidence as to the negotiations. It was held that there was no ambiguity as to the meaning of the words 'works of a similar nature'. They clearly referred to work 'for the excavation of stone and construction thereof by

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1. *Nagar Mahapalika of Kanpur* v. *Sri Ram*, AIR 1964 All 270 (DB) : (1964) 1 CrLJ 626 (All).
2. *Hara Bewa* v. *Banchanidhi Barik*, AIR 1957 Ori 243 (DB).
3. *Sukumar Banerjee* v. *Hiralal Chatterjee*, AIR 1954 Cal 48 : 1954 CrLJ 13.
4. *State* v. *Jati Ram*, 1973 Cr LJ 1208 (All).
5. *General Assurance Society Ltd.* v. *Mohd. Salim*, AIR 1965 All 561 (DB).
6. *Union of India* v. *Nand Kishore*, AIR 1966 HP 54.
7. *Tsang Chuen* v. *Li Po Kwai*, AIR 1932 PC 255.

means of machineries'. Such works being similar to the works which were the subject of the negotiations and there was no justification for excluding such works on the ground that the means of carrying out the works, though it was machinery, was machinery which was not discussed during the negotiations. Therefore, resort to oral evidence was not justified.[8]

49. THE EXISTING FACTS

It is well settled that no evidence is admissible on a question of construction of a contract or grant, which must be based solely on the terms of the document which are clear and where there is no dispute as to how the contents of the document are related to existing facts.[9] When the terms of a document are clear, conduct of parties as to how they understood them is not admissible, as it is irrelevant.[10] Generally speaking, evidence of surrounding circumstance is admissible only where there is some ambiguity or doubt as to the meaning of the terms of documents. Under this proviso, the terms of an unambiguous document cannot be controlled by the conduct of the parties.[11] In construing a written instrument the plain meaning of the express words are to be adhered to irrespective of the question of the intention of the parties.[12]

50. IN WHAT MANNER THE LANGUAGE OF A DOCUMENT

Where the operative part of the document is clear and free from ambiguity no oral evidence is admissible in ascertaining the intention of the parties. If the question is not what the parties may have intended but what is the meaning of the words which they have used, oral evidence is permissible.[13]

Section 92 of the Evidence Act forbids the admission or consideration of evidence to prove the intentions of the party and the nature of the transaction will have to be decided "on a consideration of the contents of the documents themselves with such extrinsic evidence of the surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts".[14]

Sections 94 and 95, Evidence Act, define the sphere of operation of proviso (6) to Section 92 and it is manifest from these two sections that it is only in cases where the terms of the document leave the question in doubt, that resort can be had to proviso (6) to Section 92, Evidence Act. It cannot be postulated that the legislature intended to nullify, the object of Section 92 by enacting exceptions to that section. Exceptions or proviso to the section are not meant to render the section itself nugatory, when there is a latent ambiguity in a document and not when the language is plain with reference to existing facts, Section 92(6) would come into play.[15]

Intention of parties has to be determined from document itself and not from surrounding circumstances. Inadequacy of price or payment of cost of stamp by executant cannot alter its nature.[16]

The nature of a document is to be ascertained on a conspectus of the whole of it. It is not possible to gather the intention of the parties to a document by ignoring a part of it. The deposition of any party to a

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8. *Joseph Darmanin* v. *Carmel Micallef*, AIR 1946 PC 50.
9. *Radha Sundar Dutta* v. *Md. Jahadur Rahim*, AIR 1959 SC 24; **relying on** *Balkishan* v. *Legge*, ILR 22 All 149 (PC); *Venkateshwarlu & Co.* v. *B.V.P. & Co.*, AIR 1969 AP 88; *Ramdip Sharma* v. *Baldeo Singh*, AIR 1977 Pat 234; *Shaik Khasim Saheb* v. *Vasireddy Ramanadha Babu*, AIR 1989 NOC 157 (AP).
10. *G. Valia Raja* v. *T. Vareed*, AIR 1961 Ker 293; *Union of India* v. *Kishorilal Gupta*, AIR 1959 SC 1362; *Surayya* v. *Bala Gangadhara*, AIR 1948 PC 3; *Kondiram* v. *Gundappa*, 1955 Hyd 179; (case of sale deed) *Maung Kyin* v. *Ma Shwe Law*, AIR 1917 PC 207; **relied on** *Baraboni Coal Concern* v. *Gokulanande*, AIR 1934 PC 58; *Gurubasappa* v. *Gurulingappa*, AIR 1962 Mys 246; *Bhagwat Rai* v. *Ramasi Rai*, AIR 1952 Pat 431 (DB).
11. 1968 Cur LJ 674.
12. *Madanlal* v. *Ghasi Ram*, ILR 30 Pat 613 : 1951 Pat 254 (DB).
13. *Saradarmal Ammal* v. *Natesa Mudaliar*, (1972) 1 Mad LJ 244, **following** *Maharaj Mahindra Chandra Nandi* v. *Durga Prasad Singh*, 32 MLJ 559.
14. *K.K. Nambiar* v. *P. Kusup*, AIR 1970 Ker 16 (FB); *Sukumar Bysack* v. *Sushil Kanta Banerjee*, AIR 1972 Cal 207; *Mammadissa* v. *Asyakutty Umma*, ILR (1967) 2 Ker 282; *Saradambal Ammal* v. *Netesa Mudaliar*, (1972) 1 MLJ 244; *Gurubari Lenuka* v. *Dulani Thakurani*, AIR 1971 Ori 147.
15. *Firm Bolumal* v. *Venkatachelapathi Rao*, AIR 1959 AP 612 : ILR (1959) AP 929 Letters patent Appeal No. 218/1954 dt. 28-1-59 against judgement and decree of the High Court in Second Appeal No. 2342/50 dt. 7-5-1954 J. KRISHNA SWAMI NAYUDU; **see also** *Ram Narain* v. *Manki Singh*, AIR 1954 Pat 562; *Darshan Dass* v. *Ganga Bux*, AIR 1962 Pat 53; *Chandrasekhar* v. *Mural Gope*, AIR 1957 Pat 673; *Basant Devi* v. *Official Receiver*, AIR 1936 Lah 508; *Shambhu Dutt* v. *Balwant Lal*, (1968) 70 Punj LR 790.
16. *Darshan Dass* v. *Ganga Bux*, AIR 1962 Pat 53 (DB).

document at the trial is not at all relevant for the purpose of ascertaining the intention at the time of the execution of document. The intention is to be gathered 'from the language used when it is clear and unequivocal.[17]

When the terms of an ancient grant are unambiguous, it is not open to the court to say that the document means something else than what it clearly says, merely because the parties have gone on for a long time so understanding it. In a case of ambiguity, however, the court can uphold, the construction of deed which justifies a long usage; but where there is no ambiguity, the court will not accept an erroneous interpretation though consistent with usage, so as to sanction a manifest breach of trust.[18]

51. SALE AND MORTGAGE

Where the question is whether the sale deed can be treated as a mortgage by reason of incorporation of a condition for repurchase the property, the intention of the parties is to be gathered from the language of the deed in the light of surrounding circumstances. If the language is ambiguous, intention can be gathered from the contents of the deed with such extrinsic evidence permissible u/proviso (6) of Section 92. Oral evidence of intention though not admissible, can be permitted to explain or even to contradict the recitals as distinguished from the terms of the document. Evidence of contemporaneous conduct is always admissible as a surrounding circumstance. But evidence of subsequent conduct of the parties is inadmissible.[19]

It is not permissible to consider the surrounding circumstances with a view to holding that a document which on the face of it is a sale deed is intended to operate as mortgage. There must be some limit to the suggestion that the surrounding circumstances can always be scrutinized so as to enable the court to alter or change the nature of a document to something different from what it purports to be. Otherwise, there can be no certainity as to the proper construction to be placed on a document which to all appearances is unambiguous.[20]

Extrinsic evidence is admissible for purpose of showing that a document, which purports to be, and, on the face of it, a deed of sale, is in reality a deed of gift.[21]

Where the terms in the bond clearly indicate that the transaction was that of a usufructuary mortgage and not an absolute sale, oral evidence of subsequent events would not be admissible to prove the contrary, and proviso (6) would not apply.[22] In a sale deed the value of the land is found to be far more than the consideration mentioned therein, the vendee does not take possession and allows the vendor to remain in possession, and the vendor continues to pay the revenue and this state of affairs continues for a long time, evidence of these existing facts and the manner in which the language was adopted in the document in respect thereto will certainly have to be allowed. All these facts will really act as an estoppel on the vendee from claiming that the sale deed really conveyed title to him and was nor a mortgage.[23] It was held, that the court was right in applying proviso (6) to Section 92 read with Sections 94 and 95 of the Evidence Act in allowing the existing facts to be proved by the plaintiff in order to show that the suit document was really only a mortgage and not sale deed.[24]

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17. *Hiralal Seal* v. *Sankarlal Sharma*, ILR (1969) 2 Cal 503.
18. *Somar Puri* v. *Shyam Narain Gir*, AIR 1954 Pat 586.
19. *Bhaskar* v. *Shrinarayan*, AIR 1960 SC 301; *P.L. Bapuswami* v. *N. Patty*, AIR 1966 SC 902 : (1966) 2 SCR 918; *Chunchun Jha* v. *Ebadat Ali*, AIR 1954 SC 345; *Dhanarajagirji* v. *Pasthasaradhi*, AIR 1924 PC 226; *Jhanda* v. *Wahiduddin*, AIR 1916 PC 49; *Bishan Lal* v. *Banwari Lal*, AIR 1937 All 724; *Bishambar Nath* v. *Muhammed Ubaidullah Khan*, 45 All 581; **see also** *Rajat Chandra* v. *Dhani Ram*, 1965 Assam 90.
20. *Martand* v. *Amritrao*, (1925) 27 Bom LR 951, ILR 49 Bom 662 : AIR 1925 Bom 501.
21. *Hanif-un-nisa* v. *Fiaz-un-nisa*, (1911) 13 Bom LR 391, ILR 39 IA 85, 33 All 340. **See** *Maung Kyin* v. *Ma Shwe La*, (1911) 38 IA 146, oral evidence is admissible to shown that a mortgage was subsequently converted into a sale. *Badhawa Mal* v. *Hira*, (883) PR No. 30 of 1884 (Civil).
22. *Chandra Sekhar Pathak* v. *Mural Gope*, AIR 1957 Pat 673 (DB); *Rambujhawan Prasad Singh* v. *Jugal Singh*, AIR 1957 Pat 126; *Bhagwat Rai* v. *Ramasis Rai*, AIR 1952 Pat 431; *Martand* v. *Amritrao*, AIR 1925 Bom 501. **See Contra** *Balumal* v. *Venkata Chelapathi*, AIR 1955 Mad 78; *Kaluram* v. *Gajasa*, AIR 1928 Nag 182, *Nipamacha Singh* v. *Ibohal Sarma*, AIR 1965 Mani 31.
23. *Thongam Ningol Mema* v. *Thongam Bokul Singh*, AIR 1962 Mani 45.
24. *Nipamacha Singh* v. *Ibohal Sarma*, AIR 1965 Mani 31; **dissenting from** *Firm Bolumal Dharmdas Firm* v. *Gollapudi Venkata Chelapathi Rao*, AIR 1959 AP 612; In L.P. Appeal against *Balumal* v. *Venkata Chelapathi Rao*, AIR 1955 Mad 78, **relying on** *Thongam Ningol Mema* v. *Thongam Bokul Singh*, AIR 1962 Mani 45; *Narsingerji Gyanagerji* v. *Parthasaradhi Ravanim Garu*, AIR 1924 PC 226, *Firm Balumal Dharmdas* v. *Gollapudi Venkata Chelapathi Rao*

52. LEASE

The proposition of law is well-settled that if the recitals in the lease itself and the terms thereof make out non-agricultural purposes and are free from all ambiguity, the only guide for determination of the nature of the lease would be the lease deed itself. But if the terms are not decisive and free from ambiguity, extraneous evidence will be admissible for the purpose of determining the nature of the lease.[25]

When there was oral and documentary evidence, not proving the tenancy *chit* executed, it could be challenged under Section 92(6) of the Evidence Act.[26]

53. WILLS

Plain and natural meaning to the words used in the wills, has to be given.[27]

When two wills were executed on two different dates and when there is ambiguity of language in the later will as to whether it was in substitution of or in addition to the earlier will, extrinsic evidence can be admitted to clear up that ambiguity and to certain testator's intention.[28]

54. CONSTRUCTION OF WILLS

In *Soorjeemoney* v. *Denobudhoo*[29] it was observed: "The Hindu Law, no less than the English Law points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other, as to the materials from which the intention is to be collected. Primarily, the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case, those circumstances, no doubt, must be regarded. Among the circumstances thus to be regarded, is the law of the country under which the will is made, and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to the effect, unless the language of the will or the surrounding circumstances displace that assumption."[30]

The circumstances prevailing at the time of execution of the will can be taken in deciding the question as to the daughter's claim to an absolute estate.[31]

It is not improper to take into consideration the ordinary notions and wishes of a Hindu in respect of devolution of property.[32]

The court should put itself into the testator's arm chair and give effect to the intention by taking into consideration the surrounding circumstances the language used, his outlook and manners etc., factors.[33] All parts of a will are to be construed as a whole, and should try to reconcile one with the other, if there is any conflict, and if it is not possible to reconcile, the latter part would prevail over the earlier part. That should be done after taking all the surrounding circumstances to ascertain the intention of the testator.[34] Court has no power to give effect to a hypothetical intention by supplying lacunae in the will, and thereby making practically a new will for the testator.[35]

AIR 1955 Mad 78: **see also** *Kaniyan-kandiyil Kunhiraman Nambiar* v. *Pairu Kurup of Tarwad*, AIR 1970 Ker 16 (FB).

25. *Orient Paper Mills Ltd.* v. *Sitaram Agarwala*, AIR 1957 Ori 256 (DB) : ILR 1957 Cut 509.
26. *Balachandran* v. *Gopalan*, AIR 2001 Ker 337 (paras 15 and 17).
27. *Bolo* v. *Koklan*, AIR 1930 PC 270.
28. *Rajalu Naidu* v. *Kothandarama Naidu*, AIR 1965 Ker 122 : ILR (1964) 1 Ker 532.
29. 6 MIA 526.
30. See also *Nathu Ramu* v. *Gangabai*, AIR 1938 PC 228; *Chunil Lal* v. *Bai Samarath*, ILR 38 Bom 399 (PC) : AIR 1914 PC 60; *Md. Shamsool* v. *Sewkram*, 11 Bom LR 226 (PC).
31. *Joydurga Dasi* v. *Saroj Ranjan*, AIR 1929 PC 214.
32. *Md. Shamsool* v. *Sewkram*, 11 Bom LR 226 (PC).
33. *Rajendra* v. *Gopal*, AIR 1930 PC 242.
34. *Rameshwar Bakhsh* v. *Balraj Kuar*, AIR 1935 PC 187.
35. *Gnanambal* v. *Raju*, AIR 1950 SC 103; *Ramautar Singh* v. *Ram Sundari Kur*, AIR 1959 Pat 585; *Parvabati* v. *Sarojini*, (1931-32) 36 Cal WN 1015.

This section makes evidence as to the intention of a document contrary to its express language inadmissible; but its proviso (6) lets in evidence to show in what manner the disputed transaction or the language of the document was related to existing facts.[36]

Sections 93-97 partly develop and partly restrict the principle laid down by this proviso.

Exclusion of evidence to explain or amend ambiguous document.

S. 93. When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

ILLUSTRATION

(*a*) *A* agrees, in writing, to sell a horse to *B* for "Rs. 1,000 or Rs. 1,500." Evidence cannot be given to show which price was to be given.

(*b*) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

SYNOPSIS

1. *Principle and scope* ... 844
2. *General principles of interpretation of documents* ... 846
   The general Principles may be summorised as follows ... 846
3. *Cases of patent ambiguity* ... 847
4. *Latent ambiguity* ... 847
5. *No ambiguity* ... 847

COMMENTS

1. PRINCIPLE AND SCOPE

Sections 93 to 98 deal with rules for construction of documents with the aid of extrinsic evidence. Sections 91 and 92 define the cases in which documents are exclusive evidence of the transactions which they embody. Sections 93-99 deal with the interpretation of documents by oral evidence.

Where the language employed in a document is ambiguous, the question of admissibility or otherwise of extraneous evidence is regulated by the provisions contained in Section 93 and Sections 95 to 98.[37]

Under this section no evidence is admissible to show the meaning or to supply the defects in a document when the language used is, on its face, ambiguous or defective.

There are two sorts of ambiguities of words-the one is *ambiguitas patens* and other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seems certain and without ambiguity, for anything that appears upon the deed or instrument; but there is some collateral matter out of the deed that breeds the ambiguity.[38] A good test of the difference is to put the instrument into the hands of an ordinary intelligent educated person. If, on perusal, he sees no ambiguity, but there is nevertheless an uncertainty as to its application, the ambiguity is latent; if he detects the ambiguity from merely reading the instrument it is patent. Thus, in illustration (*b*), the blanks would be patent ambiguities and they could not be filled in by parol testimony as to the intention of the parties, etc. In the illustration to S. 95 no one could detect any ambiguity from merely reading the instrument. The ambiguity does not consist in the language, but is introduced by extrinsic circumstances.[39]

This section deals with patent ambiguities. If the language of a deed is, on its face, ambiguous or defective, no evidence can be given to make it certain.[40]

STEPHEN in his digest (Art 91) states, "If the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of the document intended to say."

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36. *Manindra Nath Bose* v. *Narendra Krishna Mitra*, ILR (1956) 1 Cal 59.
37. *Belapur Co Ltd* v. *Maharashtra State Farming Corporation*, AIR 1969 Bom 231.
38. BEST, 12th Edn., 226, p. 211.
39. NORTON, S. 633, pp. 351, 352.
40. *Deojit* v. *Pitambar*, (1876) 1 All 275.

NORTON on Evidence (p. 279-280) quotes the following observation of STARKIE which runs: "By patent-ambiguity, 'must' be understood an ambiguity inherent in the words and incapable of being dispelled, either by any legal rules of construction applied to the instrument itself, or by evidence showing that terms, in themselves unmeaning or unintelligible, are capable of receiving a known conventional meaning. The great principle on which the rule is founded is that the intention of parties should be construed, not by vague evidence of their intention, independently of the expressions which they have thought fit to use, but by the expressions themselves. How, those expressions which are incapable of any legal construction and interpretation by the rules of art, are either so because they are in themselves unintelligible, or because being intelligible they exhibit a plain and obvious uncertainty. In the first instance, the case admits of two varieties; the terms though at first sight untelligible, may yet be capable of having a meaning annexed to them by extrinsic evidence just as if they were written in a foreign language, as when mercantile terms are used, which amongst mercantile men have a distinct and definite meaning, although others do not comprehend them; the term used may, on the other hand, be capable of no distinct and definite interpretation. Now it is evident that to give effect to an instrument, the terms of which though apparently ambiguous are capable of having a distinct and definite meaning annexed to them, is no violation of the general principle, for in such a case effect is given, not to any loose conjecture as to the intent and meaning of the party, but to the expressed meaning and that, on the other hand where either the terms used are incapable of any certain and definite meaning, or, being in themselves intelligible, exhibit a plain and obvious uncertainty and are equally capable of different applications, to give an effect to them by extrinsic evidence as to the intention of the party, would be to make the supposed intention operate independently of the definite expression of such intention. By patent ambiguity, therefore, must be understood an inherent ambiguity, which cannot be removed either by the ordinary rule of legal constructions, or by the application of extrinsic and explanatory evidence, showing the expressions *prima facie* untelligible, are yet capable of conveying a certain and definite meaning."

WIGRAM in his books on Extrinsic Evidence (2nd Ed., p.130) observed, "A written instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only if found to be of uncertain meaning when persons of competent skill and information are unable to do so. Words cannot be ambiguous because they are unintelligible to a man who cannot read, nor can they be ambiguous merely because the Court which is called upon to explain them may be ignorant of a particular fact, art, or science, which was familiar to the person who used the words and a knowledge of which is therefore necessary to a right understanding of the words he has used. If this be not a just conclusion, it must follow that the question, whether a will is ambiguous, might be dependent, not upon the propriety of the language, the testator has used, but upon the degree of knowledge, general or even local, which a particular judge might happen to possess; may, the technical precision and accuracy of a scientific man might occasion his intestacy a proposition too absurd for an argument" ... (WIGRAM-EXTRINSIC Evidence 2nd Edn. p. 130).

WIGRAM further says as to the inaccuracy of expression and ambiguity as follows "A distinction must be taken between inaccuracy and ambiguity of language. Language may be inaccurate without being ambiguous and it may be ambiguous although perfectly accurate. If for instance, a testator, having one leased whole house in a given place, and another house, were to devise his free hold house there to A.B, the description, though inaccurate would occasion no ambiguity. If however, a testator were to devise an estate to JOHN BAKER, of Dale, the son of Thomas, and there were two persons to whom the entire description accurately applied, this description, though accurate would be ambiguous. It is obvious, therefore, that the whole of that class of cases in which an inaccurate description is found to be sufficient, merely by the rejection of words of surplusage are cases in which no ambiguity really exists. The meaning is certain, notwithstanding the inaccuracy of the testators language."

"Latent ambiguities are of two kinds. First where the description of the devisee or the property devised is clear upon the face of the will, but it turns out that there is more than one estate or person to which the description applies; and second where the devise or property devised is imperfectly, or in some respects, erroneously described, so as to leave it doubtful what person or property is meant."[41]

According to Section 100 of this Act, Sections 91 to 99 covered by Chap. VI in this Act shall not affect any of the provisions of the Indian Succession Act (X of 1865) (which was later replaced by the Indian Succession Act 39 of 1925) as to the construction of wills. Sections 74 to 111 of Act 39 of 1925

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41. *Johu Patch* v. *White*. 117 US 210.

provide rules of construction of wills. Even in Act 39 of 1925, Section 81 states that where there is ambiguity or deficiency on the face of a will, no extrinsic evidence, as to the intentions of the testator shall be admitted.

When the name of a legatee is left blank, extraneous evidence was held not admissible to show who was intended.[42] When a bequest was made in favour of the son of LNG, no evidence is admissible who was meant.

The Supreme Court observed that Section 93 is clear on the point that if on a fair construction the condition mentioned in the document is held to be vague or uncertain, no evidence would be admitted to remove the vagueness or uncertainity. It is the language of the document alone that will decide the question. It would not be open to the parties to the court to attempt to remove the defect of vagueness or uncertainty by relying upon any extrinsic evidence.[43]

2. GENERAL PRINCIPLES OF INTERPRETATION OF DOCUMENTS

The duty of the court is always interpretation to find out not what really was the intention of the parties, as distinguished from what mere words expressed, but merely to find out the meaning of the words used by them.[44]

LORD ATKIN observed "When the meaning of the words is plain it is not the duty of the courts to busy themselves with supposed intention."[45]

When ordinary or commonly used words are used they should be given their ordinary meaning. In the construction of a deed, the question is not what the parties may have intended, as the intention of the parties is not admissible, but what is the meaning of the words they have used.[46]

The Supreme Court held that in the first place intention must be gathered from the document itself; that if the words are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out.[47]

The general principles may be summarised as follows.—Where the document is plain and unambiguous, one has to read the words in their ordinary and grammatical meaning unless it leads to an absurdity and is repugnant to the intention of the parties as can be gathered from the other parts of the document.[48]

Subsequent conduct of parties would be an irrelevant consideration, where the words are clear or the question is purely one of construction of the deed.[49]

However, it is open to see what preceeded the execution of the document, when the meaning of the words is not clear.[50] When the question of interpretation is involved, it would not be permissible for any court to call upon a witness to explain the language of the document unless the witness is an expert within the meaning of the Evidence Act, as it is the duty of the Court to interpret.[51]

Extrinsic evidence of every material fact which will enable the Court to ascertain the nature and qualities of the subject-matter of the instrument, or, in other words, to identify the person and things to which the instrument refers, is admissible (1). Thus, where there is a written agreement to deliver a quantity of grain at a particular time, parol evidence is admissible under certain limitations to show what kind of grain the contracting parties had in their contemplation at the time the contract was made (2).[52]

Normally extrinsic evidence is not admissible to explain the patent ambiguity because the court is not expected to make instruments but only to interpret them. The Allahabad High Court held that Section

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42. *Bylis* v. *Attorney General*, 2 Atk 239.
43. *Keshaulal Lallubhai Patel* v. *Lalbhai T. Mills Ltd.*, AIR 1958 SC 512.
44. *Doe Dem. Gwillim* v. *Gwillim*, (1833) 5 B & Ad. 122, 129.
45. *Narayana Swami* v. *R*, AIR 1939 PC 47.
46. *Manindra* v. *Durga*, 1917 PC 23.
47. *Chunchun* v. *Ebadat Ali*, AIR 1954 SC 345.
48. *Khan Gul* v. *Lakha Singh*, AIR 1928 Lah 609 (FB); *Ramprashad Sahu* v. *Basantia*, AIR 1925 Pat 729.
49. *Baraboni Concern Ltd.* v. *Gokulananda*, AIR 1934 PC 58; *Rustomji* v. *Dhairyawan*, AIR 1930 PC 165.
50. *Secretary of State* v. *Abdul Rahim*, 1928 Mad 1246.
51. *R.* v. *Nathalal*, AIR 1939 Bom 339.
52. *Valla Hataji* v. *Sidoji Kondaji*, (1868) 5 BHC (ACJ) 87; *Ibid.*

93 does not affect the power of the court to fill in the blanks or omissions by applying the ordinary rules of construction of documents, though extrinsic evidence is not admissible.[53]

Where the question is as to the meaning of the words in a document, evidence is admissible to show in what peculiar sense a particular word was used, and extrinsic evidence including the evidence of subsequent conduct of the parties to determine the intention of the parties and the effect of the document is admissible.[54]

Where *Khasra* numbers were not given in the sale deed due to inadvertence and later a rectification deed was executed it was held that evidence of the later deed was not extraneous evidence as contemplated by Section 93 and it was admissible.[55]

3. CASES OF PATENT AMBIGUITY

Where a document showed acknowledgement of debt and also the mode of repayment in annual instalments of Rs. 500/- and over, it was held that the mode of payment was void for uncertainty but as that *clause* was severable from the *clause* acknowledging the debt, the document is to be considered as a receipt simpliciter without an agreement to pay and no oral evidence can be given under Section 93 as to mode of repayment.[56]

Where a notice was sent purporting to cancel two powers of attorney, one special and one general, and when only "a power of attorney" was referred three times in the notice, but did not refer to any special or general power of attorney, it was held that it could not be deemed to have cancelled any of such powers when the two powers of attorney were different in nature and served two different purposes and under Section 93 evidence can not be given of the facts which would show its meaning or supply its defects.[57]

In the case of an arbitration *clause* in a contract either the word "Chief Engineer" or the "Additional Chief Engineer" was intended to be retained by striking of one of them. But both of them were retained in the particular *clause*. It was held that though by inadvertence or neglect, the parties had not struck out any one of the two from the standard *clause* it was absolutely necessary to give the *clause* a definite meaning; ambiguity was therefore patent and so void for uncertainty, unless the ambiguity could be cured by election.[58]

4. LATENT AMBIGUITY

In the case of latent ambiguity it was held that the construction put on the document by the parties themselves is the one which may safely be adopted.[59]

5. NO AMBIGUITY

Before Section 93 of this Act could apply, it must be shown that there is patent ambiguity. Section 93 cannot possibly be a bar for showing how a *challan* filed along with an election petition is to be interpreted, when there is no ambiguity in the *challan* at all.[60]

Where the terms of a bonus agreement, between the employer and the workers, are free from ambiguity, it was held that the evidence of the employer either to explain or to contradict the terms cannot be allowed.[61]

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53. *U.P. Government* v. *Lala Nanhoo*, 1960 All 420.
54. *State* v. *Bundi Electric Supply Co.*, 1970 Raj 36.
55. *Brij Lal* v. *Kartar Kaur*, AIR 1988 P&H 88.
56. *Hiralal Seal* v. *Sankarlal Sharma*, ILR (1969) 2 Cal 503.
57. *Harbans Singh* v. *Shanti Devi*, ILR (1977) 2 Del 649.
58. *Kerorimal Adwani Seth* v. *Union of India*, AIR 1959 Cal 430.
59. *Abdulla Fazal* v. *Virji*, AIR 1951 Kutch 42.
60. *Beli Ram* v. *Election Tribunal*, AIR 1958 J&K 54.
61. *Dalmia Cement Co.* v. *Industrial Tribunal, Madras*, (1960) 1 Lab LJ 628 (Mad).

Exclusion of evidence against application of document to existing facts.

S. 94. When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

ILLUSTRATION

A sells to *B*, by deed, "my estate at Rampur containing 100 bighas." *A* has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

SYNOPSIS

1. *Principle and Scope* ... 848
2. *Construction of Bonds* ... 848
3. *Natural meaning has to be given to the words* ... 849
4. *Admissibility of extrinsic evidence* ... 850

COMMENTS

1. PRINCIPLE AND SCOPE

This section says that when the language is plain in itself *i.e.* does not admit any ambiguity and applies to the existing facts, no evidence is permissible to show that it was not meant to apply to such facts. This section does not speak of any patent or latent ambiguity in any document.

LORD HALSBURY observed "The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous. So far as I am aware, no principle has ever been more universally or vigorously insisted upon than that written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself."[62]

The general rule is to give the words their natural meaning unless when applied to the subject-matter they result in an absurdity or such great inconvenience that the court concludes that the words would not have been used in their proper signification.[63]

In re : *Gale*[64] the testator gave his property to an unmarried woman with whom he was living 'during her widowhood'. Her identity was clear but as she was unmarried she could not be the testatory widow after his death and the expression 'during her widowhood' was unmeaning and hence it was ignored and the bequest upheld.

Where the language in its ordinary sense properly applies to the facts without any difficulty, evidence to show that it bears a different meaning will be rejected, as it contradicts the document.

Section 94 will apply only when the execution of the document is admitted and no vitiating circumstance has been put forward against it. Oral evidence of the witnesses in the proceedings of the Board in a Court Martial case are admissible in evidence.[65]

2. CONSTRUCTION OF BONDS

The Supreme Court in *Kamala Devi* v. *Takhatmal*[66] held that Section 94 lays down a rule of interpretation of the language of a document when it is plain and applies accurately to existing facts; it says that evidence may not be given to show that it was not meant to apply to such facts. (Note:—the words "may be given" was used by the Supreme Court though in the section "may not be given" was used; it is obviously a mistake). The Supreme Court observed that when a court is asked to interpret a document, it looks at its language; if the language is clear and unambiguous and applies accurately to

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62. *North Eastern Ry. Co.* v. *Hastings*, 1900 AC 260.
63. *Great Western Ry.* v. *Bristol Corporation*, (1918) 87 LJ Ch 414.
64. (1941) Ch 209.
65. *General Court Martial* v. *Amiej Singh Dhaliwal*, AIR 1998 SC 983 : 1998 Cr LJ 1402.
66. AIR 1964 SC 859.

existing facts, it shall accept the ordinary meaning; sometimes when it is said that a court shall look into all the circumstances to find an author's intention, it is only for the purpose of finding out whether the words apply accurately to existing facts; but, if the words are clear in the context of the surrounding circumstances, the court cannot rely on them to attribute to the author an intention contrary to the plain meaning of the words used in the document; In construing the terms of a security bond, if the language is plain and applies to the existing facts and in which no ambiguity or inconsistancy of the kind dealt with by Sections 95 to 98 exists, it is not permissible to rely on the surrounding circumstances under which the bond came to be executed.[67]

Under this section evidence to show that common words, whose meaning is plain, not appearing from the context to have been used in a peculiar sense, have been in fact so used, is not admissible.[68]

3. NATURAL MEANING HAS TO BE GIVEN TO THE WORDS

The duty of the court is not to probe in depth to ascertain one's undisclosed intention, but only to take the ordinary and natural meaning of the words used.[69]

If the words in a document are unambiguous and the difficulty is only grammatical, extrinsic evidence is not admissible.[70] Where the document shows that only 5 pies share in the *Zamindari* was mortgaged, oral evidence is not admissible to prove that the mortgagor intended to mortgage his entire *Zamindari*, when the deed is clear and unambiguous.[71] Where '*Sir* lands' were sold extrinsic evidence cannot be allowed to show that what were intended to be sold were not '*Sir* lands' but '*Sir* rights.'[72]

In PHIPSON on Evidence (15th Edn. (2000), Paras 43-46, page 1232) it is observed, "In the case of property, where proof has been given of a subject- matter satisfying all the terms of a written description, the maxim *non accipi debent verba in demonstrationem falsam quae competunt in limitationem veram* applies, and extrinsic evidence cannot be given to show that something more or less extensive was intended.[73]..... This applies not only to descriptions in the deed itself but to those in a map or schedule referred to therein;[74] though it is otherwise where such map is clearly erroneous[75], or on too small a scale to be effective[76] or where, though attached to the deed, it is not referred to therein.[77] A plan attached to a conveyance may rebut the presumption that would otherwise arise from the existence of a hedge and ditch on the boundary.[78] So, with regard to personal property; thus, where there is a specific bequest and proof of property correctly answering the description, evidence is not admissible to extend it to other property.[79]

If a person, known to the testator, accurately fufils the words in a will, evidence cannot be given to show that such person was not intended.[80]

Children means legitimate children and any evidence *de hors* the instrument itself to show that the settlor must have meant to use ordinary words otherwise than in their usual meaning cannot be allowed.[81]

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67. *Bhadu* v. *Ganpati*, 1931 Nag 25.
68. STEPHEN'S Dig., Art. 91.
69. *Kamala Devi* v. *Takhatmal*, AIR 1964 SC 589; *Rahim Baksh* v. *Shajad*, 19 CWN 1311.
70. *North Eastern Ry. Co.* v. *Hastings*, 1900 AC 260; *Higgins* v. *Dawson*, (1902) AC 1.
71. *Uma Shanker* v. *Ram Agyan*, AIR 1939 All 231; *Gobind Behari* v. *Shujaad Mond. Khan*, AIR 1938 All 364.
72. *Dhanpatti* v. *Badri Singh*, AIR 1935 All 729.
73. *Horwood* v. *Griffith*, 4 De G.M. & G. 700, 708; *Hardwick* v. *Hardwick*, LR 16 Eq 168, 175; Re : *Seale*, (1894) 1 Ch 316.
74. *Lyle* v. *Richards*, LR 1 H.L. 222; *Barton* v. *Dawes*, 10 CB 261; *Llewellyn* v. *Jersey*, 11 M&W 183; *Boyle*, v. *Mulholland*, Ir. R. 10 C.L. 150.
75. *Lyle* v. *Richards*, *ante*; *Re Boulter*, 4 Ch. D. 241; post Rule III.
76. *Taylor* v. *Parry*, 1 Scott N.R. 576; *St. Leonards* v. *Ashburner*, 21 L.T. 595; *Wigginton & Milner Ltd.* v. *Winster Engineering*, (1978) 1 W.L.R. 1462; *Scarfe* v. *Adams*, (1981) 1 All E.R. 843 at 851; *Mayer* v. *Hurr*, (1985) 49 P&C.R. 56; *Scott* v. *Martin*, (1987) 1 W.L.R. 841.
77. *Ibid*; *Wyse* v. *Leahy*, Ir. R. 9 C.L. 384; Re : *Otway*, 13 Ir. Ch. 22, 233-234.
78. *Fisher* v. *Winch*, (1939) 1 K.B. 666; **see also** *Rouse* v. *Gravelworks*, (1940) 1 K.B. 489.
79. *Horwood* v. *Griffith*, 4 De GM & G 700, 708.
80. *Sherrat* v. *Mountford*, (1873) LR 8 Ch 928; *Re Woodverton*, 7 Ch D 197, 199.
81. *Hooi Leong* v. *Khoo Hean Quee*, 96 LJPC 94.

In England, by the Family Law Reform Act 1969 any reference to the child of any person is construed as or as including a reference to the illegitimate child of that person.

The Privy Council observed that it would not be permissible to allow evidence of subsequent conduct to show that it was not meant to apply to such facts.[82]

Where the language is plain and unambiguous the intention of the parties has to be gathered from the language.[83] itself without taking the aid of surrounding circumstances.

While the true construction of an obscurely framed document may be determined by reference to the conduct of the parties, no such procedure is admissible when the terms of the instrument are unambiguous, for no amount of acting by the parties can alter or qualify words which are plain and unambiguous.[84] If there is no ambiguity in a document, the mere fact that parties have acted on an erroneous construction of an instrument furnishes in itself no reason why the Courts should not follow the general rule that an instrument should be construed according to its natural meaning in the light of the circumstances in which it was executed.[85]

When the original *Sanad* in regard to an ancient grant was produced and no ambiguity was found, it was held that conduct of parties cannot be looked into in interpreting the *Sanad*.[86] When a document like a promissory note, having some value and sanctity is in evidence, it outweighs everything else on record. Hence, it is not the calibre of oral evidence but intrinsic evidence of the promissory note that is material.[87]

In a libel case the Privy Council held that the plaintiff's witnesses can not be asked what they would mean by the words used, which were complained of, because it is a question for the court or the jury to decide; the witnesses can only depose that they understood the words as referring to the plaintiff.[88]

4. ADMISSIBILITY OF EXTRINSIC EVIDENCE

Where there were two wills executed on two different dates and the later will was ambiguous on the face of it, as to whether it was in substitution or in addition to the earlier will, it was held that extrinsic evidence can be admitted to ascertain the testator's intentions.[89] Where in a lease agreement payment of interest on arrears of rent was stipulated but not its mode of payment, it was held that the collector was not prevented by Section 94 from deciding the mode and direct writ petition for the purpose was not maintainable.[90]

A vendee filed a suit for declaration that he was the owner of *Khasra* No. 867 and that by mistake No. 855 was mentioned in the sale deed. In the sale deed it was mentioned that the vendors were in possession of No. 855 and put in possession of the vendees. It was held that Section 94 would not apply because the language in the sale deed did not apply to the existing facts, inasmuch as it was stated in the sale deed that the vendors were in possession of No. 855 and the vendee was put in possession, while as a matter of fact vendors were not in possesson, though they were the owners thereof, of No. 855.[91]

Section 92 proviso (6) states that any fact may be proved which shows in what manner the language of a document is related to the existing facts.

Under Section 94 no evidence can be allowed to show that the language in the document was not meant to apply to facts to which it accurately applies. Thus the difference is clear. The main principle of Section 92 is to see that no evidence should be permitted for the purpose of contradicting, varying, adding to or subtracting from the terms of a contract, grant or other disposition of property or any matter

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82. *Baraboni Concern.* v. *Gokulananda*, AIR 1934 PC 58.

83. *Babu* v. *Sitaram*, 3 Bom LR 768; *Velappa* v. *Palani*, 1915 MWN 325 : AIR 1915 Mad 1079.

84. *Ghellabhai Atmaram* v. *Nandubai*, ILR (1896) 21B 335, 344.

85. *Dhanpatti* v. *Badri Singh*, AIR 1935 All 729 : 156 IC 53; *Velappa Gounden* v. *Palani Gounden*, 29 IC 201; *President, Taluq Board, Peddapur* v. *Chilakamani Dharmacharlu Garu*, 12 IC 146; *Dhanpatti* v. *Badri Singh*, AIR 1935 All 729 : 156 IC 53.

86. *Somar Puri* v. *Shyam Narain Gir*, AIR 1954 Pat 586.

87. *A. Rangappa* v. *P. Krishnamurthy*, 1996 AIHC 4488 (para 3) (Kant).

88. *Advocate Co. Ltd.* v. *Arthur Leslie Abraham*, AIR 1946 PC 13.

89. *Rajalu Naidu* v. *Kothandarama Naidu*, AIR 1965 Ker 122.

90. *Tata Iron & Steel Co. Ltd.* v. *State of Bihar*, AIR 1996 Pat 37 (paras 11 and 13).

91. 1963 Cur LJ 156 (Punj).

required by law to be reduced to the form of a document. Sections 94 and 95 when read with the main principle laid down in Section 92 clearly suggest that Section 92 proviso (6) comes into play only when there is latent ambiguity in a document.[92]

Evidence as to document in, unmeaning reference to existing facts

S. 95 When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

ILLUSTRATION

A sells to *B*, by deed, "my house in Calcutta".

A had no house in Calcutta, but it appears that he has a house at Howrah, of which *B* had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah.

COMMENTS

1. PRINCIPLE AND SCOPE

This section and Sections 96 and 97 deal with documents which contain latent ambiguities.

Where the language of a document is plain in itself but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense. It is based upon the maxim *falsa demonstratio non nocet* (a false description does not vitiate the document).

The illustration to this section shows that if A sells to B "my house in Calcutta", and if A has no house in Calcutta but has a house in Howrah, of which B has been in possession since the execution of the deed, these facts may be proved to show that the deed related to the house in Howrah.[93]

Section 96 deals with a case where the language used might have been meant to apply to any one by several persons or things and could not have been meant to apply to more than one.

Section 97 refers to a case where the langauge in the document applies partly to one set of existing facts and partly to another set of facts as explained by the illustration thereunder.

Section 97 is a part of the rule in this section, and both the sections must be read together.

The rule regulating the admission of extrinsic evidence in the latter of these classes, *i.e.*, cases falling within Section 97, is merely in extension and application of the rule governing the admission of extrinsic evidence in the former class of cases, *i.e.*, cases falling within Section 95.[94] Section 95 of the Evidence Act "formulates the general rule with regard to imperfect descriptions embodied in the maxim *falsa demonstrati non nocet* (a false description does not vitiate the document), while the former (Section 97) deals with a particular form of imperfect description, namely, when such description applies to a double and not to a single set of facts".[95]

The rule embodied in Sections 95 and 97 is the same as that prevailing in England. Whereas all kinds of extrinsic evidence is admissible in the cases covered by the sections, in England direct declarations of intention of the maker of the instrument cannot be given.

The law in England is stated by PHIPSON as follows: (PHIPSON ON EVIDENCE, 15th Edn. (2000), Paras 43-40, page 1227) "(*a*) When the words of a document, in their primary or ordinary sense, are applicable to the facts, and are not modified by the context, extrinsic evidence cannot be given to show that they were not used in that sense (*b*). But where it is clear, either from the context or the facts, that such meaning cannot have been intended, extrinsic evidence (including surrounding circumstances, treatment and habits of speech, but *not* declarations of intention) may be given to show that they were used in some secondary or less ordinary sense, provided it is one which the words can properly bear."

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92. *Ram Narain Prasad Singh* v. *Manki Singh*, AIR 1954 Pat 562; *Bolumal Dharamdas Firm* v. *Venkatachalapethi Rao*, AIR 1959 AP 612; *Darshan Dass* v. *Ganga Bux*, AIR 1962 Pat 53.
93. *Karuppa Goundan alias Thoppala Goundan* v. *Periathambi Goundan*, ILR (1907) 30 Mad 397, 399.
94. WOODROFFE, Ev. 9th Ed. 689; CUNNINGHAM, Ev. 276.
95. WOODROFFE, Ev. 9th Ed. 689.

It was held by the Privy Council that where it was impossible to reconcile the statement in an agreement for the sale of land with the recitals in the schedule as to the extent of the land to be conveyed, extrinsic parol evidence is admissible to explain the facts that led to the execution of the document in order to reconcile the conflicting statements in regard to the property sold.[1]

Where the words of a grant are clear, certain, and unambiguous they should be interpreted in their plain ordinary grammatical meaning, but where they give rise to latent ambiguity extrinsic evidence would be admissible for construing the grant.[2]

Where a *Jalkar* "situated in *Mauza Moriar*" was leased but in fact it was situate in a village *Morsandi*, it was held that the reference to *Mauza Moriar* was through misapprehension as the *Jalkar* was in the vicinity of *Moriar*, and oral evidence was admissible to show that what was leased out was the *Jalkar* in *Morsandi*.[3] Where there was an order of allotment referring to accommodation situated at a particular place though in fact the accommodation was situated at another place and the parties were aware which accommodation was meant by the order, it was held that under this section the allottee can adduce evidence to prove to which accommodation the order relates and the slight error in location would not make the order invalid.[4] Where two wills were executed on two different dates, and the later will raised ambiguity on the face of it as to whether it was in substitution for or in addition to the earlier one, it was held that extrinsic evidence can be admitted to ascertain the testator's intention.[5] Where a bequest was made to "A, my *aurasa son*" knowing that A was not his *aurasa son*, it was held that the misdescription was immaterial and oral evidence was admissible to show A was the legatee.[6] Where the recitals in a sale certificate though plain in themselves, do not fit in with the admitted facts namely the survey number, the names of the tenants and the area of the plot of land sold and a doubt arises that either the survey number or the names of the tenants and the area given must be wrong, extrinsic evidence was held admissible.[7]

Where a notice for forfeiture of a bond was given, stating that in case of non- appearance the amount of the bond would be forfeited to "King Emperor" instead of "State", it was held that the misdescription in the notice does not invalidate the notice.[8] Where there was a conflict between the description of area given in a compromise petition and the decree based on it, and the actual measurements, it was held that the former would prevail.[9] Where sufficient description of the premises is set forth by giving the name of the particular field or othewise, a false description added thereto (*e.g.*, the mention of a wrong survey number) may be rejected.[10] In the case of sale of property in the execution of a decree (under Order XXI, Rule 90, C.P.C.), the doctrine was applied and the misdescription of property was ignored and the sale was upheld.[11]

It is settled law that in a private sale the area within the boundaries specified prevailed over the extent, on the application of the principle of *Falsa demonstratio non nocet* (false description does not vitiate). Even in the case of sale certificates (issued in court sales) in the first instance the area within the boundaries must be held to prevail over the extents. But under Sections 95 and 97 of the Evidence Act, the parties can lead extrinsic evidence to show what was the true state of affairs that is to say, whether the whole land lying within the boundaries described was taken possession of and enjoyed in fact or only the extent specified was taken possession of and enjoyed. The real intention of the parties has to be gathered not merely from what is set out *ex facie* in the document in question, but also from the extrinsic evidence of user.[12]

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1. *Hussanally* v. *Mangaldul*, AIR 1921 PC 40.
2. *Devandra Singh* v. *State of M.P.*, 1976 MPLJ 437.
3. *Ramlakhan* v. *Digbijay*, AIR 1948 Pat 274.
4. *Shamsher Bahadur* v. *State of U.P.*, AIR 1964 All 395; **see also** *Annathuri* v. *Ramanuja*, 22 MLJ 411.
5. *R. Souri Rajulu Naidu* v. *Kothandarama Naidu*, AIR 1965 Ker 122.
6. *Court of Wards* v. *Venkata*, ILR 22 Mad 383. **see also** *Aijaz* v. *Ram Sarup*, AIR 1931 Oudh 54. (creditor's name was noted as K instead of R in the acknowledgement.)
7. *Basudev Das* v. *Somenath Das*, AIR 1964 Ori 63.
8. *Rahimullah* v. *State*, ILR (1973) 1 All 167.
9. *Kali Saran Nanak Chand* v. *Hari Ram*, AIR 1958 Punj 13.
10. *Santaya* v. *Savitri*, (1902) 4 Bom LR 871; *Mahabir Prasad* v. *Masiatulah*, ILR (1915) 38 All 103.
11. *Sheodhyan Singh* v. *Sanichara Kuer*, AIR 1956 Pat 349.
12. *Basava-punna-reddy* v. *Krishnayya*, AIR 1966 AP 260; *Perraju* v. *Venkamma*, AIR 1971 AP 74; *Roy & Co* v. *Nani Bala Dey*, AIR 1979 Cal 50; *P K A B Co Op Society* v. *Govt. of Palestine*, AIR 1948 PC 207; *Kasuppa Goundan* v. *Pesjathambi Goundan*, ILR (1907) 30 Mad 397.

In a contract of sale where there was conflict between the boundaries given for the land and extent of the area, it was held that the intention must be gathered from the circumstances that led to the contract of sale.[13]

2. SECURITY BONDS

Where the words or terms of a security bond which was ordered by the court to be given, are ambiguous, the bond is to be construed in the light of the order of the court and the antecedent circumstances.[14]

Evidence as to application of language which can apply to one only of several persons.

S. 96. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

ILLUSTRATIONS

(*a*) *A* agrees to sell to *B*, for Rs. 1,000, "my white horse". *A* has two white horses. Evidence may be given of facts which show which of them was meant.

(*b*) *A* agrees to accompany *B* to Haidarabad. Evidence may be given of facts showing whether Haidarabad in the Dekkhan or Haidarabad in Sind was meant.

COMMENTS

1. PRINCIPLE AND SCOPE

This section also deals with latent ambiguity. In this section, the ambiguity arises when the facts in the language of the document are meant to apply to one, but they may also mean as applying to more than one person or thing. Illustrations (*a*) and (*b*) amply demonstrate, how the latent ambiguity would arise from the words in the document.

In illus. (*a*) selling of a white horse is a fact which is clear and unambiguous because "a horse" means only one horse. As the vendor had two white horses the ambiguity arises as to which horse was intended to be sold. Similarly, in illus. (*b*) to which Hyderabad A agreed to accompany B is the ambiguity. To have the clarification of the fact, declaration of the intention by the party who agreed either to sell or to accompany illus. (*a*) and (*b*) would become necessary and such evidence may be given under this section.

Where the language of a document, though intended to apply to one person or thing only, applies equally to two or more, and it is impossible to gather from the context which was intended, an equivocation arises, *e.g.*, when the same name or description fits two persons or things accurately; when the same name or description fits two objects equally but subject to a common inaccuracy, provided that the inaccuracy be a mere blank or applicable to no other person or thing.

This section modifies the rule laid down in Section 94 by providing that where the language of a document correctly describes two sets of circumstances but could not have been intended to apply to both, evidence may be given to show to which set it was intended to apply. Here the language is certain. The doubt as to which of similar persons or things the language applies has been introduced by extrinsic evidence.[15]

STEPHEN in his Digest (Art. 91) observed "Proof may be given of every fact which identifies any person or thing mentioned in a document in which the relation of the words to facts has to be ascertained. If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given, both of the circumstances of the case and of the statements made by any party to the document, and as to his intentions in reference to the matter to which the document relates."

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13. *Hara Krishna Dewan* v. *Ram Surat Pandey*, AIR 1952 Tripura 28.
14. *Jiban Krishna* v. *N.B. Coal Co. Ltd.*, AIR 1965 Cal 242; *B. Nagappa Naik* v. *Manianath Das Desai*, AIR 1959 Mys 165; *Swaminatha Iyre* v. *Srinivasa Ammal*, (1970) 2 MLJ 636; *Raghunandan* v. *Kirtyanand*, AIR 1932 PC 1; *Mahendra Nath* v. *Satish Chandra*, AIR 1934 Cal 569 : ILR 61 Cal 590.
15. *Doe'd Hiscoks* v. *Hiscoks*, (1839) 5 M&W 363; *Nga Cho* v. *Mi Se Mt.*, (1916) 2 UBR 110; STEPHEN'S Dig., Art 91.

This type of latent ambiguity is known as "Equivocation". This ambiguity is not discovered till the instrument is sought to be applied to external circumstances. Extrinsic evidence including the declarations of intention of the author of the document is allowed to be admitted by this section to show to which person or thing the words were intended to apply.[16]

The Principle in Sections 96 and 97 is based on the Maxims *"Veritas nominis tollit errorem demonstrationem; nihil facit error nominis cum de corpore constat; falsa demonstratio non nocet cum ae corpore constat."* All the three maxims mean that a false description does not vitiate a document.

PHIPSON (PHIPSON ON EVIDENCE, 15th Edn. (2000), Paras 43-52, p. 1237) states "When the language of a document, though intended to apply to one person or thing only, is equally applicable in all its parts to two or more, and it is impossible to gather from the context which was intended, an equivocation arises, and in addition to the evidence admissible under former rules, (Proviso 6 to Section 92, Sections 95, 97) direct declarations of the writer's intention may be given to solve the ambiguity."

WIGRAM gives the rule as follows:

Where the object of the testator's bounty or the subject of disposition (*i.e.* the person or thing intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator.

(See also Section 80 Indian Succession Act *Deo* v. *Hiscocks*.[17] In this case a Government notification was in relation to 'Hossainpur' and there were two places 'Hossainpur' and land of 'Hossainpur Mouza'. It was held extrinsic evidence was admissible to show which place was intended.

The Madras High Court in *M. Achuttan* v. *T. Achuttan*[18] held that where a pronote bears both English and Malayalam dates, the correct date has to be decided by allowing evidence under Section 96. Extrinsic evidence is admissible to show to which of two debts an acknowledgment was intended to apply.[19]

One testatrix in her will bequeathed "my five row diamond bracelet" to one person and another bequest was given to another stating "my diamond chain bracelet". As a fact she owned only one diamond bracelet with eight rows of diamonds. It was held that as there was latent ambiguity extrinsic evidence was admissible and as the article being divisible each beneficiary was entitled to a moiety.[20]

Evidence of conduct comes within this section.[21] Where an agreement of reference to arbitration does not refer to the disputes referred, the conduct of the parties is admissible to find out what disputes were referred.[22]

Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies.

S. 97. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

ILLUSTRATION

A agrees to sell to *B* "my land at *X* in the occupation of *Y*". *A* has land at *X*, but not in the occupation of *Y*, and he has land in the occupation of *Y*, but it is not at *X*. Evidence may be given of facts showing which he meant to sell.

COMMENTS

This section is an extension of the rule in Section 95. Under this section the language used in the document applies partly to one set of existing facts and partly to another set of existing facts, but if all

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16. *Chairman Seraiganj Municipality* v. *Chittagong Co. Ltd.*, 36 CLJ 242 : 72 IC 696 : AIR 1923 Cal 32.
17. 5 M&W 363.
18. *Achutan Nayor* v. *Achuthan Nayar*, AIR 1941 Mad 587.
19. *Nihalm Ram* v. *Radan Ram*, 155 IL 1074.
20. *Alexander's will, Re*, (1948) 2 All ER 111.
21. *Ali Abbas* v. *Sher Bahadur Singh*, 1925 Oudh 264.
22. *Rami Naidu* v. *Seethan Naidu*, AIR 1935 Mad 276.

the facts are taken together they would not apply to either. In such cases extrinsic evidence may be given to show to which of the two, the language was meant to apply.

This section is based upon the maxim *falsa demonstratio non nocet.*

Sections 95, 96 and 97 all deal with latent ambiguity. "Where in a written instrument the description of the person or thing intended is applicable with legal certainty to each of serveral subjects, extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such subjects was intended by the author." (TAYLOR, 12th Edn., S. 1226, p. 787). The rule rejecting erroneous description not substantially important is applicable only where there is enough to show the intention clearly.

The illustration to this section shows that if A agrees to sell to B "my land at X in the occupation of Y", and A has land at X but not in the occupation of Y, and has land in the occupation of Y but it is not at X, evidence may be given to show which land was intended to be sold.

Another common case is where land within certain boundaries is sold and is wrongly described as containing a certain area, the error in area is regarded as a mere misdescription and does not vitiate the deed. The maxim *falsa demonstratio non nocet* applies.[23]

Where the document of sale, mentions the boundaries which indicate that the whole plot was sold, but another part of it shows the survey number which indicates that only part of the plot was the subject-matter of sale, extrinsic evidence is admisible to show whether the whole or only a part of the plot is intended to be sold.[24] Where a statement in the document was in conflict with the schedule, as to the extent of land to be conveyed under the document, it was held that parol evidence was admissible to explain the fact that led to the execution of the agreement in order to reconcile the different statement in respect of the property sold.[25] Where there was an agreement by a vendor to sell his land to several persons, but in the body of the agreement only one person was named and "to others" was added it was held that parol evidence is admissible to identify the other vendees.[26]

Where a bequest was made by a person to his 'wife Caroline' whom he had married after his wife Mary left him (though Caroline was not his legally wedded wife as the marriage was bigamous) it was held that Caroline took the legacy.[27]

Evidence as to meaning of illegible characters, etc.

S. 98. Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense.

ILLUSTRATION

A, a sculptor, agrees to sell to *B*, "all my mods". *A* has both models and modelling tools. Evidence may be given to show which he meant to sell.

COMMENTS

1. PRINCIPLE AND SCOPE

This section enables the party to give evidence to show the meaning of illegible or not commonly intelligible characters, foreign, obsolate, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense. Section 45 of this Act says the opinion of experts or specially skilled persons in regard to foreign law, Science or Art or as to handwriting or finger impressions, is relevant.

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23. *Karuppa Goundan* v. *Periathambi Goundan*, ILR (1907) 30 Mad 397; *Pahalwan* v. *Muhessur*, 16 WR 5 (PC); *Triboobandas* v. *Krishnasam*, 18 B 283; *Bholanath* v. *Mrityunjoy*, 59 CLJ 532; *Basavapunnareddy* v. *Krishnayya*, AIR 1966 AP 260; *Banaphal Singh* v. *Noor Mohammad*, 1935 All 662; *Durga Pd Singh* v. *Rajendra*, ILR (1913) 41 Cal 493; *P.K.A.B. Co. Op. Society* v. *Govt. of Palestine*, AIR 1948 PC 207; *Kali Saram* v. *Hari Ram*, AIR 1958 Punj 13; *Roy & Co.* v. *Mani Bala*, AIR 1979 Cal 50.
24. *Banaphal Singh* v. *Noor Mohammad*, AIR 1935 All 662.
25. *Hussanally* v. *Mangaldas*, AIR 1921 PC 40.
26. *Vedamurthi* v. *Jawalapuram*, 42 MLJ 475 : 65 IC 973.
27. *Deo* v. *Rouse*, 5 CB 422; **see also** *Taylor* v. *Hammond*, 34 ChD 255; *Ryall* v. *Hannam*, (1874) 76 RR 201.

Under Section 49 the opinion of persons having special means of knowledge in regard to meaning of words or terms used in particular districts or by particular class of people or of usages and tenents is relevant. For the purpose of this section such opinion referred to in Sections 45 and 49 can be obtained,

Section 57, *clause* (13) provides that on all matters of public history, literature, science or art the court may resort for its aid, to appropriate books or documents of reference.

Section 92, proviso (5) speaks of usage or custom in regard to which parol evidence is admissible but such evidence should not be repugnant to or inconsistant with the terms of the contract.

The evidence cannot properly be said to vary the written instrument; it only explains the meaning of expressions used. Mercantile usage has given special meanings to many ordinary words. Evidence of the meaning which these words bear in mercantile transactions can be given under this section.

The principle upon which words are to be construed in instruments is very plain. Where there is a popular and common word used in an instrument, that word must be construed *prima facie* in its popular and common sense. If it is a word of a technical or legal character it must be construed according to its technical or legal meaning. If it is a word which is of a technical and scientific character, then it must be construed according to that which is its primary meaning, namely, its technical and scientific meaning. But before you can give evidence of the secondary meaning of a word, you must satisfy the court from the instrument itself or from the circumstances of the case that the word ought to be construed, not in its popular or primary signification, but according to its secondary intention.[28]

Where the point in dispute is as to the meaning of a particular word in the document, evidence may be admitted to show in what peculiar sense that particular word is used, and extrinsic evidence including the evidence regarding the subsequent conduct of the parties is admissible to determine the effect of the instrument as well as the intention of the parties.[29]

WIGMORE on Evidence (Section 2465) states: "There is no reason, in the nature of things, why the individual parties to a transaction may not employ words in a particular sense, irrespective of the ordinary or popular sense; because what we are seeking, in interpretation, is their actual standard, and the popular standard is merely taken provisionally, as presumably theirs. It can thus be, in theory, only a question of fact in each case whether the parties were using a special mutual sense..... there is no transaction whatever in which, for some idea or other, the parties do not use words in a sense of their own. Having themselves locked up the idea in the words. They themselves must furnish the key to unlock it."

Notes in shorthand are 'not commonly intelligible characters and abbreviations' within the meaning of this section. But the report of a shorthand writer is strictly speaking not substantive evidence and can be used only as part of the oral evidence.[30]

The illustration to this section is based on *Goblet* v. *Beechey*[31] where the question was as to the meaning of 'modtools for carving' which were the subject of a bequest by a sculptor. The opinions of statuaries was admitted to prove that there were no such tools as modelling tools for carving and that the word 'mod' would be understood by a sculptor as an abbreviation for models.[32]

Where a subsequent inventor claimed a particular invention and the question was whether he used the specification of a prior invention the Privy Council held that it is a question of construction and parol evidence is admissible only for the purpose of explaining the words or symbols of art and other such like technical matters and of informing the court of relevant surrounding circumstances.[33]

It was held that the word 'year' in theatrical usage meant those parts of the year during which the theatre was open.[34]

Where gas meters were to be inspected "daily" it was held that the practice of the parties that they are not inspected on Sundays was held inadmissible.[35]

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28. *Holt & Co.* v. *Collyer*, (1881) 16 Ch D 718, 720.
29. *State* v. *Bundi Electric Supply Co. Ltd.*, AIR 1970 Raj 36.
30. *Laxmi Narayan* v. *Returning Officer*, (1974) 3 SCC 425 : AIR 1974 SC 66.
31. 3 Sim 24 : 9 LJ Ch 200.
32. 3 Sim 24 : 9 LJ Ch 200.
33. *Canadian G.E. Co.* v. *Fada Radio Ltd.*, AIR 1930 PC 1.
34. *Grant* v. *Maddox*, (1846) 15 MEW 737.
35. *L.C.C.* v. *South Metro Gas Co.*, (1904) 1 Ch 76.

October in a marine Contract of Insurance was understood as the period 25th to 31st of that month.[36]

The use of the word '1000 rabbits' in a lease of a rabbit warren was held to mean in that particular part of the country 1200 rabbits.[37]

2. ILLEGIBLE OR NOT COMMONLY INTELLIGIBLE CHARACTERS ETC.

In regard to meaning of the vernacular words (*e.g. Herkmi, Malguzari, Jama etc.*,) it was held by the Privy Council that it is desirable that the word used in vernacular should be inserted in brackets after the English rendering for assisting the court to determine which meaning is applicable to a particular case.[38]

It is the duty of the court to act upon an official translation unless its rejection is justified by an expert.[39]

A judge shall not attempt to translate, however qualified to translate, as he is not a witness and also the parties cannot test his translation.[40]

Who may give evidence of agreement varying terms of document.

S. 99. Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

ILLUSTRATION

A and *B* make a contract in writing that *B* shall sell *A* certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months' credit shall be given to *A*. This could not be shown as between *A* and *B*, but it might be shown by *C*, if it affected his interest.

COMMENTS

1. PRINCIPLE AND SCOPE

This section enables strangers to give evidence of any facts tending to show a contemporaneous agreement varying the terms of the original document.

Section 92 forbids the admission of evidence of an oral agreement for the purpose of contradicting, varying, adding to, or subtracting from, the terms of a written document as between the parties to such document or their representatives-in-interest.

The principle of Section 92 does not apply to third persons. If it were otherwise, third persons might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness, or fraud of the parties, and therefore, ought not to be precluded from proving the truth, however contradictory it may be to the written statements of others.[41]

On the contrary, this section distinctly provides that persons who are not parties to a document may give evidence tending to show a contemporaneous agreement varying the terms of the document.[42]

The illustration explains the principle of this section.

2. VARYING

In this section the word "varying" only is used, while in S. 92 the words are "contradicting, varying, adding to, or subtracting from". But it is difficult to see that in using the term "varying" only, anything less could have been meant than what is conveyed by the several expressions in S. 92 and as every

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36. *Chaurand* v. *Angerstein*, (1791) 1 Peake 43.
37. *Smith* v. *Wilson*, (1832) 3 B & Ad 728.
38. *Charu Chondra* v. *Kamakhya Nasair*, AIR 1931 PC 5.
39. *Sellamani Ammal* v. *Thillai Ammal*, 1946 PC 185; *Sasiman* v. *Shibnarain*, AIR 1922 PC 63; *Rajendra* v. *Gopal*, AIR 1930 PC 243.
40. *R.H.L.R. Bahadur Estates* v. *Hern Chandra*, AIR 1949 PC 179.
41. TAYLOR, 12th Edn. S. 1149, p. 735.
42. *Bageshri Dayal* v. *Pancho*, ILR (1906) 28 All 473, 474.

"contradicting," "adding to", or "subtracting from" would necessarily be a "varying" of the instrument, the Legislature apparently used that expression as sufficient to convey all that is denoted by the other different expressions occurring in the earlier section.[43]

The Supreme Court also observed "There is no doubt that S. 92 does not apply to strangers who are not bound or affected by the terms of the document. Persons other than those who are parties to the document are not precluded from giving extrinsic evidence to contradict, vary, add to or subtract from the terms of the document. It is only where a question arises about the effect of the document as between the parties or their representatives-in-interest that the rule enunciated by Section 92 about the exclusion of oral agreement can be invoked. This position is made absolutely clear by the provisions of Section 99 itself. Section 99 provides that "persons who are not parties to a document or their representatives-in-interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document." Though it is only variation which is specifically mentioned in Section 99, there can be no doubt that the third party's right to lead evidence which is recognised by Section 99 would include a right to lead evidence not only to vary the terms of the document, but to contradict the said terms or to add to or subtract from them. In that case the official assignee sought a declaration that a deed of gift executed by the insolvent was void. The appellants pleaded that the transaction was in reality a transfer for consideration. The official assignee objected that the evidence that was sought to be led in support of the plea was inadmissible. The Supreme Court held that the official assignee was not a representative of the insolvent and Section 92 did not apply."[44]

A stranger can show that the document of sale is really a deed of gift.[45]

The mortgagrs or their representatives cannot be permitted to say that they have no interest in the property that was mortgaged, but third parties to it can question the mortgagor's title to that property.[46]

Though a document *ex facie* shows that it is a mortgage, contemporaneous oral agreement to treat it as a sale can be proved by strangers to the document.[47]

The plaintiff sued to recover one-fourth of the price of a house alleged to have been sold by the first defendant, the claim being based upon a local custom. The transaction between the defendants was ostensibly not a sale but a usufructuary mortgage. It was held that the plaintiff, not being a party to the transaction, was entitled to give evidence to show that what purported to be a usufructuary mortgage was not in reality such, but was in fact a sale.[48]

In the case of an alienation of land in which a document has been executed purporting to be a deed of gift or mortgage, it is open to a third party claiming to exercise a right of pre-emption to prove that the transaction was in reality one of sale, and that the document sought to be impugned was executed in order to conceal its real nature and to defraud him of his legal rights.[49]

Contemporaneous oral agreement for repurchasing the property sold, can be proved by strangers and not by the vendor of the sale deed.[50]

Saving of provisions of Indian Succession Act relating to wills.

S. 100. Nothing in this Chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865) as to the construction of wills.

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43. *Pathammal* v. *Kalai*, ILR (1903) 27 Mad 329, 331; *Tarachand* v. *Baldeo*, (1890) PR No. 117 of 1890, FB (Civil); *Krishnaswami Iyer* v. *Mangalathammal*, 53 IC 243.
44. *Bai Hira Devi* v. *The Official Assignee of Bombay*, 1958 SCR 1384 : AIR 1958 SC 448.
45. *Ashfa* v. *Syed Nazir*, 53 IC 961 : AIR 1919 Oudh 420.
46. *Rukmani* v. *Anakamma*, AIR 1926 Mad 74.
47. *Sundarlal* v. *Mohanlal*, AIR 1953 MB 143.
48. *Bageshri Dayal* v. *Pancho*, ILR (1906) 28 All 473; *Rahiman* v. *Elahi Baksh*, ILR (1900) 28 Cal 70, **dissented from** *Pathammal* v. *Kalai*, ILR (1903) 27 Mad 329.
49. *Tara Chand* v. *Baldeo*, (1890) PR No. 117 of 1890, FB (Civil), *Parmanand* v. *Amrapat Ram*, (1899) PR No. 20 of 1899 (Civil); *Megha Ram* v. *Makhan Lal*, (1912) PR No. 67 of 1912 (Civil).
50. *Ma Mi* v. *Maung Anugh Dun*, AIR 1928 Rang 244.

PART III

PRODUCTION AND EFFECT OF EVIDENCE

CHAPTER VII

THE BURDEN OF PROOF

Burden of proof

S. 101. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

ILLUSTRATIONS

(a) *A* desires a Court to give judgment that *B* shall be punished for a crime which *A* says *B* has committed.

A must prove that *B* has committed the crime.

(b) *A* desires a Court to give judgment that he is entitled to certain land in the possession of *B*, by reason of facts which he asserts, and which *B* denies, to be true.

A must prove the existence of those facts.

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COMMENTS

1. PRINCIPLE AND SCOPE

Part III of the Act deals with the production and effect of evidence in five chapters namely Chapters VII to XI. Chapter VII deals with matters relating to burden of proof. Section 2 defines 'proved' by

stating that "a fact is said to be proved when after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it exists". Therefore proof means that "matter" from which the court either believes the existence of a fact or considers its existence so probable that a prudent man should act upon the supposition that it exists.

Section 101 attempts to define burden of proof. This provision proceeds to say in positive terms as to the person on whom burden of proof lies whereas Section 102 puts it in negative terms. These two provisions deal with a general situation and lay down general propositions, whereas sections 103 to Section 113-B deal with specific situations and can be viewed as exceptions to the general rule. While dealing with the specific situations, the provisions also mention about the presumptions which the court may or shall presume as well as what would be conclusive proof. See Section 4 for the difference between "may presume", "shall presume" and "conclusive proof".

The term *onus probandi*, in its proper use, merely means that, if a fact has to be proved, the person whose interest it is to prove it, should adduce some evidence, however slight, upon which a Court could find the fact he desires the court to find. It does not mean that he shall call all conceivable or available evidence.

The general rule that a party who desires to move the Court must prove all facts necessary for that purpose (sections 101-105) is subject to two exceptions:—

(a) he will not be required to prove such facts as are especially within the knowledge of the other party (Section 106); and

(b) he will not be required to prove so much of his allegations in respect of which there is any presumption of law (sections 107-113), or in some cases, of fact (Section 114) in his favour. For example, a very old man donated land and later sued for possession on the ground that the gift was not voluntary. The burden was upon the donee.[1]

The burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. This rule of convenience has been adopted in practice, not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable. Moreover, it is but reasonable and just that the suitor who relies upon the existence of a fact, should be called upon to prove his own case. In the application of this rule, regard must be had to the substance and effect of the issue, and not to its grammatical form, for in many cases the party, by making a slight alteration in the drawing of his pleadings, may give the issue a negative or affirmative form, at his pleasure.[2]

The party on whom the onus of proof lies must, in order to succeed, establish a *prima facie* case. He cannot, on failure to do so, take advantage of the weakness of his adversary's case. He must succeed by the strength of his own right and the clearness of his own proof.

This expression means two different things. It means sometimes that a party is required to prove an allegation before judgment can be given in its favour; it also means that on a contested issue one of the two contending parties has to introduce evidence. The burden of proof is of importance where by reason of not discharging the burden which was put upon it, a party must eventually fail.[3]

In PHIPSON on Evidence, 13th Edn., Page 44, Para 4-03, it is observed: "The phrase, burden of proof, has three meanings: (1) the persuasive burden, the burden of proof as a matter of law and pleading the burden of establishing a case, whether by preponderance of evidence or beyond a reasonable doubt (Also referred to as the "legal burden"[4]. We prefer the term "persuasive burden" as being, we think, the more common use and in any event being easier to understandd (see WILLIAMS, CRIMINAL LAW: The General Part, Chapters 2, 3). (2) the evidential burden, the burden of proof in the sense of adducing evidence (The phrase "evidential burden" is described by PROFESSOR CROSS (5th ed. p. 87), as accurate and as a phrase which is coming to be increasingly used by the English Judges. LORD DEVLIN however

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1. *Ajmer Singh* v. *Atma Singh*, AIR 1985 P&H 315; *Mallo* v. *Bakhtawari*, AIR 1985 All 160, gift by an old window; *Clara Auroro de Branganca* v. *S.A. Alvares*, AIR 1985 Bom 372 (DB), deed executed by a person of unsound mind.
2. TAYLOR, 12th Edn., S. 364, p. 252.
3. *Narayan* v. *Gopal*, AIR 1960 SC 100; *Abdul Shukoor* v. *Arji Papa Rao*, AIR 1963 SC 1150; *Devadattam* v. *Union of India*, AIR 1964 SC 880.
4. Lord DENNING, (1954) 61 LQR 379.

thought it confusing.[5] We agree with PROFESSOR CROSS that it is both accurate and now in common use). (3) the burden of establishing the admissibility of evidence. HALSBURY, Vol. 17, Page: 11, it is observed: "There are at least two distinct senses in which burden of proof is used.[6], and clarity over which sense is relevant at any given time is essential[7]. The legal burden is the burden of proof which remains constant throughout a trial (This is the preferable view. The incidence of the burden on different issues may lie in different places, and issues may rise or fall according to the facts proved,[8] but on the analysis of issue the legal burden will not change[9] it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trail he has failed to establish these to the appropriate standard, he will lose[10]. The incidence of this burden is usually clear from the pleadings, it usually being incumbent upon the plaintiff to prove what he contends.[11] The evidential burden, however, may shift from one party to another as the trial progresses according to the balance of evidence given at any particular stage; this burden rests upon the party who would fail if no evidence at all, or no further evidence, as the case may be, was adduced by either side.[12]

STEPHEN in his digest (125, 128) states that "The primary meaning of the word "burden of proof" could have other applications and various writers have discussed the burden of proof in relation to its subject matter, such as the proof of issues and of individual facts relevant to or within an issue."

Regarding the second sense of the phrase, namely introducing evidence STEPHEN'S DIGEST (7th Ed. Article 95, p. 109) observed: "The burden of proof, in any proceeding, lies at first on that party against whom the judgement of the court would be given, if no evidence at all were produced on either side, regard being had to any presumption, which may appear upon the pleadings. As the proceedings goes on, the burden of proof may be shifted from the party on whom it rested at first, by his proving facts which raise a presumption in his favour." At page 112, it was observed: "That this rule holds equally as to matters which are not the subject of express allegation, but relate to the admissibility of evidence or the construction of documents, *e.g.*, if either party desired to give secondary evidence of a lost deed, the burden of proving the loss is upon him."

What is called burden of proof on the pleadings should not be confused with the burden of adducing evidence which is described as shifting. The burden of proof on the pleadings never shifts, it always remains constant. The initial burden of proving a *prima facie* case in his favour is cast on the plaintiff; when he gives such evidence as will support a *prima facie* case, the onus shifts on to the defendant to adduce rebutting evidence to meet the case made out by the plaintiff. As the case continues to develop, the onus may shift back again to the plaintiff. It is not easy to decide at what particular stage in the course of the evidence the onus shifts from one side to the other.[13]

In SENGUPTA on Evidence, Page: 715, it is observed: "Onus of proof in its primary sense means the duty of establishing a case. This remains throughout the entire case exactly where the pleadings originally placed it. It never shifts. It is a question of law. In its secondary sense onus means no more than the duty of adducing evidence and in this sense, the burden may shift constantly throughtout the trial. This involves no question of law but one of fact only."[14]

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5. *Jayasēna* v. *R.*, (1970) AC 618, 624.
6. **See** *Wakelin* v. *London and South Western Rly Co.*, (1886) 12 App Cas 41 at 45, HL; *Hill* v. *Baxter*, (1958) 1 QB 277 at 284 : (1958) 1 All ER 193 at 196 DC; *Brown* v. *Rolls Royce Ltd.*, (1960) 1 All ER 577 : (1960) 1 WLR 210 HL; *Bratty* v. *A-G (Northern Ireland)*, (1963) AC 386 : (1961) 3 All ER 523 HL.
7. An example of a case in which the position was not at all clear is *Redpath* v. *Redpath and Milligam*, (1950) 1 All ER 600 CA.
8. *Emanule* v. *Emanuel*, (1946) P 115 at 118 : (1945) 2 All ER 494 at 496; and *Southport Corpn.* v. *Esso Petroleum Co. Ltd.*, (1954) 2 QB 182 at 199 : (1954) 2 All ER 561 at 571.
9. **See** The Merchant Prince, (1892) p. 179, CA.
10. *Pickup* v. *Thames and Mersey Marine Insurance Co. Ltd.*, (1878) 3 QBD 594 at 599, 600 CA; *Wakelin* v. *London and South Western Rly Co.*, (1886) 12 App Cas 41 at 45, HL. As to submissions of no case to answer, **see** *Alexander* v. *Rayson*, (1936) 1 KB 189, CA; *Young* v. *Rank*, (1950) 2 KB 510 : (1950) 2 All ER 166.
11. The golden rule is that the onus of proof is on the plaintiff; *Channan* v. *Oakleigh Animal Products Ltd.*, (1970) 8 KIR 1063 at 1072 CA per DAVIES LJ.
12. **See** *Joseph Constantine Steomshep Line Ltd.* v. *Imperial Smelting Corpn. Ltd.*, (1942) AC 154 : (1941) 2 All ER 165 HL; *Huyton-with-Roby UDC* v. *Hunter*, (1955) 2 All ER 398 : (1955) 1 WLR 603 CA; *Brown* v. *Rolls Royce Ltd.*, (1960) 1 All ER 577 : (1960) 1 WLR 210 HL.
13. *Lakshmanna* v. *Venkateswarlu*, AIR 1949 PC 278.
14. *Raghavamma* v. *Chenchamma*, AIR 1964 SC 136; *N.K. Moidinkunhi* v. *K.N. Abdulla*, 1977 Cr LJ 665 (Kar); **Referring in** *Mahanta Singh* v. *Het Ram*, AIR 1954 Punj 27; *Sheo Mangal* v. *Maharaj Kuar*, AIR 1949 All 285;

The question of *onus probandi* is certainly important in the early stages of a case. It may also assume importance where no evidence at all is led on the question in dispute by either side; in such a contingency the party on whom the onus lies to prove a certain fact must fail. Where, however, evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place; truth or otherwise of the case must always be adjudged on the evidence led by the parties.[15]

Supreme Court observed: "Defendant who is in possession of account books kept by him and from which the balance could be ascertained should produce them before Court. He cannot be heard to say, relying upon the abstract doctrine of onus of proof, that it was no part of his duty to produce them unless he was called upon to do so".[16]

It was observed: "A person who seeks to displace the natural succession to property by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption and its validity. The evidence in proof of the adoption should be free from all suspicion of fraud and so consistent and probable as to give no occasion for doubting its truth. Nonetheless the fact of adoption must be proved in the same way as any other fact.[17]

Where a party in possession of best evidence which would throw light on his issue in controversy withholds it, the court ought to draw an adverse inference against him not withstanding that the onus of proof does not lie on him. Party cannot rely on abstract doctrine of onus of proof or on the fact that he was not called upon to produce it in such a case.[18]

Where both parties have already produced whatever evidence they had, the question of burden of proof ceases to be of any importance.[19]

LORD DUNEDIN in *Robin's* v. *National Trust Company*[20] observed: "Onus is always on the person who asserts a proposition of fact which is not self-evident. To assert that a man who is alive was born, requires no proof. The onus is not on the person making the assertion because it is self-evident that he has been born. But to assert that he was born on a certain date, if the date is material, requires proof; the onus is on the person making the assertion. Now in conducting any inquiry, the determining tribunal *i.e.*, the Judge or Jury, will often find that the onus is sometimes on the side of the one contending party, sometimes on the side of the other, or as it is often expressed, that in certain circumstances the onus shifts. But onus as the determining factor of the whole case can only arise if the tribunal finds the evidence, *pro* and *con* so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter. But, if the tribunal after hearing and weighing the evidence comes to a determinate conclusion the onus has nothing to do with it and need not be further considered."[21]

Nagayya v. *Chengahna*, 1957 AP 264; *Surajbhan Kailash Chand* v. *Hari Shankar*, AIR 1976 Del 70: **Relying on** *Raghavamma* v. *Chenchamma*, AIR 1964 SC 136 : (1964) 2 SCR 933; *Lakshmamma* v. *Venkateswaralu*, AIR 1949 PC 278; *Ramendra* v. *8th Industral Tribunal W.B.*, 1975 Lab IC 94 (Cal); *Ajit Prasad Narayan Singh* v. *Nandini Sathipathy*, AIR 1975 Ori 184; *Narayan Bhagwantrao* v. *Gopal Vinayak*, AIR 1960 SC 100 : (1960) 1 SCR 773.

15. *Devadattam* v. *Union of India*, AIR 1964 SC 880; *Saraf* v. *Qurashi*, 1980 J&K 36; *Richpal Chand* v. *Richpal*, 1958 All 546; *Chandanlal* v. *Amin Chand*, AIR 1960 Punj 500; *Yellappa Ramappa* v. *Thippanna*, AIR 1929 PC 8; *Narayanan* v. *Gopal*, AIR 1960 SC 100, **followed in** *Gangamma* v. *Krishnappa*, 1996 AIHC 264 (para 9) (Kant).
16. *Hiralal* v. *Badkulal*, AIR 1953 SC 225 : 1953 SCJ 315 : 1953 SCR 758.
17. *Madhusudan Das* v. *Narayani Bai*, AIR 1983 SC 114; *Raghauamma* v. *Chanchamma*, AIR 1964 SC 136.
18. *Gopal Krishnaji* v. *Mohamed Haji Latif*, 1968 SC 1413; *Gopal Krishnaji* v. *Mohamed Haji. Latif*, (1971) 2 Cut WR 292 **distinguishes** AIR 1968 SC 1413; *Niranjan Kau* v. *New Delhi Hotel Ltd.*, 1988 Del 332 **relying on** *Gopal Krishnaji* v. *Mohd. Haji Latif*, AIR 1968 SC 1413; *Kashiram* v. *State*, AIR 1996 MP 246 (para 10).
19. *Premlata* v. *Arhant Kumar*, AIR 1973 SC 626; *Babban* v. *Shiv Nath*, AIR 1986 All 185; In *M Equipment* v. *N L Kanodia*, AIR 1986 Del 36; *Rebti Devi* v. *Ram Dutt*, AIR 1998 SC 310, at p. 312; *Arumugham* v. *Sundarambal*, AIR 1999 SC 2216 (para 16).
20. 1927 AC 515.
21. *Harmes* v. *Hinkson*, AIR 1946 PC 156; *Lakshmanna* v. *Venkateswarulu*, AIR 1949 PC 278; *Durga Prasad* v. *Ghanshiam*, AIR 1948 PC 210; *Prem Lata* v. *Arhant Kumar Jain*, AIR 1973 SC 626; *Ram Kishore Sen* v. *Union of India*, AIR 1966 SC 644; *Ramji Dayawala & Sons (P) Ltd.* v. *Invest Import*, AIR 1981 SC 2085; *J.P. Singh* v. *J.K. Roy*, AIR 1971 Assam 168; *Manaka* v. *Madhavarao*, AIR 1950 PC 25; **Relying on** *Robins* v. *National Trust Co.*, 1927 AC 515; *Kalwa Devattatam* v. *Union of India*, AIR 1964 SC 880; *Baras Nath Thakur* v. *Mohini Dasi*, AIR 1959 SC 1204; *Madho Prasad* v. *Madho Prasad (General)*, ILR 1965 (2) All 901; *G.G. of India In Guncie* v. *Bhanwari*, AIR 1961 All 14; *Sat Narain* v. *Dhurva Narain*, AIR 1959 All 22; *Richhpal Chand* v. *Richhpal Singh* AIR 1958 All 546; *Union of India* v. *Eastern Match Co.*, AIR 1964 AP 172; *Babban* v. *Shiv Nath*, AIR 1986 All 185; *Nagayya* v. *Cheganna*, AIR 1957 AP 264; *Kishorilal Behati* v. *Mahabir Prosad*, ILR (1960) 12 Assam 1; *Jeeraj Kumram* v. *I T Commissioner*, AIR 1954 Ass 49; *Jalim Chand* v. *Union of India*, AIR 1956 Assam 188; *Giribala* v.

LORD MAUGHAM in *Constantine Jeseph Steamship Line* v. *Imperial Smelting Corporation Ltd*[22] observed: "The burden of proof in any particular case depends on the circumstances in which the claim arises. In general the rule which applies is *Ei qui affirmat non ei qui negat incumbit probatio*. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons."

When after the entire evidence is adduced, the tribunal feels it cannot make up its mind as to which of the versions is true, it will hold that the party on whom the burden lies has not discharged the burden; but if it has on the evidence no difficulty in arriving at a definite conclusion, then the burden of proof on the pleadings recedes ino the background.[23]

At the end of a case when both the parties have led evidence and the conflicting evidence can be weighed to determine which way the issue can be decided, the abstract question of burden of proof becomes academic.[24]

It was observed in *Harmes* v. *Hinkson*[25] that if no evidence was given by the party on whom the burden lies, the issue must be found against him, but this is qualified as pointed out in *Robins* v. *National Trust Co*[26] that onus as determining factor would come into play where there was no evidence on either side or where it was equally worthless or where it was equally balanced.

The determination of the question of burden of proof cannot depend on the form of the issue, but has, in a case in which onus of proof is a matter in controversy, to be argued and a ruling thereon given by the court at the appropriate stage after issues have been framed.[27]

When all the circumstances have been assertained so far as the parties have thought fit to ascertain them, discussion on the point of onus of proof becomes immaterial. The question of onus only becomes important if the circumstances are so ambiguous that a satisfactory conclusion is impossible without resort to the principles relating to burden of proof.[28]

The plaintiff cannot obviously take advantage of the weakness of the defence. The plaintiff case must stand or fall upon the evidence adduced by him.[29]

If there is any dispute as to amount claimed with regard to depreciation, then the burden of proof is on the company to prove by legal evidence. If presumption of accuracy is attached to balance sheet and profit and loss account and not to auditor's certificate, then mere production of auditor's certificate will

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Ushangiri Debi, AIR 1955 Assam 177; *Jatindra Mohan Karmakar* v. *Nityananda Das Bairagya*, ILR (1951) 1 Cal 295; *Chanam Reddy* v. *Narayan Reddy*, AIR 1957 Hyd 29; *Rajeshwar Rao* v. *Narasinga Rao*, AIR 1952 Hyd 75; *Nagappa Sowda* v. *Gurupadappa*, 1954 Kant 39; *Nanjamma* v. *Lingappa*, 30 Mys LJ 1 (FB); *Lala Laxminarayana* v. *Rukhmabai*, ILR (1950) Nag 834; *Babulal Agarwalla* v. *Province of Orissa*, AIR 1954 Ori 225; *Priya Bhat Narain* v. *Brijmohan Singh*, AIR 1964 Pat 2; **Reversing on** facts in *Brij Mohan* v. *Priya Brat*, AIR 1965 SC 282; *Rangabati* v. *United Bank of India*, AIR 1961 Pat 158; **following in** *Parasnath* v. *Mohini Dasi*, AIR 1959 SC 1204; *M.M.B. Catholics* v. *T. Paulo Avira*, AIR 1959 SC 31; *E.I. Ry. Co. Kirk-Wood*, AIR 1922 PC 195; *Hari Charan Rai* v. *Dwarika Prasad*, AIR 1961 Pat 88; **Following in** *M.M.B. Catholicos* v. *T. Paulo Aviro*, AIR 1959 SC 31; *Brahmdeo Narain* v. *Mishri*, AIR 1959 Pat 430; *Ramadhin* v. *Siraram*, AIR 1957 Pat 64; *Chandan Lal* v. *Amin Chand*, AIR 1960 Punj 500; *Shiv Ram* v. *Shiv Charan*, AIR 1964 Raj 126; *Neela Kanta Iyer* v. *Official Receiver*, AIR 1951 TC 55; *Sri Narayan* v. *Chamber of Commerce Ltd.*, ILR (1968) 18 Raj 1212; *Ram Kishore Sen* v. *Union of India*, AIR 1968 SC 644; *Gouranga Panigrahi* v. *Sahadeb Panigrahi*, ILR (1968) Cut 695; *Rishikesh Singh* v. *State of U.P.*, AIR 1970 All 51 (FB); *Dasuram Nirjinal* v. *Brahmadatta Bajaj*, AIR 1963 Assam 41; *Badri Das Kothari* v. *Meghraj Kothari*, AIR 1967 Cal 25; *C. Abdul Shukoor Saheb* v. *Arji Papa Rao*, AIR 1963 SC 1150; *Narayan Bhawantrao* v. *Gopal Vinayak*, AIR 1960 SC 100; *Moran Mar Basselios Catholicos* v. *Poulase Athanasius*, AIR 1959 SC 31 **followed in** *Nirmala* v. *Rukminibai*, AIR 1994 Kant 247 (para 8); *Secretary of State* v. *Laxmi Bai*, AIR 1923 PC 6; *Chidambara* v. *Verrama Reddy*, AIR 1922 PC 292.

22. (1942) AC 154, 174 : (1941) 2 All ER 165, 179
23. *Lakshmanna* v. *Venkateswarlu*, AIR 1949 PC 278; *Pannu Jeegania* v. *Deviprasad*, AIR 1963 MP 15.
24. *Narayan Bhagwantrao* v. *Gopal Vinayak*, AIR 1960 SC 100. **See also** *M.M.B. Catholicos* v. *T. Paulo Avira*, AIR 1959 SC 31; *Paras Nath* v. *Mohani Das*, AIR 1959 SC 1204; *Devadattam* v. *Union of India*, AIR 1964 SC 880.
25. AIR 1946 PC 156.
26. (1927) AC 515.
27. In re : *Voleti Appalaraju*, ILR (1977) AP 80.
28. *Sime, Darby & Co.* v. *Offl. Assignee*, AIR 1928 PC 77.
29. *Ramadhin* v. *Siaram*, AIR 1957 Pat 64. **Also see** *Punjab Urban Planning & Development Authority* v. *Shiv Saraswati Iron & Steel Re-Rolling Mills*, (1998) 4 SCC 539.

not be conclusive.[30] Burden of proof as to correctness of balance sheet and profit and loss account is on company.[31]

In an appeal to the Central Government under Section 111(3) of the Companies Act, 1956 for refusal of registration of shares further, if there is presumption in favour of directors, then the burden of proof is on the person who is appealing against the refusal order of directors.[32]

Burden of proving that the transaction on which the alleged title is claimed is *bona fide* and for valuable consideration is heavily on plaintiff, when circumstances surrounding the transaction are suspicious.[33]

Once the liquidator has shown that there was a declaration of dividend amounting to misapplication of the bank's capital resulting in loss to the bank, the burden is on the directors to show that the dividend then declared had not actually been paid.[34]

Burden is on applicant to show that there has been misrepresentation which has influenced the majority or that there has been some unfair dealing, *i.e.*, some ulterior motive of the transferor company in advising the share holders to accept the offer.[35]

Under Art. 311(1), Constitution of India, the burden of proving who was the appointing authority need not be on the employee where the point was raised and evidence was adduced by both parties.[36]

Where evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place and the truth or otherwise of the case must always be adjudged on the evidence led by the parties.[37]

Evidentiary admissions are not conclusive proof of the facts admitted and they may be explained or shown to be wrong but they do raise an estoppel and shift the burden of proof to the person making them or his representative-in-interest.[38]

Where there is an admission by a party the burden of proof shifts and it is for the party making the admission to explain it away.[39]

In order to come to a conclusion concerning on whom the legal burden of proof rests, in addition to the substantive law, the pleadings of the parties coupled with the documents that are produced and the admission if any, concerning such documents have to be taken to account.[40]

In the matter of proof, in a civil case, a defendant cannot take up the same stand as an accused in a criminal case. In civil cases, unlike criminal ones, it cannot be said that the benefit of reasonable doubt must necessarily go to the defendant. Even the preponderance of probabilities may serve as a good basis for decision.[41] The Supreme Court has held that in a civil case involving allegation of charges of criminal or fraudulent character insistence on proving charges clearly and beyond reasonable doubt is wrong.[42]

In every offence the prosecution must prove criminal intention on the part of the accused unless from the language used in the statute creating the offence, it is clear that an offence is committed

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30. *Metal Box Co.* v. *Their Workmen*, AIR 1969 SC 612.
31. *L.B. Workers Union* v. *Industrial Tribunal*, AIR 1962 Cal 375.
32. *Harinagar Sugar Mills* v. *Shyam Sunder*, AIR 1961 SC 1669.
33. *Ramachandra* v. *Doulat*, AIR 1951 MB 77.
34. *K. Madhava* v. *Popular Bank*, AIR 1970 Ker 131.
35. *Leela Mahajan* v. *T. Stones & Co. Ltd.*, AIR 1957 Mad 225.
36. *Khartar Saw* v. *Union of India*, 1980 La IC 930 (Pat).
37. *Union of India* v. *Moksh Builders and Financers*, AIR 1977 SC 409; *Charandas* v. *Mohindernath*, (1977) 2 RCJ 820 (P&H).
38. *Avadh Kishore* v. *Ram Gopal*, AIR 1979 SC 861.
39. *Chandra Kunwar* v. *Narpat Singh*, ILR (1906) 29 All 184 : 34 IA 27 : 9 Bom LR 267; *Dukh Haran Nath Zutshi* v. *Messrs. Commercial Credit Corporation Limited*, ILR (1939) 15 Luck 191.
40. *Surajbhan Kailash* v. *Hari Shankar*, AIR 1976 Del 70.
41. *Himmat Mal* v. *Shah Magaji Khubaji*, ILR (1953) 3 Raj 815. **See also** *M. Krishnan* v. *Vijay Singh*, 2001 Cr LJ 4705 (para 5) (SC) : AIR 2001 SC 3014.
42. *Gulabchand* v. *Kudilal*, AIR 1966 SC 1734.

irrespective of the intention. Intention like any other state of mind can only be proved by acts and circumstances.[43]

Burden of proof obviously is on appellant to show that the acquittal was wrong and to show conclusively that the inference of guilt the respondent is irresistible.[44]

This section lays down a test for ascertaining on which side the burden of proof lies. The section makes it clear that the initial onus is on the plaintiff. If he discharges that onus and makes out a case which entitles him to relief, the onus shifts on to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.

"So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issue.[45] In *Constantine Line* v. *Imperial Smelting Corporation.*[46] Lord MAUGHAM said :

> "The burden of proof in any particular case depends on the circumstances in which the claim arises. In general the rule which applies is *Ei qui affirmat non ei qui negat incumbit probatio.*[47] It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons."

This rule is adopted principally because it is but just that he who invokes the aid of the law should be the first to prove his case; and partly because in the nature of things, a negative is more difficult to establish than an affirmative."[48] (PHIPSON ON EVIDENCE, 15th Edn. (2000), p. 56, para 4-03).

The phrase "burden of proof" is used in two distinct meanings in the law of evidence, *viz.*, the burden of establishing a case and the burden of introducing evidence. The burden of establishing a case remains throughout the trial where it was originally placed; it never shifts. The burden of evidence may shift constantly as evidence is introduced by one side or the other. In Section 101 the phrase is used in its first meaning, and in this section in the second sense.[49]

Section 103 amplifies the general rule laid down is Section 101. It differs from Section 101. By Section 101 the party has to prove the whole of the facts which he alleges to entitle him to judgment when the burden of proofs is on him. This section provides for the proof of some one particular fact. The illustration sufficiently points out the meaning. All the facts, however numerous and complicated, which go to make up the accused's guilt, must be proved by the prosecution. If the accused wishes to prove a particular fact, his *alibi* for instance, he must prove it. If the prosecutor wishes to prove the case, not by independent oral testimony, but by the isolated fact of the accused's admission, or if he wishes to throw that in as an additional fact, he must prove it (NORTON, 289). The plea of *alibi* must be substantiated by the accused. The trial court pointed out several suspicions throwing considerable doubts about the truth of the plea. The Supreme Court did not interfere.[50]

As an instance of provision of law that the proof of a particular fact shall be upon a particular person, see Section 39 of the Criminal Procedure Code, which says that all persons shall give information of the commission of certain offences to the nearest police officer or Magistrate, and throws upon such persons the burden of proving reasonable excuse for not doing so. Where a person claims a right of way, he must prove that he acquired the right and it is not for the other party to show that he does not have any such right.[51] Where a person is protesting against nationalisation of a route, burden lies upon him to show that the scheme would not serve national purpose.[52]

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43. *State* v. *Munnilal*, AIR 1953 Punj 204; **following** *Srinivas Mall* v. *Emperor*, ILR 1947 PC 135.
44. *State of H.P.* v. *Batinath*, 1957 HP 37.
45. *Robins* v. *National Trust Co.*, (1927) AC 515, 520; *Huyton-with-Roby U.D.C.* v. *Hunter*, (1955) 1 WLR 603.
46. (1942) AC 154, 174.
47. Proof rests on he who affirms not he who denies.
48. PHIPSON ON EVIDENCE, 15th Edn. (2000), page 56 (para 4-03).
49. *Ramabai* v. *Ramchandra*, (1905) 7 Bom LR 293; *Ali Khan Bahadur* v. *Indar Parshad*, ILR (1896) 23 Cal 950 : 23 IA 92; *Sir Sobha Singh* v. *Bihari Lal Beni Parshad*, ILR (1956) Pun 1247.
50. *State of U.P.* v. *Sughar Singh*, AIR 1978 SC 191 : 1978 Cr LJ 141 : 1978 All LJ 466.
51. *Mer Nagjam Aala* v. *Punja Kana*, AIR 1981 Guj 141.
52. *Prakash Chandra* v. *Managing Director O.R.T. Co.*, AIR 1980 Ori 122.

The nature of proceeding before the Commission under the Commission of Enquiry Act is fact finding, hence the Evidence Act is not applicable to it and orders passed by the Commission imposing burden on the affected persons to lead their evidence first in an incident concerning killing of ten persons by the police firing,[53] cannot be interfered with by the High Court.

2. APPEALS

Where a party accepts the burden which is laid upon it by the trial Court without any demur or protest and allows the case to proceed on that basis throughout the trial, it cannot, when it fails to discharge it, turn round and say in appeal that the burden should not have been placed upon it.[54]

It was held by the Privy Council that where the burden of proof was wrongly placed on a party by the court, a serious prejudice would be caused to the party concerned and it is open to the superior court to decide the case by placing the correct burden of proof on the proper party.[55] It was held by the Supreme Court that an error in placing the onus of proof is a serious defect of proceedure of sufficient gravity to justify interference by the appellate court if it is found that the finding of fact was the result of such a wrong approach.[56] However it has been held in some case that the finding of the lower appellate court cannot be assailed in second appeal on the ground of wrong placing of onus.[57]

Remand is not necessary when entire evidence is before High Court in second appeal and by mistake the burden is wrongly placed which can be corrected in second appeal.[58]

When all the relevant evidence has been given by the parties, the real matters for the appellate court to consider is whether the party on whom the burden lay has discharged it.[59]

Question whether onus is rightly placed on a party is a question of law.[60]

Revision against an order refusing to change the onus of an isue is not maintainable.[61]

In appeals under Section 116-A of the Representation of the People Act, the court should normally attach importance to the findings of fact recorded by the tribunal when the said findings are given on the appreciation oral evidence.[62]

A concurrent finding of two courts below is a finding which is binding in appeal under Article 136 of the Constitution and the onus to prove that finding is erronous is on the appellant.[63]

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53. *Sardar Malkeet Singh* v. *State*, AIR 1993 All 343 (para 24) **dissenting from** *Sarjerao Kondiba Sagar* v. *P.G. Karnik*, AIR 1973 Bom 171.
54. *Raman Lal* v. *Ram Gopal*, ILR (1954) 4 Raj 262 : AIR 1954 Raj 135; *Kochil Pennu* v. *S. Krishnan*, AIR 1952 Tro co 185 **relied on** *Jadu Nath* v. *Ramun Mal*, AIR 1921 Lah 284 and *Bishamdas* v. *Teruram*, AIR 1934 Lah 1019; *Gauri Shanker* v. *Deena Nath*, 1974 Raj 238.
55. *P.R. Jogi Reddy* v. *Chinnabhai Reddi*, AIR 1929 PC 13; *Fauj Mal* v. *Nathulal*, AIR 1965 Raj 115; *Md. Tahir* v. *Raghubar Dayal*, 8 All LJ 736.
56. *Ramachandra Ayyar* v. *Ramalingam Chettiyar*, AIR 1963 SC 302.
57. *Gouranga Panigrahi* v. *Sahadeb Panigrahi*, ILR (1968) Cut 695; *Abdul Sami* v. *Mohammad Noor*, AIR 1966 All 39; *Santu* v. *Sohanlal*, AIR 1957 Pepsu 35 (FB); *Ramesh Chandra* v. *H.D. Jain College*, AIR 1957 Pat 145; *Jai Singh* v. *Gram Panchayat*, AIR 1965 Punj 232; *Nagori Ibrahim* v. *Shahjb Babumal*, AIR 1954 Raj 83 (FB); **overruling in** *Shankar Lal* v. *Deena Nath*, AIR 1951 Raj 79; *Govind Rao* v. *Dattatraya Narayan*, ILR (1974) Kant 1260; **Relying on** *Shankarlal* v. *Deeno Nath*, AIR 1951 Raj 79; *Abdul Sam* v. *Mohd. Noor*, AIR 1966 All 39; *Prem Chand* v. *Laxmi Chand*, AIR 1971 MP 124; *Ranjit* v. *Nilambar*, AIR 1978 Ori 48.
58. *Nabakumar Singh* v. *Haridas Singh*, AIR 1960 Mani 11; *Janj Mal* v. *Nathulal*, AIR 1965 Raj 115; *Sarifan Bibi* v. *Dilwar Hossain*, AIR 1975 Cal 211.
59. *Ramachandra* v. *Daulat*, 1951 MB 77; *Anama* v. *Trilochom*, AIR 1969 Ori 75; *Chand Rama Singh* v. *Nawaratan Singh*, AIR 1972 Pat 472.
60. *J.K. Cotton Spg. & Wvg. Mills* v. *I.T. Commissioner*, AIR 1967 All 513.
61. *Sadhuram* v. *Ghansham Dass*, AIR 1975 Punj 174 (FB).
62. *Baru Ram* v. *Prasanni*, AIR 1955 SC 244; *Sarju Pershad* v. *Jawaleshwari*, AIR 1951 SC 120.
63. *K. Krishna Chettiar* v. *Ambal & Co.*, AIR 1970 SC 146; *Sampat Ram* v. *Baboo*, AIR 1955 All 24; *Tajpal Singh* v. *Ganga Sahai*, AIR 1952 All 808; **Overruling** another point in *Abdul Rauf* v. *Mohd. Shafi*, AIR 1956 All 337 (FB); *Devakka* v. *Giraddi*, AIR 1956 Bom 99; *Pannalal* v. *Sita Bai*, AIR 1953 Nag 70; *Des Raj* v. *Hargurdial Singh*, AIR 1959 Punj 249; **Reversing on** another point in *Hargudial Singh* v. *Des Raj*, AIR 1963 Punj 25; *Bharat Oil Industries* v. *I.T. Commissioner*, AIR 1967 All 557; *Rattan Chand* v. *Sharab Chhozam*, AIR 1972 HP 87; *Union of India* v. *Maqsood Ahmed*, AIR 1963 Bom 110; *Veera Raghava* v. *Kanslamma*, 1957 Mad 403.

3. BURDEN OF PROOF IN CIVIL CASES

In a suit for restraining defendants from entering upon disputed land and interfering with cultivation of plaintiffs, the onus of proving acquisition of permanent occupancy interest was on defendants who claimed that they had acquired occupancy rights over suit land under Madras Act.[64] Burden of proving sufficient ground for transfer is on applicant under Section 24, C.P.C.[65] The burden of proof is on the plaintiff who asserts a right and it may be, having regard to the circumstances of each case, that the onus of proof may shift to the defendant.[66] The plaintiff must establish his case and he will not automatically succeed merely because of the failure of the defendant to establish his case[67] but onus to prove claim need not be followed in all circumstances. The Court can take the evidence of a witness wishing to leave the jurisdiction of the Court on the ground of ill health, forthwith in the presence of the parties on the date fixed. It is not necessary that issues be framed or written statements filed, before taking oral evidence.[68]

Once the defendant admits to have received the notice under Section 80 of the Code of Civil Procedure, if the defendant alleges that the notice is not in accordance with Section 80, CPC, it is for him to show to the court that it does not satisfy the requirements of law.[69]

Whoever complains against the Railway Administration that the provisions of Section 28 have been contravened must establish that there has been preference between himself and his goods on the one hand and the competitor and his goods on the other.[70] Onus to prove the alleged unreasonableness of the freight rates is on the complainant.[71]

Whenever it is necessary to prove any fact, in order to render evidence of any other fact admissible, the burden of proving that fact is on the person who wants to give such evidence. The illustrations explain the meaning of the section. A person seeking to recover possession has to prove that he was dispossessed within 12 years.[72] A father admitted that the girl whose legitimacy was in question was his daughter but that she was illegitimate. There being a presumption of legitimacy, burden lay upon father to prove otherwise.[73] Burden lies upon the plaintiff to prove all the points of the right of pre-emption.[74] In a case the plaintiff claimed half share in a house on the ground of being in joint possession and sought partition on the basis of a registered instrument and the defendant contended that the plaintiff had no right, title or interest in the said house and he was the sole owner and in exclusive possession thereof. The Courts below were satisfied with his explanation. It was held that burden lay heavily on the plaintiff to prove his case.[75] Where the plaintiffs failed to discharge their burden of proving their case, decree cannot be passed in their favour on the basis of the weakness of the defence case.[76]

This section should be read with clause (2) of Section 136 and with the illustrations attached to that section.

4. MAINTENANCE PROCEEDINGS

In a petition under Section 125, Cr.P.C., the extent of proof to establish marriage is not the same standard as is in a complaint of bigamy for offence under Section 494, I.P.C.[77]

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64. *Rama Chandra Panda* v. *K. Dandapani Dorr*, ILR (1966) Cut 874.
65. *Lalita* v. *State of Bihar*, AIR 1957 Pat 198.
66. *Nanji & Co.* v. *Jata Shankar Doassa*, AIR 1961 SC 1474.
67. *Nirakar Das* v. *Gourhari Das*, AIR 1995 Ori 270 (para 7). **See also** *K. Venkatasubba Reddi* v. *Bairagi Ramaiah*, 1999 AIHC 2782 (para 11) (AP); *Usha Beltron Ltd.* v. *Nand Kishore Parasramaka*, AIR 2001 Cal 137.
68. *Debadatta Pal* v. *Indumati Pal*, 1996 AIHC 499 (Ori) (para 3).
69. *Mast Ram* v. *Dy. Commr. Bharaiah*, AIR 1968 All 321.
70. *Raigarh Jute Mills Ltd.* v. *Eastern Railway*, AIR 1958 SC 525.
71. *Raigarh Jute Mills Ltd.* v. *Eastern Railway*, AIR 1958 SC 325.
72. *Kalooram* v. *Mangilal*, AIR 1984 MP 147.
73. *H.K. Shetty* v. *Renuka S. Shetty*, AIR 1984 Bom 229.
74. *Pyare Mohan* v. *Rameshwar*, AIR 1980 Raj 116.
75. *Gurmukh Ram Madan (Dr.)* v. *Bhagwan Das Madan*, AIR 1998 SC 2776.
76. *Ram Bhajan* v. *Abdul Rahman*, AIR 1997 All 17.
77. *Kumari Bai* v. *Anandram*, 1998 Cr LJ 4100 (paras 7 and 16) (MP).

5. BURDEN OF PROOF IN CRIMINAL CASES

"Throughout the web of the English Criminal Law, one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to the exception of the defence of insanity and subject also to the statutory exceptions". (Viscount Sankey Justice).[78]

The fact that the defence case does not even seem to be reasonable, it would not mean that the prosecution case as correct because the prosecution must succeed on the strength and merits of its evidence.[79] In a criminal case, the prosecution has to discharge its onus of proving the case against the accused beyond reasonable doubt[80] and once it is established, the prosecution need not explain the injuries sustained by the accused[81] but where the prosecution case is not supported by reliable and cogent evidence, the accused is to be given the benefit of doubt.[82] The position remains the same even in a quasi-criminal charge of professional misconduct.[83]

In criminal cases it is for the prosecution to bring the guilt home to the accused. It is not correct to say that when the prosecution has adduced such evidence as the circumstances and nature of the case require, it is for the accused to establish his innocence for the reason that there is no burden laid on the prisoner to prove his innocence and it is sufficient if he succeeds in raising a doubt as to his guilt.[84] In an accusatory system, such as that prevailing in India, it is for the prosecution to prove beyond reasonable doubt that the accused committed the offence; it is not for the Court to speculate as to how the crime has been committed.[85] It is for the prosecution to determine what witnesses it should call in support of its case. Witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.[86]

Prosecution cannot succeed just by showing that the defence raised is suspicious.[87] If the other circumstances point unfailingly to the guilt of the accused, the falsity of the defence can be considered as an additional link. The prosecution cannot be said to have proved as a result of failure of an accused person to prove his plea of *alibi*.[88] Infirmity in prosecution case can not be covered by false defence.[89]

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78. *Woolmington* v. *Dir of Public Prosecutions*, 1935 AC 462; *Charku* v. *State*, AIR 1960 AP 153; *R* v. *U. Damapala*, AIR 1937 Rang 83 (FB).
79. *Rajendra Singh* v. *State of U.P.*, 1984 Cr LJ 1164; *Md. Hussain* v. *State*, ILR (1957) 7 Raj 440; *Roy & Co* v. *Nani Bala*, 1979 Cal 50; *Vira Reddy* v. *Kistamma*, 1969 Mad 235; *Bansidhar Gangu Prasad* v. *Chaman Lal*, ILR (1975) 1 Del 445; *Jairamdas* v. *State*, AIR 1956 Bom 426; *Chhotan* v. *State*, AIR 1959 Pat 362; Prosecution cannot take advantage of weaknesses of defence or inconsistent stand taken by accused, *M.S. Reddy* v. *State Inspector of Police, A.C.B., Vellore*, 1993 Cr LJ 558 (para 64) (AP).
80. *State (Delhi Admn.)* v. *V.C. Shukla*, AIR 1980 SC 1382; *Babu Singh* v. *State of Punjab*, (1964) 1 Cr LJ 566 (SC); *Harchanda* v. *Rex*, AIR 1950 All 355; *Basanta Goham* v. *State*, AIR 1957 Assam 45; *S.C. Mitter* v. *State*, AIR 1950 Cal 435; *Gandap Bhimanna* v. *State of Hyderabad*, ILR (1956) Hyd 636; *Phankari* v. *State*, AIR 1965 J&K 105; *Rajiwali* v. *State*, AIR 1959 J&K 66; *State of Kerala* v. *Devassay*, (1964) 1 Cr LJ 101 (Ker); *Gangaram* v. *State of Rajasthan*, (1965) 2 Cr LJ 574 (Raj); *Surendra Chandra* v. *Raghunath Sil*, AIR 1964 Tri 62; *Satya Mah* v. *State*, AIR 1964 Ori 173; *Sita Ram* v. *State*, AIR 1968 All 207; *Risi Kesh Singh* v. *State*, 1970 All 51 (FB).
81. *Prithvi Nath Pandey* v. *State of U.P.*, 1994 Cr LJ 3623 (para 26) (All), **relying on** *Hare Krishna Singh* v. *State of Bihar*, AIR 1988 SC 863 : 1988 Cr LJ 925.
82. *George* v. *State*, 1996 Cr LJ 1755 (para 28) (Mad).
83. *H.V. Panchaksharappa* v. *K.G. Eshwar*, AIR 2000 SC 3344 (para 6).
84. *Mangi Lal* v. *State*, ILR (1953) 3 Raj 706; In re : *M. Rangarajulu*, AIR 1958 Mad 368; *Chhotan* v. *State*, AIR 1959 Pat 362; *Kishore Chandra Patel* v. *State*, AIR 1993 Ori 259 (paras 100, 101 and 104).
85. *Gandap Bhimanna* v. *State of Hyderabad*, ILR (1956) Hyd 636.
86. *Seneviratne* v. *King*, (1936) 39 Bom LR 1 PC.
87. *J.A. Naidu* v. *State of Maharashtra*, 1979 Cr LJ 962 (SC); *Jagdish* v. *Rajasthan*, AIR 1979 SC 1010 : (1979) 3 SCR 428; where the prosecution would not explain injuries on the person of the accused which were caused at the time of occurrence; *Shanker Lal* v. *State of Maharashtra*, AIR 1981 SC 765, falsity of defence does not establish prosecution case; *State of Punjab* v. *Bhajan Singh*, AIR 1975 SC 258, suspicion, however strong, cannot take the place of proof.
88. *Tiak* v. *State of U.P.*, AIR 1974 SC 155; *Sharad* v. *State of Maharashtra*, AIR 1984 SC 1622; *Anam Pradhan* v. *State*, 1982 Cr LJ 1585 (Ori); *Shankerlal* v. *State of Maharashtra*, 1981 Cr LJ 325 (SC) : AIR 1981 SC 765; *Bharadwaj Singh* v. *State*, AIR 1952 Cal 616; *Leo Frad Lobo* v. *State*, AIR 1967 Goa 60; *Ravi Shanker* v. *State of Gujarat*, AIR 1966 Guj 293.
89. *Subedar* v. *State*, AIR 1957 All 396.

Accused need not make a statement if he does not want to.[1] Even total silence of the accused as to any defence on his part does not lighten the prosecution burden to prove its case satisfactorily.[2] The accused denied his guilt totally but produced no evidence in defence. Even so, the prosecution has to prove its case satisfactorily. The silence of the accused being of no consequences in this context.[3] No plausible criticism of the defence evidence of the failure of the accused to establish his innocence should be deemed as sufficient to discharge the burden on the prosecution.[4]

In a criminal trial, the onus is upon the prosecution to prove the different ingredients of the offence and unless it discharges that onus it cannot succeed.[5] But where there was no evidence to show that the accused suffered the injuries in the same transaction, the prosecution was not bound to explain them.[6]

Regarding the shifting of the legal burden, it is a fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. And that burden never shifts but when the accused pleads insanity under Section 84, I.P.C., or any of the exceptions contained in I.P.C., like right of private defence *etc.*, it is the accused that has to prove the same, though the degree of proof on the accused is not as high on the prosecution and it would be sufficient for him to satisfy the test of a standard of a prudent man.[7] In criminal trial burden of proof never shifts to the accused. If a reasonable explanation is given by the accused it would be upto the court to acquit the accused.[8]

Examining defence evidence first and then examining prosecution evidence is improper.[9]

In a criminal case it is for the State to show that the accused persons have committed the offence with which they are charged.[10] Prosecution has to prove that the Court taking cognisance has territorial jurisdiction.[11] Burden to prove the negligence of licencee and his failure to take necessary steps is on prosecution.[12] To sustain an action under Section 628, Companies Act, the prosecution must show that false statements were made in the balance sheet knowing them to be false and with dishonest intention.[13] The position of a contemner being that of an accused person, whoever alleges that a contemner has disobeyed the orders passed by the court, has to prove that fact.[14] Where motive was set up by the prosecution it was for the prosecution to prove the same.[15]

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1. *Rajendra* v. *State of U.P.*, 1984 Cr LJ 1164; *Roy & Co.* v. *Nani Bala*, 1970 Cal 50; *Md. Hussain* v. *State*, ILR (1957) 7 Raj 440, *Vira Reddy* v. *Kistamma*, 1969 Mad 235; *Bansidhar Ganga Prasad* v. *Chamanlal*, ILR (1975) 1 Del 445; *Jairamdas* v. *State*, 1956 Bom 426; *Chhoton* v. *State*, 1959 Pat 362.
2. *Bishan Das* v. *State of Punjab*, AIR 1975 SC 573.
3. *Bishan Dass* v. *State of Punjab*, AIR 1975 SC 573.
4. *Sreedhar Marar* v. *State*, AIR 1965 Ker 196 **relying on** *Sher Raja Khima* v. *State*, 1956 SC 217. **See also** *Makar Bhoi* v. *State*, AIR 1951 Ori 357; *D.B. Deshmukh* v. *State*, AIR 1970 Bom 438. No adverse inference can be drawn for the non-production of evidence by the accused. *Motta* v. *Government*, AIR 1951 Raj 123.
5. *Kali Ram* v. *State of H.P.*, AIR 1973 SC 2773; *SL. Goswami* v. *State of M.P.*, AIR 1972 SC 716; *Baidyanath* v. *State of Bihar*, AIR 1968 SC 1393; *I.T. Commr., Central Calcutta* v. *Standard Vaccum Oil Co.*, AIR 1966 SC 1393; *Sajjan Singh* v. *State of Punjab*, AIR 1964 SC 464; *Tukaram* v. *State of Maharashtra*, (1979) 1 SCR 810 : AIR 1979 SC 185; In re : *Shaik Server* AIR 1957 AP 1006; *Sahadat Ali* v. *State*, AIR 1957 Assam 35; *Samad Malik* v. *State of J&K*, AIR 1953 J&K 1; *Chacko Mathai* v. *State of Kerala*, AIR 1964 Ker 222; *D. Ramasubba Reddy* v. *Ramdas*, 1970 Cr LJ 83 (AP); *Nisar Ali* v. *State of U.P.*, AIR 1957 SC 366; *Dataxiva Naique Desai* v. *State*, AIR 1967 Goa 4; *Public Prosecutor* v. *J. Pullamma*, 1970 Cr LJ 276 (AP); *Anam Pradhan* v. *State*, 1982 Cr LJ 1585; *State* v. *Kolis Hira*, AIR 1961 Guj 8; **following in** *Jumman* v. *State of Punjab*, AIR 1957 SC 469; **Dissending from** *Sebastian David* v. *Sirkar Prosecutor*, AIR 1950 TC 9; *Omkarlal* v. *Stat of M.P.*, 1987 Cr LJ 1289; *State of Gujarat* v. *S P Nair*, ILR (1965) Guj 784; *Balbir Singh* v. *State*, 1959 Punja 332.
6. *V. Viswambharan* v. *State of Kerala*, 1994 Cr LJ 1522 (para 26) (Ker).
7. *Dahyabhai* v. *State of Gujarat*, AIR 1964 SC 1563.
8. In re : OBULA NAIDU, (1964) 2 Cr LJ 78 (AP); *Nisith Chandra Ghose* v. *State of West Bengal*, ILR (1961) 1 Cal 119; **Relying on** *Woolmington* v. *DPP*, 1935 AC 462; *Shew Moni Shav* v. *State*, AIR 1953 Cal 634.
9. *State of Rajasthan* v. *Sher Singh*, 1994 Cr LJ 904 (para 14) (Raj), **relying on** *Moti* v. *State*, ILR (1962) 12 Raj 383 : 1962 Raj LW 448 and *Gajendra Singh* v. *State of U.P.*, AIR 1975 SC 1703 : 1975 SCC (Cri) 499 : 1975 Cr LJ 1494 (para 3).
10. *State* v. *Sohanlal*, AIR 1956 Punj 159.
11. *M.N. Adhkari* v. *Food Inspector*, AIR 1965 Ker 295.
12. *State of Mysore* v. *P.C. Sarangipani Mudaliar*, AIR 1960 Mys 245.
13. *Dhirendra* v. *Tripura Administration*, 1963 Cr LJ 559 (Tri).
14. *Punjab High Court* v. *S.M. Mathur*, (1976) 6 Tax LR 303.
15. *Paramjit Singh* v. *State of Punjab*, 1998 Cr LJ 2600 (para 24) (P&H).

As against this heavy burden on the prosecution the accused can claim the benefit of his defence just by showing a balance of probabilities. He has not to prove his defence beyond a reasonable doubt. The prosecution proved in a case that an official had accepted a sum of money which was intended to be a bribe. The Supreme Court said that the accused must prove his justification and he can do so on a balance of probabilities and need not prove beyond reasonable doubt.[16] The burden on the accused is not as onerous as that which lies on the prosecution. While the prosecution is required to prove its case beyond reasonable doubt, the accused can discharge his onus by establishing a mere preponderance of probability.[17]

When the accused pleaded that the confession was the result of torture onus to prove torture is on him.[18] Burden is on the accused to prove that the confessional statement was obtained by threat, duress or promise and if he is able to prove the facts creating reasonable doubt that the confession was not voluntary or was obtained by threat, coercion or inducement etc., the burden would be on the prosecution to prove that the confession was made by him voluntarily.[19]

The accused must be presumed to be innocent until the prosecution has been able to establish the charge against him beyond reasonable doubt and the presumption as to innocence must continue even in an appeal against acquittal. In a criminal case there is no burden on the accused to prove his innocence.[20]

Neither Section 103, nor Section 106 can absolve prosecution from discharging its general or primary burden of proving its case beyond reasonable doubt. It is only when prosecution has led evidence which if believed will sustain conviction, or makes out a *prima facie* case, that the question arises of considering of whether the burden of proof may lie upon the accused.[21]

A criminal case is a 'proceeding' within the meaning of Section 102 and the burden of proof in such a proceeding lies on the prosecution for the simple reason that if neither the prosecution nor the defence leads evidence, the accused is entitled to be acquitted.[22] In cases where the evidence is of such a nature that conclusion cannot be arrived at as to who started the fight or how the quarrel started, the benefit of doubt should be given to the accused.[23]

If the prosecution evidence as a whole is unreliable and cannot be accepted as correct and if the accused is silent with regard to his defence, then the court ought not to treat the case as positively proved beyond reasonable doubt, only for reason of the failure of the accused to put up his defence immediately when he was confronted.[24]

In a case under Section 411, IPC, it is not upon the accused to prove how he came to possess the property which is said to be stolen property.[25]In India arsenic is used as medicine in all types of diseases.

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16. *M.P. Gupta* v. *State of Rajasthan*, AIR 1974 SC 773; *Asokan* v. *State of Kerala*, 1982 Cr LJ 173; *Gurucharan Singh* v. *State*, 1993 Cr LJ 1622 (para 16) (Del); *N.P. Lotikar* v. *C.B.I.*, 1993 Cr LJ 2051 (para 31) (Bom). **See further** under section 106. **See also** *G.M. Natarajan* v. *State*, 1995 Cr LJ 2728 (paras 10 and 11) (Mad).
17. *Pratap* v. *State of U.P.*, AIR 1976 SC 966; *M.P. Gupta* v. *State of Rajasthan*, AIR 1974 SC 773; *Krishna Biharilal* v. *State*, AIR 1956 MB 86.
18. *Dharma Singh* v. *Manipur State*, AIR 1952 Mani 2. Loss of a thing can never be proved absolutely. **Relying on** *Basanth Singh* v. *Brij Raj Saran*, AIR 1935 PC 132.
19. *K.I. Pavunny* v. *Asst Collector (HQ), Central Excise Collectorate*, (1997) 3 SCC 721 : 1997 SCC (Cri) 444. **following** *Bhagwan Singh* v. *State of Punjab (I)*, AIR 1952 SC 214 : 1952 SCR 812.
20. *State of Assam* v. *Bhabananda Sarma*, 1972 Cr LJ 1552 (Assam); In re : *Natarajan*, AIR 1966 Mad 357; *Pershadi* v. *State*, 1955 All 443 *Harchanda* v. *Rex*, AIR 1950 All 355; *Bharath Kumar* v. *State of Gujarat*, 1982 Cr LJ 1314 (DB)(Guj); *Joseph* v. *State of Kerala*, (1964) 1 Cr LJ 493; *Gopi Ram* v. *State*, AIR 1954 MB 21; *State of M.P.* v. *Babulal*, AIR 1958 MP 55; *Public Prosecutor* v. *A. Thomas*, AIR 1959 Mad 166; In re : *Rangaraju Naidu*, AIR 1958 Mad 368; *Public Prosecutor* v. *I.C. Lingaiah*; In re : *Shivaanna*, AIR 1955 Mys 17; *Shangara Singh* v. *State*, AIR 1964 Punj 400; *Bhagwanbhai Dulabhai Jadhav* v. *State of Maharashtra*, (1963) 2 Cr LJ 694 (SC); *State* v. *Debnu*, AIR 1957 HP 52; *N.S. Gandiwal* v. *State of M.P.*, 1961(1) Cr LJ 670 (MP); *Manilal* v. *State of Orissa*, 1969 Cr LJ 992 (Ori); *Bobetim Ministeria de Justica Ministerio Publico* v. *Filomeno Jaoquim Gregorio Desouza*; **Relying on** *V.D. Jhingan* v. *State of U.P.*, AIR 1966 SC 1762; *K.P. Raghavan* v. *M.H. Abbas*, AIR 1967 SC 740; *Keval Ram* v. *Shri Ram Saran*, ILR (1981) 31 414; *State of Bihar* v. *Surajdeo Bai*, ILR (1972) 51 Pat 205; *State of H.P.* v. *Butinath*, AIR 1957 HP 37.
21. *Sawal Das* v. *State of Bihar*, AIR 1974 SC 778.
22. *Parbhoo* v. *Emperor*, 1941 All 402; *State of Orissa* v. *Chakradhar Sahu*, 1983 Cr LJ 532 (Ori).
23. *Rama* v. *State of Hyderabad*, ILR (1952) Hyd 354.
24. *Zhrunglee Ariel* v. *State of M.P.*, AIR 1954 SC 15; *Khurkhur* v. *State of Allahabad*, AIR 1970 All 198 (FB).
25. *Ahibaran Singh* v. *State*, 1953 All 493.

Mere fact that arsenic was detected is not sufficient to prove conclusively that death was due to arsenic poisoning. Prosecution should prove that a lethal dose of arsenic, that is two grains or upwards, had been administered.[26] The prosecution has to make out that the cessation of accused from duty was intentional under Section 44, Madras District Police Act. But in an ordinary case, where no other special circumstances appear on the record, the court might well assume cessation as a fact was intentional cessation. Where, however, other circumstances appear, the requiste intention has to be clearly made out.[27]

Where a person voluntarily makes a statement about his criminal activities and he neither repudiates nor offers any reasonable explanation, it would be conclusive against him. The opposite side has no burden to establish truth of such a statement.[28]

In a case where death is due to injuries or wounds caused by a lethal weapon, it is always the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it must prove the whole of the case.[29]

When administration of poison is proved by prosecution the burden is on the accused to prove that his intention was different, since it is especially within the knowledge of the accused.[30] In a cheating case for work not done, if there is a finding that works to which the claim related were not carried out at all, then there is no burden on the prosecution to establish that the appellant had personal knowledge of the bogus nature of his claim.[31]

It is for prosecution to prove that an act is not negligent but was deliberate and intentional.[32]

When accused violated order under Section 144, Cr.P.C., denying knowledge of the orders, then the prosecution must prove circumstances from which accussed's knowledge can be inferred. Onus is then on accussed to prove ignorance of order despite publication.[33]

If an application for cancellation of bail, it is not necessary for the prosecution to prove by a mathematical certainity or even beyond a reasonable doubt that the witness have turned hostile because they are won over by the accused.[34] In considering whether a public officer is guilty of his misconduct charged against him, the rule followed in criminal trial that an offence is not established unless proved by evidence beyond reasonable doubt to the satisfaction of the court, does not apply.[35]

In an offence of cheating and false evidence the burden will never shift to the accused and if an accused gives a reasonable explanation, then the jury have to take that into account and though they are not convinced about the truth, they should acquit the accused.[36]

Failure of accused to cross-examine witnesses does not discharge burden of proof on prosecution.[37]

Burden of proving "just ground" for claiming maintenance under Section 125(3), Cr.P.C. lies on wife.[38] When an able bodied husband failed to maintain his wife and children, it is for him to show that he is incapable of doing so.[39]

Burden of proof rests on person who alleges that a particular witness is an accomplice.[40]

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26. *State* v. *Fateh Bahadur*, AIR 1958 All 1.
27. *S.A.A. Biyabani* v. *State of Madras*, AIR 1954 SC 645.
28. *Emperor* v. *Surjya Kumar*, AIR 1934 Cal 221 (SB).
29. *Mohinder Singh* v. *State*, AIR 1953 SC 415; *Bhagoji* v. *Hyderabad Government*, AIR 1954 Hyd. 196.
30. *Arundhati* v. *State of Orissa*, 1968 Cr LJ 848 (Ori).
31. *Bakshish Singh* v. *State of Punjab*, AIR 1967 SC 752.
32. *D.B. Naik* v. *State of Maharashtra*, 1982 Cr LJ 856 (Bom).
33. *Emperor* v. *Afaq Hussain*, AIR 1941 All 70 (FB).
34. *Delhi Admn.* v. *Sanjay Gandhi*, AIR 1978 SC 961.
35. *State of A.P.* v. *Sree Rama Rao*, AIR 1963 SC 1723.
36. *Sudhdeo* v. *State of Bihar*, AIR 1957 SC 466.
37. *Narbhaisingh Haruasingh* v. *State*, ILR 1966 Bom 407; Comes under Section 101, as well as general.
38. *A.S.N. Nair* v. *Sulochana*, 1981 Cr LJ 1898 (Ker).
39. *Chander Prakash* v. *Shila Rani*, AIR 1968 Del 174.
40. *Kamini Kumar* v. *State*, AIR 1971 Tri 26.

6. *ALIBI*

When it is the question of an *alibi*, it is not a case, of proving the existence of circumstances bringing the case within any of the general exceptions or special exceptions of the Indian Penal Code, and therefore, Section 105 of the Indian Evidence Act, does not apply. The section applicable is Section 103 illustration of which specially mentions the case of plea of *alibi* and provides that it is for the accused who pleads *alibi* to prove it.[41] Burden to prove plea of *alibi* is on accused pleading it.[42] Burden is on the accused who is setting up defence of *alibi* to prove it but even so, the burden of proving the case against the accused is on the prosecution irrespective of whether or not the accused have made out plausible defence.[43] Onus is on accused to substantiate plea of *alibi* and make it reasonably probable.[44]

Where the accused pleaded *alibi* as they were present in their office till 5 p.m. which was at a distance of about 40 miles from the scene of occurrence taking place at 7 p.m., their presence at the scene of occurrence was held to be doubtful.[45]

7. GAMBLING OFFENCES

Prosecution must prove that "Muddemal slips" (a code word) contain a record of betting transactions or were in any manner connected with betting in American futures. It is for prosecution to explain how bets in American futures are recorded and satisfy the court that the slips seized were part of the record.[46]

8. NEGLIGENCE

Burden is on prosecution which could have easily obtained necessary information, whether the vehicle had been granted a permit and what were its conditions.[47]

Onus of proof that accused drove rashly and negligently is on the prosecution.[48]

In a suit for loss, damage or non-delivery of goods, filed against the carriers, the plaintiff is not required to prove negligence ordinarily. The burden is on the defendant carrier to prove that there was no negligence on his part.[49]

9. OFFENCE UNDER SECTION 182, PENAL CODE

In regard to an offence under Section 182, IPC burden is on the prosecution to show the accused believes the information to be false.[50]

10. DISCRIMINATION

The burden to prove the charge of discrimination and arbitrary use of power by the Collector in granting compensation in land acquisition proceedings is on the party making it.[51]

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41. *Yusuf S.K* v. *State*, AIR 1954 Cal 258: *State* v. *Sashibhushan*, (1963) 1 Cr LJ 550 (Ori).
42. *State of Haryana* v. *Sher Singh*, AIR 1981 SC 1021; *Dalel Singh* v. *Jag Mohan Singh*, 1981 Cr LJ 667 (Del). *State of U P* v. *Sughar Singh*, AIR 1978 SC 191; *Chandrika* v. *State*, AIR 1972 SC 109; *D.B Deshmukh* v. *State*, AIR 1970 Bom 438; *Yaduram* v. *State*, 1972 Cr LJ 1464 (J&K); **relying on** *Sarat Chandra* v. *Emperor*, AIR 1934 Cal 719; *Parbhoo* v. *Emperor*, AIR 1941 All 402. **Also see** *Amir Hossain* v. *State of Tripura*, 1998 Cr LJ 4315, at page 4323 (Gau).
43. *Gurcharan Singh* v. *State of Punjab*, AIR 1956 SC 460.
44. *State of U P* v. *Singhar Singh*, AIR 1978 SC 191; *Chandrika* v. *State*, AIR 1972 SC 109; *Satyavir* v. *State* AIR 1958 All 746; *Bindeshwari Singh* v. *State*, AIR 1958 Pat 12.
45. *Dharam Singh* v. *State of Punjab*, 1993 Cr LJ 150 (para 9) (SC); *Nallamsetty Yanadaiah* v. *State of A P.*, 1993 Cr LJ 408 (para 7) (SC).
46. *Harakchand* v. *State*, AIR 1954 MB 145.
47. *State* v. *K. Kesavan*, AIR 1959 Ker 161.
48. *Gangadhara Rao* v. *G. Ganga Rao*, AIR 1968 AP 290; *Seethamma* v. *Benedict D' SA* AIR 1967 Mys 11.
49. *Karnataka Transport Corporation* v. *National Insurance Bank Ltd*., AIR 1999 Kant 233 (paras 15, 19 and 20)
50. *Fakirapa Ningappa* v. *State*, AIR 1960 Mys. 208.
51. *Uttam Singh* v. *State of Punjab*, 1998 AIHC 547 (para 18) (P&H).

11. DEFAMATION AND LIBEL

It is for accused to establish that the source of information on which he acted was proper source on which he was entitled to act and that he did so with care and circumspection.[52]

If court accepts the plaintiff's contention that the publication is *per se* defamatory, the question whether it amounts to libel or not is one for court to decide and not for the plaintiff to prove by adducing evidence.[53]

The defendant must not only raise the plea in his written statement but also prove it strictly by leading evidence that the defamatory remarks about the plaintiff were true. Onus to prove justification always lies on the defendant.[54]

12. CONTEMPT OF COURT

As regards the burden, the common legal phraseology "he who asserts must prove" has its due application in the matter of proof allegations said to be constituting the act of contempt.[55]

13. OFFENCE UNDER SECTION 420, PENAL CODE

In the case of an offence of cheating it is for prosecution to prove that at the time the accused entered into the transaction with the complainant, he had no intention to pay the money and that he was actuated by dishonest intention to cheat the complaint.[56]

From the fact that the ornaments are recovered at the instance of the accused, inference cannot be drawn that the accused must have murdered the deceased. Onus lies on the prosecution to prove its case.[57]

In a suit based on an alleged hand loan the burden is and will be on the plaintiff to make out that the alleged hand loan is true, that he did in fact advance the money representing the loan to the defendant on condition of repayment.[58]

14. STOLEN PROPERTY

Onus to prove that the accused was in possession of stolen property is to be first discharged by prosecution. Burden is cast upon the accused to explain the circumstances under which he came into possession.[59]

If the accused pleads that the earlier statement made by him in commital court was made under police pressure, the burden lies on the accused to establish it.[60]

Where the prosecution could not prove beyond a reasonable doubt that the accused was connected with the destruction of a film, the accused was given the benefit of doubt[61]. Recovery of articles by itself does not connect anybody with the crime. Connection of the accused with the articles must be proved beyond a reasonable doubt.[62]

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52. *Dongarshing* v. *Krishan*, AIR 1957 MP 162; *Ramdas* v. *Raja*, AIR 1958 Raj 257.
53. *Balakrishna Kar* v. *H.K. Mahatab*, AIR 1954 Ori 191.
54. *Radha Krishen* v. *H.S. Bates*, AIR 1953 All 302.
55. *Chhotu Ram* v. *Urvashi Gulati*, 2001 Cr LJ 4204 (para 2) (SC).
56. *Veeranna* v. *Mastan Sab*, AIR 1960 AP 311.
57. *Nagappa Dondiba* v. *State of Karnataka*, 1980 SC 1753; In re : *Kaliaperumal*, AIR 1954 Mad 1088; *Ahi Baran Singh* v. *State*, 1953 All 493; In re : *M. Daveed*, 1959 AP 157; *Paramananda Mahapud* v. *State of Orissa*, 1970 Cr LJ 931 (Ori).
58. *Satyanarayana* v. *Sree Ramulu*, AIR 1961 AP 461.
59. *Abdul Kareem* v. *State of Mysore*, 1972 Cr LJ 217 (Mys); *Sathian* v. *State of Madras*, 1971 Cr LJ 1635 (Mad); *Public Prosecutor (AP)* v. *Shaik Galib*, 1975 Cr LJ 952 (AP).
60. *Bhagwan Singh* v. *State of Punjab*, AIR 1952 SC 214.
61. *State (Delhi Admn.)* v. *V.C. Shukla*, AIR 1980 SC 1382 at 1390.
62. *Nagappa Dondiba Kalar* v. *State of Karnataka*, AIR 1980 SC 1753.

15. SANCTION

Where a party desires to challenge the complaint on the ground of authority, it is for him to show that there is absence of any requisite authority to prosecute. For that purpose the court can look into and examine orders duly passed.[63] Burden of showing that requisite sanction was obtained is on prosecution and such burden includes proof that the sanctioning authority had given sanction with reference to the facts on which the prosecution is based.[64]

In order to take away the protection provided under Section 132, Cr.P.C. to persons performing their duties, the onus is on complainant to show that accused did not act under Chapter 9 of Cr.P.C. 1898 (Chapter of Cr.P.C., 1973) and therefore not entitled to protection under Section 132, Cr.P.C.[65]

Prosecution has to prove that sanctioning authority was competent to sanction prosecution and had applied its mind to the facts of the case. When the acts constituting the offence are not appearing in the order, sanctioning prosecution, it must prove the same by other evidence.[66]

When an accused person pleads Section 197, Criminal P.C. as a bar to his trial it is for him to prove the facts which bring that section into operation.[67]

16. SEXUAL OFFENCE

Prosecution has to prove beyond doubt that the girl was below 16 years of age and the burden is heavy when the girl was used to sexual intercourse.[68]

Where the inference of guilt of an accused person is to be drawn from circumstantial evidence alone, those circumstances must be established beyond reasonable doubt and they should point towards the guilt of the accused.[69]

Where a rapist confessed his guilt in writing in the presence of his parents and elders allegedly under coercion or inducement, onus of establishing coercion or inducement would be on the accused.[70]

17. PREVENTION OF CORRUPTION ACT

Before placing reliance on the prosecution under Section 4(i) of Prevention of Corruption Act of 1947 it is the duty of the prosecution to first prove the basic facts on which the prosecution rests. The burden of proving the case squarely rests on the prosecution and this burden can not be diluted simply

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63. *Sailendranath* v. *State of Calcutta*, AIR 1955 Cal 29; *Prabhakar* v. *Shankar*, AIR 1967 Goa 121; *Noohar* v. *Public Prosecuter*, 1975 Cr LJ 1304 (Ker).

64. *State of M.P.* v. *Hiranand*, AIR 1958 MP 2.

65. *V.D. Yesudasan* v. *Gurusamy*, AIR 1957 Mad 555; *Kirpal Kuar* v. *Bachan Singh*, AIR 1958 SC 199; *Ghulam Rasul* v. *Hasib Ullah*, AIR 1959 J&K 28; *Padam Nath* v. *Prithvi Nath*, AIR 1957 J&K 53; *Lala* v. *Rasula*, AIR 1957 J&K 3; *Ramzan* v. *Hatji*, AIR 1951 J&K 12; *P.K. Nayar* v. *Ranghat*, ILR 1959 Ker 1068; *V. Ramarao* v. *K. Bhaskararao*, AIR 1969 SC 1359; *Dasarathi Misra* v. *Bahgirathi Misra*, 1977 Cut 608; *Matiram* v. *Sukma Bai*, AIR 1960 MP 46; *Subramanian Chettiar* v. *Khmaroppa Chettiar*, AIR 1955 Mad 144; *N.B. Gurung* v. *Anil Krishna*, AIR 1957 Mani 25; *Abid Ali Khan* v. *Secretary of State*, AIR 1951 Nag 327; **following in** *Sarnon* v. *Sahu*, AIR 1935 Lah 93; *Jogendra Nath* v. *Caharan Das*, AIR 1958 Ori 160; *Bhikari* v. *Madan Mahan Jiu*, AIR 1953 Ori 73; *Rafail Uraon* v. *Baiha Uraon*, AIR 1957 Pat 70; *Jitendra Pratap* v. *Bhagwati Prasad*, AIR 1956 Pat 457; *Kirpa Singh* v. *State*, AIR 1954 Pepsu 28; *Atma Ram* v. *Chambeli*, AIR 1953 Punj 211; *National Bank* v. *Bai Brothers*, 1951 Punj 239; *Amar Chand* v. *Shankari*, 1956 Raj 51; *Bharat Singh* v. *Raj Singh*, ILR (1951) 1 Raj 645; **overruled on** another point in *Nagori Ibrahim* v. *Shahji Babumal*, 1954 Raj 83 (FB); *Kanku* v. *Khrsiti*, ILR (1967) Guj 1003 (FB); *Maro* v. *Paras Ram*, AIR 1966 HP 22; *Neelakntha Roy* v. *State*, ILR (1968) Cut 611; *Langa* v. *Jaba*, AIR 1971 Pat 185; *Kirit Bikram* v. *G. Kishore*, AIR 1968 Tri 11; *Gopendra Krishan* v. *Mrinalini Basu*, ILR (1975) 1 Cal 156; *Mumtaz Begum* v. *S.A. Ullah Khan*, 1973 J&K 28; *Shantilal Baldota Co.* v. *Collector of Central Excise, Bombay*, ILR (1979) Bom 329

66. *State* v. *Banshilal Luhadia*, AIR 1962 Raj 250.

67. *Jatindra Lal* v. *N.C. Dev Barman*, AIR 1957 Tri 18; **Relying on** *H.T. Huntley* v. *Emperor*, AIR 1944 Pat 378; *Jacob* v. *Jabcob*, 1949 Pat 108.

68. *Md. Hussain* v. *State*, ILR (1957) 7 Raj 440; *State* v. *Kala*, AIR 1957 HP 42.

69. *Kantu Chhagan* v. *State of Gujarat*, 1982 Cr LJ 1110 (Guj).

70. *S. Krishna* v. *State of Kerala*, 1998 Cr LJ 785 (para 8) (Kant).

because the charge is under Section 4(i) of the Act. Section 101 of the Evidence Act is equally applicable to such cases.[71]

In a criminal trial, for conviction of person for possession of assets disproportionate to his income, the prosecution need not disapprove all possible source of his income.[72]

In a prosecution under Prevention of Corruption Act, there are discrepencies in the oral evidence of the complaint with regard to demand of money, it could be said that the prosecution had failed to prove vital part of its case and thereby the accused is entitled for acquital.[73]

In a criminal trial in order to prove a change of criminal misappropriation under the Prevention of Corruption Act, if the nature of burden of proof on the prosecution is of a negative character, then the burden can be discharged by circumstantial evidence.[74]

Where prosecution alleges that the accused accepted or agreed to accept or attempted to obtain any gratification or valuable thing—the presumption under Section 4 will be made against the accused. This does not mean that the burden of the prosecution to establish acceptance of gratification is displaced by the section—the burden still remains on it. This proof must be in accordance with standard of proof laid down in Section 3, Evidence Act.[75] It is for the prosecution to prove by positive evidence that the accused obtained the thing from a person who is known to be related to the concerned person.[76]

Where some matter is presumed by the statute against an accused person "unless the contrary is proved" within Section 5(3), Prevention of Corruption Act (1947), the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt and the burden of proof may be discharged by evidence satisfying the court of the probability of that which the accused is called upon to establish.[77]

The degree and the character of the burden of proof which Section 4(i) of Prevention of Corruption Act casts as an accused person to rebut the presumption thereunder, cannot be equated with the degree and character of proof which under Section 101, Evidence Act rests on the prosecution while the mere possibility of an explanation given by the accused is his examination under Section 342 of old Cr.P.C. (S. 313 of Cr.P.C., 1973) may not be enough, the burden on him to negate the presumption may stand discharged, if the effect of the material brought on the record, in its totality, renders the existence of the fact presumed in probable.[78]

The burden of proof lying upon the accused under Section 4(*i*) of the Prevention of Corruption Act will be satisfied if he establishes his case by a preponderance of possibilities as is done by a party in civil proceedings; it is not necessary that he should establish his case by the test of proof beyond a reasonable doubt.[79]

18. OFFENCE UNDER SEA CUSTOMS ACT

Mere knowledge that goods are smuggled goods is sufficient. It is not necessary for the prosecution to establish not only that the accused knew that goods were smuggled, but that he took some active part

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71. *State (Del.) Admn.* v. *Satish Chand*, 1987 Cr LJ 1205 (Del); *C.I. Emden* v. *State of U.P.*, AIR 1960 SC 548; **overruling on** *State* v. *Abkey Singh*, AIR 1957 Raj 138; *Hayati Usha* v. *State*, AIR 1967 Goa 11 (FB); *Rameshwar Prasad* v. *State of Rajasthan*, 1979 Cr LJ 484 (Raj).
72. *State of Maharashtra* v. *Wasudeo Ramchandra*, AIR 1981 SC 1186.
73. *Anantray Lalji* v. *State of Gujarat*, 1982 Cr LJ 1883 (Guj); **Relying on** *Hari Dev* v. *State of Delhi*, 1976 Cr LJ 1176 (SC); *Panalal* v. *State of Maharashtra*, AIR 1979 SC 119 : 1979 Cr LJ 936; *Khembu Ram* v. *State of H.P.*, 1972 Cr LJ 381 (HP).
74. *Hargan Sunder Das* v. *State of Maharashtra*, AIR 1970 SC 1514; *State of H.P.* v. *Mirza Hussain Beg*, AIR 1954 HP 33; *Gopiram* v. *State*, AIR 1954 MB 21; *Sumandar Singh* v. *State*, ILR (1956) 6 Raj 942.
75. *Sanjib Kumar* v. *Principal, St. Paul's College*, AIR 1951 Cal 524; *State of Gujarat* v. *Mardhavbhai*, AIR 1964 Guj 206; *Kunhi Mohammed* v. *State*, AIR 1959 Ker 88; *Sree Krishnanarayana Rao* v. *Republic of India*, AIR 1958 Ker 136; *Deonath Dudhnath* v. *State*, 1967 Bom 1; *Om Dutt Sharma* v. *State*, AIR 1960 All 470.
76. *Urbasi Dharvoni* v. *Chandra Dharaa Satturn*, 1956 Ori 201.
77. *G.V. Nair* v. *Govt. of India*, (1963) 1 Cr LJ 675 (Ker).
78. *Trilok Chand* v. *State of Delhi*, AIR 1977 SC 666; **Following in** *Mahesh Prasad Gupta* v. *State of Rajasthan*, AIR 1974 SC 773.
79. *V.D. Jhingan* v. *State of U.P.*, 1966 SC 1762; **Relying on** *Woolmington* v. *Director of Public Prosection*, 1935 AC 462. *Rex* v. *Carr Briant*, (1943) 1 KB 607; *Harbhajan Singh* v. *State of Punjab*, AIR 1966 SC 97.

in the smuggling, thereby indicating the intention to avoid payment of duty or evade restriction. Mere possession is sufficient.[80]

19. OFFENCES RELATING TO ESSENTIAL COMMODITIES ACT

That possession of kerosene stock is for sale without licence must be proved by the prosecution.[81] Burden is on prosecution to prove that the commodity which was being exported was uncleaned *turdal*. It is not for accused to prove that the commodity was not uncleaned *turdal*.[82] It was held onus was on prosecution to prove beyond reasonable doubt that *Khesari Dal* kept in shop of accused was for sale for human consumption.[83] Burden to prove that the accused is a dealer within the definition is on prosecution.[84]

Under Section 15, Essential Supplies (Temporary Powers) Act, where any person is prosecuted for contravening any order made under Section 3 which prohibits him from doing an act without a permit, the burden of proving that he had such a permit shall be on him.[85] Burden to prove that the food grains are for sale lies on person who stores foodgrains.[86]

When prosecution failed to prove that the delay had no relation to incriminating excess percentage in damaged grains, it could be presumed that the sample may have been infested with fungus during that period. In such cases, the accused can be given benefit of doubt under Section 13 of the Prevention of Food Adulteration Act.[87]

20. PREVENTIVE DETENTION

An order of detention can only be challenged on ground of malice, the defence must establish *mala fides* on the part of the Government to secure his release.[88] Burden lies on the detenu to prove that the conduct in passing a fresh order of detention is *mala fide*.[89]

The initial burden has always been on the detenue to show that the order is liable to be quashed. This burden is not discharged by merely saying that he does not know why he was detained.[90]

Onus is initially upon the State to prove that the detaining authority was satisfied in respect of the necessity.[91]

21. COMPANY RESOLUTION

Where a resolution of a company was signed by its Chairman, it was held that it was for company to disprove that what was properly recorded in a resolution did not represent the correct position.[92]

Burden to prove that list of share holders was forwarded to Registrar in time is on the company.[93]

22. CLAIM CASES

In a suit for claiming exemption under Section 16(1) Provident Funds Act, the burden of establishing that the exemption under the section applied to the particular establishment is on the plaintiff.[94]

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80. *Asst. Collector of Customs Cal* v. *Sitaram*, AIR 1966 SC 955; **Reversing in** *Sitaram Agarwal* v. *State*, AIR 1962 Cal 370. **See** *Abdul Ali* v. *State*, AIR 1950 Assam 152—possession must be conscious possession.
81. *Kundanlal* v. *State*, AIR 1953 MB 175; *Jethalal* v. *State*, AIR 1968 Guj 163.
82. *Shrinivasa Pannalal* v. *State of M.P.*, AIR 1954 SC 23.
83. *Sita Dalcuani* v. *Rama Chandra Nahak*, ILR 1967 Cut 593.
84. *Kalipada Nandi* v. *State*, AIR 1950 Cal 427; In re : *Balaraman*, 1973 Cr LJ 1887 (Mad).
85. *Shrinivas Pannalal* v. *State of M.P.*, AIR 1954 SC 23.
86. *R.P. Gupta* v. *State*, AIR 1967 Ori 29.
87. *Bhagat Stores Panaji* v. *State*, 1982 Cr LJ 444 (Goa).
88. *Subba Rao* v. *State*, AIR 1967 AP 202.
89. *Anand Mohan Trivedi* v. *Superintedent Central Jail Agra*, ILR (1967) 1 All 22.
90. *Mrs. Bharti Nayyar* v. *Union of India*, ILR (1977) 2 Del 23.
91. *Hari Singh* v. *State*, AIR 1951 Pepsu 126.
92. *Bharat F&G Insurance* v. *P.P. Gupta*, AIR 1968 Del 68.
93. *Bankatlal* v. *State of Hyderabad*, AIR 1954 Hyd 49.
94. *Suyaji Mills Ltd.* v. *P.A. Bhasker*, AIR 1970 Bom 418.

In a suit for loss, damage or non-delivery of goods, filed against the carriers, the plaintiff is not required to prove negligence ordinarily. The burden is on the defendant carrier to prove that there was no negligence on his part.[1]

23. EVACUE PROPERTY ACT

Burden of proving property to be composite property is on custodian.[2]

24. BIHAR MONEY LENDERS' ACT

In a suit for recovery of loan without registration as money lender under the Bihar Money Lenders' Act, the burden to prove that the suit is maintainable without registration is on the plaintiff.[3]

25. A.P. LAND REFORMS (CEILING ON HOLDINGS) ACT

Burden to prove that alienations prior to 24-1-1971 were to be ignored since neither the A.P. Land Reforms (Ceiling on Holdings) Act, 1973 nor the A.P. Agricultural Lands (Prohibition of Lands) Act, 1972 bars such alienations, was on the landlord.[4]

26. URBAN LAND (CEILING AND REGULATION) ACT

Where the owner of the land in question pleaded it to be agricultural land, burden to prove the same was on him.[5]

27. EXEMPTION TO RULER

Application by Ruler to examine himself as his own witness on commission— claim of right as Ruler to be exempted from personal attendence—Burden of proving it is on Ruler.[6]

The plaintiff who wants to take advantage of an exception to a statutory bar, must clearly prove that his case is covered by the exception.[7]

28. JUDGEMENT-DEBTOR

Burden of proof is on judgment-debtor to satisfy the Court that his circumstances are such as to justify the grant of instalments in a particular manner.[8]

29. INSOLVENCY ACT

Burden is heavy on the official receiver who seeks to impeach the insolvency to prove that it was suffered by the debtor with a view to give preference to a creditor.

See Travancore Cochin Insolvency Act.[9]

30. EXECUTION OF DECREE

Onus is on the party alleging the discharge of a decree debt to prove the same.[10]

Burden is on party alleging abandonment of execution petition to prove the same.[11]

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1. *Karnataka Transport Corporation* v. *National Insurance Bank Ltd.*, AIR 1999 Kant 233 (paras 15, 19 and 20).
2. *R.L. Aggarwal* v. *Darshanlal*, AIR 1960 Punj 612.
3. *Fula Devi* v. *Mangtu Maharaj*, AIR 1969 Pat 294 (FB).
4. *Meria Venkata Rao* v. *State of A.P.*, AIR 1994 SC 471 (para 2).
5. *M. Subraya Prabhu* v. *State of Karnataka*, 2000 AIHC 1972 (para 6) (Kant).
6. *Abdul Alim Khan* v. *Sagarmal*, AIR 1963 MP 162.
7. *Noor Mahammad* v. *Haridas*, 1950 Pat 140; *Bhola Singh* v. *State*, AIR 1972 Pat 412.
8. *Arjun Charan* v. *Sukhdev Saboo*, ILR 1963 Cut 787.
9. *P.K. Velco* v. *Official Receiver*, AIR 1968 Ker 186; **Reversed on** another point in *I.T. Officer* v. *Subramania*, AIR 1970 Ker 14.
10. *Bharat Pictures Ltd.* v. *U.P. Chongani*, 1954 Bhopal 30.
11. *Sreenivasulu* v. *Nataraja*, AIR 1955 Mad 461.

Onus to bring case within one or more clauses of proviso to Section 51, C.P.C. is on decree-holder as the judgement-debtor can not waive the privilege conferred on him *viz.*, Section 51 of C.P.C.[12]

31. INDUSTRIAL DISPUTES ACT

When union of majority of workmen takes action on behalf of a workman, the presumption is that the action is taken in a representative character with the support of its members. It is for the company (employer) to prove that the members of the union are not behind the union.[13]

32. AGRICULTURAL RELIEF ACT

Party seeking relief under Bombay Agricultural Relief Act has to show that he is an agriculturist.[14]

Where a party claimed to be an agriculturist within meaning of Section 2, U.P. Agriculturist Relief Act, why under the proviso to that section, he is deprived of the status has to be proved by the opposite party.[15]

Section 9 of the Karnataka Debt Relief Act, casts burden on the creditor to prove that the person claiming benefit of the Act is not a debtor.[16]

33. RENT ACTS

Mere acceptance of amount equivalent to rent by a landlord from a tenant in possession after a lease had been determined by a notice to quit and who enjoys statutory inmunity from evidence because of the Rent Act, cannot be regarded as evidence of a new agreement of tenancy.[17]

Onus to prove that land was 'accommodation' covered by Section 2(*a*), U.P. (Temp) Control of Rent and Eviction Act, 1947, is on tenant claiming protection of Section 3 of the Act.[18]

In an eviction proceeding on the ground of *bona fide* need of landlord, burden lies upon him to establish that he genuinely requires the accommodation[19] and to avail the protection against eviction on the ground that no other suitable building was available in the locality for the tenant to shift his business, burden to prove the said fact was on him.[20] Where in an eviction proceeding on the ground of *bona fide* need, the landlord showed to be in possession of only one room which was not sufficient for his entire family whereas the tenant pleaded that the landlord was in possession of three rooms instead, the burden was on the tenant to prove his plea and not on the landlord to prove that he was not in occupation of three rooms.[21] The Bombay High Court has also held that it is open to the Court to presume the reasonable and *bona fide* need of the landlord and put the onus on the tenant to establish otherwise.[22] Where a landlord files an eviction petition on the ground of sub-letting, the burden of proving the parting with the possession in favour of a third party by the tenant lies on the landlord and on his discharge of the initial burden, onus shifts on the tenant to explain.[23] Onus to prove his plea that the suit premises was not vacated by him would be on the tenant[24] and also to prove that he is a tenant and not a licencee.[25]

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12. *Jogendra Missir* v. *Ramnandan Singh*, 1968 Pat 218: *A.K. Subramania* v. *A. Ponnuswami*, AIR 1957 Mad 777.
13. *Management of the Hindustan Times Ltd.* v. *Chief Commissioner, Delhi*, AIR 1957 Punj 102.
14. *Abehsang* v. *Dhirajlal*, AIR 1956 Bom 215.
15. *Kishan Chand* v. *Ram Basu*, AIR 1965 All 65 (FB).
16. *Narayini Amma* v. *Kochu Pillai*, AIR 1987 Ker 171.
17. *Mohanlal* v. *Siri Krishan*, AIR 1978 Del 92: **Relying on** *Bhawanji Lakhamshi* v. *Hinatlal Jamnadas*, AIR 1972 SC 819.
18. *Abdul Sami* v. *Mohammad Noor*, AIR 1966 All 39.
19. *S.J. Ebenezer* v. *Velayudhan*, AIR 1998 SC 746 (para 11).
20. *Scariah Kuncheria* v. *K.A. Rivas*, 1999 AIHC 1924 (paras 10, 15 and 17) (Ker).
21. *Dhondiba Vithalrao Jagtap* v. *Parubai Malhari More*, 1999 AIHC 2119 (para 4) (Bom).
22. *Shankar Bhairoba Vadangekar* v. *Ganpati Appa Gatare*, 2001 AIHC 3483 (paras 23 and 24) (Bom).
23. *Kala* v. *Madho Parshad Vaidya*, AIR 1998 SC 2773.
24. *Hardit Singh Chadha* v. *Jagtar Singh Grover*, AIR 1994 Del 189 (para 26).
25. *Hanuman Dutt Bajpai* v. *Budha Singh*, 1998 AIHC 25 (para 8) (Del).

34. RECORD OF RIGHTS

The entries in the record of rights are presumed to be correct until they are proved to be incorrect by evidence. The presumption would not apply where the entries were made not under any statute or the rules framed thereunder.[26]

35. TRADE MARKS AND PATENTS

The burden of proving that the trade mark which a person seeks to register is not likely to deceive or to cause confusion is upon the applicant. He must satisfy the Registrar that his trade mark does not fall within the prohibition of Section 8 of the Trade Marks Act, 1940.[27]

When a trade mark is an ordinary plain word, heavy onus lies upon applicant to prove that it has acquired distinctiveness.[28]

36. MRTP ACT

Burden to prove unfair trade practice lies on the person who alleges it.[29]

37. CONTRABAND

Prosecution should prove that articles brought are smuggled articles— Presumption under Section 178-A cannot be raised when article seized is not covered by Section 178(A)(2)[30].

Section 3 of Assam Opium Prohibition Act 1947 prohibits import, export, transport or possession of opium among other things. Section 5(*a*) provides for punishment for contravention. Section 28 lays down that unless and until the contrary is proved, it shall be presumed that the accused has committed the offence in respect of the opium for the possession of which he fails to account for satisfactorily. The Assam High Court held that possession means knowledge or consciousness of the existence of an article at a place where he could exercise dominion. Conscious possession on the part of the accused has to be established by the prosecution for the presumption under Section 28 to be raised. Burden to prove conscious possession on the part of the accused remains on the prosecution and is not shifted to the accused by anything contained in Section 28.[31]

The expression "unless and until the contarary is proved" in Section 54 (Narcotic Drugs and Psychotropic Substances Act) clearly imposes the burden of proving that the possession of the prohibited substance is legal, is on the accused himself and that dispenses entirely the prosecution from proving that possession of such substances is illegal.[32]

Where there was no evidence against accused excepting that the contraband opium was being carried in car which belonged to him, he cannot be convicted on suspicion that he was behind the same.[33]

Owing to the peculiar nature of the offence dealt with under the Act the Legislature thought it wise to put the onus of proving his innocence upon the accused person where there was a reasonable belief that he was in possession of smuggled goods and such goods were actually seized from his possession.[34]

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26. *Mahant Krishna Dayal* v. *Rani Bhubaneswari*, AIR 1931 PC 221; *Jatindranath Malik* v. *Sushilendra Nath*, AIR 1965 Cal 321; *Lakhi Nath Bera* v. *Nabadwip Chandra Nandi*, AIR 1927 Cal 268; *Srinath* v. *Udainath*, AIR 1923 PC 217; *Shankarrao* v. *Shambhunath*, AIR 1940 PC 192; *Shaligram Taltesam Shop* v. *Narayansa*, AIR 1954 Nag 223; *Sheo Pershad* v. *Jhaman Singh*, AIR 1925 Pat 488.
27. *N.S. Thread Co.* v. *James Chadwick & Bros.*, AIR 1953 SC 357.
28. *Ram Rakhpal* v. *Amrit Dhara Pharmacy*, AIR 1957 All 683.
29. *H.M.M. Ltd.* v. *Director General, Monopolies & Restrictive Trade Practices Commission*, AIR 1998 SC 2691.
30. *Public Prosecutor* v. *M.L. Modi*, AIR 1961 Mad 368.
31. *Abdul Ali* v. *State*, AIR 1950 Assam 152.
32. *Radhakisna Parashar* v. *State*, 1988 Cr LJ 17 (Bom). **See contra** *Shermal* v. *C.E. & L.C. Collector*, 1956 Cal 621.
33. *State* v. *Venkata Ramana*, ILR (1964) Cut 890.
34. *State of Punjab* v. *Krishanlal*, AIR 1960 Punj 664.

In a case under Narcotic Drugs and Psychotropic Substances Act, 1985, it was held that the prosecution must prove that the accused was informed of her right in respect to search and seizure under S. 50(1) of the said Act.[35]

38. FOOD ADULTERATION ACT

Though the prosecution need not prove the *mens rea* of the accused under prevention of food adulteration, the onus to prove every essential ingredient of the offence lies on the prosecution.[36]

39. PROHIBITION CASES

Burden is on prosecution to prove that the accused committed offence under Prohibition Act.[37]

40. NEGOTIABLE INSTRUMENTS ACT

Onus of proving good faith and absence of negligence as contemplated by Section 131, Negotiable Instruments Act is on the banker claiming protection under the Act.[38]

In case of dishonour of a cheque, the burden of proof of innocence lies on the accused drawer of the cheque and it does not run counter to the basic principle of criminal law presumption of the innocence of the accused.[39]

41. TRANSFER OF PROPERTY ACT

The rule against the coming to an end of the tenancy on the redemption of the mortgage (Section 76(a) of T.P. Act) being in the nature of an exception has to be specifically proved by the tenant inducted into possession by the mortgage. As such the burden of proof lies on the tenant to establish the *bona fides* of the mortgagee when tenancy is created by him in the course of management.[40]

Where the deceased had allegedly committed criminal trespass in the land of the accused who delivered two deadly knife blows on his chest and the sale-deed established the transfer of possession in favour of the father of the accused, it was for the prosecution to prove that possession of the accused was subsequently disturbed and the deceased had come into possession. The burden of proof was not on the accused to establish that their possession remained undisturbed.[41] In a case which involves determination of the question whether there has been surrender of old lease and creation of fresh lease, apart from the direct evidence the circumstantial evidence has a great role to play. While appreciating the evidence brought on records by the parties, the Court in a case of this nature must also necessarily take into consideration the normal human behaviour as also its experience in such matter. The Court in a case of this nature cannot arrive at a finding on the basis of the consideration of abstract rule of burden of proof but on consideration of the entire material on record has to arrive at a finding on the basis as to in whose favour the preponderance of probability lies. It is also a trite law that the question of onus of proof looses its importance when both sides have adduced evidence.[42] Where the executant of the sale-deeds was illiterate, burden was on the persons wanting to take advantage of the deeds to prove that the contents of the deeds were read over and explained to the executant.[43] In a transfer by an ostensible owner, the

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35. *Shanta Bai* v. *State of Madhya Pradesh*, 1999 Cr LJ 1945, at p. 1947 (MP).
36. *Manindra Narayan* v. *State of Assam*, 1977 Cr LJ 1102; *Mohonar Singh* v. *State of Punjab*, AIR 1960 Punj 135; *Mehnza Buta* v. *Crown*, AIR 1953 Punj 295; *M.N. Rajan* v. *State of Kerala*, 1980 Cr LJ 177 (Ker); *Rajesh Kumar* v. *State of U.P.*, 2001 Cr LJ 2093 (para 13) (All).
37. *State of Bombay* v. *Narandas*, AIR 1962 SC 579; In re : *A.S. Krishna*, AIR 1954 Mad 993; *Lingappa* v. *State of Mysore*, AIR 1955 Mys 116; *Koli Ganda* v. *State*, AIR 1956 Sau 25; *State* v. *Talshi Sadul*, 1953 Sau 14; *Ayodhya Prasad* v. *State of Maharashtra*, 1971 Cr LJ 712 (Bom).
38. *Wood Briar Estate Ltd.* v. *Catholic Bank of India*, AIR 1958 Ker 316.
39. *R Sankaralingam* v. *Union of India*, 1996 Cr LJ 3387 (paras 5-7) (Mad). **See also** *Hiten P. Dalal* v. *Bratindranath Banerjee*, 2001 Cr LJ 4647 (paras 20 and 21) (SC); *K.N. Beena* v. *Muniyappan*, 2001 Cr LJ 4745 (paras 6 and 7) (SC) : AIR 2001 SC 2895.
40. *Matra Puri* v. *Hukam Chand*, AIR 1965 Punj 231.
41. *Deepa* v. *State of M.P.*, 1999 Cr LJ 413, at p. 415 (MP).
42. *Tarak Nath Sha* v. *Bhutoria Brothers Pvt. Ltd.*, AIR 1998 Cal 31.
43. *Kartick Prasad Gorai* v. *Neami Prasad Gorai*, AIR 1998 Cal 278 (para 21). **See also** *Sethani* v. *Bhana*, AIR 1993 SC 956 (para 4).

burden to prove that the ostensible owner under the registered sale-deed is only a *benamidar*, lies upon the person who sets up *benami*.[44] Where the persons challenging the execution of the sale-deeds were not present at the time of execution and the concerned parties had full knowledge of the respective cases and led evidence, the question of burden of proof had become academic.[45]

42. CONTRACT ACT—BAILOR-BAILEE

Where goods entrusted to a bailee are lost, initial presumption of negligence on his part arises and the onus to rebut the same by proving that such care as a man of ordinary prudence would have exercised was taken.[46] In the case of bailment if the damage caused were such that in the ordinary course of events it would not happen to the goods of the kind in questions, if used with ordinary prudence, it would be for the hirer to prove that he had exercised such prudence; otherwise, the owner must prove negligence.[47] Bailor has to prove negligence or lack of sufficient care on the part of bailee from the materials produced by bailee to prove negligence on his part.[48] Onus to establish special contract to escape ordinary liability as a bailee is on him who pleads the same.[49]

The same rule as to burden of proof applies to the case of a Railway Administration. See cases under Sections 151 & 152 of the Contract Act and the cases under the Heading Carriers Act.

43. CARRIERS—RAILWAYS ACT

If the loss or damage has been caused to the property during the transit, the burden of proof is on the carriers Railway Administration to prove absence of criminal act or negligence on the part of carrier or its agents or servants.[50] When there is a loss caused by criminal act of carrier or his servant, then it is for carrier to prove that no criminal act was committed by him or his agent or servant.[51]

The value of goods and extent of damage have to be proved by the claimant because the railway certificate is not the final thing.[52]

Where railways had to prove that the goods were not lost within seven days of the end of transit and offered no evidence, their case fails.[53]

Provision imposing burden on one set of common carriers only, without a similar burden being cast on other common carriers like Railways and Airways, is not violative of Article 14 of the Constitution of India.[54]

If his foods were consigned on one Railway and delivered on another Railway in a damaged condition, then the burden of proof is on delivering railway to prove that the damage did not occur in its Railway.[55] When the goods are consigned at Railway risk and there is shortage in delivery on account of pilferage in transit the case comes with the general responsibility of the Railway Administration under

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44. *Mirza Mahboob Baig* v. *D.V. Narasimha Reddy*, 1996 AIHC 3070 (para 14) (AP).
45. *Kartick Prasad Gorai* v. *Neami Prasad Gorai*, AIR 1998 Cal 278, at page 282. The Court referred to *Narayan Bhagwantrao Gosavi Balajiwale* v. *Gopal Vinayak Gosavi*, AIR 1960 SC 100, at page 105.
46. *Trustees of Harbour, Madras* v. *Best & Co.*, ILR (1899) 22 Mad 524 Delivery of goods for safe custody; *Shields* v. *Wilkinson*, ILR (1887) 9 All 398; *Lakhi Chand* v. *G.I.P. Railway Co.*, ILR (1913) 37 Bourl : 14 IC 793 (2); *Firm Gourimal* v. *Secretary of State*, ILR (1926) Lah 217 : 91 IC 963; *Maung PO* v. *Maung Tha*, ILR (1923) Rang 73 : 74 IC 18; *Cochin Port Trust* v. *Associated Cotton Traders Ltd.*, AIR 1983 Ker 154.
47. *Rampal* v. *Murray & Co.*, ILR (1899) 22 All 164.
48. *Calcutta Credit Corporation* v. *Prince Peter*, AIR 1964 Cal 374; *Thacker Jeraj Keshavji* v. *Chavda Soleman, Mod*, AIR 1952 Kut 50; *Ranga Raju* v. *Muthu Krishna*, 1962 Mad 244; *Madras Port* v. *Home Insurance Co.*, AIR 1970 Mad 48.
49. *Raipur Transport Co.* v. *Ghanshyam*, AIR 1956 Nag 145.
50. *Banwarilal* v. *Road Transport Corporation*, AIR 1989 Pat 303; *Union of India* v. *Ranganayukulu*, AIR 1964 AP 477; *Lakshmiah* v. *Union of India*, AIR 1969 AP 386.
51. *Yelinje Mammi* v. *Chennakeshava*, AIR 1963 Ker 198.
52. *Union of India* v. *Madan Mohan*, AIR 1981 Ori 9.
53. *Raman & Co.* v. *Union of India*, AIR 1985 Mad 37; *Union of India* v. *Ram Prasad.*, AIR 1982 Raj 253.
54. *Assam Bengal Roadways Ltd.* v. *Union of India*, AIR 1988 Kant 157.
55. *Tahsil Co-op. Agricultural Association* v. *Union of India*, AIR 1968 MP 185; **Relying on** *Jetmull Bhojraj* v. *Darjeeling, Himalaya Railway Co. Ltd.*, AIR 1962 SC 1879.

Section 73 and the onus will lie upon the Railway to prove that they had taken reasonable care, even if the goods were proved to have been defectively packed by the consignor.[56]

When the Railway pleads loss due to looting by riotuous mob, it is for them to place all necessary materials for a proper inference.[57] Burden to prove negligence and misconduct on the part of Railway Administration, is on the plaintiff. When there is a loss occurred in deviation from agreed route or goods were not properly packed or destroyed by fire, the onus is on the Railway Administration in view of Section 74 of the Railway Act.[58] Where a person sending parcel for carriage by railways has not declared the value of goods and there is a loss of the parcel then the burden lies on Railway Administration to prove loss.[59] When the Railway Administration pleads for the dismissal of the suits on the ground of limitation, it has to establish that the loss occurred beyond one year from the date of institution of the suits.[60]

Section 9 of the Carriers Act relieves the plaintiff of proving negligence. The carrier must exonerate himself from liability.[61]When a Consignor or agent signed the declaration expressly agreeing to all conditions in the consignment note, burden lies upon him to show that the signature was secured by fraud or misrepresentation or that he had no notice of the conditions[62].

44. LAND GRABBING

In an allegation that certain parties are landgrabbers, the initial evidence as to the said allegation is to be adduced by the complainant in the first instant and not by the persons against whom allegation has been made.[63]

45. SEIZURE AND AUCTION

Where a bank seized a vehicle and auctioned the same asserting that it did so in exercise of its legal rights, onus was on the bank to prove its assertion and not on the plaintiff.[64]

On whom burden of proof lies.

S. 102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

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56. *T.M. Veerappa* v. *Union of India*, AIR 1972 Mys 164; *Bellary Central Co-op. Stores Ltd* v. *Union of India*, AIR 1959 Mys 90; **Distinguishing from** *Dominion of India* v. *Guru Prosad Ram*, AIR 1949 Cal 679; *Union of India* v. *C.S. Rai*, AIR 1973 Pat 244; *Union of India* v. *Orissa Textile Mills*, AIR 1979 Ori 165; *General Manager, Southern Rly.* v. *Agarwal Traders*, AIR 2001 Kant 366 (paras 10 and 11).
57. *G.G. in Council* v. *Mahabir Ram*, 1952 All 891 (FB); **Relying on** *Dwaraka* v. *R.S.N. Co.*, AIR 1917 PC 17.
58. *S.V. Traders* v. *Union of India*, AIR 1966 All 333; *Pyarelal* v. *Governor General of India*, AIR 1957 All 21; *Union of India* v. *Eastern Match Co.*, AIR 1964 AP 172; Firm *R. Bhagwati Prasad* v. *Union of India*, AIR 1959 Assam 98; *Jalim Chand* v. *Union of India*, AIR 1956 Assam 188; *Union of India* v. *Muralidhar*, AIR 1951 Assam 173; *Ram Krishna Ramnath Shop* v. *Union of India*, AIR 1960 Bom 344; *Fushraj Thanmull* v. *Union of India*, AIR 1960 Cal 458; *Bhairuddon* v. *Union of India*, AIR 1957 Cal 573; *India T&G.I. Co.* v. *Union of India*, AIR 1957 Cal 190; *D.H. Railway Co.* v. *Jetmall Bhojraj*, AIR 1956 Cal 390; *Manickam Chettar* v. *Union of India*, AIR 1960 Mad 149; *Asaram* v. *Union of India*, AIR 1957 Nag 59; *Union of India* v. *Parikh Shankerlal*, AIR 1956 Nag 255; *Dominion of India* v. *Rupchand*, AIR 1953 Nag 169; *Union of India* v. *Bishwanath*, AIR 1959 Pat 473; *Union of India* v. *Bhagwan Sah*, AIR 1957 Pat 325; *Janendra Kumar Jain* v. *Union of India*, AIR 1957 Pat 147; *Manilal Raghavji* v. *Union of India*, AIR 1956 Pat 434; *Sattanmal Vishandas* v. *Union of India*, AIR 1960 Raj 121; *Union of India* v. *Brijlal*, AIR 1969 SC 817; *Union of India* v. *Firm, M.P. & Sons*, AIR 1971 MP 131; *Union of India* v. *Bhagat Ram*, AIR 1967 Del 153; *Union of India* v. *Raj Supplying Agency*, AIR 1968 AP 327; *Union of India* v. *Hukumchand*, AIR 1970 MP 55; *K.R. Sarda & Co.* v. *Union of India*, AIR 1968 MP 199.
59. *Banarsi Stores* v. *President*, AIR 1953 All 318; *Gopi Krishna* v. *Union of India*, AIR 1961 Pat 473; *Dominion of India* v. *B.L. Butt*, AIR 1957 Pat 328; *Sheonandrai Gajanand* v. *Union of India*, ILR (1967) 46 Pat 607; *Union of India* v. *Orissa Textile Mills*, AIR 1967 Ori 148.
60. *Union of India* v. *Amar Singh*, AIR 1960 SC 233; *Fetmull Bhojraj* v. *Darjeeling Himalayan Railway Co. Ltd.*, AIR 1962 SC 1879; *Raman & Co.* v. *Union of India*, AIR 1985 Mad 37.
61. *M. Sicka & Co.* v. *Narhar Singh*, AIR 1959 MP 351; *A.S. Navigation Co.* v. *Jethalal*, AIR 1959 Cal 479.
62. *I.A. Corporation* v. *Jothaji*, AIR 1959 Mad 285.
63. *Bahaggan Bai* v. *Mandal Revenue Officer*, 1998 AIHC 317 (paras 3 and 4) (AP).
64. *J&K Bank* v. *Sardar Karan Singh*, 1998 AIHC 4703 (paras 3-5) (J&K).

ILLUSTRATIONS

(a) *A* sues *B* for land of which *B* is in possession, and which, as *A* asserts, was left to *A* by the will of *C*, *B*'s father.

If no evidence were given on either side, *B* would be entitled to retain his possession.

Therefore the burden of proof is on *A*.

(b) *A* sues *B* for money due on a bond.

The execution of the bond is admitted, but *B* says that it was obtained by fraud, which *A* denies.

If no evidence were given on either side, *A* would succeed, as the bond is not disputed and fraud is not proved.

Therefore the burden of proof is on *B*.

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COMMENTS

1. ABANDONMENT

Abandonment must be proved affirmatively by the person who sets up by unimpeachable evidence.[1]

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1. *Y.C. Rattayya* v. *D. Venkata Ramayya*, AIR 1959 AP 551; *Kanhiya Shanker* v. *Mohabata Sedhu*, AIR 1960 Punj 494; *Nemsnath Appayya* v. *Jamboo Rao*.

2. ABATEMENT

Where a tenant claims abatement of rent on account of diluvion and the landlord admits or it is proved that some diluvion has taken place, the onus is upon the tenant to prove the extent of the diluvion and the corresponding abatement claimed.[2]

3. ACCOUNTS

There is no presumption that in a suit for accounts, the accounts produced by the legal representative, as being that of the deceased accounting party, are either genuine or correct. But since the original accounting party is not available, they must be treated as '*prima facie*' accounts of the deceased, and it would be for the plaintiff to prove that they are not genuine or correct.[3]

In a suit for recovery of amount due on the basis of adjustment of amounts signed by defendant, if the defendant denied the correctness of amount found due, then the defendant who is in possession of account books, from which the balance could be assertained should produce them before the court. He cannot be heard to say, relying upon the abstract doctrine of onus of proof, that it was not part of his duty to produce them unless he was called upon to do so.[4]

4. ACQUIESCENCE, ADMISSION, ESTOPPEL AND WAIVER

The onus is on the person who pleads estoppel[5]. The burden is on the insurer to show the breach of the conditions of the policy for avoiding its liability.[6]

The person who sets up a plea that the admission contained is an unregistered document, either admitted or proved, is, as a matter of fact, false the burden lies on him to prove that fact.[7] Burden of proving contrary to admission of adoption in a registered deed lies on him making admission.[8] Onus is heavy on a person to show that recitals in document as to admission made by him while executing the document are untrue or tainted with illegality or the untrue statements were made with set purpose.[9]

Onus of proof is on judgment-debtor to prove waiver on part of decree holder to exercise a right which had arisen under the decree when acceptance of money after default took place.[10] Burden of proof is on the purchaser to establish the waiver of right by other co-heirs.[11]

5. ADOPTION

A party who is seeking to establish adoption displacing the right of the natural heirs has to prove strictly not only the factum of adoption but also its validity, but where there is long lapse of time between the adoption and when it was questioned, absence of some evidence in proof of adoption can be favourably entertained and the burden shifts on the otherside and the burden rests heavily on him who challenged its validity.[12] A person who seeks to displace the natural succession to property by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption and its validity. The evidence in proof of the adoption should be free from all suspicion of fraud and so

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2. *Arun Chandra Singha* v. *Bhagaban Chandra Roy*, ILR 1931 Cal 537 (FB).
3. *Panmal* v. *Omraomal*, AIR 1953 Cal 244.
4. *Hiralal* v. *Badkulal*, AIR 1953 SC 225; **following in** *Murugesan Pillai* v. *Gnana Sambandha*, AIR 1917 PC 7; *Ishwar Dass* v. *Radha Mal*, AIR 1960 Punj 417; **relying on** *Rameshwar Singh* v. *Bajit Lal Pathak*, 1929 PC 95; *Kanhailal* v. *Kantilal*, AIR 1968 Raj 278; *Budhlada Municipality* v. *Firm Bhuria Mal*, AIR 1953 Punj 94; *Khushi Ram* v. *Mehrchand*, 1950 East Punj 272.
5. *Sashi Mukhi* v. *Keshav*, 1924 PC 213.
6. *Union* v. *Sohanlal*, (1971) 2 SCR 706.
7. *Ram Chand* v. *Chhunun Mal*, AIR 1925 Lah 417 : (1925) 6 Lah 470 (FB); *Mania* v. *Wy. Director Consolidation*, AIR 1971 All 151.
8. *Bhola Chaube* v. *Man Matun*, 1965 All 258; *Govinda* v. *Chimabai*, AIR 1968 Mys 309.
9. *Muneyya & Co.* v. *Varada-rajulu*, AIR 1964 AP 17.
10. *Humayun Properties* v. *Fersazzinis (P) Ltd.*, AIR 1963 Cal 473.
11. *Nagammal* v. *Nanjammal*, (1970) 1 MLJ 358.
12. *Seetharama Chandra Rao* v. *Krishna Rao*, AIR 1925 PC 201; *Venkataratnam* v. *Venkata Narasayamma*, AIR 1964 AP 109; *Chhoti Bai* v. *Ganesh Lal*, AIR 1964 MP 302; *Babulal* v. *Dwaraka Bai*, 1963 MPLJ 46.

consistent and probable as to give no occasion for doubting its truth. Nonetheless the fact of adoption must be proved in the same way as any other fact.[13]

It is for the adopted son to prove his giving by his natural father and taking by the adoptive father and his title as an adopted son.[14]

Where an adoption was recognised by all members of family for over fifty years, strong presumption in favour of its validity arises. A heavy burden lies on reversioner challenging it to prove his allegation that it is invalid on the ground of the adoptive mother lacking competence to adopt.[15]

See Hindu Law—Adoption.

6. ADVERSE POSSESSION

Burden of making out ouster is on person claiming to displace lawful co-heirs, by adverse possession.[16] A person who is in long possession of property can undoubtedly maintain a suit to turn out a trespasser on the property, as it is the trespasser who is to show a title better than that of the plaintiff if the plaintiffs long possession is otherwise established.[17] Where a widow in joint family took over possession or some family property, the onus is on person who asserts that her possession is not adverse, to show it.[18]

If there is no evidence of open assertion of hostile title against the plaintiff, and no fault indicative of ouster was proved to have taken place any time 12 years before the date of the suit, then the plea of adverse possession must fail as the burden in this behalf squarely is upon the defendant.[19] For a plaintiff to succeed in getting possession basing on his title he has to prove that he was in possession within 12 years of the suit; the onus is not on the defendant to prove adverse possession for a period of 12 years.[20]

In a suit for possession, the plaintiff failed to prove title, it was held that in such a case it is not necessary for the defendant to prove his title.The plaintiff suit will be dismissed irrespective of the fact whether the defendant had any right in the property or not, and he cannot succeed on the weakness of the defendant's case.[21]

In a suit against Government for declaration of title based on adverse, possession the onus of proving possession, for 60 years is on plaintiff. Mere proof of long possession does not shift the onus to the State to prove its title and possession within 60 years proceeding the suit.[22]

7. AGREEMENT

If an agreement is challenged as being a restraint of trade, then the onus of showing that restrictions were reasonably necessary to his interest is on the party who is supporting the contract.[23]

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13. *Madhusudan Das* v. *Narayani Bai (Smt.)*, AIR 1983 SC 114; *Daulat Rao* v. *Harish Chander*, AIR 1972 SC 2446; *Arjun Banchhor* v. *Buchi Banchhor*, AIR 1995 Ori 32 (para 7).
14. *Debi Prasad* v. *Tribeni*, AIR 1970 SC 1286.
15. *V. Ramarao* v. *K. Bhaskarao*, AIR 1969 SC 1359.
16. *P. Lakshmi Reddy* v. *L. Lakshmi Reddy*, AIR 1957 SC 314; *Secretary of State* v. *Cheliani Ruma Rao*, 1916 PC 21; *Bitola Kuer* v. *Ramacharan*, AIR 1978 all 555; **Relying on** *Radhamoni Debi* v. *Collector*, ILR 27 Cal 943 (PC); *Alla Rakhi* v. *Shan Md.*, AIR 1934 PC 77; *Lachhmi Nath* v. *Bholanath*, AIR 1964 All 383; *States of J&K* v. *Sannavllah*, AIR 1966 J&K 45; *Balia* v. *Kanshi Ram*, AIR 1975 HP 60; *Franiji* v. *Gokuldas*, ILR 16 Bom 338; *Ganpatrao* v. *Hardayal*, AIR 1933 Lah. 72; *Garibu* v. *Lakhshami Narain*, AIR 1952 J&K 24; *Trilochan Dand Sena* v. *State (FB)*, AIR 1995 Ori 239 (para 9); *D. Lakshmamma* v. *Kathi Chinna Narasappa*, 1999 AIHC 3370 (para 15) (AP).
17. *S. Jama Masjid* v. *Kanhaiyalal*, AIR 1973 Raj 322.
18. *Gaya Deen* v. *Amrauti*, AIR 1955 All 630; *Rashid Ali* v. *Durparam Namasudra*, AIR 1954 Assam 94; *B. Gopal Krishnam* v. *Meganathan*, AIR 1973 Mad 170; *Triveni Bai* v. *Swaroop Chand*, AIR 1974 Raj 232.
19. *Joti* v. *Manukabai*, 1988 Bom 348.
20. *Bhikari Charan Sahu* v. *Chhima Basic School*, AIR 1967 Ori 44.
21. *Chotelal* v. *Mangali*, AIR 1957 All 135; *Audilakshamma* v. *V.A. Ramarao*, AIR 1973 AP 149; *Jagadish Narain* v. *Nawab Said Ahmad Khan*, AIR 1946 PC 59; *Nasiruddin* v. *Lala Baboolal*, AIR 1945 All 197; *Brahma Nand Puri* v. *Meki Puri*, AIR 1965 SC 1506; *Govindji* v. *Devji*, ILR (1960) 10 Raj 1197; *Lalita James* v. *Ajit Kumar*, AIR 1991 MP 15.
22. *Kurmanaikulu* v. *D.M.E., S.E., Rly*, AIR 1964 Ori 253.
23. *V.M. & S. Brewing Co.* v. *V. Breweries Ltd.*, AIR 1934 PC 101; *N.S. Golikari* v. *Century S & M Co.*, AIR 1967 SC 1098; *Trivenkada Moopanar* v. *Subbaiah Moopaner*, (1967) 1 MLJ 117; *Hukmichand* v. *Jaipur ICE & Oil Mills Co.*, 1980 Raj 155; *Raghunandan Lal* v. *Sheodhan Das*, 1953 All 594.

8. ALIENATION

It is well-settled that it is for the party who wants the court to uphold the alienation of *debuttar* property to prove that the alienation was made for legal necessity.[24]

Under no circumstances, the initial onus which is on the purchaser shifts on the plaintiff at the first stage even when the plaintiff states in the plaint why he makes the subsequent purchaser a party and how he came to know that the person concerned was the subsequent purchaser.[25]

The burden of proving that the plaintiff had knowledge of the alienations 12 years prior to the date of suit was on the alienee defendants.[26]

9. ARBITRATION

The onus is on the person who asserts that consent of one of the parties to an arbitration was obtained by threats or through undue influence.[27]

10. ASSESSMENT TO AND RECOVERY OF TAX

In a contract for work involving transfers of contracted goods, the burden of showing that transfer of goods constituted taxable sale is on Revenue Authority.[28]

When sufficient evidence either direct or circumstantial is disclosed by Revenue Authority and the assessee fails to put before department material in his exclusive possession then adverse inference can be drawn against assessee.[29] Where the assessee fails to show that the assessment is *prima facie* wrong, the taxing authority is under no obligation to prove that it is justified.[30]

Onus lies on the department to prove in penalty proceedings under Income Tax Act that there was concealment of Income or deliberate furnishing of inaccurate particulars of income under Section 28(i)(c) of Income Tax Act.[31] Burden of proving that the Income had escaped assessment is on the I.T. Authorities.[32] Burden is on Revenue Authorities to show the income is liable to tax under the statute. Onus of proving that particular class of income is exempt from taxation, however, lies on assessee.[33] Burden of proof is on the assessee to show to the satisfaction of the Income Tax Officer that the income was saved from operation of sub-section (1) and sub-section (3) of Section 44-D of I.T. Act or under any other provisions of the Act.[34] Assessment made in respect of income on agricultural activities the

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24. *Jogendra Nath* v. *Official Receiver*, AIR 1975 Cal 389; **Relying on** *Palaniappa Chetty* v. *Devasi Kamony*, AIR 1917 PC 33; *Biram* v. *Narendra*, AIR 1966 SC 1011; *Ramsumran* v. *Shyam Kumari*, AIR 1922 PC 356.

25. *Ram Chander Singh* v. *Bibi Ashgari Begum*, AIR 1957 Pat 224.

26. *Laxminarayan* v. *Padmanabha*, AIR 1972 Mys 81.

27. *Purvatha* v. *Jayavera*, 4 WR 31 (PC).

28. *Government of A P.* v. *Guntur Tobaccos Ltd.*, AIR 1965 SC 1396; *Associated Hotels of India* v. *Excise and Taxation Officer*, AIR 1966 Punj 449; *Mangal Chand Gobardhan Das* v. *I.T. Commissioner, Assam*, AIR 1954 Assam 89; *I.T. Commissioner* v. *Bai Shirinba's*, AIR 1956 Bom 586.

29. *Income Tax Commissioner, Madras* v. *Best & Co., Ltd., Madras*, AIR 1966 SC 1325.

30. *General Electric Co-op. of India Ltd.* v. *Corp., of Calcutta*, AIR 1959 Cal 413; *Corp. of Calcutta* v. *Nani Gopal*, AIR 1956 Cal 269.

31. *Bhajuram Ganpatram* v. *C.I.T.*, AIR 1970 Ori 38; *N.J. Naidu* v. *I.T. Commr.*, AIR 1956 Nag 157; *C.I.T.* v. *Gokuldas*, 1959 Bom 96; *C.I.T.* v. *Anwar Ali*, AIR 1970 SC 1782.

32. *Bhimraj Pannalal* v. *I.T. Commissioner, B&O*, AIR 1957 Pat 638.

33. *Nizam's Religious Endowment Trust, Hyderabad* v. *Commissioner of I.T. Andhra Pradesh*, AIR 1966 SC 1007.

34. *Chidambaram Chettiar* v. *I.T. Commissioner, Madras*, AIR 1966 SC 1453; *I.T. Commissioner, Bombay* v. *Chugandas & Co.*, AIR 1965 SC 568 **relied on;** *I.T. Commissioner* v. *Ramkrishna Deo*, AIR 1959 SC 239; *Mahabir Sugar Mills* v. *State of U.P.*, AIR 1964 All 439; *Nizams Religious Endowment Trust, Hyd.* v. *Commr. of I.T., A.P.*, AIR 1966 SC 1007; *Kilash Chandra* v. *I.T. Commissioner*, AIR 1967 MP 149; *Seetharamamma* v. *Commissioner of I.T.*, ILR (1963) AP 1051; *Hazarilal* v. *Commissioner of I.T.*, ILR (1963) AP 636; *R.C. Society* v. *State of Andhra*, AIR 1961 AP 86 (FB); *Srish Chandra* v. *I.T. Commissioner*, AIR 1958 Cal 34; *N.S. Factory* v. *Commissioner of Sales Tax*, AIR 1956 Hyd. 194; *Md. Ravoother* v. *Dy. Commercial Tax Officer*, AIR 1958 Mad 176; *Rangaswamy & Bros* v. *E.P. Tax Commissioner*, AIR 1958 Mad 27; *Commissioner of Income Tax & E.P. Tax* v. *Andiappa Pillai*, AIR 1952 Mad 542; *Munnalal* v. *I.T. Commissioner*, AIR 1957 Nag 73; *Gopi Ram* v. *I.T. Commissioner*, AIR 1959 Pat 246; *Dalmia Jain & Co.* v. *I.T. Commissioner*, AIR 1957 pat 424; *Zainuddin Ahmed* v. *I.T. Commissioner*, AIR 1956 Pat 251; *S.N. Ganguly* v. *I.T. Commissioner*, AIR 1954 Pat 51; *H.R. Gupta & Co.* v. *I.T. Commissioner*, AIR

assessee claimed that the income did not belong to the Hindu Undivided Family but to its members in their individual capacity. Then the burden rests on the department to prove that the income belonged to the Hindu Undivided Family in the absence of evidence that the property could be acquired with the income from joint family property.[35]

Burden of proof is on assessee to show that the order of the special officer and the annual valuation of the building was wrong.[36]

In any case of dispute regarding the quantum of a tax or any other financial burden between a subject and the state, the burden is on the state to show that larger quantum is leviable and not the smaller one.[37]

In a claim for allowance under secion 10(2)(xv) of Income Tax Act by the Assessee Company, burden of proof lies on the company to prove that expenditure was incurred wholly and exclusively for business of the company.[38]

Where partners of firm are residents in this country, normal presumption is that the firm is resident in taxable territory—presumption is rebuttable and can be rebutted by assessee by shwoing that control and management of affairs of the firm is situated wholly outside taxable territory. The onus to rebut initial presumption is on assessee.[39]

Burden of proving that the transaction came within the mischief of Section 10(A) is on the department.[40] Where there is a Credit entry of deposit by wife of assessee partner in account book of the firm, the source of money need not be proved by assessee and burden to prove that it is false shifts to the department.[41] It is for department to consider whether there are sufficient materials for rejecting the method of accounting.[42]

If annual value has been raised on the ground that since the last revaluation the rental value of property has increased, the burden is on corporation to lead evidence to show that there had been really such increase.[43] Where the assessee pleaded that the contractual rent should not be regarded as standard rent and therefore rateable value has not been properly fixed, onus was on the assessee.[44]

11. ASSETS

Onus is on assessee to prove whether written down value is the true value for determination of net value of assets of a business with regular account.[45]

Joint Hindu family carrying on business of money lending and purchase and sale of property had made allotment of family property towards share of a member in the partition is a capital asset in his hands. Proceeds of sale of the said property is capital receipt. Burden of proof is on the department to prove its contention that the asset was converted into stock in trade of going business.[46]

1956 Punj 90; *I T. Commr. W.B.* v. *D.P. More*, AIR 1971 SC 2439; *V. Hall & R Textiles* v. *I.T. Commissioner*, AIR 1971 AP 184.

35. *Anil Kumar Roy Chowdury* v. *C.I.T.*, AIR 1976 SC 772; *Devadattam* v. *Union of India*, AIR 1964 SC 880; *Firm Jathmall Sadasukh* v. *I T. Commissioner*, AIR 1957 All 110; *I.T. Commissioner* v. *Anwar Ali*, AIR 1970 SC 1782; *C.I.T* v. *Anwar Ali*, AIR 1968 Cal 345; *A. Trisulapany* v. *I.T. Commissioner*, AIR 1958 AP 546; *Mangilal* v. *I.T. Commissioner*, AIR 1955 Pat 366; *S.N. Ganguly* v. *I.T. Commissioner*, AIR 1954 Pat 51.
36. *Corp. of Calcutta* v. *Union Jute Co.*, AIR 1957 Cal 230; In re : *Suburban Bank Ltd.*, AIR 1953 Cal 487; *Lal Chand & Sons.* v. *Calcutta Corp.*, AIR 1953 Cal 428.
37. *N. Manickm* v. *Arunagiri*, ILR 1961 Mad 489.
38. *Lakshmiratan Cotton Mills* v. *I.T. Commissioner of U.P.*, AIR 1969 SC 917; *Commr. of I.T. West Bengal* v. *Cal. Agency Ltd.*, AIR 1951 SC 108; *C.I.T.* v. *Chugandass Co.*, AIR 1965 SC 568; *CIT* v. *Ram Krishna Deo*, AIR 1959 SC 239.
39. *Erin Estate* v. *I.T. Commissioner*, AIR 1958 SC 779.
40. *Md. Ibrahim & Co.* v. *Commr. E.P.T.*, AIR 1953 Mad 221.
41. *Tolaram Daga* v. *Commissioner of I.T.*, AIR 1968 Assaml (DB).
42. *State* v. *Madhogaria*, AIR 1959 Ker 200.
43. *Lalchand & Sons* v. *Calcutta Corporation*, AIR 1953 Cal 428; *Santosh Kumar Bose* v. *Corporation of Calcutta*, ILR (1971) 2 Cal 532.
44. *Municipal Corporation, Ahmedabad* v. *Oriental F.&G. Insurance Co. Ltd.*, AIR 1994 Guj 167 (paras 31 and 32).
45. *W T. Commr.* v. *Tungabhadra Industries Ltd.*, AIR 1970 SC 352.
46. *Swaminathan Chettiar* v. *C.I.T.*, AIR 1967 Mad 328.

12. ATTACHMENT

The onus of proof is on the person, who alleges the non-observance of the formalities necessary for attachment.[47]

In a suit attacking the transfers of property, the burden is on the plaintiff of establishing the attacks and the *onus probandi* applies when judge is in doubt, he should not be blind to facts before him.[48]

13. BAD FAITH (*MALA FIDES*) & *BONA FIDES*

Burden to show that the transferee was acting in good faith is on the transferee himself and he has also to show consideration for the transfer.[49] Where the issue is whether a transaction is *bona fide* and genuine one or is sham and bogus, the burden of proof would not be on the party alleging it to be sham to prove its allegation unless the transaction is proved to be *bona fide* by the opposite party.[50] The burden of establishing *mala fide* is very heavy on the person who alleges it.[51] Where *mala fides* were alleged against a minister, it was held that the minister has to contravant the allegations in the counter affidavit and not the secretary in the department who had no personal knowledge and the *mala fides* were proved and the order the minister was to be set aside.[52] Onus of proving unreasonableness or unfairness of a scheme or of want of good faith is on those who object to the sanction of the scheme.[53]

Onus of proving that the impunged transactions were not entered in good faith and valuable consideration is on official receiver.[54]

Burden is on the party setting up a case of bias to prove the same.[55]

14. BAILMENT

The onus, which lies on a bailee to negative negligence on his part in case of loss of the bailed goods or articles, while in his custody, is discharged by his placing before the court all relevant or material facts under Section 106 of the Evidence Act; then the onus shifts upon the bailor (plaintiff) to show that the true inference from those fact is negligence on the part of the bailee; the true view of the decision of the Privy Council in *Dwarakanth's* case.[56] The burden is always on the bailee to prove that he took reasonable care of the goods entrusted to him as a man of ordinary prudence would have exercised.[57]

15. *BENAMI*

The law as to *Benami* transactions is now governed by the *Benami* Transactions Prohibition Act, 1988. The law in respect of *benami* transactions prior to the said enactment may however be useful and are dealt with hereunder.

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47. *Ram Krishna* v. *Sarfunessa*, 6 Cal 129 (PC).
48. *Bal Kishan* v. *Ram Charan*, ILR 1929 PC 296.
49. *Abudl Shukoor* v. *Abji Papa Rao*, AIR 1963 SC 1150; *Rukiayia Begum* v. *Radha Kishan*, AIR 1944 All 214; *Basuvegowda* v. *S. Narayanaswamy*, AIR 1986 Kant 225.
50. *Subhra Mukherjee* v. *Bharat Coking Coal Ltd.*, AIR 2000 SC 1203 (para 13).
51. *E.P. Royappa* v. *State*, AIR 1974 SC 555; *Jwala* v. *State*, 1976 Punj 158; *Chandrama Singh* v. *Y. Singh*, AIR 1972 Pat 128; *Ashutosh* v. *State of Delhi*, AIR 1953 SC 451; *Gajanan* v. *State*, AIR 1967 Bom 96; **Following** *Basanta Chandra* v. *Emperor*, AIR 1945 FC 18; *Srinivas Kedwal* v. *State of W.B.*, AIR 1954 Cal 171; *Bireshwar Chakravarti* v. *L.N. Kaula*, AIR 1957 All 671; *Pratap R. & T. Factory* v. *State of Punjab*, AIR 1966 Punj 16; *Puri Urban Co-op Bank Ltd.* v. *Jagat Bandhu Mohapatra*, ILR 1975 Cut 225; *Jawala Prasad Singh* v. *State of Bihar*, AIR 1976 Pat 158; *Ghasi Ram* v. *State*, AIR 1966 Raj 247.
52. *Patap Singh* v. *State of Punjab*, AIR 1964 SC 72.
53. In re : *Hindustan General Electric Corpn. Ltd.*, AIR 1959 Cal 679; *Kamalakar Singh* v. *S.K. Gupta*, AIR 1952 Cal 147; *Sudhindra Nath* v. *Sailendra Nath*, AIR 1952 Cal 65; *Narayana Sankaran Mooss* v. *State of Kerala*, AIR 1965 Ker 253; *Coimbatore Kamala Mills* v. *Sundasam*, AIR 1950 Mad 725; *Brundaban Chandra* v. *State of Orissa*, AIR 1953 Ori 121; *Khurjawala Buckles Mfg. Co.* v. *Sale Tax Commissioner*, AIR 1967 All 378; *Bhupinder Singh* v. *State of Haryana*, AIR 1968 Punj 406; *Sohan Singh* v. *State*, AIR 1970 Punj 322 (FB); *Karunanidhi* v. *Asst. Police Commissioner*, AIR 1968 Mad 54.
54. *Srikantaiah Setty* v. *A. Basha Saheb & Co.*, AIR 1958 Mys 35.
55. *Viswanathan R.* v. *Rukn-ul-Mulk Syed Abdul Wajid*, AIR 1963 SC 1.
56. AIR 1917 PC 173.
57. *R.S. Deboo* v. *M.V. Hindlekar*, AIR 1995 Bom 68 (para 18). **Also see** *Calcutta Credit Corporation Ltd.* v. *Prince Peter*, AIR 1964 Cal 374, 384.

In cases of *Benami* transaction, the burden of proof lies heavily on the person who claims against the tenor of the deed, that is, the alleged beneficiary to show that the ostensible vendee was a mere name lender and the property was in fact purchased only for his benefit.[58] In a suit for possession of property filed by a widow against her son she claimed that she had purchased the property under a registered sale-deed out of the money acquired by the sale of her jewellery and ornaments and other sources and the defendant son alleged that the same was purchased by his father in the name of his mother *benami* and the consideration was paid entirely by his father. It was held that the initial burden of proof was on the defendant son who raised the defence of *benami* but when the parties adduced oral and documentary evidence, the question of burden of proof became insignificant.[59]

The burden could be discharged by satisfying the well known criteria *viz.*, in the case of *Benami* transactions:[60]

1. the motive for the transaction.
2. the source of purchaser money relating to the transaction.
3. the custody of the documents of title.
4. the subsequent facts of possession.[61]

In determining whether a transaction is *Benami* or not, all relevant factors have to taken into consideration along with surrounding circumstances, the position of the parties and their relationship to one another and the motives which would governed their actions and also their subsequent conducts.[62]

The decision on the question of *Benami* transaction must not rests upon suspicion but must be based on legal grounds established by legal testimony, as a person cannot be deprived of property upon mere conjecture or surmise.[63]

The onus is on the party two asserts that an endowment is nominal but not real.[64]

If all relevnt facts are before the court then the inference should be drawn from them and the question of onus becomes academic.[65]

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58. *Ponnuswamy* v. *Narayanan*, AIR 1977 Mad 19; *A. Pillai* v. *A. Ilango*, AIR 1969 Mad 252; **Relying on** *Sitamma* v. *Suapati Rao*, AIR 1938 Mad 8; *Union of India* v. *Moksh Builders*, AIR 1977 SC 409; *Krishnanand* v. *State of M.P.*, AIR 1977 SC 796; *Kadderambi* v. *Fatima Bi*, AIR 1981 Bom 406; *Rama Kant Jain* v. *M.S. Jain*, AIR 1999 Del 281 (para 37); *G.P. Lakshmi* v. *T.B. Rajamma*, 2000 AIHC 4885 (Kant).
59. *Rebti Devi* v. *Ram Dutt*, (1997) 11 SCC 714.
60. *Ram Narain* v. *Muhammad Hadi*, ILR (1899) 26 Cal 227 (PC); *P.B. Reddy* v. *State of Mysore*, AIR 1969 SC 655; *Surasaibalini* v. *Phanindra Mohan*, AIR 1965 SC 1364 : (1965) 1 SCR 861; *Natesa Chettiar* v. *N. Krishnah*, AIR 1971 AP 179; *Satya Deo Prasad* v. *Chander Joti*, AIR 1966 Pat 110; **Relying on** *Bilas Kunwar* v. *Desraj Ranjit Singh*, AIR 1915 PC 96; *M.S M.S. Mara Cayar* v. *Abdul Majeed*, AIR 1975 Mad 95; **Disting from** *Sardar Gurbaksh Singh* v. *Gurdial Singh*, AIR 1927 PC 230; *Raghavan* v. *T. Thommi*, AIR 1957 Ker 121; **Relying on** *Gangadara Ayyar* v. *Subramania*, AIR 1949 FC 88; *Manchunder Deo Sree* v. *Gopal Chunder*, M. Moo. Ind. App. 28; *Nabibai* v. *Seth Vallabhdas*, 1964 MPLJ (Notes) 103; *Appalanarasimlam* v. *Udalama*, AIR 1959 AP 407; *Oliyabi* v. *Intiyzbi*, 1963 MPLJ (Notes) 71; *L.K. Textile Mills* v. *Its Workman*, 1961 SC (Note) 860; *Shamsher Ali* v. *Shirin Bai (Smt.)*, ILR (1963) MP 878; *(Maung) PO Kin* v. *Maung PO Shein*, AIR 1926 PC 77; *Bachansigh* v. *Bhupal Singh*, AIR 1966 Punj 36 (FB) (case premption); *Papammal* v. *Chinnammal*, (1964) 1 MLJ 306; *S. Thygera Mudaliar* v. *Jayalakshmi*, (1978) 2 Mad LJ 552; *Chanchala Devi* v. *Puri Bank*, AIR 1951 Ori 22; *Thiruvaryamuthu* v. *O.R. Qulon*, AIR 1951 TC 193; *Maya Debi* v. *Rajlakshmi Debi*, AIR 1950 Cal 1; *Ram Chand* v. *Mati Thad*, ILR (1967) 2 All 341; *Nagendriah* v. *Ramachandnah*, (1969) 2 SC WR 568 : 1969 UJ 697; *Niranjan Das* v. *Liquidator Puri Bank Ltd.*, AIR 1968 Ori 183; *Kesavan* v. *Lekshmy Amma*, AIR 1968 Ker 154; *Hajar Khan* v. *Kesar Khan*, AIR 1968 Guj 229; *Mishra Bandhu Karyalaya* v. *S. Koshal*, AIR 1970 MP 261; *S. Fauja Singh* v. *Kuldip Singh*, AIR 1978 All 279.
61. *Union of India* v. *Moksh Builders*, AIR 1977 SC 409; *Surasaibalini* v. *Phanindra Mohan*, 1965 SC 1314; *Ponnuswamy* v. *Narayanan*, AIR 1977 Mad 19; *Papammal* v. *Chinnammal*, 1964(1) MLJ 306; *Sathadeo Prasad* v. *Chander Joti*, AIR 1966 Pat 110; *Gopinath Sarma* v. *Sasi Dei*, ILR (1980) 1 Cut 392; *Khatoon Bee* v. *Ameena Bi*, 1953 Mys 89; *Ramchand* v. *Moti Thad*, ILR 1967 (2) All 341; *Hiri Luxmi* v. *I.T. Officer*, AIR 1955 Pat 404; **Relying on** *Hazaribagh M.M.C.* v. *Ashalata*, AIR 1952 Pat 61; *Abdul Latif* v. *Abdul Huqkazi*, AIR 1924 Cal 523.
62. *Manmohan Das* v. *Ramdei*, 1931 PC 175.
63. *S.M. Mansukhbai* v. *Poja Bijoy Singh*, AIR 1921 PC 69.
64. *M.A. Ramanjacharyulu* v. *M. Venkatanarasimhacharyulu*, AIR 1974 AP 316.
65. *Sachindranath* v. *Nilima*, AIR 1970 Cal 38 **following** *Sethuratnam Aiyaz* v. *Venkatachela*, AIR 1920 PC 67; *Badri Narain* v. *Harnam Kuar*, AIR 1922 PC 289.

To make an assessment on the basis that assessee was carrying on business in *Benami* name, the burden of proof is on department to show the *Benami* nature of transaction.[66]

A fraudulent transfer voidable under secion 53, T.P. Act is not the same thing as a fictitious or *benami* transfer. If a transaction is fictitious, it was never inteded to exist, though its object might be to defeat the rights of other people. The burden is greater in the case of a fraudulent transfer under Section 53, T.P. Act. If an intention to defraud is proved, the burden shifts to the transferee to make out good faith and consideration for the transfer.[67]

Where the plea of *benami* refers to a type of Sham transaction such as there was no sale at all, the party pleading *benami* has to establish that there was absolutely no consideration for the sale.[68] The burden of proof is heavy on a plaintiff who sues for a declaration of a document solemnly executed and registered, as a fictitious transaction. The burden becomes doubly heavy when the plaintiff seeks to set aside the order of the civil court, passed in execution proceedings, upholding the claim of a third party to a property sought to be proceeded against in execution.[69] A sale deed executed before in Sub-Registrar carries a presumption of genuineness and the burden to prove that it was *benami* is on the person who alleges it.[70] The onus of proof that the transaction in suit was a *benami* transaction was on the defendants when it was his case that the sale deed was taken *benami* in the name of the plaintiff by him with a view of preventing any trouble from Income Tax Department.[71] In a suit filed by the decree-holder under Order XXI, R. 63 of the Civil Procedure Code alleging that the claimant was the *Benami*dar of the judgment debtor, the onus to prove *benami* lies in plaintiff.[72]

(a) Husband and Wife.—The Privy Council in *Guran Ditta* v. *Ram Ditta*[73] observed "The deposit by a Hindu of his money in a bank in the joint names of himself and his wife and on terms that it is payable to either as survivor does not on his death constitute a gift by him to his wife. There is a resulting trust in his favour in the absence of proof of a contrary intention, there being in India no presumption of an intended advancement in favour of a wife.[74] Where there was no explanation for the transaction the law in England presumes an intention to benefit the wife or child. But in India no such presumption or rule exists.[75] In the last case in[76] the wife pleaded that the transaction in her favour was in persuance of an ante-nuptial arrangement, the plea was rejected as the agreement was not proved and it was held that the husband is the real onwer of the property.

Deposit of money in wife's name does not amount to a gift. It is a resulting trust. If anybody says it was a gift he must prove it.[77]

In a suit by vendee for specific performance of agreement by husband to sell land belonging to wife, the burden of proving that husband had implied authority of wife to sell her land is upon plaintiff and not upon subsequent transferee from wife herself.[78]

The ordinary rule that the onus is on the person to prove that the property belonged to somebody other than the person in whom the title deed stands is not shifted even if the property stands in the name of a married woman.[79]

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66. *Adinarayana* v. *Broke Bond Tea India Ltd.*, 1960 Ori 142.
67. *Rukiayia Begum* v. *Radha Kishan*, AIR 1944 All 214; *Basauagowda* v. *S. Narayanaswamy*, AIR 1984 Kant 225.
68. *K C. Das* v. *M.C. Das*, AIR 1970 A&N 75; **following in** *Meenakshi Mills Ltd. Sree* v. *CIT*, AIR 1957 SC 49.
69. *Paras Nath* v. *Mohini Dasi*, AIR 1959 SC 1204.
70. *Deep Chand* v. *Dy. Director*, AIR 1979 All 47; consolidation.
71. *Ulhasi Bai Jethmal* v. *Bhagchand Marwari*, ILR (1959) Bom 680; *Deep Chand* v. *Dy. Director*, AIR 1979 All 47
72. *Khabiramessa Bibi* v. *Sudhamoy Bose*, 1958 Cal 733; *Pappayamma* v. *Rama Raju*, AIR 1962 Ori 69; *Hira Luxmi* v. *I.T. Officer*, AIR 1955 Pat 404.
73. AIR 1928 PC 172.
74. *Gangadara Ayyar* v. *Subramania Sastrigal*, AIR 1949 FC 88; *Mujtabai Begum* v. *Mehbub Rehman*, AIR 1959 MP 359.
75. *Uzur Ali* v. *Bebee Ultaf Fatima*, 13 MIA 332 (PC); **following in** *Kerwick* v. *Kerwick*, AIR 1921 PC 56; *Guran Ditta* v. *Ram Ditta*, AIR 1928 PC 172; *Lakshmiah Shetty* v. *Kothandarama Pillai*, AIR 1925 PC 181.
76. *Lakhmiah Shetty* v. *Kothandarama*, AIR 1925 PC 181.
77. *P. Narayana Menon* v. *P.B. Amma*, AIR 1985 Ker 14.
78. *Phuljhari Devi* v. *Mithailal*, AIR 1971 All 494.
79. *Protimarani Debi* v. *Pattipaban Mukherjee*, (1956) 60 Cal WN 886; **Approving in** *Official Assignee of Madras* v. *Natesa Gramani*, ILR 1927 Mad 194; *Radha Govind Roy* v. *Durgarani Dassi*, ILR (1955) 1 Cal 207; *G. Begum* v. *M Gaziuddin*, AIR 1956 Hyd 52; *Jeevan* v. *Mehtab*, AIR 1953 Hyd 77; *Gwashalal* v. *Kartar Singh*, AIR 1961 J&K 66.

Mere proof that the consideration was paid not by the wife but by the husband is not sufficient to establish the claim of *benami*.[80]

(b) *Benami* (Father and Son).—Where the property is purchased by the father in the name of his son and the latter claims it as his own by alleging that father intended to make a gift of the property to him, the onus rests upon him to establish such a gift as the presumption therefore is to favour of the transaction being *benami*.[81]

The fact that the donor had debts at the time of gift is not conclusive to show that the gift was a *Benami* transaction.[82]

(c) *Benami's* (other illustrations).—The actual lender of money is entitled to sue upon on a mortgage though the mortgage deed is executed in favour of another.[83]

There is nothing in law of partnership to prevent the plaintiff from making a case that apart from having a share in his own name he was holding a further share in the partnership in the *benami* of his son.[84]

The burden is on income tax department to prove that what was apparent from the registered partnership deed was not real and that it was *benami*.[85]

In a suit for pre-emption, *onus probandi* of proving that pre-emptor is acting *benami* for vendee is on the person making the allegation.[86]

16. BIRTH, DEATH AND AGE

Where the allegation as to age of the plaintiff made in a plaint is denied by the defendants, it is for the plaintiff to establish the correctness of the facts alleged as to age in the plaint and he must discharge the burden by adducing necessary proof.[87]

Where the question for determination is whether death was caused by accident or design, the initial presumption must in favour of death by innocent cause. This presumption may be dislodged by showing facts and circumstances which may be sufficient to nullify the probative value of the presumption.[88] Party asserting survival has to prove it like any other fact. There is no presumption of it founded on age, sex or other factor and also no presumption of death at the same time.[89] Under Section 21 Hindu Succession Act, the statutory presumption is the death of several persons by same calamity at same time that the presumption as to survivorship is according to seniority, the younger being presumed to have survived the older and this presumption is rebuttable.[90]

17. CANCELLATION OF SALE DEED

Where in a suit for cancellation of the sale deed and for possession filed on default by his purchaser to pay the balance of the purchase money as agreed upon, a compromise decree was passed whereby the defendants agreed to pay the balance of the purchase money by instalments and in case of default of any one instalment the suit was to be decreed and such default having been made the plaintiff applied for execution of the decree. It was held that it was for the defendants to prove that the fault was not theirs.[91]

Chanchala Devi v. *Puri Bank*, AIR 1951 Ori 22; **Explaining** *Lakshmiah* v. *Kothandarama*, AIR 1925 PC 181; **Relying on** *Gangadara Ayyar* v. *Subramania*, AIR 1949 FC 88 and *Ratanchand* v. *Deo Chand*, AIR 1946 Bom 157; *Hazaribagh M.M. Co.* v. *Ashalata*, AIR 1952 Pat 61.

80. *Appalanarasimham* v. *Vdalama*, AIR 1959 AP 407; *Khatoon Bee* v. *Ameena Bi*, AIR 1953 Mys 89.
81. *Suraj Mal* v. *Mohd. Bux*, 1951 Raj 133; *Inder Narayan* v. *Rupnarayan*, AIR 1965 MP 107.
82. *Maya Debi* v. *Rajolakshmi*, AIR 1950 Cal 1.
83. *Harish Chandra* v. *Basicllar Mohanty*, AIR 1965 SC 1738; **Relying on** *Bilas Kunwar* v. *Desraj Ranjit Singh*, AIR 1915 PC 96; **Explaining in** *Gur Narayan* v. *Sheo Lal Singh*, AIR 1918 PC 140.
84. *V.R. Verma* v. *Mohan Kumar*, AIR 1962 Cal 563 (SB).
85. *Madura Knitting Co.* v. *I.T. & E.P.T. Commr.*, AIR 1957 Mad 488,
86. *Maru Rur Singh* v. *Gamesha Ram*, AIR 1950 Pepsu 27.
87. *Channa Basavegowda* v. *Rangegowda*, AIR 1951 Mys 38 (FB).
88. *Ranjani Bai* v. *New India Assurance Co.*, AIR 1956 Bom 633.
89. *Manni* v. *Paru*, AIR 1960 Ker 195.
90. In re : *Mahabir Singh*, AIR 1963 Punj 66.
91. *Bishan Singh* v. *Mahbub Ali*, AIR 1948 PC 17.

18. CARRIERS

In a suit for damages to goods entrusted for carriage by defendant's ship, defendant's plea was one of accident and then it is for him to prove the perils of sea.[1]

19. CASTE

If a Hindu belonging to *Adi-dravida* caste coverted to Christianity ceases to belong to *Adi-dravida* caste, then the burden lies on him to prove that on conversion he again became member of *Adi-dravida* caste.[2] The person claims to belong to particular socially and educationally backward class, must establish conclusively that he belongs to that caste.[3] Party alleging reversion to Hindu religion has to prove his assertion.[4]

20. VICARIOUS LIABILITY

In the case of vicarious liability of State for the acts of its employees, the burden of proving existence of circumstances to claim immunity lies on State and its employees.[5]

21. COMPROMISE

Burden is on plaintiff to establish that the compromise decree in earlier suit is not binding upon him being *mala fide* and tainted with fraud and collusion.[6]

22. CONSIDERATION

If the company's property was sold to another company and the payment of consideration was in shares, then the burden of proving consideration for sale was less than what is purported to be was on the transferor company.[7]

In a suit for price of coal, the plaintiff alleged that price was to be paid by weight but the defendant alleged the payment was to be made by measurement. When no satisfactory evidence could be adduced by both the parties, it was held that it was for plaintiff to prove the claim.[8]

The onus of proof on the question whether there was consideration of whether full consideration as stated in the document in fact passed is wholly on the defendant and it is not for the plaintiff to prove affirmatively.[9] The burden lay on the defendant to substantiate his denial of the receipt of consideration in the face of the document itself, admitting his indebtedness to the plaintiff in clear terms.[10] When the execution of the document was admitted by the defendant or proved, it is he to prove affirmatively about the failure or partial failure of the consideration.[11]

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1. *R.S. Navigation Co.* v. *Firm Milapchand*, AIR 1958 Assam 115.
2. *Rajgopal* v. *C.M. Armugam*, AIR 1969 SC 101.
3. *N.B. Rao* v. *Principal, Osmania Medical College, Hyd.*, AIR 1986 AP. 196.
4. *Gigi* v. *Panna*, AIR 1956 Assam 100.
5. *Harbanslal* v. *Union of India*, 1970 J&K 5.
6. *Baisnab Padhan* v. *Parma Padhan*, AIR 1964 Ori 156; *Nandlal* v. *Naubat*, AIR 1965 Pat 345
7. *Associated Clothiers Ltd.* v. *I.T. Commr.*, AIR 1967 SC 788.
8. *W.R. Collery* v. *Bihar State Co-op., Marketing Union*, AIR 1978 Pat 57.
9. *Thakur Bhagwan Singh* v. *Bishamber Nath*, AIR 1940 PC 114; *Sethupathi* v. *Chidambardra*, AIR 1938 PC 123.
10. *Triveni Bi* v. *Leela Bi*, 1955 Nag 170; *State of Coorg* v. *P.K. Assu.*, AIR 1956 Mys 30; *Micchu Kuanr* v. *Raghu Jane*, AIR 1961 Ori 19; *Chandanlal* v. *Amunchand Mohanlal*, AIR 1960 Punj 500; *Chhaganmal* v. *Heer Bai*, ILR (1960) 10 Raj 394. **Relying on** *Bhoori* v. *Thakur Gulab Singh*, AIR 1958 Raj 10; *Ram Chand* v. *Chhunun Mal*, AIR 1925 Lah 471 (FB); *Sukha Nand* v. *Shiv Devi*, 1935 Lah 14; *Dungarmull* v. *Sambhu Charan*, AIR 1951 Cal 55; *Kattayam Bank* v. *Ahammed D.K. Rawther*, AIR 1957 Ker 164; *Radheyshyam* v. *Kashi Nath*, 1957 MB 82; *Pardhan Purushotham* v. *Shantilal Purushotam*, AIR 1954 Sau 42; *State* v. *Daulat Kumari*, AIR 1969 Pat 25; *Gangapani Palo* v. *Shyamadei Padhi*, ILR (1978) 1 Cut 511; *Ramjelal* v. *Vijay Kumar*, 1970 Cr LJ 1176.
11. *Sudharshan* v. *Chuha Singh*, AIR 1956 HP 28; *Sethupathi* v. *Chindambaram Chettiyar*, AIR 1938 PC 123; *T.A. Umapathi* v. *T.A. Masilamani*, AIR 1987 Mad 156; *Kishore Chunder Singh Deo* v. *Babu Ganesh Prashad*, AIR 1954 SC 316; *Chandanlal* v. *Aminchand*, AIR 1960 Punj 500.

Where plaintiff wants to set up a different form of consideration other than the recitals in the pronote, he has to prove the same; though the defendant denies consideration under the pronote.[12]

When Mortgagor admitting execution but pleading want of consideration then burden to prove want of consideration is squarely on shoulders of mortgagor.[13] Burden of proving that no consideration passed under a promote is on A who denies it. In the case of an admission by A in another deed that he had received the amount under a promissory note, the burden is on A to prove that the admission was made under a mistake and is not true.[14] When there is an admission in the document between the parties of passing of the consideration, burden lies on the party making the admission to explain the admission and the admissions can be taken into consideration in assessing the value of the evidence produced by the parties.[15]

It was held that when the court disbelieved the defendant's plea as to the circumstances under which the pronote was executed without consideration and also disbelieved the plaintiff's story, still the presumption under Section 118 of the Negotiable Instruments Act would operate and the suit is entitled to be decreed.

However in *G. Vasu* v. *Syed Yaseen Sifuddin*[16] following the view expressed by WANCHOO C.J. in[17] JAGANATHRAO J. delivering the judgment of the Full Bench held that on a consideration of the expression "until the contrary is proved" in Section 118(a) Negotiable Instruments Act and the expressions "proved" "disproved" and "not proved" and "shall presume" in Sections 3 and 4 of the Evidence Act and the provisions relating to burden of proof contained in Sections 101 to 104 of the Evidence Act, that while dealing with the question as to whether the contrary, namely the absence of consideration, has been proved by the defendant the Court shall have to consider not only whether, it believes that consideration does not exist, but also whether it considers the non-existence of consideration so probable that a reasonable man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. It was further held following the view of the Supreme Court in *Kundanlal* v. *Custodian Evacuee Property*[18], that the legal burden initially rested on the plaintiff but where the execution of the pronote is admitted, the evidential burden is initially shifted to the defendant who can adduce acceptable evidence or may also rely upon circumstantial evidence or may rely on presumptions contained in Section 114 or other provisions of the Evidence Act, then the burden shifts again to the plaintiff as the presumption under Section 118 Negotiable Instruments Act can be rebutted by the presumption under Section 114 of the Evidence Act[19]; when the burden shifts to the plaintiff and the legal burden of the plaintiff is revived to prove that the pronote is supported by consideration at that stage the presumption of law covered in Section 118 disappears and no longer subsists.[20]

Where execution of a mortgage deed has been proved as required by law, an acknowledgment contained therein of receipt of consideration is evidence not only as against the mortgagor but also as

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12. *Venkata Reddi* v. *Nagireddy*, AIR 1951 Mad 851.
13. *Karan Raj* v. *Chunnilal*, AIR 1964 Raj 72; *Sudhakar Sahu* v. *Achutananda*, AIR 1967 Ori 89.
14. *Kishore Chandra Singh Deo* v. *Babu Ganesh Prasad Bhagat*, AIR 1954 SC 316 : 1954 SCR 959; *Shrinarain* v. *Chunnilal*, AIR 1957 Raj 159; *Sethu Pati* v. *Chidamburam*, AIR 1938 PC 123.
15. *Dasuram Mirjmal* v. *Brahmadatta Bajaj*, AIR 1963 Assam 41; *Suryanarayana* v. *Sreerama Chandra Murthy*, 1951 Myd 18; *Thatha Rao* v. *Jummarlal*, AIR 1953 Hyd 179. In *Janaka Lakshmi* v. *Madhavarao*, AIR 1973 AP 103 **following** *Tar Mohamed* v. *Tyeb Ebrahim*, AIR 1949 Bom. 257.
16. AIR 1987 AP 139 (FB).
17. *Heerachand* v. *Jeevraj*, 1959 Raj 1 (FB) and the VARADACHARIAR J in *Narasamma* v. *Veeraju*, AIR 1935 Mad 769 and of LORD DIPLOCK in *Public Prosecutor* v. *Yuvaraj*, 1970 AC 913 (PC).
18. AIR 1961 SC 1316.
19. **See** *Narayana Rao* v. *Venkatappyya*, AIR 1937 Mad 182.
20. **followed** *Narasamma* v. *Veerraju*, AIR 1935 Mad 769; *Laxshmanaswamy* v. *Narasimha Rao*, AIR 1937 Mad 223; *Heerachand* v. *Jeevraj*, AIR 1959 Raj 1 (FB); *Chandanlal* v. *Amin Chand Lal*, 1960 Punj 500; *Sunderlal Singh* v. *Khushi Ram*, AIR 1927 Lah 864; *Md. Shafi* v. *Md. Moazzam Ali*, AIR 1923 All 214; *Indermal* v. *Ram Prasad*, AIR 1970 MP 40; *Sharada Bai* v. *Syed Abdul Hai*, (1971) 2 Mys LJ 407. **Dessented from** *Alex Mathew* v. *Philip*, AIR 1973 Ker 210; *Lal Girwarlal* v. *Dau Dayal*, 1935 All 509; *Premraj* v. *Nathumal*, AIR 1936 Nag 130; *Ramani Mohan* v. *Surjya Kumar Dhar*, AIR 1943 Cal 22; *Barham Deo Singh* v. *Kari Singh*, AIR 1936 Pat 498; *M. Venkata Raghavulu Chetty* v. *Sabapathy Chetti*, (1911) 21 MLJ 1013.

against a purchaser from the mortgagor or an auction purchaser at a sale in execution of money decree. And if such a purchaser pleads want of consideration then the burden lies on him to prove it.[21]

In a suit by the creditor for enforcing pious obligation of sons to pay their father's debt by proceeding against interest of the sons in ancestral property if they deny the factum of debt the creditor must prove that there was a real debt in existance. Admission made by father in the deed executed by him alone, does not have the same probative value against sons that it has against executants. Consideration will not be presumed but will have to be proved against sons, if disputed.[22]

Onus rests on plaintiff to prove both the fact of execution and passing of consideration.[23]

It is open to minor heir of a deceased mortgagor, to rebut the presumption as to receipt of consideration arising from proof of the execution of the mortgage by the deceased mortgagor by showing that the admission of receipt of consideration cannot be safely acted upon.[24]

When assignor admitted receipt of consideration, then burden is on him to show that he did not as a matter of fact receive it.[25]

Where a plaintiff's case with reference to a bond which did not describe the consideration, is that the consideration was a previous account due, it is not necessary for him to produce documentary proof of consideration. The proof of the bond would be enough.[26]

23. CONSTITUTIONAL VALIDITY

Under Article 13 of the Constitution of India, the socio-economic bio-data of challenged legislation must be produced by litigants explaining how, why and why not of each clause.[27]

Persons who attack any provision as *ultra vires* the Constitution have to establish their contention.[28] The burden of proving that a particular reservation offends Art. 16(1) of the Constitution of India, is on the person who assails the reservation.[29] If the petitioner objected for transfer of village 'C' to Pakistan under part relating to *Beruban Union No.* 12 in Sch. 2, Constitution (9th Amendment) Act, 1960 the onus lies on him to show that the attempt made by the Govt. to transfer his village is illegal and unconstitutional.[30] Under Article 14, Constitution of India, the burden is on the person challenging the legislation as discriminating.[31] Unless classification of employees for purposes of appointment or promotion is *prima facie* unjust, onus lies on the party attacking classification to show that it is unreasonable and violative of Article 16 of Constitution.[32] The burden is on the person who impeaches the law as violative of the constitutional guarantee.[33] Burden of proving invalidity of Rules lies on person who challenges their validity.[34]

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21. *Jyoti Prakash* v. *Raj Kumar*, 1957 All LJ 475; **following in** *Narain Das* v. *Dilawar*, AIR 1919 All 448; **Relying on** *Babbu* v. *Sitaram*, AIR 1914 All 319; and *Ramchand* v. *Chhunun Mal*, 1925 Lah 471 (FB); *Ram Sarup Saha* v. *Karam Ullah Khan*, 1914 All 158(1); **Dissenting from**, *Hoveli Shan* v. *Charandas*, AIR 1929 PC 184.
22. *Venkateswarlu* v. *Venkata Narasimham*, AIR 1957 AP 557; **Overruling** in *D. Subramanyam* v. *K. Bhavanarayana*, AIR 1954 AP 17.
23. *S. Mammad* v. *K. Kummad*, AIR 1957 Ker 63; *State of Coorg* v. *P.K. Assu*, AIR 1956 Mys 30.
24. *Dharshi Monji* v. *Chandulal Girdharlal*, AIR 1950 Kutch 84.
25. *Soma Sundaram* v. *Chidambaram*, AIR 1951 Mad 282.
26. *Sannamma* v. *Erappa*, 1950 Kant 80.
27. *Ganga Sugar Corp.* v. *State of U.P.*, AIR 1980 SC 286.
28. *Barham Dutt* v. *Peoples Corp. T.S. Ltd.*, AIR 1961 Punj 24.
29. *State of Punjab* v. *Hiralal*, AIR 1971 SC 1777; **following in** *Gen. Manager, S. Rly.* v. *Rangachari*, AIR 1962 SC 36; *N.B. Rao* v. *Principal, Osmania Medical College, Hyd.*, AIR 1986 AP 196.
30. *Ram Kishore Sen* v. *Union of India*, AIR 1966 SC 644 : (1966) 1 SCR 430.
31. *East India Tabacco* v. *State of A.P.*, AIR 1962 SC 1733; *Shankarava* v. *State of Mysore*, (1965) 2 Mys LJ 245; W.C.E. *Federation* v. *State*, AIR 1968 Ker 18; **Relying on** *U. Unichoyi* v. *State of Kerala*, AIR 1962 SC 12; *State of U.P.* v. *Kartar Singh*, AIR 1964 SC 1135; **Affirming** in *W.C. Employees Federation* v. *State*, AIR 1967 Ker 199.
32. *Govind* v. *Chief Controller*, AIR 1967 SC 839; *Banarasidas* v. *State*, AIR 1956 SC 520; *All India Station Masters' and Assistant Station Master's Association* v. *General Manager, Central Rly.*, AIR 1960 SC 384; *General Manager, Southern Rly.* v. *Rangachari*, AIR 1962 SC 36; *Bajaynanda* v. *State of Bihar*, AIR 1954 Pat 266.
33. *Amrit Banaspati Co. Ltd.* v. *Union of India*, AIR 1995 SC 1340, **following** *Gauri Shankar* v. *Union of India*, (1994) 6 SCC 349 : 1994 AIR SCW 4059.
34. In re : *P. Bapanaiah*, AIR 1970 AP 47.

24. REASONABLE RESTRICTION

Onus to prove the reasonableness of restrictions imposed under Art. 19(1)(g) is on the state or the authority concerned.[35]

25. CONTRACT

In the case of plea by insurance company that there was breach of term of policy in that the driver of insured vehicle did not have valid licence the burden to prove is on company.

Burden to prove absence of privity of contract is on defendant.[36] See Contract Act (1872), S. 2.

In a contract made with plaintiff by *A* and at plaintiff's request plaintiff's name was deleted and *H*'s name was submitted and a fresh contract made in *H*'s name by *A*. Onus of proving that plaintiff was liable on contract inspite of altered term was on *A*.[37] Where the contract was purported to be signed by the Dy Secretary who was ostensibly authorised to sign contracts on behalf of the Government, if the Government denied such authority, then the burden of proof is on them to show that the person who actually executed the contract was not duly authorised to execute the said contraction behalf of the Government.[38] Party making allegation that the contract is conditional must prove the condition in contract.[39]

In a suit for damages for breach of contract burden of proving that the frustration is self induced is on the plaintiff.[40]

Where the purchaser under a contract for the sale of immovable property claims under S. 27(b) of the Specific Relief Act, 1877, a decree for specific performance against a person claiming title from the vendor under a registered sale-deed executed after the contract, the onus is upon the defendant to prove that he is a *bona fide* purchaser for value without notice of the earlier contract so as to bring himself within the exception provided by the above section. *Himatlal* v. *Vasudev*[41] and other decisions in India to the above effect, were approved.[42]

Where agreement is challenged as being a restraint of trade, the onus of showing the restrictions were reasonably necessary to his interest is on the party supporting the contract.[43]

In a suit for specific performance of agreement burden of proving is on the defendant alleging abandonment of contract by plaintiff.[44]

If plaintiff is buyer, he must allege and prove that he was ready and willing to pay for the goods.[45] It is for plaintiff to show that she had not forfeited her right of reconveyance even though she did not make the offer within time.[46] Onus of proof is on plaintiff to show that defendant committed the breach by not disclosing material defect. Mere averment in the plaint is not evidence.[47]

The ordinary rule regarding the onus, incumbent on the plaintiff, has really no application to cases where the true boundary is to be ascertained.[48]

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35. *Bhagwan Dass* v. *Municipal Corporation of Delhi*, AIR 1995 Del 17 (para 11).
36. *K.M. Patel* v. *Firm Md. Hussain Rahimbux*, AIR 1981 SC 977.
37. *Lila Dhar Nemchand* v. *Rawji Jugjiwan*, AIR 1935 PC 93.
38. *State of Bihar* v. *R.B. Ojha*, AIR 1977 Pat 258; *G.S. Partners Ltd.* v. *Union of India*, AIR 1959 Cal 287.
39. *Gangapani Palo* v. *Shyamadei Padhi*, ILR (1978) 1 Cut 512.
40. *Narasu* v. *P.S.V. Iyer*, AIR 1953 Mad 300.
41. (1912) ILR 36B 446.
42. *Bhup Narain Singh* v. *Gokul Chand Mahton*, 61 IA 115 : AIR 1934 PC 68.
43. *N.S. Golikari* v. *Century Spinning Mills & Co.*, AIR 1967 SC 1098.
44. *Neminath Appayya* v. *Jamboorao*, AIR 1966 Mys 154.
45. *A.R.G.K. & Co.* v. *M. Sitharamayya*, AIR 1958 AP 427.
46. *Phukan Ali* v. *Sahjadi*, AIR 1954 Assam 54.
47. *Ratanlal* v. *Nana Bhai*, AIR 1956 Bom 175.
48. *Bibhuti Bhushan* v. *Sadhan Chandra*, AIR 1965 Cal 199.

Onus of proving a contract to be wagering one is on the party alleging it.[49] Burden of proving that suit contract was illegal as prohibited by law lies heavily on defendant who takes that defence.[50] Burden of proving allegation that share in managing agency was offered as bribe and was against public policy is on those who allege it. They are not required to prove it beyond reasonable doubt as in a criminal case.[51]

26. CUSTOM

If a party pleads in specific terms as to what is the custom that he is relying, he must prove that custom.[52]

The general custom of Punjab is that a daughter excludes collaterals in succession to self-acquired property of her father. Therefore initial onus, is on the collaterals to show that the general custom has been varied by a special custom excluding daughters.[53] Onus of proof is upon party who sets up a custom at variance with general law.[54] Burden of proof is on person who alleges it to show that there is a family custom of excluding the females from taking the property as heirs.[55]

Here a Hindu belonging to *Adi-Dravida* Caste is converted to Christianity burden lies on him to prove that on reconversion he again became member of *Adi-Dravida* Caste.[56] Burden of proving that in the matter of succession Hindu Law applies to *Mewatis* would be upon person alleging it.[57]

Burden of proof of a community custom is much heavier than that of a family or local custom. It would require examples spread throughout India and the number must necessarily be correspondingly. large.[58]

27. DAMAGES

In a suit for compensation against the defendant for extracting coal from underground within area belonging to the plaintiffs, the onus is always on the plaintiffs to establish firstly that the land alleged to be encroached upon belongs to them, secondly, there was encroachment of the land and thirdly the encroachment was done by the defendants.[59]

In a suit for damages it is for the plaintiff to adduce reliable evidence to show what damage he had suffered.[60] In a suit for damages for non-delivery of goods, the seller has to prove that the booking of the goods became impossible to make delivery of goods in terms of the contract.[61] In a suit to recover value of car on the allegation that it was lost in transit the burden of proving it was on plaintiff/consignor.[62]

Where plaint was filed on a definite averment that the storing agent did not deliver certain goods and claimed a specific amount towards their value burden lies on the plaintiff to prove his case.[63] Loss of pecuniary benefit due to death of deceased and to sustain action under Fatal Accidents Act, the plaintiff has to prove reasonable expectation of pecuniary advantage.[64] The value of goods and extent of damage

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49. *Mannalal* v. *Biharilal*, AIR 1956 MB 38; *Suganchand* v. *Fulchand*, AIR 1957 MP 194; *Walayti Ram* v. *Bhagwan Dass*, AIR 1960 Punj 471; *Faujmal* v. *Nathulal*, AIR 1965 Raj 115; *Surajmal* v. *Doongarmal*, AIR 1959 Raj 27.
50. *Ratanlal* v. *Firm, Mangilal Mathurala*, AIR 1963 MP 323.
51. *Gulabchand* v. *Kudilal*, AIR 1959 MP 151 (FB).
52. *Kunjaraman* v. *Mathevan*, AIR 1971 SC 1398; *Munshi Dass* v. *R. Mal Singh*, AIR 1977 SC 2002; *Mahant Bhagavan* v. *Girijanandan*, AIR 1972 SC 814; *Brahmananda Puri* v. *Neki Puri*, AIR 1965 SC 1506.
53. *Kehar Singh* v. *Chanan Singh*, AIR 1968 SC 806; *Salig Ram* v. *Maya Devi*, AIR 1955 SC 266; *Abbasali Shah* v. *Mohd. Shah*, 1951 MB 92; *Nekhi Ram* v. *Hazari*, 1952 Punj 226.
54. *Ramdhanlal* v. *Radhesham*, AIR 1951 SC 210.
55. *Mohammad Baqar* v. *Naim-un Nisa Bibi*, AIR 1956 SC 548.
56. *Rajagopal* v. *Armugam*, AIR 1969 SC 101.
57. *Hooriya* v. *Munna*, AIR 1956 MB 56.
58. *Biswanath* v. *Dhapu Debi*, AIR 1960 Cal 494.
59. *Kundan Bai* v. *Skh. Safdar Ali*, AIR 1960 Pat 266; *Sadanand* v. *Emperor*, AIR 1920 Pat 378; *Srish Chandra* v. *Ramji Beeham Das*, AIR 1936 Pat 179; *Adjai Coal Co. Ltd.* v. *Pannalal*, 1930 PC 115.
60. *Kunwar Lal* v. *Kamakhya Narayan*, AIR 1957 Pat 350.
61. *H D C Market* v. *Form Murlidhar*, AIR 1957 MB 53; **Reversed on** another point in *Muralidhar* v. *Harish Chandra*, AIR 1962 SC 366.
62. *V.P. Desai* v. *Union of India*, AIR 1958 MP 297.
63. *Aswini Kumar* v. *Union Territory, Tripura*, AIR 1969 Tri 26.
64. *Govt. of India* v. *Jeeraj Alva*, AIR 1970 Mys 13.

have to be proved by the claimant because the railway certificate is not the final thing.[65] In a class for compensation under Section 110(A) of the M.V. Act, it is for the claimants to adduce evidence and show what the income of the deceased was and what pecuniary loss they had suffered by the death. Once they adduce such evidence, it is then for the opposite party to adduce evidence to show the amount to be deducted from the pecuniary loss sustained by the clamants.[66]

In a suit by the employee for breach of contract of employment and liability for payment of salary by way of damages, the burden to prove existence of mitigating circumstances is on the employer.[67]

In a claim for damages under Section 110-B of Motor Vehicles Act, onus of proof normally is on plaintiff. Where facts and circumstances made out a clear case of negligence, it is for defence to prove that he was not negligent.[68]

An insurance company pleaded breach of a term of the policy in that the driver did not have a valid licence, but produced no evidence of the lack of licence. The Company's case failed[69] Where there was no direct evidence to prove that a person purchased ticket and boarded a train or that he died in the accident, the claim for compensation failed.[70]

Genera damages need not specifically be proved.[71]

28. DECLARATORY SUITS

Where in a suit, the plaintiffs admit that the defendant is in possession of the suit properties but they assert that he is there as *mutawalli* and that his possession is on behalf of the *Sunni Muhammadan Community* and for that reason the plaintiffs say that a declaratory suit will lie and that they need not sue for possession, then the burden lies on the plaintiffs to prove their claim.[72] In a suit by the creditors for declaration that the transfer of property made by the debtor was fradulent and as such was not binding on them, the onus to prove want of good faith in the transferee is on the creditors who impugn the transaction. But where fraud on the part of transferer is established, the burden of proving that he is a transferee in good faith fell within the exception.[73] Where in a suit for declaration of title to certain property, the plaintiff relies on a gift deed in her favour executed by her husband in respect of his self-acquired property, and if the defendant alleged that it is an ancestral property of Hindu Joint Family, then the main burden will be on the plaintiff to prove that the property is self-acquired property of her husband.[74] When the plaintiff seeks a declaration to the effect that he is not liable under the Employee's Provident Fund Act and seeks a permanent injunction restraining the department from enforcing the provisions of the Act though no positive evidence has been adduced by the department, as the reliefs which the plaintiff claims are equitable reliefs, the initial burden of proving that he is entitled to these equitable reliefs is upon the plaintiff. It may be that very slighest evidence may be sufficient to satisfy the court that the burden has been discharged.[75] In a suit for declaration of title, the plaintiff must prove his title and he cannot take advantage of the weakness of the defendant.[76]

29. DISCHARGE AND PAYMENT

Accused admitted that he received money but contented that he handed it over to *J*, who was incharge of office. It was held that the burden of proof was on him to show what he had done with money and that when he failed to discharge that burden, the conviction has to be upheld.[77] When once a

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65. *Union of India* v. *Madan Mohan*, AIR 1981 Ori 9.
66. *Ishwar Devi* v. *Union of India*, AIR 1969 Del 183.
67. *Hira-nadini* v. *B.B.D. Mfg. Co.*, 1969 Bom 373.
68. *Subhash Chander* v. *Ram Singh*, AIR 1972 Del 189.
69. *N.V. Kamat* v. *A.A.D. Martin*, AIR 1985 SC 1281.
70. *Sudha Srivastva* v. *Claims Commr.*, N.R. AIR 1985 All 52.
71. *Ramdas* v. *Raja*, 1958 Raj 257.
72. *Md. Shah* v. *Fasihuddin Ansari*, AIR 1956 SC 713.
73. *Basavagowda* v. *S. Narayana Swamy*, AIR 1986 Kant 225.
74. *Bai Chandan* v. *Rajakbhai*, AIR 1962 Guj 9 **relying on** *Moran Mar Basselios Catholicos* v. *Paulo Avira*, AIR 1959 SC 31.
75. *S.T. Trading Co.* v. *Union of India*, AIR 1966 Guj 116.
76. *R K Madhuryyajit Singh* v. *Takhellambam Abung Singh*, AIR 2001 Gau 181 (para 16).
77. *Madanlal* v. *State of Punjab*, AIR 1967 SC 1590.

mortgage has been admitted, the onus is on the mortgagee to show that the mortgage has been extinguished by subsequent sale.[78]

Normally, the debtor must show agreement that payment towards interest would be appropriated towards principal under Order XXI, Rule 1, C.P.C.[79] Burden is on judgment-debtor to prove the plea of discharge under Section 30 Bengal Money Lenders Act.[80] Payment by a judgment-debtor to a partner of a decree-holder firm binds all the partners and, if any partner disputes the payment, the burden is upon him to prove the special circumstances under which it does not bind him.[81]

In a suit on a bond, the plaintiff accounted for the non-production of the bond, by alleging that the defendant had stolen it. The defendant admitted the execution of the bond, but alleged he had paid it. It was held that the defendant was bound to begin and prove payment, either by the production of the bond or other evidence or by both.[82]

Suit based on promissory note was contested by the defendant on the ground that he had repaid the amount. If he claims that he had received the amount in settlement of previous debt, then the burden of proof is on him to prove the previous debt.[83]

The mere fact that the promissory note is found to be in the possession of the plaintiffs is not sufficient for holding that the liability under it has not been discharged.[84]

30. DISCIPLINARY PROCEEDINGS

In a disciplinary or departmental inquiry, the question of burden of proof depends upon the nature of charges and the nature of explanation put forward by the delinquent officer and does not always lie on the department. Where loans were disbursed to ineligible persons on the basis of wrong notings of an officer, the burden to establish his case was on the officer.[85]

31. DOMICILE AND CITIZENSHIP

In a prosecution under Section 14, Foreigners' Act, the accused pleaded that he was domiciled in India and was residing in India when the Constitution of India came into force, the burden is upon him and he should be given a chance to prove it.[86]

Onus to prove loss of citizenship is on party seeking to deprive a person of his citizenship right.[87]

Onus lies upon person claiming the citizenship.[88]

The onus of proving that a domicile has been chosen in substitution for the domicile of origin is upon those who assert that the domicile of origin has been lost.[89]

32. EASEMENTS

Exercise of a right in assertion of an easementary right is one of the essential ingredients which a claimant has to establish.[90]

In law the owner of every open space is entitled to build over it unless his action in building interferes with as easementary right already acquired.[91]

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78. *Wali Mohammad* v. *Md. Baksh*, 1930 PC 91.
79. *Meghraj* v. *Bayabai*, AIR 1970 SC 161.
80. *Radha Kisen* v. *Keshavdeo*, AIR 1954 Cal 105.
81. *Raya Reddaiah* v. *Krishna Finance Corporation*, 2001 AIHC 2100 (para 7) (AP).
82. *Chuni Kuar* v. *Udai Ram*, (1883) 6 All 73.
83. *Prem Chand* v. *Laxmichand*, AIR 1971 MP 124.
84. *K. Unikali* v. *Krishna Vasanthi*, AIR 1952 TC 203.
85. *Orissa Mining Corporation* v. *Ananda Chandra Prusty*, AIR 1997 SC 2274.
86. *Abdul Sattar* v. *State of Gujarat*, AIR 1965 SC 810; **Reserving** in *State* v. *Abdul Sattar*, AIR 1963 Guj 226
87. *Abida Khotoon* v. *State of U.P.*, AIR 1963 All 260.
88. *State of Abdullah Khan*, AIR 1963 Raj 11.
89. *Kedar Pandey* v. *Narain Bikram Sah*, AIR 1966 SC 160; *M. Authony* v. *State of Bombay*, 1956 Bom 501
90. *Ratanchand* v. *Kasim Khaleel*, AIR 1964 Mad 209; *Lambodar* v. *Ramesh Chandra*, 1958 Ori 248; *Chidambara* v. *T Vedayya*, AIR 1967 Mad 164.
91. *Veerappa Mallappa* v. *Nagappa Fakuirappa*, AIR 1965 Mys 292.

33. EJECTMENT

In any action by an *inamdar* to evict his tenants and by a *zamindar* prior to the enactment of the Madras Estates Land Act, 1908 to evict his *raiyats* from their holdings the burden was on the plaintiff to make out the right to evict by proving that the grant included both the *melvaram* and the *kudivaram* interests or that the holders of land or their predecessors were let into possession by the *inamdar* or the *zamindar* under a terminable lease.[1]

A plaintiff suing for ejectment can only succeed on the strength of his own title. There is no obligation on the defendant to prove possible defects in that title.[2]

In a suit for ejectment it is for the plaintiff to prove his title and the Court is not concerned with the weakness of the title of the defendant. The defendant may be a trespasser, but as a defendant in possession, he is entitled to ask the plaintiff to prove strictly his title.[3] The ground of eviction that the tenant had impaired materially the value of the building, has got to be proved by the landlord.[4] However, if certain acts were proved or admitted to have been committed by the tenant, they speak for themselves.[5]

The burden lies upon the plaintiff to prove that he was in possession within 12 years of the suit.[6]

Agricultural lease granted by the mortgagee in possession will be binding on mortgagor even though the mortgage has been redeemed provided that it is such that a prudent owner of property would enter into, in the ordinary course of management. This being in the nature of an exception, it is for the person who claims benefit thereon to strictly establish it.[7]

34. ELECTION CASES

Burden to prove invalidity of votes is on the petitioner.[8] The burden of proving that the election is liable to be set aside for corrupt practice is heavily on the applicant, though the petitioner need not prove the allegations beyond all reasonable doubt as in a criminal prosecution.[9] It cannot be said that the mere fact that the wasted votes are greater than the margin of votes between returned candidates and the candidate securing the next highest number of votes must lead to the necessary inference that the result of the election has been materially affected. That is a matter which has to be proved and the onus of proving it lies upon the election petitioner.[10]

Where a nomination paper has been improperly rejected there is a strong presumption that the result of the election has been materially affected and the burden is on the person seeking to uphold the election to prove the contrary.[11]

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1. *Sunkavilli Suvarna* v. *Goli Sathiraju*, AIR 1962 SC 342; **Relying on** *Lakshmanma* v. *Venkatesbasula*, AIR 1949 PC 278.
2. *Moran Mar Basselios Catholicos* v. *Most. Rev. Mar Poulose Athonsius*, AIR 1954 SC 526.
3. *Totoba Ganu* v. *Tarabhi*, 1957 Bom 280; *Santoshilal* v. *Chandra Mohan*, AIR 1956 MB 121; *Shyamacharan* v. *Sheojee Bhai*, AIR 1964 MP 288; *Hanumantha* v. *Gowdaiah*, AIR 1953 Mys 44.
4. *B Ramesh* v. *H Nandeeswari*, 2000 AIHC 2152 (para 9) (Mad) : AIR 2000 NOC 59 (Mad). **See also** *G. Subramani* v. *Y.E. Seshachari*, 2000 AIHC 2331 (para 10) (Mad).
5. *G. Subramani* v. *Y.E. Seshachari*, 2000 AIHC 2331 (para 11) (Mad).
6. *Rense Kohl* v. *Singa Hoe*, ILR (1958) Cut 186.
7. *Asa Ram* v. *Ram Kali*, AIR 1958 SC 183 : 1958 SCJ 575.
8. *Sudhir Kumar* v. *Abhoy Pada*, 1966 Cal 141.
9. *Amolak* v. *Bhagawan Das*, AIR 1977 SC 813; *Bhanu* v. *Mohanlal*, AIR 1971 SC 2025; *Jagdev* v. *Pratap*, AIR 1965 SC 183; *Harischandra* v. *Triloki Singh*, AIR 1957 SC 444; allegations must be sufficiently clear and precise: *Ram Sharan Yadav* v. *Thakur Muneshwar Nath Singh*, AIR 1985 SC 24; *Nizamuddin Ahmed* v. *Narbada Prasad*, (1976) 1 SCC 1 : AIR 1975 SC 1909; *Razik Ram Choudhary* v. *Chouhar Jaswant Singh*, AIR 1975 SC 667; *Kanwarlal* v. *Amarnath*, AIR 1975 SC 308; *Surya Kant Roy* v. *Imamul Hak Khan*, (1975) 1 SCC 531 : AIR 1975 SC 1053; *Hem Raj* v. *Ramjilal*, (1975) 4 SCC 671 : AIR 1975 SC 383; *Shantilal* v. *Bipinlal*, AIR 1964 MP 92; *Mohd Yunus Saleem* v. *Shiv Kumar Shastri*, (1974) 4 SCC 854; *Prananath* v. *Banamali*, AIR 1958 Ori 228; *Inderlall* v. *Lal Singh*, AIR 1961 Raj 122; **Reserved on** another point in *Inderlal* v. *Lal Singh*, AIR 1962 SC 1156; *Krishna Kanta Misra* v. *Banamali Basu*, AIR 1968 Ori 200; *Ghasiram Mashi* v. *Omkar Singh*, AIR 1968 Ori 99; *Projengton Momin* v. *Elwin Sangma*, AIR 1973 Gau 145.
10. *Vashist Narain* v. *Dev Chandra*, AIR 1954 SC 513.
11. *Surendranath Khosla* v. *S. Dalip Sing*, AIR 1957 SC 242; *Barot Jagannath Magantal* v. *Purshottamdas*, ILR (1967) 1 Guj 76; **See also** *Chatturbhuj* v. *Moreshwar*, 1954 SCR 817, 842 : AIR 1954 SC 236; *Karnail Singh* v. *Election Tribunal*, 10 Elec LR 189.

The burden is on the party challenging declaration alleging malpractices and such other acts to prove those allegations. Further, unless he proves that had it not been for the malpractices, he would have secured more votes, but he would not succeed and it could then be said that the result of the election was not materially affected. But if challenge is not on any malpractices but non-compliance with any provisions of the Act and if the petitioner succeeds in establishing the non-compliance, the declaration of the returning officer that the respondent is elected for the general seat would naturally amount to materially affecting the result which deprives the petitioner from being declared elected.[12] Where the question was of proving the corrupt practice of under influence under the Representation of the People Act, 1951, the Supreme Court said.[13] "There is no ritualistic formula nor a cut and dried test to lay down as to how a charge of undue influence can be proved but if all the circumstances taken together lead to the irresistible inference that the voters were pressurised, threatened or assaulted at the instance of either candidate, they should be sufficient to vitiate the election. While insisting on standard of strict proof, the Court should not extend or stretch this doctrine to such an extent as to make it well-nigh impossible to prove an allegation of corrupt practice. Such an approach would defeat and fraustrate the very laudable and sacrosanct object of the Act maintaining purity of the electoral process".

The onus to show that a statement of fact which was published by a candidate or his agent or by any other person with the consent of the candidate, affecting his personal character or conduct is on the election petitioner under Section 123(4), Representation of People Act.[14]

In challenging that the candidate does not belong to a particular scheduled caste is on the petitioner to show to which particular caste the candidate belongs.[15]

Where election was challenged on the ground that the elected candidate was below 25 years of age on the date of filing the nomination paper and thus disqualified under Article 137 of Constitution of India, the burden to prove that the age was below 25 years on relevant date is on election petitioner.[16] Where a petitioner challenged the election by accepting improper nomination or by refusal of a nomination, the onus lies upon the petitioner.[17] Question whether poster containing allegations against character of appellant, candidate at election, was distributed by respondent, (successful candidate) the burden is on appellant to prove that such distribution took place at various meetings.[18]

35. EXECUTION OF DOCUMENT

In the case of a suit on a bond when execution and consideration are both denied by the defendant, the primary burden to prove execution as well as consideration is on the plaintiff.[19]

In a suit under Orders XXI, R. 63 of C.P.C. 1908, (Now Rule 58(5)), the burden of proof is heavy on the plaintiff suing for declaration that the document on which the order of the executing court was passed was a sham & fictitious one.[20] There is presumption in favour of plaintiff that a suit bond bearing signature of defendant and duly attested and registered had been validity executed. If defendant wants to challenge its genuineness or validity, it is he who has to establish his contention.[21] When a signature or

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12. *Dippala Suri Dora* v. *V.V. Giri*, AIR 1958 AP 724.
13. *Ram Sharan Yadav* v. *Thakur Muneshwar Nath Singh*, AIR 1985 SC 24 at 25; *Takvri Devi* v. *Rama Dogra*, AIR 1984 HP 11, proof of undue influence.
14. *Kumara Nand* v. *Brij Mohanlal Sharma*, AIR 1967 SC 808; *Santi Swaroop* v. *Abdul Rehman*, AIR 1965 MP 55. Onus is on the unsuccessful candidate to prove *G Vagheesam Pillai* v. *M R Krishnamurthi*, ILR (1966) 1 Mad 580.
15. *Laxman* v. *Kattimani*, AIR 1968 SC 929; *Abhoy Pada* v. *Sudhir*, AIR 1967 SC 115; *Bhaiyalal* v. *Harikishan Singh*, AIR 1965 SC 1557; ***Basavalingappa B.*** v. ***Munichinappa D.***, AIR 1965 SC 1269.
16. *Brij Mohan* v. *Priya Brat*, AIR 1965 SC 282; *Brij Mohan Singh* v. *Priya Brat Narain*, AIR 1965 SC 282 : (1965) 3 SCR 861; *Birad Mal Singhvi* v. *Anand Purohit*, AIR 1988 SC 1796, at p. 1808; *Tara Devi* v. *Sudesh Chaudhary*, AIR 1998 Raj 59 (para 19); *Abdul Rahiman* v. *Sadasiv*, AIR 1968 Ori 84; *Harish Chandra* v. *Triloki Singh*, AIR 1957 SC 444; *Tazuddin Ahmed* v. *Dhaniram*, AIR 1959 Assam 128; *Rakesh Chandra Das* v. *S K Dutta*, AIR 1957 Assam 118; *Shiv Ram* v. *Shiv Charan*, AIR 1964 Raj 126; *Ram Dass* v. *Chandulal*, AIR 1969 J&K 12.
17. *Vashist Narain Sharma* v. *Devchandra*, AIR 1954 SC 513; *Brij Mohan Singh* v. *Priya Brat*, AIR 1965 SC 282
18. *Nihal Singh* v. *Rao Birendra Singh*, 1970 (3) SCC 239.
19. *Jeegania* v. *Dewi Prasad*, AIR 1963 MP 15.
20. *Paras Nath Thakur* v. *Mohini Dasi*, AIR 1959 SC 1204.
21. *Akhayyamma* v. *Papaiah*, AIR 1956 Mys 36.

thumb impression in a document is admitted by a person to be his and it purports to be in token of the execution of the document by him then a presumption rises that he must have executed it.[22]

Where there is no reason forthcoming why a different ink has been used for the purpose of the signatures of the attesting witnesses from the ink used for the body of the document and the thumb impression on the deed, the execution of the document is suspicious.[23]

Where the defendent admits his signature on a voucher that an amount was advanced by way of loan the burden is on him to prove that he signed on a blank paper.[24] Where the defendant admitted only that he put his signature on a blank paper which he alleged had possibly been utilised for fabricating document, the onus of proving due execution must be thrown on the plaintiff.[25] Initial onus on plaintiff is not discharged by proving identity of thumb impression. It must be further proved that the thumb impression was given on the document after it had been written out and completed.[26]

A heavy burden is laid on the defendant to prove that plaintiff had not only agreed to sell out but she knew what was being written when the plaintiff is admittedly blind, and her signature on the sale deed cannot have any force[27] and also when an old lady having no proper vision contended that she wanted to execute only a power of attorney and not a settlement deed.[28] Where a person ignorant of English affixed his mark to a document written in English, the onus to prove that the document was properly explained and interpreted to him so as to make him understand its true import is on the party relying on the document.[29] 'A' filed a suit to evict 'B' from the suit land on ground that 'B' was a licencee, relying on letter in Urdu and signed by 'B' in *Mundi*. Admission of the signature by 'B' who was an illitrate and did not know Urdu, was held not amount to admission of document. Burden was on 'A' to prove that 'B' was a licencee and the document was properly explained to him.[30] Onus to prove that the document was properly explained and interpreted to an illiterate person affixing his mark so as to make him understand its true import is on the party relying on the document.[31] Where a woman, illiterate and unaware of the contents of a document executed a sale deed in favour of a close relative under the impression, it was a mortgage, it was held that this was a case of *non est factum* and the burden lay upon the vendee to show the plaintiff was fully aware of the nature of the document.[32]

The Supreme Court observed : "The burden of proof was always upon the person who sought to sustain a transaction entered into with a *pardanashin* lady to establish that the document was executed by her after clearly understanding the nature of the transaction. It had to be established not only that it was her physical act but also that it was her mental act. The burden could be discharged not only by proving that the document was explained to her and that she understood it, but also by other evidence, direct and circumstantial."[33] Where in a mortgage deed executed by *Pardanashin* lady which was read out and

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22. *Lakshmamma* v. *M. Jayaram*, AIR 1952 Mys 114: **Dissending from** *Pirbhu Dayal* v. *Tula Ram*, AIR 1922 All 401 (2); *Ramlakhan Singh* v. *Gog Singh*, AIR 1931 Pat 219.
23. *Gopalkrishna Govind* v. *Tukaram Narayan*, AIR 1956 Bom 566.
24. *Rewachand Ladharam Ramchandani* v. *Naraindas B. Kanuga*, AIR 1992 Bom 434.
25. *Ethirjulu Naidu* v. *K.R.C. Chettiar*, AIR 1975 Mad 333.
26. *Ram Pragas* v. *Gajendra Prasad*, AIR 1976 Pat 92.
27. *Shivamma* v. *Abdul Rahman*, AIR 1953 Hyd 25.
28. *Thirumalai Vadivu Ammal* v. *Muthammal*, 2000 AIHC 237 (para 17) (Mad).
29. *Kwamin Bassain* v. *Bendentu*, AIR 1937 PC 274.
30. *Surajbhan Kailash Chand* v. *Harishanker*, AIR 1976 Del 70; *Lakshmamma* v. *M. Jayaram*, AIR 1952 Mys 114; *Kwamin Bassayin* v. *Bendentu*, AIR 1937 PC 274; *Jogesh Prasad Singh* v. *Ramchandar Prasad Singh*, AIR 1950 Pat 370.
31. *R.J. Gounder* v. *V.T. Elaiya*, AIR 1972 Mad 336; *Kwamin Bassayin* v. *Bendentnu*, AIR 1937 PC 274; *Manoharlal* v. *Rajeswari Devi*, AIR 1977 All 36.
32. CHESHIRE AND FIBOOL'S LAW OF CONTRACT 10th Edn., p. 229; *Foster* v. *Mackinnan*, LR.4 CP 704; Thorough good's case (1582) 2 LR *Gallie* v. *Lee*, 1971 AC 1004 **referred to** *Varudan* v. *Pattammal*, (1993) 1 MLJ 259; *Ramdeo* v. *Dulari Devi*, AIR 1996 All 253 (paras 18 and 19); *Palanivelu* v. *Sadasiva Padayachi*, 2000 AIHC 2477 (para 15) (Mad).
33. *Kharbuja Kuer* v. *Jangbahadur Rai*, (1963) 1 SCR 457 : AIR 1963 SC 1203; *Geresh Chander* v. *Bhuggobutty Debia*, (1869) 13M IA 419; *Kali Baksh* v. *Ram Gopal*, (1913) 41 IA 23 29; *Farid Unnisa* v. *Mukhtar Ahmed*, (1925) 52 IA 342 : 1925 PC 204; *Ramanamma* v. *Viranna*, AIR 1931 PC 100; *Satydeo Prasad* v. *Chander Jott Smt.* AIR 1966 Pat 110; **following** *Sabiri Thakurain* v. *F.A. Savi*, AIR 1933 Pat 306; *Thiratman* v. *Gunjeswari*, AIR 1926 Pat 529; *Hirday Narain* v. *Babu Ram*, AIR 1941 Oudh 172; *Bank of Khulna Ltd.* v. *Jyoti Prokash Mitra*, AIR 1940 PC 147; *Hanifa Bibi* v. *Kabul Khan*, ILR (1963) Cut 554; *Md. Shafi* v. *Kalsum Bi*, AIR 1924 Lah 200; *Hem Chandra* v. *Suradhani Debya*, AIR 1940 PC 134; *Kishore Raj Thakur Bije* v. *Basanti Kumar Das*, AIR 1994 Ori 113 (para 7).

sufficiently explained to her and the language of deed was quite clear and intelligible to her, in such cases, the proof of independent advice is not necessary.[34] Where the court losing sight of the right of onus thrown upon persons claiming under an instrument executed by a *pardanashin* woman comes to a conclusion that she executed the deed knowingly, largely on circumstantial evidence which is quite consistent with the possibility that the woman did not in fact understand the nature of the deed that she was executing, the finding is vitiated.[35]

Where a sale deed contains an admission made by one of the parties, and that party challenges the sale deed then the onus to prove falsity of contents of deed is on that party only.[36]

Where contention was that the document was a sale deed, but in actual fact, it was intended by the parties only to be a mortgage. The burden is on the party who alleges the same.[37]

36. SIGNATURE ON BLANK PAPER

In case the defendant says that he put his signature on a blank paper but, if the evidence adduced by the plaintiff is found to be reliable and he is able to discharge his burden sufficiently, then the onus will shift to the defendant to show that he had not executed the document.[38]

Where the defendant admitted only that he put his signature on a blank paper which he alleged had possibly been utilised for fabricating document, the onus of proving due execution must be thrown on the plaintiff.[39]

37. FRAUD

Fraud like any other charges of criminal offence whether made in Civil or Criminal Proceedings, must be established beyond reasonable doubt, as no fraud cannot be based on suspicion and conjecture.[40]

Where the conveyance is brought about by fraud practised by vendor or where there is any express agreement between parties for payment of compensation for any defect or deficiency in property conveyed, or where there is any express or implied warranty, the burden is on plaintiff to make out the case of fraud on the part of the defendant.[41] The burden of proving that a purchase has been made by a person, as an agent for the plaintiff and that the former fraudulently made the purchase in his own name and concealed the fact from the plaintiff is entirely on the agent.[42]

A debtor transferred his property. Creditors alleged and proved it to be a fraudulent transfer. The burden was now on him to show that the transfer was within any of the exceptions.[43]

Where *A* alleges that a deed executed by him is vitiated by misrepresentation. The onus is upon *A* to establish plea of misrepresentation.[44]

Where there was an innocent on insignificant misstatement of the value of an article sent by insured post and the article is lost, it is for the insurer to lead evidence that the market value of the article was higher as the burden is on the insurer to show than the policy is no longer subsisting or that there has been such a condition which relieves the insurer from liability.[45] Insurer alleging fraud and misrepresentation in procuring re-instatement or revival of policy, has to establish the same and has also to show that the misrepresentation was material and that the insured knew of the falsity of the statement.[46]

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34. *Kundanlal* v. *Musharrafi*, AIR 1936 PC 207; **Relying on** *Sunitabala Debi* v. *Dhara Sundari Debi*, AIR 1919 PC 24.
35. *Bibi Saleha* v. *Zakaria Khan*, AIR 1950 Pat 247.
36. *Mania* v. *Dy. Director, Consolidation*, AIR 1971 All 151.
37. *Naba Kumar Singh* v. *Hari Das Singh*, AIR 1960 Mani 11.
38. In re : *Kuttadan Valayudhan*, AIR 2001 Ker 123 (para 16), **overruling** *A. Pathu* v. *Katheesa Umma*, (1990) 2 Ker LJ 115 and *Ahamad* v. *Gangadharan*, (1990) 1 Ker LT 456.
39. *Ethirjulu Naidu* v. *K.R.C. Chettiar*, AIR 1975 Mad 333.
40. *Narayanan* v. *Official Assignee, Rangoon*, AIR 1941 PC 93.
41. *Chacko Joseph* v. *Varghese Markose*, AIR 1957 Ker 181. **See also** *Krishna Prasad* v. *Gopal Prasad*, AIR 2001 Pat 1 (paras 8, 9, 10 and 12).
42. *Giribala* v. *Ushangiri Debi*, AIR 1955 Ass 177.
43. *Basavegowda* v. *S. Narayanaswamy*, AIR 1986 Kant 225.
44. *Kuppuswamy Chettiar* v. *Arumugam, A.S.P.A.*, AIR 1967 SC 1395.
45. *Union of India* v. *Sohanlal*, AIR 1971 SC 432.
46. *Lakshmi Insurance Company* v. *Bibi Padma Wati*, AIR 1961 Punj 253.

Where cheques were dishonoured burden lay upon those issuing them to show that they were issued by mistake.[47]

38. GRANT

The grant being clearly of a named village, it was an 'Estate', within the meaning of Section 3(2)(d) of Madras Act (1 of 1908). Burden to prove that the village was not an "Estate" is on the party claiming accordingly.[48] Burden lies on the party contending that land is not estate to prove that minor *inams* were granted subsequent to *inam* grant of named village.[49] Where the petitioners claimed re-grant of *watan* land on the ground that they were tenants in possession, burden was on them to establish that they were authorised holders of the said land.[50]

39. HINDU JOINT FAMILY

Burden of proof that any particular property is joint family property is in the first instance upon the person who claims it as coparcenary property. It is only after possession of adequate nucleus is shown that the onus shifts on to person who claims property as self-acquired without any aid from the family estate.[51]

A Hindu son governed by the *Mistakashara* Law is bound to pay the debts of his father even if they are not incurred for purpose of legal necessity or for benefit to the estate, provided the debts are not *argavahasika* or illegal, the burden of proving that there is a debt and that the debt is *aryavahrika* or illegal was before the son.[52]

In an alienation by a *Karta*, proof of a legal necessity is on the alienee.[53] Where in a Joint Hindu Family the widowed mother was the '*karta*' and her sons claimed execution of sale in their favour by their mother, the '*karta*' due to legal necessity, the burden of proving the legal necessity was on the alienees.[54] Where the father alienated some joint family property and the son assailed the alienation, it was for the son to prove the grounds of his assailment that the alienation was tainted with illegality and immorality of which the purchasers had previous knowledge. The father was not required to show that it was made for the legal necessity or for the family benefit.[55]

Where manager of a Hindu family admitted that family possessed certain unaccounted cash, the burden of proving that division of that amount was in fact made, lies on him.[56]

Onus is on him who asserts that an item held by a member is joint family property, to prove it.[57] Where one party pleaded that a certain disputed property of the joint family was purchased from the separate income of their father, onus was on them to prove.[58]

There is no onus in law on a Hundu family to show that certain items of deposits standing in the names of different members of the family do not belong to it.[59]

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47. *J&K R T Co* v. *3A Enterprises*, AIR 1981 J&K 64. Those who issued pronotes must show that they did so undue influence. *Ram Raja Ram* v. *Dhruba Charan Jena*, AIR 1982 Ori 264.
48. *Seetharamayya Varma* v. *Venka Girayya*, AIR 1983 SC 608.
49. *Varado Bhavanarayana Rao* v. *State of A.P.*, (1964) 2 SCR 501 : (1964) 2 SCJ 523.
50. *Vithal Govind Toke* v. *Drupadabai Chima Gayakwad*, 1999 AIHC 1240 (paras 5-8) (Bom).
51. *Mudigowda* v. *Ramchandra*, AIR 1969 SC 1076; *Bhagwatilal* v. *Modulal*, AIR 1952 Ajmer 52; *Mangal Singh* v. *Harkesh*, AIR 1958 All 42; *Y. Venkataraju* v. *Y. Yedukondalu*, AIR 1958 AP 147; *Raja of Vizianagaram* v. *Vishweshwar*, AIR 1955 Mad 219; *Nanjedevaru* v. *H.V. Rama Rao*, AIR 1959 Mys 173; *Premchand* v. *Bittan*, AIR 1954 All 143; *Jamunabai* v. *Sharadabai*, 1998 AIHC 4652 (paras 17-19) (AP); *Budhia* v. *Raghu*, AIR 1973 Ori 85 (property in the name of a female).
52. *Sita Ram* v. *Radha Bai*, AIR 1968 SC 534.
53. *Pandurang Madhadeo* v. *Annaji Balwant*, AIR 1971 SC 2228.
54. *Subhas Chandra Bhowmik* v. *Kalyani Bhowmik*, AIR 1998 Gau 96 (para 24).
55. *Kolasani Sivakumari* v. *Kolasani Sambasiva Rao*, 2000 AIHC 2512 (para 20) (AP).
56. *Kashi Nathsa Yamosa Kabadi* v. *Nar Singsa Bhaskarsa Kabadi*, AIR 1961 SC 1077.
57. *V. Venkataswamy* v. *V. Radha Krishna Reddy*, AIR 1963 AP 476.
58. *Parkash Chand* v. *Hans Raj*, AIR 1994 HP 144 (para 21). **See also** *Mayandi Thevar* v. *Arumugha Thevar*, 1999 AIHC 2866 (paras 12 and 13) (Mad).
59. *Jesroi Jiwanram* v. *I.T. Commissioner*, AIR 1954 Assam 49.

Whether properties acquired by widow out of savings from income from her husband's estate form an accretion to her widow's estate or constitute her *stridhan* must be determined according to the intention of the widow in dealing with those properties. Person alleging accretions must show that the property was acquired by the widow with that intention.[60] Where the defendant alleged that the suit property was purchased by the plaintiff from the joint family funds, burden was on him to prove his allegation.[61]

If a set of persons carries on business as a firm, it is for them to show that the firm is a joint family firm.[62]

The burden of proof is on the person who sets up partition. There is no presumption where one person separates whether the rest continue joint or separate[63] but in case of partition by a registered deed, burden to prove that the partition was not true and valid, lies upon the party, challenging the partition.[64]

Allegation by members that the joint family had separated must be proved by them. This can be proved by evidence of conduct subsequent to the material date.[65]

Where the father and the sons, not a Joint Hindu Family, carried on business in partnership and property was purchased in the name of the eldest son, presumption would be that it was the property of the son in whose name the purchase was made. If the other partner claims that the purchase was for the benefit of all, burden would be on him to prove it[66] and not on the party in whose name the sale-deed was executed to prove that he had acquired the said property by his own money or that he had a separate income at the relevant time.[67]

40. JURISDICTION

Party seeking to oust jurisdiction of Civil Courts must establish its right to do so.[68]

41. LANDLORD AND TENANT

Where there is no dispute as to indentity of the subject let, but the tenant denies that he had ever got possession of the subject, it is for the landlord to prove that he had discharged his obligation to put the tenant in possession before he can enforce the tenant's obligation to pay rent.[69] Where there was a dispute of ownership of a building erected allegedly by the tenant on the leased land and the tenant specifically denied that the said building was also leased, it was for the landlady to establish his tenancy to the said building.[70]In a suit for eviction against a sub-tenant, the tenant was neither contesting nor did he appear as a witness and the landlord also did not appear but produced witnesses on his behalf and relied on a document, a *sulehnama*, entered into between the tenant and the landlord which being not proved, could not be relied upon. Onus squarely lay on the landlord to prove the sub-tenancy.[71]

If it is alleged that tenancy is at will according to established custom, the onus is on him to prove the custom.[72] Where the person claiming to be a tenant produced a certified copy of the admission of his

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60. In re : *Makbool Alam*, AIR 1957 Pat 355.
61. *Baban Girju Bangar* v. *Namdeo Girju Bangar*, AIR 1999 Bom 46 (para 5). **See also** *B. Pushpavalli* v. *I R Sivasankaran*, 2001 AIHC 3836 (para 40) (Mad).
62. *Mangat Ram* v. *Mangelal*, AIR 1954 Punj 162.
63. *Raghavamma* v. *Chenchamma*, AIR 1964 SC 136; *Ramadivi* v. *Gokul Prasad* AIR 1959 MP 251.
64. *Suryadevara Pullayya* v. *Suryadevara Satyanarayana*, 2001 AIHC 2807 (para 12) (AP).
65. *Dattatraya Ramrao* v. *Shakuntalabai*, 1956 Nag 95.
66. *K R Santhyanarayana Rao* v. *K R Venkoba Rao*, AIR 1998 Mad 276 (paras 14 and 16). The Court referred to *Appalaswami* v. *Suryanarayanamurti*, AIR 1947 PC 189; *Srinivas* v. *Narayan*, AIR 1954 SC 379 (para 8); *Mudigowda* v. *Ramchandra*, AIR 1969 SC 1076, at p. 1080 and *Ranganayaki Ammal* v. *S R Srinivasan* (1978) 1 Mad LJ 56.
67. *Birendra Kumar Singh* v. *Kalyani Bhanjo*, 1999 AIHC 2874 (para 17) (Pat).
68. *V L N S Temple* v. *I Pattabhi Rami*, AIR 1967 SC 781; *Abdul Waheed Khan* v. *Bhawani*, AIR 1966 SC 1718
69. *Jogesh Chandra* v. *Emdad Meah*, AIR 1932 PC 28; **Dist from :** — *Arun Chandra* v. *Bhagaban Chandra*, AIR 1931 Cal 537 (FB).
70. *Ganesan, R.* v. *Y. Rajanayagam*, 1998 AIHC 518 (paras 11, 12, 15 and 16) (Mad).
71. *Dibyeddu Bhowmik* v. *Joseph Chandra Nath*, 1996 AIHC 557 (paras 4 and 5) (Gau), **reversing** the decision dt. 15-9-91 (Gau) and **affirming** the decision dt. 31-8-1987 (Gau).
72. *Eakubjan* v. *Bidhu Bhasan*, 1952 Tri 11.

tenancy given by the landlord, the burden was on the landlord to disprove the admission.[73] Once sub-tenancy is proved, the burden would be on the tenant to prove that the parting with possession—both legal and physical—by him in favour of the sub-tenant was without any valid consideration.[74]

42. LEGITIMACY

If a person claimed to be a preferential heir to the estate of the deceased, over another person, on the ground that the later was illegitimate, the former must adduce "sufficient general evidence" of illegitimacy so as to throw the onus on the latter of proving his legitimacy.[75]

When a man and a woman lived together as husband and wife for sufficiently long time and were treated as husband and wife by friends, relatives and neighbours there is always a presumption in favour of their marriage. If children are born to such a couple, there is a further presumption in favour of their legitimacy.[76]

The standard of proof required for proving non-access between the husband and wife during the subsistence of their marriage must at least be of a degree between the proof beyond reasonable doubt and the test of preponderance of probability.[77]

43. LIMITATION

In an application to set aside an *ex parte* decree, it is for the applicant to show that the application was within 30 days from his knowledge of the decree and hence was within limitation.[78]

The plaintiff has to prove the acknowledgement of debt by the defendant to save[79] limitation.

Burden of proof is on person seeking to get the delay condoned to establish sufficient cause for the delay.[80]

To defeat the plaintiff's claim to sue within three years from the date of knowledge of a fact, the defendant has to prove that plaintiff had knowledge of the fact more than three years back prior to filing of the suit.[81]

The burden to bring the case under Section 14, Limitation Act is on plaintiff.[82] Where the plaintiffs were conscious of the delay in filing the suit, onus was on them to show that their suit was within time.[83] It is incumbent on the plaintiff to show in the first instance how the suit brought by them was within time.[84]

Burden of proving that the plaintiff is within time is on plaintiff. In some cases evidence may reach a point at which onus to prove the suit out of time rests upon the defendant. Regard must always be had of the party in whose knowledge the relevant facts may appear.[85]

44. DESERTION—MATRIMONIAL

In divorce proceedings the plaintiff must prove the offence of desertion, like any other matrimonial offence beyond all reasonable doubt.[86]

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73. *Damu Ganu Bendale* v. *Arvinda Dhondu Talekar*, AIR 1994 SC 1303 (para 3).
74. *Dudabhai* v. *Sulochanaben Gopaldas Kothari*, AIR 1995 Guj 68 (paras 13, 14 and 24).
75. *Lal Haribansha* v. *Nikunja Behari*, ILR 1960 Cut 230.
76. *Ningu* v. *Sadashiv*, AIR 1987 Bom 27.
77. *Kamti Devi* v. *Poshi Ram*, AIR 2001 SC 2226 (paras 12 and 15).
78. *Pannalal* v. *Murarilal*, AIR 1967 SC 1384.
79. *K. Ganapathy* v. *Vaidyalingan*, AIR 1971 Mad 425.
80. *U. Subbiah* v. *Narsimloo*, AIR 1956 Hyd 161.
81. *K.S. Nanji* v. *Jatashankar*, AIR 1961 SC 1474.
82. *Madhav Rao* v. *Ram Krishna*, AIR 1958 SC 767; *M. Krishnamurthy* v. *Y. Ramamurthi*, AIR 1957 AP 654; *Firm Bansidhar Baldeo Pershad* v. *Firm Alopi Pershad Sons Ltd.*, AIR 1963 Punj 556.
83. *Triro* v. *Dev Raj*, AIR 1993 J&K 14 (paras 8 and 9).
84. *Ishak Ali* v. *Unnasbi*, AIR 1958 MP 209.
85. *Chouthmal* v. *Ramchandra*, AIR 1955 Nag 126.
86. *Bipin Chander* v. *Prabhavathi*, AIR 1957 SC 176.

The burden of proof is on the person who alleges adultery. The mere fact that some male relation writes improper letters to a married woman does not necessarily prove that there was illicit relationship between the writer of the letters and the married woman who received them.[87]

45. MAINTENANCE

In maintenance proceedings the only consequence of the defendant's refusal to give blood for testing, will be that it will be taken into consideration alongwith other evidence in evaluating the evidence against him.[88]

46. INTENTION, KNOWLEDGE AND *MENS REA*

It is for the prosecution to prove the due publication or that the accused had knowledge. This cannot be inferred from the mere conduct of the accused.[89]

47. MALICIOUS PROSECUTION

It is well-settled that in an action for malicious prosecution, the onus of establishing absence of reasonable and probable cause in launching the criminal prosecution against the plaintiff by the defendant lies in the first instance on the plaintiff.[90]

48. MORTGAGE

Where a mortgage deed contains a recital that a mortgage money was given as a loan to the mortgagor and that he received the amount, the burden is on the mortgagor to prove that no consideration was in fact paid and merely because of some discrepancies in the evidence of mortgagee's witness the burden will not be deemed to be discharged.[91]

In a suit for declaration of title based on a *chora othi* (an irredeemable mortgage amounting to sale), it is for the plaintiffs to prove when the suit mortgage was executed and also that the acknowledgement relied upon by them is in respect of that mortgage and that it has been made within the period of limitation.[92]

49. NEGLIGENCE

When the plaintiff has estblished a *prima facie* case of negligence, the burden shifts to the owner of the vessel under way to prove that they were not at fault.[93]

When a house leased to defendant was destroyed by fire, the onus of proving negligence is on plaintiff landlord. Doctrine of *res ipsa loquitur* does not apply.[94]

The burden of proving contributory negligence is on the defendant.[95]

In an action based on negligence. The maxim *res ipsa loquitur* does not alter the rule that the onus to prove negligence rests on the claimant. The defendant may rebut the inference by proving the specific cause of accident[96] but where the vehicle suddenly went off the road, overturned and killed the victim, the burden of proving no negligence in such cases shifts to the other party/the driver.[97] Where the cause of accident was pleaded to be mechanical failure of the vehicle, burden was on its owner to prove that all

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87. *Chandra Mohini Srivastava* v. *Avinash Prasad Srivasatva*, AIR 1967 SC 581.
88. *Subbayya Gounder* v. *Bhoopala*, AIR 1959 Mad 396.
89. *State* v. *Sheo Prasad*, AIR 1956 All 583; *Bhagwan Din* v. *State*, AIR 1967 All 580; *Ram Kumar* v. *State*, AIR 1970 Raj 60; *M.S. Jaggi* v. *Registrar, Orissa High Court*, 1983 Cr LJ 1527 (Ori); *Kimtilal* v. *State of Haryana*, 1984 Cr LJ 690 (P&H).
90. *Sachindra Nath* v. *Labangalata*, AIR 1980 Cal 121.
91. *R.S. Kothari* v. *Anar Dei by L.Rs. Smt.*, (1968) 1 SCWR 235.
92. *Esakki Palpu* v. *Chesian*, AIR 1976 Mad 142.
93. *Jalim Ram Mallah* v. *P.S.N. Co. Ltd.*, 1969 SCD 1122.
94. *Mohammad Habib* v. *Ram Narain Lal*, AIR 1959 Pat 348.
95. *Krishna Goods Carriers (P) Ltd* v. *Union of India*, AIR 1980 Del 92.
96. *Indian T.G. Insurance Co* v. *Madhukar*, AIR 1967 MP 110; *M.P.S.R.T. Corporation* v. *Sudhakar*, AIR 1968 MP 47.
97. *Sumati Debnath* v. *Sunil Kumar Sen*, AIR 1994 Gau 59 (para 13).

necessary care and caution was taken to keep the vehicle in road-worthy condition[1] and in a death caused by electrocution by coming into contact of a live wire snapped from a pole, the burden to prove the plea that the wire was snapped due to heavy rains and there was no negligence on their part, was on the Electricity Board.[2]

In a suit for redemption, the plaintiff should establish that the alleged mortgage was subsisting and was not extinguished.[3]

Failure to perform emergency operation and death of patient on account of such failure amounts to negligence on the part of surgeon. If the surgeon advances a plea that the patient did not give his consent for the surgery or the course of treatment advised by him, the burden is on him to prove that the non-performance of surgery or the non-administration of the treatment, was on account of the refusal of the patient to give consent thereto.[4]

50. NOTICE

It is the established law that, where a sale or a decree is impeached on the ground of non-service or fradulent suppression of notices, the initial onus is on the person who alleges service, that is to say, on the defendant to the action who tries to maintain the impugned sale.[5] The burden of proving the service of notice of award to the claimant under the Land Acquisition Act, either actually or constructively, is on the state.[6]

51. PARTNERSHIP

The question whether a person dealing with a firm has notice of the dissolution of the firm by the retirement of one of partners from it, is one of fact and the onus of proving that fact is on such partner.[7]

52. SUCCESSION

Whenever a person claims title to the estate of another by inheritance or succession, it is imperative for him to prove not only that he was related in some way or other with the last male holder of the estate but also that under the law of succession governing the parties he was the only heir entitled to succeed to the estate at the material time. In other words, he must prove not only that he was related in particular manner but also that no nearer heir was in existence.[8]

Under Section 27, Sonthal, Parganas Settlement Regulation heavily laid down prohibition against transfer of *raiyats* land. The burden lies on the person setting up invalidity of transfer to show it was *raiyati* land.[9]

53. TRUST AND TRUSTEE

The plaintiffs brought the suit claiming to be trustees and praying for a declaration of their own title as trustees and for a declaration that the defendants were not trustees and for possession of the trust properties and other incidential reliefs. It was found as a fact that the meeting at which the plaintiff were elected trustees had not been held on due notice to all churches interested and was consequently not a valid meeting. It was held that in a suit of this description if the plaintiffs were to succeed they must do so on the strength of their own title.[10]

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1. *Sivashanmugham* v. *Govt. of T.N.*, 2000 AIHC 496 (para 16) (Mad), **relying on** *Minu B. Mehta* v. *Balkrishna Ramchandra Nayan*, AIR 1977 SC 1248; *Lakshmiammal* v. *State*, AIR 1975 Mad 157 and *Mewa Devi* v. *Ram Prakash Rajinder Pal*, AIR 1990 HP 53.
2. *Hotukuri Bheemava* v. *APSEB*, 1998 AIHC 1279 (para 10) (AP).
3. *Basava Gowda* v. *Basava Gowda*, 1952 Kant 1; *Md. Akbar Khan* v. *Md. Motia*, AIR 1948 PC 36.
4. *T.T. Thomas* v. *Elisa*, AIR 1987 Ker 52.
5. *Kamakshya Narain Singh* v. *Karanapura Development Corporation*, AIR 1950 Pat 161.
6. *Special Deputy Collector, L.A. Unit* v. *Dasari Ramulu (FB)*, 2001 AIHC 387 (para 34) (AP).
7. *Kala Ram* v. *Punjab National Bank (Ltd.)*, AIR 1935 PC 14.
8. *Mahabati Kuer* v. *Raghunandan Prasad*, AIR 1958 Pat 249; *Puttaswamiah* v. *Ramachandran*, AIR 1953 Mys 72.
9. *Ram Kisto Mandal* v. *Dhan Kisto Mandal*, AIR 1969 SC 204; **relying on** *Dhan Kisto* v. *Ram Kisto*, AIR 1964 Pat 254.
10. *Moran Mar Basslious Catholicos* v. *T. Paulo*, AIR 1959 SC 31.

Where the discoverable origins of property show it to be trust property the onus of establishing that it must have illegitimately come into the trustee's own right does not rest upon the beneficiaries. On the contrary, the onus is heavily upon the trustee to show by the clearest and most unimpeachable evidence the legitimacy of his personal acquisition.[11]

Investment of trust fund with himself by the trustee is breach of trust. To make co-trustee liable, some kind of knowledge or connivance or gross negligence or the like contributory factor on the part of the co-trustee has got to be made out. Burden is on plaintiff who seeks to make the co-trustee liable, to make out clearly that the co-trustee had become trustee for the fund and incurred liability therefor of the trustee's breach.[12]

Where about a temple trust, there was credible version of witnesses that public worshipped therein without restriction and it was installed and managed by public, burden lay on the person asserting that it was a private trust.[13]

The party setting up the case of dedication of family property has to prove such a case. Mere description of property as belonging to a *Devaswom* will not be proof of dedication.[14]

In a suit for rendition of accounts against trustee when after the death of trustee, the liability and duty devolved on his legal representatives, then burden of proof to show that monies were due from deceased is on the plaintiff.[15]

In a suit by *Mahant* of a *math* to set aside order of Commissioner under Section 64(1), Orissa Hindu Religious Endowments Act, the onus is initially on him to show that order of Commissioner is wrong.[16]

54. UNAUTHORISED CONSTRUCTION

In a criminal complaint for unauthorised construction burden to prove that the land belonged to the Development Authority and the accused made unauthorised construction thereon lies on the complainant authority.[17]

55. VALIDITY OF DRIVING LICENCE

In a dispute as to the validity of a driving licence, it is for the insurer to prove that the driver of the offending vehicle had no valid driving licence at the time of the accident[18] and the insurer cannot escape its liability for payment of compensation by taking the plea of invalid driving licence without producing any evidence.[19]

56. IDENTITY OF VEHICLE INVOLVED IN ACCIDENT

In an accidental claim petition, the burden of proof of the identity of the vehicle involved in the accident is on the claimant and on his failure to adduce positive evidence, the burden does not shift on the opponent to prove the negative.[20]

57. WILL

Onus of proof that the testator was major when he made the Will and was competent to execute is on person relying on Will.[21]

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11. *Narayan Bhagwantrao* v. *Gopal Vinayak*, AIR 1960 SC 100 : 1960 SCJ 263 : (1960) 1 SCR 773; **following** *Srinivas Chariar* v. *Evalappa Mudaliar*, AIR 1922 PC 325.
12. *Ranganathan Chettiar* v. *Peria Karuppan Chettiar*, AIR 1957 SC 815.
13. *Kanteisuni Thakurani, Bije Rampur Kaitha* v. *Bahadur Rout*, AIR 1995 Ori 197 (paras 5 and 6).
14. *Sankaran* v. *Narayanan*, AIR 1954 TC 38.
15. *Shriram Pershad* v. *Channo Devi*, AIR 1969 Del 75.
16. *Srinivas Das* v. *Sorjanarayan*, AIR 1967 SC 256.
17. *Special Development Area, Chitrakut* v. *Pooranlal*, 1997 Cr LJ 3484 (MP).
18. *National Insurance Company Ltd., Sultanpur* v. *Shashi Bala Gupta*, 2000 AIHC 2224 (para 20) (All).
19. *New India Assurance Co. Ltd.* v. *Kiran Jain*, 2000 AIHC 4610 (para 5) (MP).
20. *Sh. Gulab Chand Dhot* v. *Sh. P.N. Aggarwal*, AIR 1994 NOC 255 (Del).
21. *Kalidindi Venkata* v. *Chintalapati*, AIR 1968 SC 947.

Where there are suspicious circumstances, onus is on propounder to explain them to Court's satisfaction before the Court accepts the Will as genuine. Where caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same, even where there are no such pleas but circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. Court would naturally expect that all legitimate suspicion should be completely removed. When these are removed, the court would grant probate even if the Will might be unnatural and might cut off wholly or in part near relations.[22]

Where it is proved that a Will has been executed with due solemnities by the testator of competent understanding and as apparently free agent, the burden of proving that it was executed under undue influence is on party who alleges it.[23]

When by a Will the natural order of succession is disturbed by some one who propounds the Will, it is incumbent upon the beneficiary of the Will to remove every circumstance of suspicion attaching to the execution of the Will and disposal of property by it.[24]

It was held by the Privy Council held that where the propounder of a Will was the principal beneficiary under it and had taken active part in its execution and registration. It would give rise to some suspicion and requires to be examined with great vigilance and scruitiny; the propounder in such cases will not be entitled to probate unless he clearly proves that the testator approved the Will and by adducing evidence removing any suspecion about the Will.[25]

The Privy Council observed: "The onus of establishing an oral Will is always a very heavy one, and in this connection their Lordships may refer to the ruling of this Board for the guidance of Courts to India in dealing with oral wills in *Bahoo Beer Pertab Sahee* v. *Rajender Pertab Sahee*[26] that they must be proved with the utmost precision, and with every circumstance of time and place".[27]

When a Will which has not been registered during the lifetime of the testator, and has not seen the light of the day for about three years after the death of the testator, is put forward and a probate is asked for, something more is required than the bare and formal proof of execution and attestation, by calling in a few only of the persons connected with it. It has to be satisfactorily made out that it is the free and conscious act of the testator and for this purpose the best evidence of all the circumstances connected with the execution of the Will, has to be fully made out.[28]

In the case of Revocation of Will, burden of proof is on the objector, which may be discharged either by direct evidence or by inference.[29]

The propounder of a will has to discharge the burden *qua* its genuineness as mere its registration is not enough.[30]

58. SPECIFIC RELIEF ACT

Onus to prove exception carved out in Section 19(b) of the Specific Relief Act, is on the subsequent purchaser.[31]

59. COMPANIES ACT

It is for prosecution to prove that accused were in fact, holding of Managing Director and President of Company at the relevant time as alleged.[32]

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22. *Shashi Kumar* v. *Subodh Kumar*, AIR 1964 SC 529; *Gurdial Kaur* v. *Kartar Kaur*, (1998) 4 SCC 384.
23. *Naresh Charan* v. *Paresh Charan*, AIR 1955 SC 363.
24. *Chukka Reddy* v. *Lachma Reddy*, (1969) 2 SCWR 605; *Gorantla Thataiah* v. *Thotakura Venkata Subbaiah*, AIR 1968 SC 1332.
25. *Vellaswamy Servai* v. *Shivaraman Servai*, AIR 1930 PC 24. **See also** *Patai Dhorain* v. *Digam Dhora*, AIR 1960 Pat 318.
26. 12 MIA 1 at p.28.
27. *Venkat Rao* v. *Namdeo*, AIR 1931 PC 285.
28. *Nilamber Bewa* v. *Fagu Prusty*, AIR 1951 Ori 236.
29. *Satya Charan* v. *Asutosh*, AIR 1953 Cal 657; *Devi Charan* v. *Durga Porshad*, AIR 1967 Del 128.
30. *Vattakam Purath Ananda Bhai* v. *Kanaka Bhai*, AIR 1995 Ker 208 (para 4).
31. *Murlidhar Bapuji Valve* v. *Yallappa Lalu Changule*, AIR 1994 Bom 358 (para 20).
32. *State of Gujarat* v. *New Swadeshi Mills, Ahmadabad*, 1983 Cr LJ 1268 (Guj).

Section 47 Companies Act makes it expressly clear that *hundi* shall be deemed to have been made by the Company. The onus is upon the company to show that the *hundi* did not bind the company at all.[33]

Burden of proof as to particular fact.

S. 103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

ILLUSTRATION

A prosecutes *B* for theft, and wishes the Court to believe that *B* admitted the theft to *C*. *A* must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

COMMENTS

Where in an appeal before the Rent Control Tribunal the tenant raised a new plea in his application for additional evidence that on the date of grant of permission for tenancy for a limited period on the basis of the alleged joint application of the landlord and the tenant, he was out of the country and the said permission was taken by the landlord by playing fraud on the Court, it was held that the burden was on the tenant to prove his absence from the Court on the day of grant of permission.[34] Where the defendant asserted that the suit property was a 'public trust' which the plaintiff did not admit, the burden of proving his contention was on the defendant.[35] Where in a suit for declaration of title, the defendant denied the claim by claiming that the suit land formed the part of General Land Register and was classified as A2, the burden of proving this particular fact was on him.[36] Where a tenant alleged that the rent was paid but no receipt was issued by the landlord, in absence of any explanation for not sending the rent by postal money-order, he could not be deemed to have discharged the burden which was cast upon him.[37] Burden of proving material waste or damage to the building due to unauthorised construction by the tenant, was on the landlord.[38] Where the guarantor of a bank loan pleaded that the hypothecated goods were insured and were lost due to the negligence of the creditor bank, the burden was on the guarantor to prove the alleged negligence.[39] Where inspite of admitted oral partition, the defendant claimed that the disputed strip of land was left in common, burden was on him to prove his claim.[40] Where in a proceeding for maintenance the wife produced '*Nikahnama*' as a proof of marriage, signature over which the husband denied, it was for husband to prove that applicant-wife was not his legally wedded wife.[41]

Burden of proving fact to be proved to make evidence admissible.

S. 104. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

ILLUSTRATIONS

(a) *A* wishes to prove a dying declaration by *B*. *A* must prove *B*'s death.

(b) *A* wishes to prove, by secondary evidence, the contents of a lost document. *A* must prove that the document has been lost.

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33. ***Sri Kishan*** v. ***Mondal Bros & Co.***, AIR 1967 Cal 75.
34. ***Mohan Singh*** v. ***Amar Singh***, (1998) 6 SCC 686.
35. *Champalal* v. *Thakurji Shri Gopalji*, AIR 1998 Raj 220 (paras 12, 13 and 15).
36. *Secretary to Government of India, Ministry of Defence, New Delhi* v. *Indira Devi*, 1999 AIHC 4682 (para 10) (AP)
37. *Raghubir Prasad* v. *Rajendra Kumar Gurudev*, AIR 1993 All 326 (paras 4 and 14), **relying on** *Madan Mohan* v *Krishna Kumar Sood*, 1993 (1) JT 162 : 1993 AIR SCW 743.
38. *Ratanlal Bansilal* v. *Kishorilal Goenka (FB)*, AIR 1993 Cal 144 (para 157).
39. *Gopal Chandra Bagaria* v. *State Bank of India*, AIR 1994 Ori 329 (paras 5 and 6).
40. *S. Perumal Gounder* v. *Karuppa Gounder*, 1998 AIHC 1040 (para 13) (Mad).
41. ***Zulekha Khatoon*** v. ***State***, 2000 Cr LJ 3416 (para 4) (Pat).

COMMENTS

Where the detenus sent unsigned telegrams to various authorities that they were illegally arrested at 11.30 a.m. but they were shown to be arrested 3 p.m. the same day, it was for the detenus to prove that they sent the telegrams prior to the detention order as the said telegrams could not be taken into consideration unless confirmed by signed applications, representations or affidavits.[42] Where in an accidental claim case, the vehicle involved was transferred prior to the accident, the fact that the transferee failed to apply for consequential transfer of the insurance certificate was to be pleaded and proved by the insurer when the claimant is the third party.[43] Where there was abundant evidence to show that the deceased/wife was subjected to cruelty and harassment by the accused persons demanding dowry before her death, burden to show that it was not a dowry death but suicide shifted on the accused.[44] Where in a partition suit the plaintiff claimed by virtue of being the natural son of the defended who admitted his sonship but asserted that he was his foster son, burden to prove the nature of relationship was on the defendant.[45]

Burden of proving that case of accused comes within exceptions.

S. 105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code (XLV of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

ILLUSTRATIONS

(a) *A*, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on *A*.

(b) *A*, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on *A*.

(c) Section 325 of the Indian Penal Code provides that whoever, except in the case provided for by Section 335, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under Section 325.

The burden of proving the circumstances bringing the case under Section 335 lies on *A*.

SYNOPSIS

1. *Principle* ... 911
2. *'General Exceptions'* ... 913
3. *Private Defence* ... 915
4. *Insanity* ... 915

COMMENTS

1. PRINCIPLE

In criminal cases the burden of proof, using the phrase in its strictest sense, is always upon the prosecution and never shifts, whatever the evidence may be, during the progress of the case. When sufficient proof of the commission of a crime has been adduced and the accused has been connected therewith as the guilty party, then the burden of proof, in another and quite different sense, namely in the sense of introducing evidence in rebuttal of the case for the prosecution is laid upon him. The onus of establishing an exception shifts to the accused when the pleads an exception. This onus can be

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42. *District Magistrate* v. *G. Jothisankar*, 1993 Cr LJ 3677 (paras 9 and 10) (SC) : AIR 1993 SC 2633.
43. *Oriental Insurance Co. Ltd.* v. *Joshy*, 1996 AIHC 1150 (paras 7-9) (Ker).
44. *G.M. Natarajan* v. *State*, 1995 Cr LJ 2728 (paras 10 and 11) (Mad).
45. *Muralidhar Sutar* v. *Balamani Sutar*, 1999 AIHC 37 (para 7) (Ori).

discharged either by affirmatively establishing the plea taken by an accused person or by eliciting such circumstances which would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated.[46]

The test is not whether the accused has proved beyond all reasonable doubt that he comes within any exception to the Indian Penal Code, but whether in setting up his defence he has established a reasonable doubt in the case for the prosecution and has thereby earned his right to an acquittal.[47] But this does not mean that the accused must lead evidence. If it is apparent from the evidence on the record, whether produced by the prosecution or defence, that a general exception would apply, then the presumption is removed and it is open to the court to consider whether the evidence proves to the satisfaction of the Court that the accused comes within the exception.[48] Thus, if a man takes the life of another, he should prove circumstances, if any, justifying his doing so. If the act is done in exercise of the right of private defence, it lies upon him to show that he did not exceed that right.

The onus which rests on an accused person under S. 105, to establish his plea of private defence is not as onerous as the unshifting burden which lies on the prosecution to establish every ingredient of the offence with which the accused is charged beyond reasonable doubt.[49] In any event, the discarding of the prosecution story as respects the manner of the causing of the injuries on the victim means that the whole story as to the manner of occurence becomes very doubtful. In such a situation the benefit of doubt must go to the accused.[50]

An accused pleading the right of self defence need not prove it beyond reasonable doubt. It is enough; if he establishes facts which on the test of preponderance of probabilities, make his defence acceptable.

The evidence, though insufficient to establish the exception, may be sufficient to negative one or more of the ingredients of the offence.[51]

Where the plea of insanity is invoked by an accused it is for him to establish that fact.[52]

Under Section 105 of the Evidence Act, the burden of proving the existence of circumstances bringing the case within the exception lies on the accused and the court shall presume the absence of such circumstances. Under Section 105 of the Evidence Act, read with the definition of 'shall presume' in Section 4 thereof, the court shall regard the absence of such circumstances as proved unless, after considering the matters before it, it believes that the said circumstances existed or their existence was so proabable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist.

The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions: (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite *mens rea* and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by S. 84 of the Penal Code; the accused may rebut it by placing before the court all the relevant evidence—oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. (3) Even

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46. *Babu Lal* v. *State*, AIR 1960 All 223. **See also** *State* v. *Kolis Hira*, AIR 1961 Guj 8; *Laksmanan* v. *Lakshmanan*, AIR 1964 Mad 418; *Nishikanta* v. *Calcutta Corporation*, AIR 1953 Cal 401.
47. *King-Emperor* v. *U. Damapala*, ILR (1936) 14 Ran 666 (FB); *Emperor* v. *Dhondu*, (1927) 29 Bom LR 713; *Emperor* v. *Yusuf Mian*, ILR (1938) All 681; *Ghulam Sarwar* v. *Crown*, ILR (1937) 18 Lah 726; *Emperor* v. *Parbhoo*, ILR (1941) All 843 (FB); **approved in** *Rishi Kesh Singh* v. *State*, AIR 1970 All 51 (FB). **See also** *Padi Patra* v. *State*, AIR 1966 Orissa 199.
48. *Emperor* v. *Musammat Anandi*, ILR (1923) 45 All 329; *Bala Prasad* v. *State of M.P.*, AIR 1961 MP 241; *C.B. Sohanki* v. *Srikanta Parashar*, 1997 Cr LJ 3050 (para 13) (Kant).
49. *Mohd. Ramzani* v. *State of Delhi*, AIR 1980 SC 1341; *Yagendra Morarji* v. *State of Gujarat*, AIR 1980 SC 660; *Partap* v. *State of U.P.*, AIR 1976 SC 966 : 1976 Cr LJ 697; *Rafiq* v. *State of Maharashtra*, AIR 1979 SC 1179; *Omkar Nath Singh* v. *State*, AIR 1974 SC 1550; *State of M.P.* v. *Ahmadulla*, AIR 1961 SC 998.
50. *Mohan Singh* v. *State of Punjab*, AIR 1975 SC 2161.
51. *State of U.P.* v. *Ram Swarup*, AIR 1974 SC 1570.
52. *Bhikari* v. *State of U.P.*, AIR 1966 SC 1; *Kunnakunnummal* v. *State*, AIR 1967 Ker 92; *Kuttappan* v. *State of Kerala*, 1986 Cr LJ 271; Insanity proved, *Raghu Pradhan* v. *State of Orissa*, 1993 Cr LJ 1159 (Ori)

if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including *mens rea* of the accused and in that case, the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged.[53]

It has to be shown that (a) accused was insane, at the time when he did the act and that as a result of unsoundness of mind he was incapable of knowing the nature of the act or that he was doing what was really wrong or contrary to law.[54]

There is no conflict between the general burden, which is always on the prosecution and which never shifts and the special burden on the accused to make out his defence of insanity.[55]

An accused person who at his trial had not pleaded the right of private defence, but had raised other pleas inconsistent with such a defence, cannot in appeal set up a case, founded upon the evidence taken at his trial, that he acted in the exercise of the right of private defence; neither is the Court competent to raise such a plea on behalf of the appellant.[56]

2. 'GENERAL EXCEPTIONS'

The General Exceptions here referred to are those applicable to all crimes, and are laid down in Chapter IV of the Indian Penal Code.

This section is a general provision which imposes the burden of bringing himself within an exception upon the person who relies upon the exception; and there is no distinction between a case in which the exception is contained in the body of the statute imposing the prohibition and a case in which it is not so included.[57]

Even when the accused denies, in toto, the act or acts alleged, if evidence of the existence of circumstances bringing the case within a general or special exception is to be found in the evidence for the prosecution, the Court must review the whole evidence and either acquit the accused or convict him of the minor offence as the case may be.[58] This section does not relieve a judge, even in cases where the accused has not pleaded that his case comes within any particular exception, from pointing out to the jury such facts in the evidence as might justify in taking the view that the accused's case was covered by one or other exception.[59] In a case of publication of defamatory article to prove that the publication falls within the exceptions, it is not necessary to produce documents in evidence and get them marked through witnesses, Section 105 does not specify that the evidence must be pleaded or led. If from the evidence on record it is proved that the general exceptions would apply, presumption of such circumstance under Section 105 is removed and the Court can consider whether the evidence on record proves the offence alleged or not.[60] The Supreme Court has laid down that the burden of proving defences arises only when the prosecution discharges its initial and traditional burden of establishing the complicity of the accused.[61] Even under this section the standard of proof required for establishing a defence is that of a

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53. *Dahya Bhai Chhagan Bhai Thakker* v. *State of Gujarat*, AIR 1964 SC 1563; *Oyami Ayatu* v. *State of M.P.*, AIR 1974 SC 216; *Jailal* v. *Delhi Administration*, AIR 1969 SC 15; *Harbhajan Singh* v. *State of Punjab*, AIR 1966 SC 97; *Bhikari* v. *State*, AIR 1966 SC 1.
54. In re : *Kandasami Mudali*, AIR 1960 Mad 316; *Nivrutty* v. *State of Maharashtra*, 1985 Cr LJ 449 Bom; *Umaru Santa* v. *State*, ILR (1979) 2 Cut 261.
55. *N.C. Nath* v. *State*, AIR 1971 Tripura 16; *Kashiram* v. *State*, AIR 1957 MB 104.
56. *Queen Empress* v. *Timmal*, ILR (1898) 21 All 122.
57. *Emperor* v. *Dahyabhai Savchand*, ILR (1941) 43 Bom LR 519; *Government of Bombay* v. *Samuel*, (1946) 48 Bom LR 746, S.B.
58. *King-Emperor* v. *U. Damapala*, ILR (1936) 14 Ran 666, FB. **Also see** *State of U.P.* v. *Lakhmi*, AIR 1998 SC 3790 : 1998 Cr LJ 1411.
59. *Emperor* v. *Hasan Abdul Karim*, (No. 2), (1944) 46 Bom LR 566. Jury system has been now abolished.
60. *State of M.P.* v. *Nisar Ahmad*, 1997 Cr LJ 3055 (MP).
61. In *Yogendra Morarji* v. *Gujarat*, AIR 1980 SC 660, at 666.

prudent man as laid down in Section 3.[62] But within that standard there are degrees of probability. The nature of the burden on an accused person is not as onerous as the general burden of proving the charge beyond reasonable doubt. The accused may discharge his burden by establishing a mere balance of probabilities in his favour with regard to the alleged crime.[63] Yogendra Morarji picked up a quarrel with his labour as to wages and drove away without paying them. They took a short cut and meeting him on the road signalled him to stop. He was led away by a fear complex and fired at them, killing one and injuring another. Whether the workers came to endanger him, nobody knows. But there could have been a probability of that kind also. The Supreme Court gave him the benefit of that probability.

In another case before the Supreme Court[64] a newly wedded wife died of poisoning from strong dose of potassium cyanide. In a short span of only four months of married life she was ill-treated by her husband and in-laws. It was shown in defence that she was very sensitive and awkward. They were allowed the benefit of the probability of suicide. Where two shop-owners were alleged to be negligent to put off the main switch in their shops as a result of which fire broke out affecting the adjoining shops and the facts showed that the shop allotted to the second owner was run by the first owner, the name of the second owner was improperly included as an accused. However, there arose a strong suspicion against the first owner, and commission of the offence could be presumed against him.[65]

Where there is no reliable evidence in support of the prosecution case and where the responsibility arises only out of the plea raised by the accused, the Court can convict him only if the plea amounts to a confession of the guilt, but if the plea only amounts to an admission of facts and raises a plea of justification the Court cannot proceed to deal with the case as if the admission of facts which was not part of the prosecution case was true and the evidence did not warrant the plea of justification.[66] Where a part of a section of an Act has been held unenforceable by the Court, it is for the prosecution to estblish to the satisfaction of the judge that the case comes within the enforceable part; no onus is cast on the accused to prove that his case falls under that part of the section which has been declared unenforceable.[67]

In the case of an offence under Section 14, Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 in order to bring home the offence charged, the prosecution may have to show that the person to whom the list was sent was not a registered practitioner. Once this is established, it is for the accused to satisfy the court that his case falls under Section 14(1)(c).[68] See Drugs and Magic Remedies (Objectionable Advertisements) Act (1954) Section 3.

Where a person causes the death of another person it is for him to show that his act was removed from the category of murder by one of the exceptions to the section.[69] It is for accused to show that he was not a previous convict and deserved to be treated, as first offender.[70] In a prosecution for occupation of municipal land without permission accused stated that occupation is with permission. Burden of proving such occupation lies on him.[71] It is for applicant to convince the court that the order of forfeiture of published book is to be set aside on the ground that the matter published does not fall within mischief of Section 153-A or Section 295-A Penal Code.[72] Where prosecution proves circumstances which would lead to a reasonable inference that an offence under Section 486, IPC has been committed, the accused has to prove the circumstances set out in the section to claim acquittal[73].

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62. **See** *Dahyabhai* v. *State of Gujarat*, AIR 1964 SC 1563. **Also see** *Sankaran* v. *State*, 1994 Cr LJ 1173 (para 10) (Ker); *Bhikari* v. *State of U.P.*, AIR 1966 SC 1 : 1966 Cr LJ 63 (para 6); *State of U.P.* v. *Ram Sarup*, AIR 1974 SC 1570 : 1974 Cr LJ 1035 (para 19) : *Rabindra Kumar Dey* v. *State of Orissa*, AIR 1977 SC 170 : 1977 Cr LJ 173 (para 6); *Madhvan* v. *State of Kerala*, (1992) 1 Ker LT 544 and *Kuzhiyaramadijil Madhvan* v. *State*, 1994 Cr LJ 450 (para 9) (Ker).
63. Also to the same effect *Mohd. Ramzani* v. *State of Delhi*, AIR 1980 SC 1341; *Bhupendrasingh A Chudasama* v *State of Gujarat*, AIR 1997 SC 3790 : 1998 Cr LJ 57.
64. *Sharad* v. *State of Maharashtra*, AIR 1984 SC 1622.
65. *Usman Ali* v. *State*, 1997 Cr LJ 2457 (Mad).
66. *Ram Kanwar* v. *State*, AIR 1970 Punj 301.
67. *Behram Pesikaka* v. *State of Bombay*, (1954) 56 Bom LR 575.
68. *CIT* v. *India Woolen Textile Mills*, AIR 1964 SC 784.
69. *Shyama Charan* v. *State*, (1969) 1 Cr LJ 129; Luck now Bench, AIR 1969 All 61.
70. *Mohammadi* v. *State*, 1957 Cr LJ 275 (All).
71. *Sharanpur Municipality* v. *Kripa Ram*, AIR 1965 All 160.
72. *Harnam Das* v. *State of U.P.*, AIR 1957 All 538.
73. *Panchu* v. *State*, AIR 1956 Cal 268.

Though there are provisions dealing with cases of exceptions under the Indian Penal Code in criminal cases, the same principle is extended in civil cases also on the principle that when a person relies upon the exception under any general provisions, the onus of proving that his case falls within the exception is on the person who affirms it.[74]

Railway seeking protection of Section 77 of the Railway Act, 1989 has to establish that Section 77 would apply and further that non-delivery was due to circumstances which made it a case of loss.[75]

The Gauhati High Court has held that the Section 6 of the I.P.C. should be read as a proviso to Section 105 of this Act.[76]

3. PRIVATE DEFENCE

Where the evidence in respect to the right of private defence of the accused was conflicting, the evidence favouring the accused should be accepted.[77] There is no inflexible rule of law that the party which sustained smaller number of injuries is the aggressor. It depends upon the facts and circumstances of each case. However, in the instant case, the prosecution side suffered smaller number of injuries as compared to the defence side and was held to be aggressor.[78] Where the eye-witness could not state as to how the occurrence in question started, there arose the reasonable doubt as to who the aggressor was and the accused was entitled to benefit of doubt.[79]

Criticising and discarding by the Court the availability of the plea of self-defence to the accused persons on the ground that the plea was not specifically taken by the accused in their statements under Section 313 Cr.P.C., and because the injured accused did not enter the witness-box.[80]

4. INSANITY

In a plea of insanity the burden of proof is on the accused.[81] Where plea of unsoundness of mind was raised by the accused for the first time at examination under Section 313, Cr.P.C. but the psychiatrist's report showed no symptom of insanity in him and neither any witness was examined to establish it nor any medical certificate was produced to disprove sanity, it was held that burden of proof was not discharged.[82] Where legal insanity of the accused was not proved but the material on record suggested that he suffered from some mental imbalance or acute disturbing factor which provoked him to commit the four murders but what provoked him was not established, it was held to be not a case where sentence should be enhanced to sentence of death.[83]

Burden of proving fact especially within knowledge.

S. 106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

ILLUSTRATIONS

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) *A* is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

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74. *Mathra Puri* v. *Hukam Chand*, AIR 1965 Punj 231.
75. *Union of India* v. *Meghraj*, AIR 1958 Cal 434.
76. *Khuraijam Somoi Singh* v. *State of Manipur*, 1997 Cr LJ 1461 (Gau).
77. *Machindra Babu Salve* v. *State of Maharashtra*, 1997 Cr LJ 486 (Bom).
78. *Machindra Babu Salve* v. *State of Maharashtra*, 1997 Cr LJ 486 (Bom). **Also see** *Rukma* v. *Jala*, 1997 Cr LJ 4661 (SC).
79. *Periasami* v. *State of T.N.*, 1997 Cr LJ 219 (SC). **Contra :** *Valummel Thommachan* v. *State*, 1994 Cr LJ 1738 (para 23) (Ker).
80. *Kashi Ram* v. *State of M.P.*, AIR 2001 SC 2902 (para 24), **reversing** Cri A No. 244 of 1988, Dt. 26-10-1999 (MP).
81. *Kuzhiyaramadiyil Madhvan* v. *State*, 1994 Cr LJ 450 (para 9) (Ker); *Sushil Bhoi alias Sursingh alias Bundi Bhoi* v. *The State*, 1994 Cr LJ NOC 110 (Ori); *Meh Ram* v. *State*, 1994 Cr LJ 1897 (para 9) (Raj).
82. *Sankaran* v. *State*, 1994 Cr LJ 1173 (para 9) (Ker).
83. *Namdeo Satyagonda Patil* v. *State of Maharashtra*, 1994 Cr LJ 3493 (paras 38 and 39) (Bom), **relying on** *Devendra Singh* v. *State of U.P.*, 1971 Cr LJ 1283 : AIR 1971 SC 1759.

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COMMENTS

1. PRINCIPLE

This section states that when any fact is specially within the knowledge of any person the burden of proving that fact is upon him. This is an exception to the general rule contained in Section 101, namely, that the burden is on the person who asserts a fact. The principle underlying Section 106 which is an exception to the general rule governing burden of proof applies only to such matters of defence which are supposed to be especially within the knowledge of the defendant. It cannot apply when the fact is such as to be capable of being known also by a person other than the defendant.

It is the bounden duty of a party, personally knowing the whole circumstances of the case, to give evidence on his own behalf and to submit to cross-examination. His non-appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case.[1]

Section 106 should be confined to those cases where a fact is specially within the knowledge of any person.[2] When the matter is within the knowledge of the defendant, he is to prove the same.[3]

This section applies only to the parties to a suit or proceeding.[4]

The Supreme Court had to deal with a case where the appellant was charged with having unauthorisedly claimed second class fare on account of travelling allowance. The prosecution relied on the circumstance that no second class ticket was issued on the relevant date and relying on illustration (b) to Section 106 contended that the burden of proving that the appellant paid the fare was on him. Dealing with this contention the Supreme Court observed that Section 106 is an exception to Section 101 which lays down the general rule that the burden of proof in a criminal case is on the prosecution and Section 106 is not intended to relieve it of the duty. The Supreme Court observed: "On the contrary it is designed to meet certain exceptional cases in which it would to be impossible or at any rate disproportionately difficult for the prosecution to establish facts which are "especially" within the knowledge of the accusel and which he could prove without difficulty or inconvenience. The word "especially" stressess that. It means facts that are pre-eminently or especially within his knowledge."[5] If the section were to be interpreted otherwise it would lead to the very starting conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he, whether he did or did not. It is evident that, that cannot be the intention and the Privy Council twice refused to construe this section as reproduced in certain other acts outside India to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried.[6]

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1. *Gurbakish Singh* v. *Gurdial Singh*, (1927) 29 Bom LR 1392 PC.
2. *Sridhar Misra* v. *Jaichandra*, AIR 1959 All 598.
3. *Madamanchi Goundayya* v. *Madamanchi Chimpiramma*, (1966) 1 An WR 227: *Sachindra Nath Das* v. *Corpon of Calcutta*, ILR (1966) 1 Cal 216 : (ILR) (1970) 2 Ker 109.
4. *Mahabir Singh* v. *Rohini*, AIR 1933 PC 87.
5. *Shambhunath Mehra* v. *State of Ajnor*, AIR 1956 SC 404 : 1956 SCJ 429.
6. These cases are *Attygalle* v. *Emperor and Seniviratne* v. *R*., (1936) 3 All ER 36; AIR 1936 PC 289.

Illustration (b) to Section 106 has obvious reference to a very special type of case namely to offences under Sections 112 and 133 of the Indian Railways Act for travelling or attempting to travel without a pass or ticket or with an insufficient pass etc. Now if a passenger is seen in a railway carriage or at the ticket barrier and is unable to produce a ticket or explain his presence it would obviously be impossible in most cases for the railway to prove or even with due diligence to find out where he came from and where he is going and whether or not he purchased a ticket. On the other hand it would be comparatively simple for the passenger either to produce his pass or ticket or in the case of loss or of some other valid explanation to set it out; and so far as proof is concerned it would be easier for him to prove the substance of his explanation than for the State to establish its falsity.

We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused the facts cannot be said to be "especially" within the knowledge of the accused. This is a section which must be considered in a common sense way and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the case with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well established rule of law that, save in very exceptional class of cases, the burden is on the prosecution and never shifts".[7]

In *Seneviratne* v. *R*,[8] the Privy Council held that Section 106 does not cast any burden on the accused to prove that he had not committed the offence by proving facts lying specially within his knowledge, that if anything is unexplained which the jury think the accused could explain then they, not only may, but must, find him guilty.[9]

In *Sawal Das* v. *State of Bihar*[10] the Supreme Court observed: "Learned Counsel for the appellant contended that Section 106 of the Evidence Act could not be called in aid by the prosecution because that section applies only where a fact relating to the actual commission of the offence is within the special knowledge of the accused, such as the circumstances in which, or the intention with which, an accused did a particular act alleged to constitute an offence. The language of Section 106 of the Evidence Act does not in our opinion warrant putting such a narrow construction upon it. This Court held in *Gurcharan Singh* v. *State of Punjab*[11] that the burden of proving a plea specially set up by an accused which may absolve him from criminal liability, certainly lies upon him. It is a different matter that the quantum of evidence by which he may succeed in discharging his burden of creating reasonable belief, that circumstances absolving him from criminal a liability may have existed, is lower than the burden resting upon the prosecution to establish the guilt of an accused beyond reasonable doubt.

Neither the application of Section 103 nor that of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a *prima facie* case, that the question arises of considering facts of which the burden of proof may lie upon the accused. The crucial question in the case before us is: "Has the prosecution discharged its initial or general and primary burden of proving the guilt of the appellant beyond reasonable doubt."

The Supreme Court observed: "The principle underlying Section 106 which is an exception to the general rule governing burden of proof applies only to such matters of defence which were supposed to be specially within the knowledge of the party concerned. It cannot apply when the fact is such as to be capable of being known also by persons other than the party".[12]

It was held that when various links in the prosecution case have been satisfactorily made out pointing the accused as the probable assailant and the proximity of the accused to the deceased as regards the time and situation, and if the accused does not offer any explanation which might afford a reasonable

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7. *Mukand Lal* v. *State*, AIR 1957 Raj 178; *Ambalal* v. *Union of India*, AIR 1961 SC 264; *Jethalal Nanalal* v. *State of Gujarat*, AIR 1968 Guj 163.
8. 1936 PC 289.
9. *Matilal* v. *R*, AIR 1949 Cal 586; *State of Orissa* v. *Prafulla Kumar*, AIR 1964 Ori 46.
10. AIR 1974 SC 2776.
11. AIR 1956 SC 460.
12. *Razik Ram* v. *J.S. Chouhan*, AIR 1975 SC 667.

basis for a conclusion consistent with his innocence such absence of explanation or false explanation would be an additional link to the prosecution links. Following this principle in In re : *Naina Md.*[13] it was held that though Section 106 does not cast any burden on the accused, if some facts are specially within his knowledge he has to prove the same which could support any theory or hypothesis compatible with his innocence.

This section does not cast any burden on an accused person to prove that no crime was committed by proving facts specially within his knowledge nor does it warrant the conclusion that if anything is unexplained which the court thinks the accused could explain, he ought therefore to be found guilty.[14]

It does not affect the onus of proving the guilt of the accused. That onus rests the prosecution and is not shifted on to the accused by reason of the section.[15] It is only in cases where the facts proved by the evidence give rise to reasonable inference of guilt unless the same is rebutted, and such inference can be negatived by proof of some fact which in its nature can only be within the special knowledge of the accused that the burden of proving the fact is on the accused.[16] This section cannot be used to shift the onus of establishing an essential ingredient of the offence on the accused.[17] To infer guilt of the accused from the absence of a reasonable explanation (or a false explanation) where the other circumstances are not by themselves enough to call for his explanation would be to relieve the prosecution of its burden.[18]

In cases of criminal breach of trust, the burden is on the prosecution, initially to prove the guilt of the accused, and that burden is not shifted on to the accused by reason of Section 106 which is not intended to relieve the prosecution of its initial burden of proof which is fundamental in criminal jurisprudence.[19]

It is only when the prosecution led evidence, if believed, which would sustain a conviction, then the burden of proving anything would lie on the accused under Section 106.[20]

Section 106 cannot be involved to make up for inability of the prosecution to produce evidence to prove the guilt of the accused.[21]

This section is not intended to be used to place upon the accused the burden of proving his innocence.[22]

Once the court is satisfied that the evidence either direct or circumstantial is acceptable against the accused and if the accused takes up a plea based on facts which are within his special knowledge, it is for him to prove those facts under Section 106. The standard of proof by the accused in not so high as in the case of prosecution.[23]

Where a person was charged for using iron material for a purpose other than the specific purpose for which a permit was given, it was held that the purpose for which it was used was in the special knowledge of the accused, and he has to prove the same under Section 106 and merely because the prosecution failed to prove the misuse of the material which is in the negative form, the accused cannot escape liability.[24] Where a postman was charged with criminal mis-appropriation of money-order amounts and when the accused admitted not having delivered the amounts to the payee, but gave it to some boy in that house and the other students living in that room denied receiving the amount, it was

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13. AIR 1960 Mad 218.
14. *King Emperor* v. *U. Damapala*, ILR (1936) 14 Rang 666 (F.B.); *Shewaram* v. *Crown*, ILR (1940) Kar 249; *Enamul Huq*, ILR (1951) 1 Cal 204.
15. *Crown* v. *Santa Singh*, ILR (1945) 26 Lah 137.
16. *Narayyan* v. *Executive Officer CP Board*, AIR 1965 Ker 73; **See also** In re : *Naina Mohamed*, AIR 1960 Mad 218.
17. *Jethala* v. *State*, AIR 1968 (Guj) 163.
18. *Hadu* v. *State*, AIR 1951 Oris 53.
19. *State of Orissa* v. *Prafulla Kumar Santra*, AIR 1964 Ori 46; In re : *Wahib Basha*, AIR 1961 Mad 162; (case of possession of Ganja) *Gopal Chandra Das* v. *State of Assam*, 1988 Cr LJ 481 (Gau).
20. *Md Hussain* v. *State of Bihar*, 1987 Cr LJ 1391 (Pat); *N Shantilal Baldota* v. *Dr. Kalhi, Collector of Central Excise, Bombay*, ILR 1979 Bom 329.
21. *Gullegar Setty* v. *State*, AIR 1953 Mys 31 : ILR 1953 Mys 298.
22. In re : *Basavaraja Swami*, AIR 1967 Mys 210; *Narayanan Nambiar* v. *Executive Officer Cherukunnu Panchayat Board*, AIR 1965 Ker 73.
23. *Arjun Tewari* v. *State*, 1977 Cr LJ 1751; *Narayanan Nambiar* v. *Executive Officer Cherukunnu Panchayat Board*, AIR 1965 Ker 73; *Maibam Birahari Singh* v. *Manipur Administration*, 1967 Manipur 41.
24. *Public Prosecutor* v. *Ramasami*, AIR 1952 Mad 162.

held that as it was within the knowledge of the accused to whom he gave the money, it was for him to prove the same under Section 106.[25] When the accused was prosecuted for occupation of municipal land without permission and when the accused pleaded that the occupation is with permission, he is to prove that he had permission.[26]

Where a postmaster was charged for the offence of forgery for having signed moneyorder receipts as payee and the accused pleaded *alibi*, it was held that Section 106 was not attracted and the accused could not be asked to prove as to who signed the receipt and who are witnessess to it.[27]

The burden of proving *alibi* undoubtally, lies on the accused, but even so, the burden of proving the case is on the prosecution irrespective of whether or not the accused have made out a plausible defence.[28]

In the case of an offence under Section 5(3)(a) under the Explosives Act, on account of an explosion in a licensed premises causing some death of minor children, it was held that it was for the prosecution to prove all the ingredients of the offence, and Section 106 would not absolve it from proving its case; if once that is proved the accused may prove that minors were not employed in the manufacture of explosives or that explosives were not manufactured at all on the day of occurrance.[29] In the case of Explosive Substances Act, it is only after the prosecution proves conscious possession and actual control of the incriminating article with guilty knowledge, that accused should explain his possession.[30]

When the accused pleads the first exception to Section 499, IPC, *viz.*, that the imputation is true and made for the public good in a defamation case, it is for him to prove facts to come within that exception.[31] When a corpse concealed from the public view is discovered on the information given by the accused, a reasonable inference that the accused himself concealed it can be drawn, in the absence of any explanation as to how he obtained that knowledge under Section 106.[32] When an accused fired a pistol causing superficial injuries he would be deemed to have fired the pistol with knowledge that the shot would be fatal, but if the accused pleads that he used defective ammunition, then it is he that should prove it, as it is within his knowledge that it contained defective ammunition.[33] In an offence for misappropriation under Section 409, I.P.C. proof of the manner in which the money was misappropriated is not necessary. The burden is on the accused to show how the money was utilised.[34]

Several persons were found at eleven o'clock at night on a spot outside the city of Agra, all carrying guns concealed under their clothes. None of them had a licence to carry arms and none of them could give any reasonable explanation of the presence at the spot under the particular circumstances. It was proved that dacoities had been frequent in the neighbourhood. It was held that they were guilty under Section 402 of the Indian Penal Code as it was not shown by them that the object for which they had assembled was not that of committing dacoity.[35]

In the case of dacoity when the prosecution establishes some circumstances giving rise to a legitimate inference that the accused's intention was to commit dacoity then it is for the accused to prove that their intention was different under illustration (a) of Section 106.[36]

2. INTENTION, *MENS REA*

The Privy Council in *Srinivas Mall* v. *Emperor*[37] held that the court should bear in mind that unless the statute rules out *mens rea* as a constitutent part of the crime an accused should not be found guilty of

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25. *Nilamber* v. *State*, AIR 1957 All 381; **See also** *State* v. *Radha Kishan*, (1961) 1 Cr LJ 595 (All).
26. *Sharanpur Municipal Board* v. *Kripa Ram*, AIR 1965 All 160.
27. In re : *Basawaraja Swami*, AIR 1967 Mys 210.
28. *Gurcharan Singh* v. *State of Punjab*, AIR 1956 SC 460.
29. *Md. Usman* v. *State of Bihar*, AIR 1968 SC 1273.
30. *State of Bihar* v. *Amir Hasan*, AIR 1951 Pat 638.
31. *Hardevi* v. *State*, AIR 1969 All 423.
32. *Harmal* v. *State*, 1971 Cr LJ 1215 (All).
33. *Badshah Singh* v. *State*, AIR 1958 All 677.
34. *Brahmananda Mohanty* v. *State*, AIR 1967 Ori 135; *Duttahari Mohapatra* v. *Republic of India*, ILR 1970 Cut 766; *State of Orissa* v. *Raj Kishore Singh Samanta*, (1966) 32 Cut LT 41; 1971 BLJR 322.
35. *Queen Emperor* v. *Bholu*, ILR (1900) 23 All 124.
36. *State* v. *Dhanpat Chamara*, AIR 1960 Pat 582; *Jain Lal* v. *Emperor*, AIR 1943 Pat 82; *Navsing Thavaria* v. *State of Gujarat*, 1968 Cr LJ 996; *State of U.P.* v. *Randhir Srichand*, AIR 1959 All 727.
37. AIR 1947 PC 135.

an offence against the criminal law unless he has got a guilty mind. In a case where words describing *mens rea* do not appear in the definition of the crime, it is for the accused to show that he acted without *mens rea*.[38]

Intention or guilty knowledge of the accused has to be proved by the prosecution and it is not on the accused.[39]

It is not for the prosecution to anticipate and eliminate all possible defence of circumstances which may exonerate an accused. If the accused had a different intention, that is a fact especially within his knowledge which he must prove.[40]

When there is failure to honour a negotiable instrument, the prosecution must prove the circumstances showing the intention to cheat to make out an offence under Section 420, I.P.C.[41]

3. *ALIBI*

Burden of proving the plea of *alibi* by positive evidence lies on the accused who raises it.[42]

4. PROHIBITION CASES

The Supreme Court held that the burden to establish that the offence took place within the jurisdiction of a particular magistrate is upon the prosecution and therefore such knowledge cannot be said to be especially within the knowledge of the accused to prove anything under Section 106.[43]

The Gujarat H.C., however, following *Shambhunath Mehra's Case*[44] and explaining *Krishnakumar's case*[45] held that though the burden on the prosecution would not shift to prove its case, under Section 106 the accused can establish that he had consumed liquor at a place where it was not an offence to consume.[46] The accused can also show under Section 106 that what he consumed was exempted liquor.[47]

5. CUSTOMS

In proceedings under Section 167(8) of Sea Customs Act for confiscation of goods, the Collector of Customs has to be guided by the provisions of Section 106 besides the principles of natural justice, though the Evidence Act and the Criminal Procedure Code do not in terms govern the onus of proof in such proceedings. The broad effect of the application of the basic principle underlined Section 106 to cases under Section 167 (8) of the Sea Customs Act is that the department would be deemed to have discharged its burden if it adduces only so much evidence, circumstantial or direct, as is sufficient to raise a presumption in its favour with regard to the existence of the facts sought to be proved.[48]

Burden of proving innocent receipt of goods under the Customs Act is on the accused.[49] Where the question was whether the accused had a valid permit to export uncleaned *tur-dhal*, it was held that the burden is on the prosecution to prove that the commodity which was being exported was uncleaned *tur-dhal* and it was not for the accused to prove that the commodity which he was exporting was not

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38. *State* v. *Munni Lal*, AIR 1953 Punj 204.

39. *Sattiah* v. *State of A.P.*, AIR 1960 A.P. 153: **relying on** *Attygalle* v. *King*, AIR 1936 PC 169; *Stephen Seneviratne* v. *King*, AIR 1936 PC 289.

40. *Arundhati Keutuni* v. *State of Orissa*, 1968 Cr LJ 848.

41. *Ajodhya Prasad* v. *Chiranjilal*, AIR 1957 All 246.

42. *Brijlala Pd. Sinha* v. *State of Bihar*, AIR 1998 SC 2443 : 1998 Cr LJ 3611; *Nisar Ahmed Fajmohmed Kaji* v. *State of Gujarat*, (1998) 9 SCC 23 : 1998 SCC (Cri) 967.

43. *Krishna Kumar* v. *Union of India*, AIR, 1959 SC 1390.

44. AIR, 1956 SC 404.

45. AIR, 1959 SC 1390.

46. *State* v. *Dhulaji Bauaji*, AIR 1963 Guj 234; *Gullegar Setty* v. *State*, AIR 1953 Mys 31; *State* v. *Pranjivan*, AIR 1952 Sau 35; *Chhaganji* v. *State*, AIR 1970 Gau 131, *Rabari Ramji* v. *State*, AIR 1954 Sau 31.

47. *State* v. *Talshi Sadul* AIR 1953 Sau 14; *State* v. *Rang Rao Bala*, AIR 1952 Bom 327, *Manuram Gunju* v. *State of Assam*, AIR 1970 Assam 49.

48. *Collector of Customs* v. *D. Bhoormul* AIR 1974 SC 859; **relying on** *Kanungo & Co.* v. *Collector of Customs* AIR 1972 SC 2136; *Issardas Daulatram* v. *Union of India* AIR 1966 SC 1867 **and dissenting from** *Ambalal* v. *State* AIR 1961 SC 264.

49. *Labhchand* v. *State of Maharashtra*, AIR 1975 SC 182.

uncleaned *tur-dhal*.[50] Where foreign goods were seized under the Customs Act, the accused pleaded that the goods were sent to him by a broker from Bombay, the accused has to prove those facts which are within his knowledge.[51] The burden of proving that goods are not smuggled goods shall be on the person from whose possession goods were seized as Section 123(1) of Customs Act 1962 is similar to the provisions of Section 106.[52] Where a person was found in possession of gold with foreign markings, the Supreme Court held that burden lay upon him to account for his possession.[53] In a case for the offences of smuggling goods, when the accused pleads that he had no hand in smuggling it is for him to prove that fact.[54] When contraband gold of foreign origin was seized from the petitioner at the Imphal-border and the petitioner No. 2 admitted ownership of gold and he handed it over to petitioner No. 1 inside the border for being taken to Imphal, it was held that the petitioners must prove the special fact within their knowledge as to how they came into possession of gold.[55] The burden is on the importer to produce the permission granted to him under Foreign Exchange Regulation Act 1947.[56]

The burden of proving unlawful importation of goods is on the customs authorities, when the goods seized are not covered by Section 178-A of the Customs Act. In such cases Section 106 does not apply.

The Supreme Court observed: "Section 106 of the Evidence Act in terms does not apply to a proceeding under the said Act. But it may be assumed that the principle underlying the said section is of universal application and under that section any fact especially within the knowledge of any person, the burden of proving that fact is upon him".[57]

It is not for the accused to prove the negative, namely that the goods were lawfully imported either by himself or by somebody else.[58]

6. PREVENTION OF CORRUPTION

The Supreme Court held that the offence under Section 5(1)(c) of Prevention of Corruption Act is constituted when the property has been received by the accused for or in the name, or on account of the master or employer and it is complete when the servant fraudulently mis-appropriates that property. And the accused under Section 106 has to prove his innocence.[59]

7. ESSENTIAL COMMODITIES ETC.

In a prosecution under the Essential Commodities Act, the dealer accused has to show how borken rice came to be mixed with the whole rice, because that matter is specially within his knowledge.[60]

Under the Mysore Movement of Timber (Control) Order, 1948, the prosecution should prove not only that timber was found in the house of the accused but also his possession commenced more than 24 hours prior to the discovery, and Section 106 cannot be invoked against the accused.[61]

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50. *Shrinivas Pannalal* v. *State of M.P.*, AIR 1954 SC 23; **overruling** *Shanker Rao Deshmukh* v. *Vinayak*, AIR 1951 Nag 307.
51. *Shah Guman Mal* v. *State of A.P.*, AIR 1980 SC 793.
52. 1985 Mad LJ (Cri) 353 (Coloum 2) (Kant.).
53. *Shah Guman Mal* v. *State of A.P.*, AIR 1980 SC 793.
54. *Thangdawla Lushai and Land Customs* v. *Assistant Collector, Central Exercise*, AIR (1965) 1 Cr LJ 515.
55. *Neithanga Hmar* v. *Assistant Collector, Central Excise and Land Customs*, AIR 1963 Manipur 1.
56. *Satyendra Kumar Dutta* v. *District Board of 24 Paragana's*, AIR 1959 Cal 536.
57. *Ambalal* v. *Union of India*, AIR 1961 SC 264; *Mangala Prosad* v. *V.J. Manerikar*, AIR 1965 Cal 507; *Gianchand* v. *State of Punjab*, AIR 1962 SC 496; *Hiralal Sarangi* v. *Collector of Central Excise*, AIR 1962 Assam 39; *Sanwarmal Purohit* v. *Collector of C.E. & L. Customs*, AIR 1964 Assam 121 (FB).
58. *Collector of Customs, Madras* v. *Nathella Sampathu Chetty*, AIR 1962 SC 316; *Lawrence* v. *The King*, 1933 AC 699; *Woolmington* v. *Director of P.P.*, AIR 1935 AC 462.
59. *Krishn Kumar* v. *Union of India*, AIR 1959 SC 1390.
60. *State of A.P.* v. *B. Prakasa Rao*, AIR 1976 SC 1845.
61. *Subbaraya* v. *Government of Mysore*, AIR 1952 Mys 8; *Mukandlal* v. *State*, AIR 1957 Raj 178; (Possession of food-grain by the accused for more than a week under Rajasthan Food-grains Control Act 1949) **relying on** *Behram Kurshid* v. *State of Bombay*, AIR 1955 SC 123.

8. N.D. AND P.S. ACT

Where the factory from where the psychotropic substances were seized belonged to the accused, burden was on him prove how the offending articles came to be found in his factory.[62]

9. RAILWAY

There is a duty on the part of the Railway to disclose the manner of dealing with the consignment. Where the facts were within the knowledge of the railway administration, it must prove such facts.[63]

There is nothing in Section 74-D of the Railways Act to indicate any legislative intent to override the provisions of either Section 106 or Section 114 of the Evidence Act.[64]

When certain articles are delivered to the accused for booking them by signing a requisition form and he fails to book them and they are missing, as the matter is within his special knowledge, he is bound to explain the missing of the articles under Section 106.[65] In a case where the accused travelled without pass or ticket, it is for the prosecution to prove that there was intention to defraud the railway administration; mere travelling without pass or ticket does not attract Section 112 of the Railways Act. The question of intention is one which depends upon circumstances of each case. If once that is proved then the accused may prove as to how his travel without a ticket was not in contravention of Section 68 of the Railways Act and to that extent the burden is on him; as such facts will be especially within his knowledge.[66]

When a reply to a notice was given by the General Manager Railways indicating the receipt of notice, the Railways has to prove the actual date of receipt of notice, to show that the claim was out of time.[67]

10. NON-DELIVERY OR SHORT DELIVERY OF GOODS

In suits for damages for the loss of goods in transit it is for the plaintiff to prove that the loss occurred due to the negligence or want of skill of the defendant carrier under Section 74(c), but it is also the duty of the carrier to show under Section 74(d) how the consignment was dealt with during the transit, as that is a matter within the special knowledge of the defendant or its servants and agents. The defendant must first adduce evidence disclosing its treatment of the goods and the plaintiff may rely on that evidence in addition to any tendered by him to show that the loss had occurred by reason of the defendant's default or negligence or that the loss could not have occurred but for such default or negligence. If the defendant does not adduce all the evidence at its command the plaintiff may, in proper cases, ask the court to make a presumption under Section 114(g) against the defendant.[68]

Under Section 80 of the Railways Act, there is a burden on the plaintiff to prove that the goods sent through railway was lost or damaged, and he cannot take advantage of Section 106.[69] In the case of claim for compensation from the railways, if the plaintiff does not call for any disclosure from the railways, it was held that no duty lies on railway to disclose anything or how the consignment was dealt

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62. *Jagdish Budhroji Purohit* v. *State of Maharashtra*, (1998) 7 SCC 270 : 1998 SCC (Cri) 1578.
63. *Union of India* v. *Bhagat Ram*, AIR 1967 Del 153; *Banarsi Stores* v. *President of the Union of Indian Republic*, AIR 1953 All 318.
64. *Tulsidas Vithal das* v. *Union of India*, AIR 1967 Guj 130; *Union of India* v. *Sri Ram Richpal*, AIR 1965 All 246.
65. In re : *Vellai Pillai*, AIR 1952 Mad 322.
66. *Sudhir Chandra Gupta* v. *State of Assam*, AIR 1965 Assam 38.
67. *Nagarmal More* v. *Union of India*, AIR 1971 Assam 41; *Jainarain* v. *G.G. of India*, AIR 1951 Cal 462; *G.G. in Council* v. *Krishna Shenoy*, AIR 1951 Mad 327.
68. *Textiles and Yarn Pvt. Ltd.* v. *Indian National Steam Ship Co.*, AIR 1964 Cal 362; *Indian Trade & General Insurance Co. Ltd* v. *Union of India*, AIR 1957 Cal 190 : 1966 All WR (SC) 651; *Union of India* v. *Kalinga Textiles Pvt. Ltd.*, AIR 1969 Bom 401; *Sarada Mills Ltd* v. *Union of India*, AIR 1966 Mad 381; *Sobharam Jokhiram* v. *Union of India*, AIR 1970 Pat 182; *Union of India* v. *Firm Munnalal Pasari & Sons*, AIR 1971 MP 131.
69. *Chandra Sekharam* v. *Union of India*, AIR 1960 Ori 100; *Asaram Gangaram* v. *Union of India*, AIR 1957 Nag 59; *Ram Ratan* v. *Union of India*, ILR (1958) 8 Raj 1156; *G.G. of India in Council* v. *Jesraj Tirlokchand*, AIR 1950 Assam 175; *Qadir Salamat Ullah* v. *G.G. in Council*, AIR 1951 All 438; *Union of India* v. *Delhi Cloth & General Mills Co. Ltd.*, AIR 1964 Punj 147; *Union of India* v. *Aluminium*, (1972) 1 An LT 189; *Works Co-Operative Factory Ltd.*

with during the transit and no adverse presumption against the railway can be drawn.[70] However, the railway to get protection under Section 74-A of the Railways Act has to show that short delivery was due to defective packing.[71]

When the goods were insured and sent by railways and the policy covered the risk of theft, the risk was to last only for three days after the arrival of the train at the destination, and no liability for the loss would attach unless notice is given within 10 days of the said risk to the Insurance Company. In such cases the onus of proving as to when the train arrived at the destination would be on the assured and that notice was also given as required before saddling the company with liability for loss.[72]

When there is discrepancy as to the entry in receipt and the quantum of goods delivered, the burden is on the railway to explain the cause for such discrepancy.[73] When the weight of the goods mentioned in the receipt did not tally with actual weight of the goods delivered to the railway and there was no admission by the railway of the actual weight, it was held that the railway is not liable for short delivery of goods.[74]

If the railway did not adduce evidence negativing the allegation of misconduct or negligence on the part of the railway, it was held that negligence was established by inference.[75] In a suit against railway for damages for short delivery of goods when the plaintiff did not adduce evidence showing *prima facie* proof of negligence or mis-conduct on the part of the railway, it was held that there is no duty on the railway to call material witnesses to prove facts which may be within its special knowledge. The principle *res ipsa loquitur* is not applicable.[76] When the terms of the risk-note provide that it is for the plaintiff to prove mis-conduct, it was held that inference from non-disclosure by the railway cannot be drawn against him.[77] When the risk-note was not signed by the consignor of the goods then under Section 106, it is the bailee/railway to whom the goods have been entrusted that has to prove that the loss caused was not due to its negligence.[78]

When a consignment was carried only to some extent by the defendant railway and from there upto the destination in Pakistan by the Pakistan Railway it was held that non-delivery at the destination could not be held to be within the knowledge of the defendant railway, under Section 106.[79] When mis-conduct was alleged on the part of the railway for the loss of goods, it was held that the delay in forwarding consignment can not be properly regarded as mis-conduct, unless delay is deliberately caused by the railway administration.[80]

When the allegation of damage to goods was against a particular railway administration, the plaintiff must prove the same. And he cannot take advantage of Section 106 or Section 114 of Evidence Act, as such onus of proof does not shift.[81]

When the damage was due to fire the consignor/bailor is to prove lack of sufficient care by the bailee.[82] A Steam-ship Company has to prove that the cargo was actually carried on the deck, in the case

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70. *Union of India* v. *Sheo Prasad Fulchand*, AIR 1967 Pat 328; *Sobharam Jokhiram* v. *Union of India*, AIR 1970 Pat 182.
71. *Union of India* v. *Ratilal Jadauji*, AIR 1971 Cal 515.
72. *New Asiatic Insurance Co. Ltd.* v. *Bihar State Co-operative Bank Ltd.*, AIR 1966 Pat 69.
73. *Jugal Kishore* v. *Murugan Gas Supply Co.*, AIR 1973 Mad 331.
74. *South-Eastern Railway* v. *Satyanarayan*, AIR 1961 Ori 141.
75. *Union of India* v. *Sri Ram Richpal*, AIR 1965 All 246.
76. *Ram Pyari Devi* v. *Union of India*, ILR (1964) 14 Raj 811; **See contra** *Rama Krishna* v. *Union of India*, AIR 1960 Bom 344; *B.B. & C.I. Railway* v. *Rajnagar Spinning Co. Ltd.*, AIR 1930 Bom 129; (in the Bombay cases it was held "mis-conduct" and "negligence" are different notions. Some kinds of negligence may amount to mis-conduct. When goods were carried during monsoon season at owners risk, the case is governed by Section 74-C. When goods were damaged due to rain water the principle of *res-ipsa-loquitur* may be applied to infer mis-conduct, and the railway has to prove that there was no mis-conduct).
77. *Union of India* v. *Banshidhar Prasad*, AIR 1956 Pat 68.
78. *Balkishan* v. *Union of India*, AIR 1956 Hyd 193; *Jankidas Marwari* v. *G.G. in Council*, AIR 1946 Pat 336; *Secretary of State* v. *Kesho Prasad*, AIR 1932 All 584.
79. *Union of India* v. *Meghraj Agarwalla*, AIR 1958 Cal 434.
80. *Union of India* v. *Muralidhar Agarwalla*, AIR 1951 Assam 173.
81. *Kanyaka Parameshwari* v. *Union of India*, AIR 1960 Ori 103; **relying on** *Chandra Sekharam & Sons* v. *Union of India*, AIR 1960 Ori 100; *Darjeeling, Himalayan Railway Co.* v. *Jetmull Bhojraj*, AIR 1956 Cal 390; *Kannayalal Ram* v. *Union of India*, AIR 1959 Pat 335; *Firm Radhakishen Bhagwati* v. *Union of India*, AIR 1959 Assam 98.
82. *Calcutta Credit Corporation Ltd.* v. *His Highness Prince Peter of Greece*, AIR 1964 Cal 374.

of accepted cargoes under Section 106.[83] In the case of bailment the plaintiff must prove bailment and the bailee must prove that he took care of the goods. And reliance under Section 106 cannot be placed.[84]

11. NEGLIGENCE

In case of rash and negligent driving, the bus turned turtle. It was held *res ipsa loquitur* (fact speaks for itself) would apply and the negligence on the part of the driver would be presumed. The best evidence against negligence would be of the driver himself under Section 106.[85]

However, it was held that the maxim *res ipsa loquitur* loses its importance when all the evidence is tendered by both parties. If the plaintiff alleges negligence and gives particulars of it, it is on him to prove it.[86]

In the case of fatal accidents if it suggests negligence, the defendant must prove lack of negligence.[87]

In a suit for damages for negligence, plaintiff proved negligence on the part of the defendant, but the defendant suppressed all important materials in its possession. It was held that Section 106 or the doctrine of *res ipso loquitur* is attracted.[88]

Where the evidence showed that the combustible material was stored by the tenant in the premises admittedly in his possession regarding which sufficient warning was given by the landlord and tenant also did not take any steps at the time of fire to prevent it by reporting to the authorities concerned, the burden would shift on the tenant to prove that he was not negligent and not responsible for fire.[89]

12. *MESNE* PROFITS

Initially, onus of proof regarding profits earned lies on the person accountable for *mesne* profits.[90]

In cases of *mesne* profits the plaintiff would be entitled to get *mesne* profits calculated or arrived at on the basis of the prevailing rates or on the basis of what the person in occupation would have actually received, with ordinary deligence under Section 106, the burden of proving the amount actually received will lie on the person who received the amount, but the burden of proving the profits that might have been received is on the person who claims it.[91] When the question of *mesne* profits is to be determined when the defendant claims that he made improvements, it is for him to prove how much amount he spent for improvements. And if the plaintiff alleges waste by the defendant, he has to prove the extent of the waste as the claim for waste would stand on the same footing as claim for *mesne* profits.[92]

13. LANDLORD AND TENANT

The burden of proof regarding payment of rent lies on the tenant and liability regarding which is not discharged by mere oral allegation of payment without receipts and without satisfactory explanation for non-recourse to money order.[93]

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83. *Scindia Steam Navigation Co.* v. *Ismain Lohmed Batatawala,* AIR 1960 Bom 416.

84. *Firm Radhakishen Bhagwati* v. *Union of India,* AIR 1959 Assam 98.

85. *Mangli* v. *Krishna Bus Service Ltd.,* (1965) 67 Punj LR 1064; **See also** *District Board Bhagalpur* v. *Province of Bihar,* AIR 1954 Pat 529; *Municipal Corporation of Delhi* v. *Sobhag Wanti,* AIR 1960 Punj 300, (damages for loss of life due to collapse of building); *Madhuri Chowdhuri* v. *Indian Air-lines,* AIR 1962 Cal 544; *Sushma Mitra* v. *M.P. State Road Transt. Corp.,* AIR 1974 MP 68.

86. *Indian Airlines* v. *Madhuri Chowdhuri,* AIR 1965 Cal 252; **reversing** *Madhuri Chowdhuri* v. *Indian Airlines Corporation,* AIR 1962 Cal 544.

87. *Engineers Industrial* v. *C.H. Raju,* (1974) 1 Mad LJ 37.

88. (1977) 2 Cal LJ 108.

89. *M. Kuppusamy* v. *Viswanathan,* 1998 AIHC 2856 (paras 12, 13 and 14) (Mad).

90. *Ratanlal* v. *Girdhari Lal,* AIR 1972 Del 11.

91. *Mahant Narayana Dossjee* v. *Board of Trustees.,* AIR 1959 AP 64 **Reversed on** another rating point to payment of interest on *mesne pagi* in *N. Dasjee* v. *Tirupathi Devasthanan,* AIR 1965 SC 1231; *Ramakka* v. *Nageshan,* AIR 1925 Mad 145; *Kallynath Dutta* v. *Shew Buy Mohata,* AIR 1950 Cal 87; *Shaik Salma* v. *Shai Md. Abdul Kadar,* AIR 1961 AP 428; *R.S. Ramakrishna* v. *K. Rajagopal,* AIR 1953 Mys 139; *Md. Abdul Ghaffur* v. *Md. Samsuddin,* AIR 1925 Mad 297; *Girish Chunder Lahiri* v. *Shesht Shikhareswar,* (1900) 10 MLJ 356 (PC); *Dhanaraja Gerji* v. *Parthasarathy,* AIR 1933 Mad 825.

92. *K.C. Alexander* v. *Nair Service Society Ltd.,* AIR 1966 Ker 286.

93. *Sukhanand* v. *IV Additional District Judge, Bulandshahr,* AIR 1994 All 59 (paras 7 and 8).

The amount spent on improvements is a fact within the special knowledge of the tenant who has to prove the same.[1]

In a suit by the landlord for eviction of a residential building under the Delhi and Ajmer Rent-Control Act, it was held that the landlord must allege that the tenant has built a house or acquired vacant possession of a suitable residence. The onus to prove facts within the special knowledge of a party would be on him under Section 106.[2]

When the landlord places material showing *prima facie* that the tenant created a sub-tenancy, it is for the tenant to show facts within his knowledge how the alleged sub-tenant occupied the premises and the nature of relationship between him and those occupying and if he does not prove the same the landlord is entitled for eviction.[3]

A tenant claiming exemption from eviction under Kerala Land Reforms Act of 1964, has to show that he is a *kudikidappukaran* within the meaning of that Act. The burden cannot be placed on the landlord to show that the value of the building is such that the Act does not apply on the ground that he has special knowledge of its value.[4]

14. ELECTION LAWS

Where a charge is made in an election petition that the election expenses did not show certain expenditure, it is for the petitioner to prove it, and the onus is not on the successful candidate and Section 106 has no application.[5]

Where a successful candidate prior to the election published a bulletin alleging that his rival candidate/petitioner through his worker distributed or offered coats and blankets to the voters at a particular place or on a particular day, the petitioner adduced evidence to show that it was not possible for his worker to be present at a particular place on that particular date. It was held that the burden on the petitioner was discharged and the burden shifted on the successful candidate to dislodge the assertions.[6]

In a petition to set aside an election on the ground of corrupt practices, the allegations must be established beyond reasonable doubt as the proceedings are of quasi-criminal character, and there is a presumption of innocence in favour of the respondent.[7]

15. MASTER & SERVANTS

In the case of a servant charged with misappropriation of goods of his master, if the failure to account is due to an accidental loss, the facts being within the servant's knowledge, it is for him to explain the loss.[8] In a case for breach of contract of employment by the employer, the onus is on the employer to show that the employee ought reasonably to have taken certain mitigating steps and the existence or non-existence of other jobs is not a matter which could be said to be especially within the knowledge of the employee within the terms of Section 106.[9] In the case of reinstatement of workman and payment of back-wages, the facts about employment or non-employment or the efforts made or not made to secure alternative employment are within the special knowledge of the employee.[10]

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1. *Shripati Raoji* v. *Vishwanath*, AIR 1955 Bom 457.
2. *Nrader Mal* v. *Ugar Sain Jain*, AIR 1966 Punj 509; **See also** for similar type of cases : *G.G. in Council* v. *Mahabi Ram*, AIR 1952 All 891; *Ramkrishna Ramnath Shop* v. *Union of India*, AIR 1960 Bom 344; *India Trade & General Insurance Co. Ltd* v. *Union of India*, AIR 1957 Cal 190; *Freddy Fernandes* v. *PC Mehra*, ILR (1973) 1 Del 682
3. *Lalit Mohan* v. *Kesharao*, 1963 MPLJ (Notes) 269; *Santoshi Lal* v. *Chandra Mohan*, AIR 1956 MB 121; *Ziaul Hasan* v. *Pannalal*, AIR 1972 MP 209; *Prabhu Dial* v. *Vijay Kumar*, (1974) 76 Punj LR 642; *Annakutty* v. *Padmavathy Amma*, 1980 Ker LT 820; *Rajkumar* v. *Harbanslal*, AIR 1978 Punj 186. ; *Gur Dayal Khanna* v. *Malti Devi*, AIR 1993 All 90 (paras 12 and 13).
4. 1969 Ker LR 782.
5. *Kandaswami* v. *Adityan*, AIR 1960 Mad 170.
6. *Badri Prasad* v. *Satish Kumar Sharma*, AIR 1964 Raj 184.
7. *Razikram Choudhary* v. *Choudhary Jaswant Singh*, AIR 1975 SC 667; *Prasad Deb* v. *Bhanuganga Deb*, AIR 1964 Ori 8; *Sri Raj Raj Deb* v. *Gangadhar Mohapatra*, AIR 1964 Ori 1.
8. *Krishan Kumar* v. *Union of India*, AIR 1959 SC 1390.
9. *Hiranandini* v. *Bharat Barell & Drum Mafg. Co.*, AIR 1969 Bom 373.
10. *Sadanand Patankar* v. *New Prabhat Mills, No. 2 Bombay*, 1975 Lab. I.C. 457 (Bom).

Whether a petitioner, a government servant, was included by the Director in the list of superseded persons sent to the Public Service Commission is a fact within the special knowledge of the Director.[11] In a case the services of the appellant were terminated by the Government on a certain ground and it was claimed that a prior show cause notice was given to him the service of which he denied. The Govt. could not produce any proof of service of the notice as the records had been weeded out. However, there was on records the explanation of the appellant submitted by him before the termination of his service. It was held that the burden of proving the service of notice was discharged.[12]

In a suit to declare the order of demotion and dismissal as illegal and *ultra vires*, the burden is on the plaintiff to prove the same and in such cases Section 102, applies but not Section 106.[13]

16. TAX-LAWS

In the case of an assessee partner of a firm a credit-entry of deposit made by his wife appeared in the account books of the firm and there was a similar deposit on the same date made by the wife of another partner, it was held that the source from which money was realised by the wife need not be proved by the assessee; that the department cannot hold that the other deposit made by another partner's wife was the amount of undisclosed income of the assessee.[14]

The burden is on the assessee to explain the true nature and source of the income.[15] The assessee has to prove that a particular income has its origin in the capital amount.[16] Where remittances were made from non-taxable territory and the Income Tax Department established the source, the presumption that remittances are out of accumulated profits arises. Regarding the question as to where from remittances are made being a matter within the special knowledge of the assessee, he has to prove that those remittances are from source other than accumulated profits.[17] When the assessee fails to explain the nature of cash credit entry, the income tax officer may presume that it falls under income from other sources.[18] The burden of establishing that a disputed amount is not assessee's income lies on the assessee and not on the department.[19] When an assessee claims exemption he should give detailed facts entitling him to exemption as under Section 106 when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him.[20]

Assessability at single point and non-assessability at other points is for the assessor to prove.[21]

In a suit for recovery of an amount of reward announced by the Board of Direct Taxes, it was held that the burden lies on the defendant to prove realisation of extra taxes and if the defendants suppressed assessment record regarding realisation of extra taxes which it has to do, under Section 106 a presumption can be drawn against the defendant under Section 114(g).[22]

How much amount was expended from out of the licence fee would be within the knowledge of the Zilla Parishad and is has to prove the same.[23]

A person who collects *Tehbazari* dues and fails to account for the collections has to porve how he gave discharge of those amounts under Section 106.[24]

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11. *Mareshwar Lal Joshi* v. *State of Rajasthan*, 1971 Raj LW 140.
12. *Sanjay Kumar Bajpai* v. *Union of India*, (1997) 10 SCC 312.
13. *State of Bihar* v. *Shiva Bhikshuk*, AIR 1960 Pat 162: **overruling** *Ramesh Chandra* v. *H.D. Jain College* AIR 1957 Pat 145.
14. *Tolaram Daga* v. *Commer., of I.T.*, 1968 Assam 1.
15. *Har Prasad* v. *Commr. of I.T.*, AIR 1957 All 746.
16. *Raghava Reddy* v. *Commissioner of I.T.*, AIR 1957 A.P. 926; *D.C. Auddy & Bros* v. *Commr. of I.T.*, AIR 1956 Cal 295.
17. *B.R. Bamasi* v. *CIT, Bombay*, (1972) 83 ITR 223 **relying on,** *CIT* v. *Jankidas Kaluram*, 17 ITR 406.
18. *C.I.T.* v. *Krishna Mining Co.*, (1972) 83 ITR 860.
19. *Munnallal* v. *Commer. of I.T.*, AIR 1957 Nag 73.
20. *Burhanpur Tapti Mills Ltd.* v. *State of M.P.*, AIR 1962 M.P. 225; **relying on** *Thungabhadra Industries Ltd* v. *Commercial Tax-Officer*, AIR 1955 AP 257; *I & Wire Products Ltd* v. *Supt of Commr Taxes*, AIR 1957 Pat 112.
21. *B.V. Bhatta* v. *State*, ILR (1965) 2 Mad 623.
22. *Narayan Chandra Chakra Borty* v. *Union of India*, 1980 Tax LR 509 : 84 Cal WN 293.
23. *Zilla Parishad Aligarh* v. *Ami Chand*, 1972 Cr LJ 530 (All).
24. *Ishwar Dayal* v. *Municipal Board, Rath*, AIR 1980 All 143.

17. HUSBAND AND WIFE

In an application for maintenance by a wife, the onus lies on the husband to disclose his income under Section 106.[25]

In a suit for declaration that the marriage was invalid on the ground of non-performance of essential formalities, the burden is on the plaintiff to prove the non-performance of such formalities which would invalidate the marriage, as it would be reasonable and proper to presume that the qualified *purohit* attached to the temple had complied with all the ceremonial formalities for a valid Hindu marriage.[26]

As to the facts relating to the pregnancy of a woman and the birth of her child, they would be within her knowledge and so she has to prove the same.[27] When cruelty was alleged as a ground for judicial separation the petitioner has to prove the same.[28]

18. MISCELLANEOUS

Where *A* hires a bicycle from *B* and alleges that he has lost it, it is *A* that should prove as a fact which is purely within his knowledge and *B* cannot be expected to know how it was lost and under what circumstances.[29]

The question as to when the petitioner migrated to Pakistan is a matter which is especially within his knowledge and so he must prove it. And the burden is not on the government to prove it.[30] In cases of acquisition of land for development, for industrial and residential purposes, the onus of proving facts and circumstances lying specially within the knowledge of the official who formed the opinion resulting in the notification issued rests upon that official.[31] When the question is whether a Sub-Divisional Controller had authority to enter into a contract on behalf of the Government, it is for the Government to produce the file containing the relevant orders as such fact is especially within the knowledge of the Government.[32]

Where the plaintiff has personally executed a deed of assignment which he seeks to be set aside on the ground of it being a *Benami* deed he cannot keep himself away from the witness box, as he has to prove the facts which are within his knowledge to show that the deed is not actually what it purports to be.[33]

When damages are claimed for violation of Trade Marks Act, it is for the defendants to produce the account books to show the amounts received which matter is entirely within their special and exclusive knowledge.[34] In a suit for recovering damages against the owners of a vessel, there was allegation by the plaintiff that the owner of the vessel and the charterers of another vessel were one and the same entity and the vessel was owned by the named individual. The defendant owners produced no document to disclose shareholding pattern of either the owner or the shareholding of the majority shareholder which must be considered to be within the special knowledge of the owners and they were under obligation under Section 106 to disclose the name of the majority shareholder.[35] In a case under a Sale of Goods Act, the person claiming the refund has to prove that he has suffered in loss or injury because it is in his special or exclusive knowledge.[36]

It is for the plaintiff to prove that his suit is within time when time begins to run from the date of plaintiff's knowledge of a particular event, since the knowledge of that event can only be within the

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25. *Chitra Sengupta* v. *Dhruba Jyoti*, AIR 1988 Cal 98. **See also** *Anil Kumar* v. *Laxmi Devi*, AIR 1994 NOC 61 (Raj).
26. *G.V. Chalapathi Raw* v. *Potti Lakshmi Kantham*, (1977) 2 An WR 32.
27. *Nand Kishwar Bux* v. *Gopal Bux Rai*, AIR 1940 PC 93.
28. *Tushar Kana (Smt.)* v. *Bhowani Prosad Roy*, (1969) 73 Cal WN 143.
29. *Samaraj* v. *Kuppaswamy*, AIR 1957 Mys 55.
30. *Masud Khan* v. *State of U.P.*, AIR 1974 SC 28.
31. *Narayan* v. *State*, AIR 1977 SC 183; *Biharilal* v. *Union of India*, AIR 1979 Del 84.
32. *Raipada Pramanaik* v. *State*, AIR 1977 Cal 7.
33. *Devji Shivaji* v. *Karsandas Ramji*, AIR 1954 Pat 280; **following** *Gurbakhsh Singh* v. *Gurdial Singh*, AIR 1927 PC 230.
34. *Firm Bhagwan Dass Ramjilal* v. *Watkins Mayor & Co.*, AIR 1956 Punj 17.
35. *Alexandros Dryron S.A.* v. *Owners and Parties, M.V. PRAPTI*, AIR 1998 Cal 142 (para 12).
36. *Mafatlal Industries* v. *Union of India*, (1997) 5 SCC 536.

knowledge of the plaintiff and no one else.[37] Where a person has taken an elephant on hire the burden of proving the number of days for which the elephant has worked is on him since that fact is particularly within his knowledge.[38] Where infringement of a patent is alleged the defendant is to prove that his process of manufacture was different as such matter would be specially within his knowledge.[39] Where blocks were recovered from the possession of a printer which were indentical or almost identical with the genuine trade mark, it is for the printer to prove that he had no knowledge of the existence of the original trade-mark.[40] Where there was failure to observe the terms as to accounts in the licence issued in a prescribed form, the onus is on the licensee to prove that he was prevented by reasonable cause to maintain accounts correctly.[41] Where a party claimed to be an agriculturist within the meaning of Section 2(2) of U.P. Agriculturists Relief Act, it was held that the onus of proving that under the proviso to Section 2(2) he is deprived of the status has to be proved by the opposite party.[42] In a suit for partition of joint family property mere mention of an arbitration agreement and award does not bar the suit. It is necessary for the defendant to plead necessary facts in support his plea to bar the suit.[43]

19. FACTS WITHIN THE KNOWLEDGE OF A PARTY

Under the Slum Areas (Improvement and Clearance Act) 1956, when the eviction petition is filed, income of the tenant is a question to be considered. Income of the tenant, is a fact especially within the knowledge of the tenant and so he has to prove the same under Section 106, showing that he has no sufficient means for securing alternative accommodation.[44] Special facts such as the competence of a party to espouse a cause under the U.P. Industrial Disputes Act 1947, are to be proved under Section 106 by the espousing party.[45] Where a State Government passed an order under delegated authority with the prior concurrence of the Central Government and when that order is challenged, it was held that whether there was concurrence or not was within the special knowledge of the State Government, and so it has to be proved under Section 106.[46] When a premises is let and a stranger other than the lessee is in possession the burden is on the lessee to show that he is not a sub-lessee but a licensee as it is within his special means of knowledge.[47]

Where the dead body of the victim of rape was found on the cot inside the house of the accused, the burden was on him to explain how the dead body happened to be there.[48] The Court would be justified in appropriate cases to draw the presumption that the abductors themselves could be the killers of the abducted victim, unless they explained otherwise as to what they did with the prey.[49] Where a housewife died of drowning in the well in the courtyard of the house of the in-laws and at the time of the incident only the accused persons were in the house, burden was on them to prove what happened on that night which resulted in her death.[50] Where the accused husband alone was present with the deceased at the time and place of offence and he absconded soon after the incident, he was bound to explain the fact, it being in his special knowledge and in the absence of any explanation the only possible inference would be that he participated in the Act.[51] Where the appellant was charged for purchasing paddy from a

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37. *Bakhshish Singh* v. *Inder Singh*, AIR 1953 Pepsu 74.
38. *Achutan* v. *Govindan Valia*, (1963) 7 Ker LJ 1079.
39. *F.H. & B. Corpn.* v. *Unichem Laboratories*, AIR 1969 Bom 255.
40. 1970 All WR (HC) 332.
41. *Mangal Singh* v. *State of Bihar*, AIR 1968 Pat 37.
42. *Kishon Chand* v. *Rambabu*, AIR 1965 All 65 (FB).
43. *Maumati* v. *Mohan*, AIR 1969 MP 7; **relying on** *Abdul Quddoos* v. *Abdul Gani*, AIR 1954 Nag 332; *Md. Yusuf* v. *Hazi Md. Hussain*, AIR 1964 Mad 1; *Bansidhar* v. *E.B. Sukhia*, AIR 1957 MP 24.
44. *Rajendra Kumar Jain* v. *H.C. Arora*, AIR 1974 Del 221; *Mandir Dass Jain* v. *P.R. Varshneya*, 1973 Del 71.
45. (1972) 25 Fac LR 262 (All).
46. *Foremost Dairies Ltd.* v. *State of Rajasthan*, AIR 1986 Raj 116.
47. *Gur Dayal Khanna* v. *Malti Devi*, AIR 1993 All 90.
48. *State of A.P.* v. *Gangula Satya Murthy*, AIR 1997 SC 1588 : 1997 Cr LJ 774.
49. *State of W.B.* v. *Mir Mohd. Omar*, 2000 AIR SCW 3230, **followed in** *Sucha Singh* v. *State of Punjab*, 2001 Cr LJ 1734 (paras 15, 19-22) (SC) : AIR 2001 SC 1436. **See also** *Ram Gulam Chaudhary* v. *State of Bihar*, 2001 Cr LJ 4632 (paras 23 and 24) (SC) : AIR 2001 SC 2842.
50. *Balram Prasad Agrawal* v. *State of Bihar*, AIR 1997 SC 1830 : 1997 Cr LJ 1640.
51. *Shanmugasundaram* v. *State*, 1997 Cr LJ 499 (Mad). The Court referred to *Shambhoo Nath* v. *State of Ajmer*, AIR 1956 SC 404 : 1956 Cr LJ 794. **See also** *Rajammal* v. *State*, 1993 Cr LJ 3029 (para 46) (Mad); *Namdeo Satyagonda Patil* v. *State of Maharashtra*, 1994 Cr LJ 3493 (para 24) (Bom); *Ahluvalia* v. *State*, 1995 Cr LJ 3511 (para 24) (Mad); *National Insurance Co. Ltd.* v. *Om Prakash Poddar*, AIR 1993 Cal 26 (para 9).

peasant on payment of forged currency notes and offered no explanation as to wherefrom he got them, it was held that his silence was a telling circumstance which would weigh against him in the consideration of the prosecution evidence.[52]

Burden of proving death of person known to have been alive within thirty years.

S. 107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

Burden of proving that a person is alive who has not been heard of for seven years.

S. 108. Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

SYNOPSIS

1. *Principle and Scope* ... 929
2. *Presumption rebuttable* ... 930
3. *Presumption does not extend to the date of death* ... 931
4. *Presumption of death date on which the question is raised* ... 931
5. *Hindu Law and Mohammadan Law superseded* ... 931
6. *Pleadings and Proof* ... 933
7. *Section 108 not exhaustive* ... 933
8. *Simultaneous deaths* ... 934
9. *Kidnapping* ... 934
10. *S. 108 and Rent Control Act* ... 934

COMMENTS

1. PRINCIPLE AND SCOPE

Halsbury states (4th Edn., Vol. 17, page 85): "There is generally no presumption of law by which the fact that a person was alive or dead on a given date can be established but the question must be decided on the facts of the particular case.[53]

This section provides that if it appears that a person, whose present existence is in question, was alive within thirty years and nothing whatever appears to suggest the probability of his being dead the court is bound to regard the fact of his still being alive as proved.

Section 107 is almost similar to illustration(d) of Section 114 which says that a thing or state of things which has been shown to be in existence within a period shorter than that whithin which such things or state of things usually ceases to exist is still in existence. Illustration to Section 114 deals with the presumption of continuance of a thing or state of things, whereas this section deals with the presumption of continuance of life.

Sections 107 and 108 must be read together because the latter is only a proviso to the rule contained in the former and both constitute one rule when so read together.[54]

Under Section 107, where there is a question whether a man is alive or dead, if it is shown that he was alive within 30 years the burden that he is dead is on the person who asserts it. Thus the section

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52. *Ponnusamy* v. *State*, 1997 SCC (Cri) 217.
53. In so far as old cases speak of presumption of continuance of life as if it were a presumption of law, they are not consistent with the modern authorities. For such cases, see *Wilson* v. *Hudges*, (1803) 2 East 12; *Napaan* v. *Das Hkaught*, (1837) 2 M&W 894; *Lapsley* v. *Grierson*, (1848) 1 HL cas 498 at 595; *R* v. *Willshire*, (1880) 6 QBD 336 CCR; *R* v. *Jones*, (1883) 11 QBD 118, CCR; *R* v. *Lumley*, (1869) LR 1 CCR 196; *Re Phene's Trust*, (1870) 5 Ch 139; In re : *Aldersey, Gibson* v. *Hall*, (1905) 2 Ch 181; *MocDarmaid* v. *A—G*, p. 232 (1950) 1 All ER 497; *Chard* v. *Chard*, (1955) 3 All ER 721.
54. *State of Punjab* v. *Bachna Singh*, ILR (1956) Pun 1232.

deals with a presumption of continuance of life, whereas under Section 108, if it is proved that person as not heard of for seven years by such of those persons who would naturally have heard of him if he was alive, then the burden of proving that he is alive is shifted to the person who asserts it. Thus under Section 108, there is a presumption of death, once it is proved that the person was not heard of for seven years. That section is a proviso to Section 107 is made clear by the opening words "provided that".

Where a person is alive within 30 years the burden is on the person claiming that he is dead to prove the same. If he is not heard of for 7 years the burden is on the person who claims that he is alive.[55]

In one case the Supreme Court observed that in view of the fact that one Sardul Singh was alive on May 24, 1960, it shall be presumed that he was not dead on May 24, 1970. As the appellant had alleged that Sardul Singh was dead on that date, the onus to prove that fact shall be on him.[56]

But as soon as anything appears which suggests the probability of a person being dead, the presumption disappears, and the question has to be determined on the balance of proof, Markby, 83.

Where a person was not heard of for many years previously but was alive on the date of filing of the suit and impleaded as a defendant, the question of presumption of death does not arise.[57]

2. PRESUMPTION REBUTTABLE

In either case (Sections 107 & 108) the presumption is rebuttable. The presumption embodied in Section 108 is by way of a proviso to Section 107; if two sections are read together, it would be evident that it would be erroneous to seek to apply both Sections 107 and 108 to one and the same case and at the same time. Before a presumption under Section 108 is raised, it has to be found by making an appropriate enquiry that the person has not been heard for 7 years by those who ought to have heard of him; in that enquiry it is permissible to show that the allegation that the person has not been heard of for over 7 years is not true and that there is evidence to show that he is alive or has been heard of within the period; if it is proved that the person has been heard within 7 years it is obvious then that the presumption of death, under Section 108 can not be raised.[58]

If it is shown that a man was alive within 30 years, the presumption under Section 107 is that he is alive but the presumption is rebuttable but then the burden shifts to the person who asserts that the man is dead.[59]

Where the allegation was that the defendant died before passing a decree, it was held that the onus is on the plaintiff to prove that the defendant was alive on the date of passing of the decree.[60]

The presumption under Section 107 does not apply to petitions for declaration of nullity of the marriage by reason of Sections 7 and 10(4) of the Divorse Act.[61]

If a person has not been heard of for seven years, there is a presumption of law that he is dead under secion 108[62] and the burden of proving that he is alive is shifted to the otherside.[63] Under Section 108, it is not required that the Court should hold that a person is dead after the expiration of seven years but it only provides shifting of burden to the person who asserts that the person is alive.[64]

In a matter under the Rent Control Act on application of the tenant's mother stating that her son was not heard of for more than 13 years and hence he be presumed to be dead and she be impleaded as a party, it was held that a separate suit for declaration of the original tenant to be dead is not necessary as

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55. *S.N. Shah* v. *Regional Commissioner Employees Provident Fund*, (1993) 1 MLJ 328; *Indirani Ammal* v. *E. Chandra*, (1993) 1 MLJ 339. **See also** *Nagalakshmi* v. *Thirugnanasambandam* AIR 1995 Mad 120 (paras 13, 15 and 16).
56. *Surjit Kumar* v. *Jhujhar Singh*, AIR 1980 SC 274.
57. *Sirla Appalaswamy* v. *Pattivada Appallamma*, 1997 AIHC 2259 (para 5) (Ori).
58. *T.R. Ratham* v. *K. Varadarajulu*, 1970 AP 246; *Sarojini* v. *Sivanandan*, AIR 1956 Tra.Co. 129.
59. *Saraswati Goswamy* v. *General Manager N.F. (Railway)*, AIR 1976 Gau 15; *Surjit Kaur* v. *Thujhar Singh*, AIR 1980 Punj 274.
60. *Mary* v. *Zucharia & Co. Ltd.*, 1967 Ker LT 1082.
61. *Green Wood* v. *G.*, 1945 Mad 65.
62. *Ramsati Kuer* v. *Dwarika Prasad*, AIR 1967 SC 1134.
63. *H.J. Bhagat* v. *L.I. Corporation*, AIR 1965 Mad 441.
64. *Narayan Bhagwant* v. *Srinivas*, 8 Bom LR 226; *Gopal* v. *Maniji*, 47 Bom 5; *Ramlal* v. *Ram Niwas*, ILR (1959) 9 Raj 276; *Jiwan Singh* v. *Kaur Reoti Singh*, AIR 1930 All 427; *Jangi Singh* v. *Gudri Singh*, AIR 1932 All 365; *Sarojini* v. *Sivabandan*, AIR 1956 Tra.co 229; *Cengar Soury Navakan* v. *Meenan*, AIR 1969 Ker 212.

Section 108 does not prescribe any procedure.[65] Where on an application to implead the heirs of a party to a suit presumed to be dead on the ground of not being heard of for seven years, nothing was brought on record to show that the said party was no more, it was held that the man not heard of for seven years can be deemed to have met with civil death and not the death occasioned on his last breath and the ingredients of Sections 107 and 108 cannot be taken advantage of.[66]

3. PRESUMPTION DOES NOT EXTEND TO THE DATE OF DEATH

The presumption of death does not extend to the date of death[67]. There is no presumption that he died at the end of the first seven years or at any particular date[68] or at any subsequent period.[69]

It is not a presumption in law that a person was alive for seven years from the time when he was last heard of. Sections 107 and 108 deal with the procedure to be followed when a question is raised before a court, as to whether a person is alive or dead, but do not lay down any presumption as to how long a man was alive or at what time he died. Assuming that the court could make a presumption that a person was alive for seven years after he was last heard of, it depends on the circumstances of each case whether the court could draw such a presumption or not.[70]

4. PRESUMPTION OF DEATH DATE ON WHICH THE QUESTION IS RAISED

The presumption of death would be the date on which the question was raised and not on an entecedent date. If the person is not presumed to be dead on an antecedent date prior to the one on which the question is raised, the natural inference is that he was alive till the question was raised. To a case where the proviso is attracted, the presumption under Section 107 does not apply.

The English law is in no way different from the Indian Law.[71]

The earliest date to which the death can be presumed can only be the date when the suit or claim of that right is filed, it cannot have a further retrospective effect.[72] Where a suit was filed exactly after the expiry of seven years the court said that without proof of the fact that death occurred before the enforcement of the Hindu Womens Rights to Property Act, rights under the Act could not be acquired.[73]

The Supreme Court observed in a case before it,[74] that the presumption about the death of Sardul Singh even if raised would be restricted to the date of the filing of the petition. The court cited the Privy Council decision to the effect that "there is only one presumption and that is that when these suits were instituted in 1916 Bhagwan Gir was no longer alive. There is no presumption at all as to the time he died. That, like any other fact, is a matter of proof".[75]

Where a person disappeared in December, 1950 and did not draw his allowance in January, 1951 and was not heard of for more than 7 years, it was held that in the absence of any evidence of probable motive of foul play or accident one has to speculate as to the cause of his disappearance, and it could not

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65. *Panchanan Chandra* v. *Kamala Biswas*, 2000 AIHC 566 (para 2) (Cal) : AIR 2000 NOC 19 (Cal).
66. *Chami Narayanan* v. *V.R. Krishna Iyer*, AIR 1998 Ker 365 (para 15).
67. *Ganesh Bux Singh Thukar* v. *Mohammad*, ILR (1954) 19 Luck 581; *Venkata Subba Rao* v. *G. Subba Rao*, AIR 1964 AP 326; *Narayan Pillai* v. *Velayudhan*, AIR 1963 Mad 385; *A.V. Narayana Vadhyar* v. *Vankateshwara*, AIR 1971 Ker 85 FB; *N Jayalakshmi Ammal* v. *R. Gopala Pathar*, AIR 1995 SC 995 (para 8).
68. *Vidhabai* v. *Malhar*, (1937) 41 Bom LR 147 : ILR (1938) Bom 155; *Nidhuram Das* v. *Munei Pandab*, ILR (1954) Cut 547.
69. *Mahammad Sharif* v. *Bande Ali*, AIR (1901) 34 All 36 (FB).
70. *Veeramma* v. *Channa Reddi*, ILR (1921) 37 Mad 441. **See also** *Subhash Ramchandra Wadekar* v. *Union of India*, AIR 1993 Bom 64 (para 12). **dissenting from** *Ram Kali* v. *Narain Singh*, AIR 1934 Oudh 298.
71. *Sarojini* v. *Sivnandan*, AIR 1956 Tra/Co. 129; *A.V. Narayana Vadhyar* v. *Venkateshwara*, AIR 1971 Ker 85 (FB); *Lalchand Marwari* v. *Ramrup Gir*, AIR 1926 PC 9; *Venkateshwarulu* v. *Bapayya*, AIR 1957 AP 380; In the Goods of *Ganesh Das Arora*, AIR 1926 Cal 1056; *Mrs. Pat Sharpe* v. *Dwijendra Nath Bose*, (1964) 1 Cr LJ 367 (Cal); *Philip* v. *Kesavani*, (1957) 1 Ker LJ 1028.
72. *Jeshankar* v. *Bai Divali*, (1920) 22 Bom LR 771.
73. *R. Gopala Pathar* v. *N. Jayalakshmi Ammal*, AIR 1984 Mad 341.
74. *Surjit Kaur* v. *Jhuihar Singh*, AIR 1980 SC 274.
75. *Lalchand* v. *Ramsarup Gir*, AIR 1926 PC 6; **see also** *Mathru* v. *Rami*, AIR 1986 HP 6 - presumption of death for succession.

be presumed that he was dead, on the date of his disappearance and in the absence of proof that he was alive, the only conclusion possible is that he was dead at the time the question arose (date of plaint)[76].

In a case where the wife of a person alienated the property to the plaintiff on 4-6-1962 and the plaintiff was dispossessed by the defendants in July 1962 and the vendor's husband was not heard of for 7 years, it was held that when the defendants challenged the right of the plaintiff's vendor to dispose of the property, in the absence of any proof as to the date of death of the transferor's husband, it can be presumed that he died earliest on the day when the plaintiff brought the suit. And since on the date of the earliest on the day when the plaintiff brought the suit. And since on the date of the transfer there was no proof that he was not alive, the plaintiff's suit could not be maintained and the presumption of death cannot be given a further retrospective effect.[77] The true principle of law is that where a party relies on a specific date of death of a person who has not been heard of for 7 years or more he must prove the specific date. If that cannot be proved the earliest date to which the death can be presumed can be the date on which the suit was filed, and it cannot be given further retrospective effect.[78]

In a suit for possession of property alleging that the successor-in-interest had died and his line was extinct the suit was dismissed after 6 years on the ground that the death was not proved and hence the suit was premature. It was held that provisions of Section 14(1) of the Limitation Act do not apply to the suit as Section 108 raises only presumption of death, but not the time of death.[79]

The relevant point of time at which the presumption under Section 108 is available when the factum of the death of the person concerned becomes material and not the date of the suit; where the material point of time was the date of adoption *viz.*, 15-8-1955 and it was established that the person to whom the adoption was made was not heard of by any person who should have heard of him, if he was alive, for seven years prior to 15-8-1955, then the presumption under Section 108 would be that he was dead on or before 15-8-1955[80].

It was observed in *Ram Nathan* v. *Varadarajulu*, (1970 AP 246) that the principles underlying Section 108 was not properly understood in *Shankarapa* v. *Shivabadrappa*, (1963 Mys 115) above.[81]

In a case for divorce by the 2nd husband under the Hindu Marriage Act on the ground that on the date of his marriage the respondent's husband was living the respondent contended that her first husband was not heard of for over 7 years and should therefore be deemed to be dead under Section 108, of the Act; it was held that the presumption even if raised, could only mean that he was dead on the date of the petition *i.e.*, 11-11-76 and would not relate back to the marriage *i.e.*, 24-5-1970 that since the husband by the first marriage who was alive in 1960 was presumed to be not dead on 24-5-1970 by the application of the rule under Section 107, in the absence of proof of death the marriage with the petitioner was null and void.[82] But under Section 13(7) of the Hindu Marriage Act of 1955, and Section 27(h) of the Special Marriage Act of 1954 it is specifically provided as a ground for divorce if the person had not been heard of for seven or more years by those who would naturally have heard of him if he was alive. There is a similar provision in Section 14(3) of the Matrimonial Causes Act 1965 in England.[83]

5. HINDU LAW AND MOHAMMADAN LAW SUPERSEDED

The presumption of Mohammadan Law, that when a person has disappeared and has not been heard of for a certain number of years, he is dead and further that, as regards property coming to him by

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76. *Huseinny J. Bhagat* v. *L.I.C. Madras*, AIR 1965 Mad 440; *Ramamma* v. *Appayya*, 1956 Andh WR 137
77. *Narbada* v. *Ramdayal*, AIR 1968 Raj 48; **dissented in** *A.V. Narayana Vadhyar* v. *Venkateshwara*, AIR 1971 Ker 85 (FB).
78. *Ramlal* v. *Ram Niwas*, ILR (1959) 9 Raj 276; *Sarojini* v. *Sivanandan*, AIR 1956 Tra.Co. 129; *Ramabai* v. *Saraswathi*, AIR 1953 Tra/Co. 114; *Huseinny J. Bhagat* v. *LIC. Madras* AIR 1965 Mad 440; *Harnand* v. *Commissioner Ambala Contonment*, AIR 1972 Punj 14; *Jeshankar* v. *Bai Divali*, AIR 1920 Bom 85; *Ponduri* v. *Jaladi*, (1922) 43 MLJ 725; *Chandi Charan* v. *Bhagvadhar*, AIR 1976 Cal 356; *Narbada* v. *Ram Dayal* 1968 Raj 48; *Ramamma* v. *Appayya*, 1956 An WR 137.
79. *Munsha Singh* v. *Gurdit Singh*, AIR 1965 Punj 80; **see also** *Punjab* v. *Natha*, AIR 1931 Lah 582 (FB).
80. *Shankareppa* v. *Shivarudrappa*, AIR 1963 Mys 115; **dissented in** *Biswanath Padhi* v. *Dharan Padhhi*, ILR 1972 Cut. 318; *Surjit Kuar* v. *Thujhar Singh*, AIR 1980 Pun 274.
81. *Narbada* v. *Ramdayal*, AIR 1968 Raj 431; *Parikhit Muddali* v. *Champa Dei*, 1967 Ori 70; and *Huseinny J. Bhagat* v. *LIC Madras*, 1965 Mad 440; and doubted the decision in 1956 An WR 137.
82. *Surjit Kaur* v. *Jhujhar Singh*, AIR 1980 Punj 274.
83. *Thompson* v. *Thompson*, (1956) 1 All ER 603.

inheritence he must be deemed to have died at the date of his disappearance is a rule of evidence only and is superseded by this section.[84]

The rule of Mohammaden Law that a missing person is to be regarded as alive till the expiry of ninety years from the date of his birth is overruled by this section.[85]

So is the rule of Hindu Law that twelve years must elapse before an absent person of whom nothing has been heard during this period, can be presumed to be dead.

Where the plaintiff claimed under Mohammaden Law a share in his grandfather's estate the onus is on him to show either by establishing a presumption under the Indian Evidence Act, Section 108, or by actual evidence that his father's death occurred at a date subsequent to that of the deceased owner; otherwise he is excluded by the children of the deceased living at his death as being earlier in degree.[86]

Sections 107 and 108 provide a uniform rule for Hindus and also for Mohammadns, and supersede the rules contained in Hindu and Muslim Laws.[87]

6. PLEADINGS AND PROOF

The benefit of Section 108 is not available when the plea is neither raised not proved.[88]

Before a presumption under Section 108 is raised an appropriate enquiry is to be held and it is permissible to show that the allegation that a person has not been heard of for over 7 years is not true and there is evidence to show that he is alive, or has been heard of within that period.

Unless it is established that the whereabouts of a person are not known and he has not been heard of for the past 7 years before the date of the suit, the presumption would be that he is alive.[89]

In an ejectment suit by one of the joint lessors alleging that the co-lessor had died in or about 1954, it was held that it was not proved, that the co-lessor had not been heard of for seven years on the date when the second appeal was heard and decided, by those persons who would have heard of him if he had been alive, that as long as that was not proved, the provisions of Section 108 did not become applicabe, and the case has to be decided not by applying Section 108 but by applying Section 107.[90]

Where *A* stated that he and another *B* are monthly joint tenants under a landlord of a certain premises, it was held that it must be regarded as an admission on the part of *A* that *B* is alive and not that he is dead; that so Section 108 is ruled out and Section 107 is attracted and *A* must prove that *B* is dead.[91]

No suit lies for a declaration that a person who was not heard of for over 7 years is deemed to be dead.[92]

On which date within the period of seven years, a person has died is not a matter of presumption but of evidence and onus of proving that the death took place at any particular time lies upon the person who claims a right to the establishment of which that fact is essential.[93]

7. SECTION 108 NOT EXHAUSTIVE

Section 108 is not exhaustive on the question of presumption as regards the death of a person. The court may in the circumstance of a case make a suitable presumption even regarding the time of death of the person concerned.[94]

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84. *Mairaj Fatma* v. *Abdul Wahib*, (1921) 49 All. 678; *Azzul Hussan* v. *Mohammad Faqrua*, (1933) 9 Luck 401 : AIR 1934 Oudh 41.
85. *Mazhar Ali* v. *Budh Singh*, ILR (1884) 7 All 297 (FB).
86. *Moola Kasim* v. *Moola Abdul Rahim*, 32 IA 177.
87. *Gurudas* v. *Morilal*, 6 BLR 16; *Rukbi Bibi* v. *Rahat Bibi*, 7 NWP 191; *Moola Kasim* v. *Moola Abdul Rahim*, ILR 33 Cal 173 (PC) : 321 A 177; *Ballaiah* v. *Kistnappa*, ILR 11 Mad 448.
88. *Mohan Lal* v. *Jit Singh*, 70 Punj LR 1047.
89. *Balwant Rao* v. *Kerba*, AIR 1953 Hyd 187.
90. *Ram Swarup* v. *Roshan*, 1964 All LJ 465.
91. 1963 Cal LJ 75 : 68 Cal WN 786.
92. *Freemantle* v. *Freemantle*, (1949) 52, Bom LR 641.
93. *Hemant Kishore* v. *Brij Raj Kishore*, AIR 1998 All 328 (para 5). Death of executant of adoption-deed not proved, not heard of by plaintiffs and near relations for the last seven years not proved, no presumption of death. *Baru* v. *Tej Pal*, AIR 1998 All 230 (para 8).
94. *Ramsingh* v. *Board of Revenue*, AIR 1964 All 310.

The presumption is not rigid and may be proved before lapse of seven years from proof of special circumstance, *e.g.*, where a deceased has been exposed it specific perils of death.[95]

8. SIMULTANEOUS DEATH

When two individuals perish in a common calamity (*e.g.* ship wreck, train collision, air crash, earthquake, etc.) and the question arises who died first in the absence of evidence on the point, there is no presumption in law that the younger survived the elder. Such a question is always from first to last a pure question of fact, the *onus probandi* lying on the party who asserts the affirmative.[96]

9. KIDNAPPING

Where during the pendency of the first appeal the plaintiff/respondent was kidnapped and the appeal was allowed against him in his absence, his wife and children were allowed to file the second appeal without waiting for seven years in the ends of justice.[97]

10. S. 108 AND RENT CONTROL ACT

The question of presumption of death can be decided only by a Civil Court and not by a Court vested with limited jurisdiction under the Rent Control Act.[98]

Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent.

S. 109. When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

SYNOPSIS

1. *Principle and Scope* ... 934
2. *Partners* ... 935
3. *'Landlord and tenant'* ... 935
4. *Principal and agent* ... 935

COMMENTS

1. PRINCIPLE AND SCOPE

This section deals with presumption in case of relationship of partners in a partnership, landlord and tenant, or principal and agent. When the existence of a personal relationship, or a state of things, is once established by proof, the law presumes that the relationship or state of things continues to exist as before, till the contrary is shown, or till a different presumption is raised, from the nature of the subject in question. A partnership tenancy, or agency, once shown to exist, is presumed to continue, till it is proved to have been dissolved.

Cases other than the three cases mentioned in this section are covered by the general presumption under Section 114(d) of the Act.

GARTH C.J. observed "This is a principle upon which the courts and the Legislature have generally thought it right to act, as in cases of presumption, and in presuming that a tenancy or partnership or other state of things continue till the contrary is proved". The learned judge was dealing with a case of an admitted private partition and the members of the family acted upon that partition for several years. It

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95. *Ishwar Dashabhuja Thakurani* v. *Kanchanbala Dutta*, AIR 1977 Cal 473; In the Goods of Ganesh Das, AIR 1926 Cal 1056.
96. *Agha Mir Ahmad* v. *Mir Mudassir Shah*, (1944) 7 IA 171 : AIR 1944 PC 100; see Section 21 of the Hindu Succession Act, 1956 in the case of simulataneous death).
97. *Chanda Devi* v. *Shrinath Sharma*, AIR 1993 Pat 105 (para 3).
98. *Haji D. Husain* v. *Vijavaraj*, 1999 AIHC 4313 (para 8) (Kant).

was held that the onus was upon the plaintiffs who wants to disturb the existing state of things to show the arrangement under which the private partition was determined.[1]

2. PARTNERS

Where a partner is to be made liable, the plaintiff should prove that such a person is a partner and continues to be a partner or has been acting as a partner of the firm.[2]

Partnership once shown to exist is presumed to continue until the contrary is proved.[3]

After a firm is dissolved, the partners continue to be liable to third parties for any act done which would have been an act of the firm if done before the dissolution, until public notice of dissolution is given (s. 45, Indian Partnership Act, 1932).

When the question is whether persons concerned are partners and it has been shown that they had been acting as such, the presumption under this section is that the appellant who is one of such persons and who has been acting as a partner, is in fact a partner in the firm and that he continues to be such; the burden of proving that they are not partners or they had ceased to be partners is on the person who says that he was not a partner or had ceased to be a partner.[4]

3. 'LANDLORD AND TENANT'

Where the relationship of landlord and tenant is admitted or proved to exist, it will be presumed to continue until it is shown by affirmative proof that it has ceased to exist. Mere non-payment of rent, though for many years, is not sufficient to show that such relationship had ceased.[5] Where it was shown that there was a relationship of landlord and tenant it is for the party to prove that such relationship ceased to exist.[6]

In the case of an agricultural tenancy, it was held that where there was no proof of actual possession by the landlord, the continuance of tenancy by holding over is to be presumed, entitling the tenants to occupancy rights.[7]

Where a tenant was continuing in possession without the landlord's consent, it was held that he would not be a tenant holding over, but he would be a tenant by sufferance; if acceptance of rent would constitute implied assent of the landlord, it would have the effect of renewing the lease and not continuing the original lease.[8]

Where a suit was filed by a tenant against landlord for possession of premises on the ground of illegal eviction and when both parties adduced evidence, it was held that the question of onus of proof was immaterial.[9]

4. PRINCIPAL AND AGENT

Where an authority to do an act is once shown to exist, it is presumed to continue until the contrary is proved. Section 182-238 of the Indian Contract Act deal with the relationship of principal and agent. Section 206 provides that a reasonable notice must be given of revocation or renunciation of agency. Section 208 provides for when the authority of an agent is terminated. Once the relationship of principal and agent, is shown to exist the burden of proving that it has ceased is on the person who asserts it.[10]

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1. *Abhoy* v. *Hurinath*, (1882) 8 Cal 72.
2. *Bharat SP & W Co.* v. *Manilal*, AIR 1935 PC 175.
3. *Liladhar Ratanlal* v. *Holkarmal*, (1958) 60 Bom LR 203 : AIR 1959 Bom 528.
4. *Allah Bux* v. *Rahanlal Jain*, AIR 1958 All 829; *Firm Jowala Das* v. *Uttam Chand*, AIR 1923 Lah 585.
5. *Rungo Lall Mundul* v. *Abdool Guffoor*, ILR (1878) 4 Cal 314; *British India Steam Navigation Company* v. *Hajee Mahomed Esack and Company*, ILR (1881) 3 Mad 107; *Attar Singh* v. *Ramdutta*, (1881) PR No. 110 of 1881 (Civil); *Harish Chandra* v. *Ghisa Ram*, AIR 1981 SC 695, recorded in Jamabandi as a tenant, presumption.
6. *Kishore Singh* v. *State of Rajasthan*, AIR 1981 SC 695; *Chavali* v. *Tulluru*, 28 MLJ 361; *Devalraju* v. *Md Jaffer*, ILR 36 Mad 53; *Sindh Shaik Ahmed* v. *Sultan Ahmad*, 1938, 71 CLJ 100.
7. *Mjd. Ali* v. *Nimar Ali*, AIR 1973 Gau 80.
8. *Bhawanji* v. *Himatlal Jamnadas Dani*, AIR 1972 SC 819; Udoy v. Md. Ali, 65 IC 589.
9. *Industrial and Mining Equipment Corp. Pvt. Ltd.* v. *N.L. Kanodia*, AIR 1986 Del 36.
10. *Hira* v. *Md. Ali*, AIR 1935 Lah 49.

When two principals appoint an agent in respect of a matter in which they are jointly interested and if one of the principals dies, the death of one terminates the authority not merely in respect of the deceased, but also in respect of the other living principals.[11] Where an agent was appointed by several principals and one of the principals died, the agency continues under the surviving principals unless the principals were joint principals and not joint and several principals, and unless the power given to the agent was not joint and several. In such cases if the agent pleads that the entire agency has terminated, it is for him to prove under Section 109 by producing the document *i.e.* the power of attorney or by secondary evidence, that the principals were joint principal's.[12]

Under the Hindu Law there is a presumption that a family was joint and it must be shown that the same character was determined by division.[13]

Burden of proof as to ownership.

S. 110. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

SYNOPSIS

1. *Principle and Scope* ... 936
2. *English Law* ... 937
3. *Indian Law* ... 937
4. *Presumption under the section* ... 937

COMMENTS

1. PRINCIPLE AND SCOPE

This section says that when a person is shown to be in possession of some property, the burden of proving that he is not the owner of such property is on the person who affirms it. This is based on the well known principle that possession is *prima facie* proof of ownership. The object of this provision is to allow a person who is in possession of property to continue in possession till some other party proves his title to it, thereby achieving the object of preventing other persons from committing breaches of peace by taking the law into their own hands. With the very same object Section 6 of the Specific Relief Act, 1963 and Section 145, Cr PC, were enacted.

This section gives effect to the principle that possession is *prima facie* evidence of complete title: anyone who intends to oust the possessor must establish a right to do so.[14] This is to be presumed from lawful possession until the want of title or a better title is proved.[15]

A person in possession of land without title has an interest in the property which is heritable and good against all the world except the true owner, an interest which unless and until the true owner interferes, is capable of being disposed of by deed or will, or by execution sale just in the same way as it could be dealt with if the title were unimpeachable.[16]

Where a vendor of immovable property sues for possession his vendor not having been in prosession at the time of the suit, it lies upon him to show that his vendor was in possession at some period within twelve years prior to the date of the suit.[17]

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11. *Ponnuswami* v. *Chidambaram*, 35 MLJ 294, In re : *Sital Prasad*, 21 Cal WN 620.
12. *Manindra* v. *Haripada*, 41 Cal WN 27.
13. *Cheetha* v. *Baboo Miheen*, 11 MIA 369.
14. *Ramchandra Apaji* v. *Balaji Bhaurav*, ILR (1884) 9 Bom 137; *Hassan* v. *Fazal Wahid*, (1882) PR No. 121 of 1882 (Civil); *Pir Baksh* v. *Jhanda Mal*, (1882) PR No. 157 of 1882 (Civil); *Nihal Chand* v. *Teju*, (1883) PR No. 74 of 1883 (Civil); *Nihal Singh* v. *Jiwanda*, (1888) PR No. 116 of 1888 (Civil); *Ram Chand* v. *Bhana Mal*, (1900) PR No. 71 of 1900 (Civil); *U Nyo* v. *Ma Shwe Meik*, (1899) PJLB 514; *Ma Ba* v. *Maung Kun*, (1889) SJLB 474; *Maung Ya Baung* v. *Ma Kyin Ya*, (1895) 2 UBR (1892-96) 234; *Ma Hla Gywe* v. *Ma Thaik*, (1896) 2 UBR (1892-96) 377 *Maung Thit* v. *Maung Kin*, (1898) 2 UBR (1897-1901) 412; *Maung Nwe* v. *Maung Po Gyi*, (1897) 2 UBR (1897-1901) 416; *Maung Lu Pe* v. *Maung Lu Gale*, (1899) 2 UBR (1897-1901) 418; *Ma Ngwe Zan* v. *Mi Shwe Taik*, (1910) 1 UBR (1910-1913) 61.
15. *Jadh Singh* v. *Sundar Singh*, (1882) PR No. 122 of 1882 (Civil).
16. *Gobind Prasad* v. *Mohan Lal*, ILR (1901) 24 All 157.
17. *Deba* v. *Rohtagi Mal*, ILR (1906) 28 All 479.

S obtained a money decree against the sons and heirs of *A* and under that decree attached a shop as part of *A*'s estate. *N* (father of *A*) applied to have the attachment removed alleging that the shop was his. The application was rejected and the shop was sold in execution and bought by *P* the defendant *N* then brought his suit against *P* to establish his title. It was held that the plaintiff having proved his possession at the date of the execution sale it lay upon *P* who claimed the property to prove a title in himself or in the judgement debtor *A* and that he having failed to do this, the plaintiff was entitled to a decree declaratory of his right to the property as against the defendant.[18]

2. ENGLISH LAW

The English Doctrine of Possessory Title is based on equitable considerations to see that a person having long possession of the property is not disturbed by any wrong doer. COCKBORN C.J., observed "I take it as clearly established that possession is good against all the world except the person who can show a good title."[19]

This was followed in *Perry* v. *Clissold*[20] wherein it was stated that "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner".

In another case *Glenwood L.C. Ltd.* v. *Phillips*[21] it was held that it is a well-established that possession is good against a wrong doer and the latter cannot plead justteritii.[22]

3. INDIAN LAW

Under Section 6 of Specific Relief Act (47 of 1963) provides that a person who has been in possession of property, if dispossessed should file a suit for possession within six months of dispossession. In that case the person who files the suit need not necessarily have title to it.

The Privy Council has laid down in a case, in which the plaintiff was a purchaser in possession and the defendant had no title at all, that lawful possession of land is sufficient evidence of right as owner, as against a person who has no title whatever, and who is a mere trespasser. The former can obtain a declaratory decree and an injunction against the wrongdoer.[23] In that case the plaintiff was in possession when he brought his suit and he asked for a decree declaring his right, and an injunction restraining the defendant from disturbing his possession. The Privy Council observed (Pages 106, 107 of 20 Indian Appeals), "The possession of the plaintiff was sufficient evidence of title as owner against the defendant. By Section 9 of the (old) Specific Relief Act (Act 1 of 1877), if the Plaintiff had been dispossessed otherwise than in due course of law, he could, by a suit instituted within six months from the date of the dispossession, have recovered possession, notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove a title, it is certainly right and just that he should be able, against a person who has no title and is a mere wrongdoer, to obtain a declaration of title as owner, and an injunction to restrain the wrongdoer from interfering with his possession."

It is not necessary for a person claiming injunction to prove his title to the suit land provided he proves that he was in lawful possession until he was dispossessed by the defendant who had no title.[24]

4. PRESUMPTION UNDER THE SECTION

The presumption of title under Section 110 from possession can arise only where facts disclose no title in any other party.[25]

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18. *Premraj Bhavaniram* v. *Narayan Shivaram Khisti*, ILR (1882) 6 Bom 215 F.B. ; *Krishna Yashawant* v. *Vadudev Apaji Ghotikar*, ILR (1884) 8 Bom 371; *Moung Mir Dutta Maung Oh Gang*, (1989) 2 UBR (1947) 1901, 421.
19. *Asher* v. *Whitlock*, (1865) 1 Q.B. 1 **followed in** *Sundar* v. *Parbati*, ILR 12 All 51 (PC); *Wali Ahmed* v. *Ajudhia*, ILR 33 All 537 (FB); *Ramdayal* v. *Sarswathi*, ILR 49 All 191.
20. 1907 AC 73, 79.
21. 1904 AC 405.
22. *Glenwood L.C. Ltd.* v. *Philips*, 1904 AC 405.
23. *Ismail Ariff* v. *Mahomed Ghouse*, (1893) 20 IA 99 : ILR 20 Cal 834; *Sundar* v. *Parbati*, ILR (1889) 12 All 51, 16 IA 186.
24. *Fakir Bhai Bhagwandas* v. *Maganlal Haribhai*, AIR 1951 Bom 380.
25. *Nair Service Society Ltd.* v. *K.C. Alexander*, AIR 1968 SC 1165.

Where there is proof of long possession, it would constitute *prima facie* proof of title in the person having possession and it is for the other party to displace that presumption[26] but the burden is on the person claiming adverse possession to establish the identity and extent of the suit property.[27] Section 110 embodies a well-recognised principle that possession is *prima facie* proof of ownership; it does not make any distinction between the Government and a private citizen. It is equally applicable where a Government claims to be the owner and challenges the ownership of a person who is in possession of the property.[28]

The plaintiffs sued the Government for a declaration that a certain piece of land belonged to them and that they might be confirmed in their possession, alleging that they had purchased the site for Rs. 20 in 1888 from one *D* whose father had mortgaged it for Rs. 20 to the plaintiffs' father. It was held that the possession of the plaintiffs being peaceable and having been obtained without ousting anyone, it was of such a character as to attract the presumption described in this section and was good against the whole world except the person who could show a better title, and that, as the Government had failed to establish their title to the land plaintiffs were lawfully entitled to its possession.[29]

Where a portion of a house is proved to be in possession of a person for a long time a presumption of ownership of that portion arises in his favour.[30]

The presumption of ownership contained in this section would arise only if two conditions are satisfied:—(1) That the possession of the plaintiff is not *prima facie* wrongful *i.e.*, his possession must have a lawful origin. (2) The other party has not proved his title to the property in question.[31]

Mere acts of user will not lead to a presumption of title in case the possession is *prima facie* not proved to be lawful. When the possession of the plaintiff is referable to a sale certificate issued by the executing court, it is *prima facie* lawful in origin, and the presumption arising in favour of the municipality u/s. 36(h) of the Indor Municipal Act was held to be displaced.[32] When it is shown that a person has been in possession since a long time and his possession is of lawful origin and the opposite party cannot prove any superior title, the person in possession, is entitled to a decree for possession, if he is dispossessed. (though his suit is not under Section 9 of the (old) Specific Relief Act.[33]

This rule applies both to immovable and movable property.[34] Where property was seized by the police from the possession of some known persons, it should be delivered to such persons without resorting to the procedure prescribed for proclamation under Ss. 457(2) and 458, Cr.P.C. as the presumption under Section 110 of the Evidence Act arises.[35]

Where *A* is proved to be in possession of a disputed quantity of pepper at the relevant time the presumption is that he is the owner. The burden of proving that he is not the owner is on the person who asserts it.[36]

Where night soil was collected by sweepers of a Municipal Board and deposited on a leased land, it was held that the ownership in the night soil deposited on the leased land must be deemed to be in the Municipal Board.[37]

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26. *Keshav Krishnaji* v. *Municipal Commor*, AIR 1951 MB 114; *Ladhuram* v. *Suraj Bux*, 1958 Raj 294; *Prabhatbhai Shankerbhai Parmar* v. *Mahijbhai Nanabhai Parmar*, 1998 AIHC 4395 (paras 19 and 20) (Guj).

27. ***Abdul Majid* v. *Abdul Ghaffar*, 1997 AIHC 2933 (para 7) (All).**

28. ***A.P. State* v. *G Subbaraya Setty*, (1967) 2 An WR 433.**

29. *Hanmantrav* v. *Secretary of State for India*, (1900) 2 Bom LR 1111 : ILR 25 Bom 287.

30. ***Ladhuram* v. *Suraj Bux*, 1958 Raj 294.**

31. *Secretary of State* v. *Chimanlal*, AIR 1942 Bom 161; *Nilakantha Singh* v. *Heisnam Ningol Thokchom*, AIR 1970 Manipur 50.

32. *Municipality Indore* v. *Gopal Puri*, AIR 1956 MB 70, **relying on** *Jagannath Shivanarayan* v. *Municipality Commr., Indore*, AIR 1951 MB 80.

33. *Krishna Rav Yashwant* v. *Vasudeo Apaji*, ILR (1884) 8 Bom 371; *Wali Ahmed Khan* v. *Ajudhia Kandu*, ILR (1891) 13 All 537; *Sam Bhasheo* v. *Mahadeo*, AIR 1914 Nag 55; *Tanhabai* v. *Gopinath*, 1960 Nag LJ (notes) 65, *Ladhuram* v. *Suraj Bux*, AIR 1958 Raj 294.

34. *Chattra Kumari* v. *Mohan Bikram Shah*, AIR 1931 Pat 114; *Uthuppu* v. *Varki*, 1959 Ker LT 682.

35. ***Keshu Lal* v. *State of Rajasthan*, 1996 Cr LJ 740 (paras 18-20) (Raj).**

36. *Uthuppu* v. *Varki*, 1959 Ker LT 682 **relying on** *Chattra Kumari* v. *Mohan Bikram Shah*, AIR 1931 Pat 114.

37. ***Municipal Board Meerut* v. *Bir Singh*, AIR 1965 All 527.**

The presumption applies only to ownership and not to adverse possession. When the title is not in dispute, this section has no application.[38]

The term 'possession' in this section is to be understood as opposed to juridical possession and to denote actual present possession.

Possession to be proved must be such possesion as the property is capable of the normal method of user.[39] The proof of possession varies with the nature of property under the scrutiny of Courts and it can be proved by credible oral evidence as well.[40]

In a suit to establish ownership over Government land by adverse possession, it was held that though from evidence of exclusive user, possession may be inferred, evidence of mere user by tethering cattle is not evidence of possession, much less of adverse possession and Section 110 is not attracted.[41] The plea of adverse possession has to be raised before the original authority and not for the first time at appeal or revision stage.[42] Where the presumption is that the ownership of salt land vests in the Govt., there arises no question of applying the presumption under this section.[43]

In the case of waste and jungle land where there would be nothing except self-grown trees or wild grass, the possession which the plaintiff has to prove must be adequate in continuity, and in publicity and adverse to the opponent.[44] In the case of waste or jungle lands it was held that payment of land tax may be sufficient evidence of possession, as being the only practicable act of dominion.[45] However it was held that land revenue receipts do not *ipso facto* prove actual possession of land.[46]

Where in a *Pahani Patrak* the name of one *X* was shown in the column "cultivators" for some years and the same column was left blank in subsequent years, it was held that the presumption is that *X* continued in possession in the subsequent years also and that there is no warrant for assuming that the onwer re-entered into possession in those years.[47]

There was a conflict of opinion between the High Courts as to whether a plaintiff in a suit for possession of immovable property, other than a suit under Section 9 of the (old) Specific Relief Act (1 of 1877), is entitled to succeed merely upon proof of previous possession and dispossession by the defendant within twelve years prior to the suit, or whether he is bound to prove title. A Full Bench of the Bombay High Court held that possession is good title against all persons except the rightful owner, and entitles the possessor to maintain ejectment against any person other than such owner who dispossesses him.[48] A person, although suing more than six months after the date of dispossession and without resorting to a possessory suit,[49] is entitled to rely on the possession previous to his dispossession as against a person who has no title.[50] The view of the Bombay High Court is in accordance with the English law. The effect of the Bombay cases is that when there is wrongful ouster of the person in possession, the person who comes into Court to oust such tort-feasor need not prove more than his possession of the land in dispute, and that he had been ousted by the defendant, and that the plaintiff's

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38. *Ram Piari* v. *Nawab Singh*, AIR 1950 All 496.
39. *Venkiteshwara Iyer* v. *Cheriyathu Mathen*, AIR 1957 Tra/Co. 223.
40. *Kanti Lal* v. *Shanti Devi*, AIR 1997 Raj 230.
41. *State of Bombay* v. *Patel Chhotabhai Bhajibhai*, ILR 1965 Guj 691; *Jagannath Sivanarayan* v. *Municipal Commier., Indore*, AIR 1951 MB 80.
42. *Kottaiah* v. *State of Karnataka*, 1997 AIHC 1882 (para 5) (Kant).
43. *Union of India* v. *Muhammad Asagar*, 1997 AIHC 61 (para 32) (Bom), **relying on** ratio of decision referred in AIR 1938 Mad 193 and **distinguishing** the decisions as reported in AIR 1922 PC 163 : AIR 1933 PC 103 and AIR 1965 SC 516. The Court referred to decision reported in 1944 BLR 295.
44. *Jhandad* v. *Abdul Ghafur*, AIR 1930 PC 281; *Kuthali Mootharar* v. *Perigati Kunharhn Kutty*, ILR 44 Mad 883 (PC).
45. *Kirbi* v. *Cowderoy*, 1912 AC 599; *Devaji* v. *Gadhabhai*, 11 WR 35 (PC).
46. *Chandra Kanta* v. *Hem Chandra*, AIR 1979 Gau 55.
47. *Bapu Raw* v. *Govt. of A.P.*, (1979) 1 An WR 58.
48. *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti*, ILR (1882) 6 Bom 215, F.B.; *Ramchandra Narayan* v. *Narayan Mahadev*, ILR (1886) 11 Bom 216; *Krishnacharya* v. *Lingawa*, ILR (1895) 20 Bom 270; *Ambalal* v. *Secretary of State*, (1899) 1 Bom LR 45; *Basapa* v. *Basapa*, (1900) 2 Bom LR 410; *Fatan* v. *Emad*, (1901) 3 Bom LR 246.
49. *Specific Relief Act*, 1877 S. 9.
50. *Krishnarav Yashwant* v. *Vasudev Apaji Ghotikar*, ILR (1884) 8 Bom 371; *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti*, ILR (1882) 6 Bom 215, FB **followed,** and *Dadabhai Narsidas* v. *Sub-Collector of Broach*, (1870) 7 BHC (ACJ) 82, **dissented from;** *Wa Tha* v. *Pe Hlaw*, (1905) 3 LBR 27.

prior possession was *prima facie* evidence of his title. According to this view, it is not necessary to show title in the absence of any title shown by the defendant. The word 'possession' denotes actual present possession. JENKINS, C.J. said: "To say that a possession is not within the meaning of Section 110, unless it is a possession according to title, would be to render that section meaningless, and to introduce a doctrine subversive of the established principles of property law."[51] But RANADE J., struck a different note: "Under Section 110, possession, when long and continued up to a recent date, leads to a presumption of title. Where the conflict is between mere previous possession and recent actual possession, the fact of previous possession will not entitle plaintiff to a decree except in suits under Section 9, (old) Specific Relief Act (1 of 1877), brought within six months from dispossession. Where this period is exceeded before a suit is brought, and is less than the limitation law requires, he must make out a *prima facie* title...And Section 110 (Evidence Act) refers to the presumption to be made of ownership based on the circumstance of such possession, and allows the plaintiff with such *prima facie* title to claim a decree where no superior title is proved on the other side. It is in reference to such cases that it has been held that possession is evidence of title, and the plaintiff who proves such possession and subsequent disturbance, shifts the burden of proof on the defendant when the *prima facie* title is made out....Where no such title is made out, and plaintiff comes to the court and asks for a declaratory decree, he cannot obtain that decree on the mere ground that he was in possession and the defendant had no title. Mere wrongful possession is insufficient to shift the burden of proof.[52] This means that possession must be such a character as leads to a presumption of title.[53] A suit on a possessory title must be distinguished from a suit filed under S. 6 of the Specific Relief Act, 1963, within six months of dispossession. The latter type of suit cannot be resisted on the ground of title, so that the suit can be maintained even against a true owner if he has dispossessed the plaintiff otherwise than in due course of law. A suit on possessory title, on the other hand, can be filed within twelve years of dispossession (Art 64 of the Limitation Act, 1963) and the plaintiff can maintain it against any person who does not have a better title.[54]

The Calcutta High Court held that mere previous possession will not entitle a plaintiff to a decree for the recovery of possession except in a suit under S. 9 of the (old) Specific Relief Act.[55] In a suit to recover possession brought more than six months after the date of dispossession, the plaintiff must prove title, and mere previous possession for any period short of the statutory period of twelve years cannot be suffficient for the purpose.[56] In a suit for recovery of possession based on the plaintiff's possessory title, the burden of proof lies on the plaintiff to prove his legal possession within 12 years, if proved the burden shifts to the defendant to prove that he is entitled to retain the possession on the basis of better title.[57] Thus, in cases other than possessory suits under the Specific Relief Act the plaintiff must show title or such adverse possession as confers a title under the Limitation Act. The Calcutta High Court in *Nishachand* v. *Kanchiram*, (ILR 26 Cal 579) purported to follow the decision of the Privy Council in *Wise* v. *Ameerunnissa*, (6 CLR 249 : 7 IA 73 (PC)) which in holding that mere previous possession for any period within 12 years will not entitle a plaintiff to a decree for possession in a suit brought more than 6 months time after dispossession, even if the defendant could not establish any title to the disputed land. In *Satish* v. *Madan*[58] the court expressed doubt about *Nishachand* v. *Kanchiram*, (ILR 26 Cal 579)

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51. *Hanmantrav* v. *The Secretary of State for India* **see also** *Ali* v. *Pachubibi*, (1900) 25 Bom 287, 290 : 2 Bom LR 1111, 1114 : (1903) 5 Bom LR 264; *Rajaram* v. *Nanchand*, (1903) 5 Bom LR 225, 227.
52. *Hanmantrav* v. *Secretary of State for India*, (1900) 25 Bom 287, 303, 2 Bom LR 1111, 1126; *Achutt* v. *Shivajirao*, (1936) 39 Bom LR 224. In an ejectment suit the defendant, though a trespasser, is entitled to require the plaintiff who seeks to eject him to prove that he has a superior title; *Kalu* v. *Barsu*, ILR (1894) 19 Bom 803. Plaintiff in an action of ejectment must recover by the strength of his own title, not the weakness of his adversary's : *Jowala Buksh* v. *Dharum Singh*, (1866) 10 MIA 511; *Thakur Basant Singh* v. *Mahabir Pershad*, (1913) 15 Bom LR 525 : 530 40 IA 86 : 35 All 273; *Dharani Kanta* v. *Gabar Ali*, (1912) 15 Bom LR 445, P.C.; *Ramchandra* v. *Vinayak*, (1914) 16 Bom LR 863, 900 : 41 IA 290 : ILR 42 Cal 384; *Bapuji* v. *Bhagvant*, (1918) 20 Bom LR 346, 42 Bom 357. The plaintiff must establish such title as carries a present right to possession; *Sitaram* v. *Sadhu*, (1913) 16 Bom LR 132 : ILR 38 Bom 240.
53. *Vasta* v. *Secretary of State for India*, ILR (1920) 45 Bom 789 : 23 Bom LR 238.
54. *Mariumbi Aslamkhan* v. *Vithoba*, (1969) 72 Bom LR 142.
55. *Ertaza Hossein* v. *Bany Mistry*, ILR (1882) 9 Cal 130; *Debi Churn Boido* v. *Issur Chunder Manjee*, ILR (1882) 9 Cal 39; *Purmeshur Chowdhry* v. *Brijo Lall Chowdary*, ILR (1889) 17 Cal 256.
56. *Nisa Chand Gaita* v. *Kanchiram Bagani*, ILR (1899) 26 Cal 579, 584; *Sharma Churn Ray* v. *Abdul Kabeer*, (1898) 3 CWN 158 **Doubted in** *Shyama Charan Ray* v. *Surya Kanta Acharya*, (1910) 15 CWN 163; *Manik Borai* v. *Bani Charan Mandal*, (1910) 13 CLJ 649; and *Adhar Chandra Pal* v. *Dibakar Bhuyan*, ILR (1913) 41 Cal 394. *Approved in Naba Kishore Tilakdas* v. *Paro Bewa*, ILR (1922) 50 Cal 23.
57. *Kanti Lal* v. *Shanti Devi*, AIR 1997 Raj 230.
58. 1931 Cal 483.

and held that a person in peaceful possession of land though not able to explain his title, will be entitle to recover possession by ejecting a trespasser.[59]

The Madras High Court has held that, as against a wrong-doer, prior possession of the plaintiff in an action of ejectment is sufficient title, even if the suit be brought more than six months after the act of dispossession complained of, and the wrong-doer cannot successfully resist the suit by showing that the title and right to possession are in a third person. It is immaterial however short or recent the plaintiff's possession was.

A suit to recover certain plots of land which were reformed after diluvion was filed basing on the title by prescription. Their Lordships of the Privy Council held that plaintiff cannot succeed as he did not file the suit under Section 9 of the (old) Specific Relief Act, within 6 months of dispossession.[60]

SUBRAMANIYA IYYAR J., observed in *Mustafa Saheb* v. *Santha,* ILR 23 Mad 176, that the observation of the Privy Council in *Wise* v. *Ameerunnissa's* (6 CLR 249 (PC) case should be read in conjunction with the finding given in that case namely, that the defendants became entitled to the land under a settlement with the government, to whom the land belonged and so the plaintiff could not recover on the strength of the previous possession except in a suit filed under Section 9 of the (old) Specific Relief Act. The same view was taken in *Krishnarao* v. *Vasude*[61] & *Sahodra* v. *Gobardhan*[62]; *Mahabeer* v. *M*; as per *Garth C.J.*[63]

The Allahabad High Court held that S. 9 of the (old) Specific Relief Act does not debar a person who has been ousted by a treaspasser from the possession of immovable property to which he has merely a possessory title, from bringing a suit in ejectment on his possessory title after the lapse of six months from the date of his dispossession.[64]

The Patna High Court held that a plaintiff who has omitted to sue under S. 9 of the (old) Specific Relief Act, when first dispossessed, is not debarred from relying, in a suit for ejectment, on this section. As soon as he has proved that the defendant has dispossessed him the onus is thrown upon the latter to prove his title.[65] It was held by Patna High Court that if a person's original entry into the land was on an ostensibly lawful basis on origin and if he is forcibly dispossessed by any trespasser or a wrongdoer, the person who was dispossessed would be entitled to a decree for possession taking the aid of Section 110 of the Evidence Act, without being called upon to negative the defect of his title.[66]

In POLLOCK & MULLA'S CONTRACT ACT (7th Ed. P. 659) it is observed "It is submitted that the correct view is the one taken by Bombay, Allahabad & Madras Courts in accordance with the English doctrine as now settled, and that the present Section 9 of Specific Relief Act, cannot be held to take away any remedy available to a party on the strength of his previous possession."

The question is now concluded by the decision of the Supreme Court holding that a regular suit basing on prior possession without proof of title is maintainable against all persons who do not have title to the property.[67]

The Supreme Court held in a suit for ejectment that prior possession of the plaintiff is sufficient title and the wrongdoer cannot resist the suit by showing that the title and right to possession are in a third person. He can only resist by showing a superior title in himself.[68]

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59. *Narayana Row* v. *Dharmachar,* ILR (1902) 26 Mad 514, **See** *Krishna Aiyar* v. *Secretary of State for India,* ILR (1909) 33 Mad 173.
60. In *Mustafa Saheb* v. *Santha,* ILR 23 Mad 176; SUBRAMANIYA IYYAR J., *explained the decision in Wise* v. *Ameerunnissa,* 6 CLR 249 (PC).
61. ILR 8 Bom 371, 376.
62. 39 IC 458.
63. ILR 7 Cal 591.
64. *Wali Ahmad Khan* v. *Ajudhia Kandu,* ILR (1891) 13 All 537. **See** *Lachho* v. *Har Sahai,* ILR (1887) 12 All 46; *Gobind Prasad* v. *Mohan Lal,* ILR (1901) 24 All 157.
65. *Haradhan Mondal Modak* v. *Iswar Das Marwari,* (1916) 2 PLJ 61; *Bodha Ganderi* v. *Ashloke Singh,* ILR (1926) 5 Pat 765.
66. *Lilku Mahto* v. *Amar Mahto,* AIR 1936 Pat 602; Section 9 of the Specific Relief Act 1877 does not control the operation of Section 110 of the Evidence Act in a suit based on possessing title *Atra Devi* v. *Ramswaroop Prasad,* 1972 Pat 186.
67. *Nair Service Society* v. *Alexander,* AIR 1968 SC 1165. **Approving** the decision in *Mustafa* v. *Shanta,* 23 Mad 176.
68. *Somanath* v. *Raju,* AIR 1970 SC 846 **following** *Ismail Ariff* v. *Md. Ghouse,* ILR (1893) 20 Cal 834 (PC); **and overruling** *Nishchand* v. *Kanchiram,* ILR 26 Cal 579.

Where the plaintiff put forward a definite case of possession on the ground of the only evidence which was discarded, she could not revert back from the evidence and rely on the presumption under this section.[69]

Proof of good faith in transactions where one party is in relation of active confidence.

S. 111. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

ILLUSTRATIONS

(a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

SYNOPSIS

1. *Principle*	...	942	9. *Illiterate person—non est factum*	...	947
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COMMENTS

1. PRINCIPLE

This section deals with proof of good faith in a transaction between the parties, where one of the parties is in a position of active confidence of the other. The two illustrations explain the scope of this section.

A person who challenges the validity of a transaction on the ground of fraud, undue influence, etc., and alleges bad faith on the part of his opponent has to prove such allegations under Section 101 of this Act. An exception to this rule is the case of a person who stands in the position of active confidence to the other.

The words 'good faith' indicate that the relationship between the parties must be such that one is bound to protect the interests of the other. This had been held to apply to a trustee, an executor, an administrator, a guardian, an agent, a minister of religion, a medical attendant, an auctioneer, and attorney. Persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them unless they can show to the satisfaction of the court that the person by whom the benefits have been conferred had competent and independent advice in conferring them.[70]

Though the illustrations refer only to instances of a lawyer and a client and a father and a child, this section applies to other cases also where one stands in a confidential relationship with the other whereby his predominating influence exists. This section applies especially to the case of *pardanashin* ladies.

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69. *K.P. Parvathy Amma* v. *K.P. Chandramathi*, 1999 AIHC 4548 (para 5) (Ker), **relying on** *Suna Pana Chena Voona Sevugan Chetty* v. *Koovamma Kana Nana Kana Kannappa Chetty*, AIR 1931 Mad 282 and *Chandran Nair* v. *Kunhambu Nair*, 1981 Ker LJ (SN) 83 and **distinguishing** *Bhagavathy Pillai Parvathi Pillai* v. *Anthony Kochumadan*, 1968 Ker LR 127.

70. *Raghunathji* v. *Varjiwandas*, (1906) 8 Bom LR 525 : ILR 30 Bom 578; *Hoti Lal* v. *Mussammat Ram Piari*, (1903) PR No. 77 of 1903 (Civil).

The principle of the rule embodied in this section which was called "the great rule of the Court" is that "He who bargains in a matter of advantage with a person placing confidence in him is bound to show, that a reasonable use has been made of that confidence. The rule applies to trustees, attorneys, or any one else."[71]

Where a fiduciary or *quasi*-fiduciary relationship exists, the burden of sustaining a transaction between the parties rests with the party who stands in such relation and is benefited by it. The plaintiff having been entirely in the hands of the defendant, would be destitute of the means of proving affirmatively, the *mala fides* of the transaction; whilst the defendant in such a transaction may fairly be subjected to the duty not only of dealing honestly but of preserving clear evidence that he has done so (Markby). In such cases it is seldom, if ever, possible to prove specific acts of deception, or of exercise of authority amounting to moral coercion. Yet, the risk of abuse is obviously great. The law therefore reverses its usual rule of evidence in dealings between man and man. Commonly we do not presume, without specific indications, that there is anything contrary to good faith in transactions which on the face of them are regular.... But this is the rule as between equals, persons who are capable of dealing with one another, as the accustomed forensic phrase goes, "at arm's length". When one party habitually looks up to the other and is guided by him, he can no longer be supposed capable, without special precautions, of exercising that independent judgement which is requisite for his consent to be free. (*Pollock's Law of Fraud in British India*, pp. 63-64).

Section 16 of the Contract Act deals with cases where one of the parties is in a position to dominate the Will of the other and if he makes use of that position to obtain an unfair advantage, it can be challenged. Section 16(2)(a) of the Contract Act gives an example of a person who is in a position to dominate the Will of the other, by stating "standing in a fiduciary relation to the other". Secton 16(3) states that the burden of proof is on the person who is in a dominating position, when the transaction appears to be unconscionable.

The Supreme Court held that Section 16(1) of the Contract Act, lays down the principle in general terms whereas Sub-section (2) lays down that a presumption of undue influence is deemed to arise if the conditions set out therein are fulfilled; that Sub-sec. (3) lays down the conditions for raising a rebuttable presumption that a transaction is procured by the exercise of undue influence; the reason being that a person who has obtained an advantage over another by dominating his Will, may also remain in a position to suppress the requisite evidence in support of the plea of unde influence.[72]

The Courts of Equity in England place the burden of sustaining the transaction on the party benefited by it, where fiduciary relationship existed. The party has to show that the relationship was of unobjectionable character.[73]

There is no fiduciary relationship between a grandfather and a grandson. When a grandfather impeaches the trnasaction he must give particulars of undue influence in sufficient detail, and he must prove that the grandson was in a position to dominate his Will.[74]

Under Section 16(3) of the Contract Act, the burden is on the person who is in a dominating position when the transaction appears on the face of it or on the evidence, to be unconscionable. It must be shown that the dominating position was used to the detriment of the other person.[75]

2. GOOD FAITH

Section 111 applies where the validity of the transaction which is otherwise valid in all respects, is called in question on the ground that the person benefiting from it did not act in good faith or took advantage of his position. In a case where one party alleges that the other executed a promissory note in consideration of a debt and the other denies execution and alleges that the document itself is a forged one, Section 111 ordinarily has no application.[76]

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71. *Gibson* v. *Jeyes*, (1801) 6 Ves Jun 266; **followed in** *Nisar Ahmad Khan* v. *Mohan Monucha; Mohan Monucha* v. *Nisar Ahmad Khan*, (1940) 43 Bom LR 465, 469 PC : AIR 1940 PC 204.
72. *Ladli Parshad* v. *Karnal Distillery Co.*, AIR 1963 PC 1279.
73. *Seetalpandit* v. *Parbhulal*, (1888) 10 All 535; *Mannu* v. *Umadat*, (1889) 12 All 523.
74. *Narain Bhatta* v. *Narsimha Batta*, AIR 1965 Ker 189.
75. *Poosathurai* v. *Kannappa Chettiar*, ILR 43 Mad 546 (PC).
76. *Satya Narain* v. *Nanki Devi*, AIR 1968 All 224.

3. ACTIVE CONFIDENCE

Where three sisters (defendants) executed a pronote in favour of the first defendant's husband (plaintiff) for services rendered in managing their joint estate the Privy Council held that it appeared from the circumstances that the first defendant (eldest sister) was in a position to influence her younger sisters and the onus of proving good faith was on the plaintiff.[77] Where an old woman depending entirely for food, clothes, and management of her property executed a gift in favour of the nephew it was held, it was sufficient to raise a presumption of influence over her and the burden was on the donee to prove that the act was spontaneous.[78] It was held that in a case of gift the donee should prove that the donor really understood and intended to execute the deed, but it was not necessary to prove that the donor took independent advice.[79] Where the plaintiff who was old, infirm, weak and having none to look after him, executed a deed of gift in favour of his brother's grandson believing it to be a deed of Will and he executed it at the request of the grandson; it was held that the burden is on the grandson to prove that the gift was not induced by *undue influence*.[80] Where the transaction appears on the face of it to be unconscionable the burden lies on the person benefited by the transaction to prove that the transaction was not induced by *undue influence*.[81] The burden is on the person who is in position of dominating to show that there was no *unde influence*.[82]

Where fraud, misrepresentation, or undue influence is alleged by a party in a suit, normally, the burden is on the person who alleges it to prove the same. But, when a person is in a fiduciary relationship and in a position of active confidence, in regard to an illiterate woman, the burden of proving the absence of fraud, mis-representation or undue influence, is upon the person in the dominating position; he has to prove good faith and fair play in the transaction and that it is a genuine and *bona fide* one. When the party complaining shows fiduciary relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the trnasaction is perfectly fair and reasonable.[83]

An agent entrusted with the management of an estate is in the position of active confidence of his principal and the burden of proving good faith is on the agent or on the person who claims through him. In such cases the presumption against the transaction, is rebuttable.[84]

Where the impugned deed was executed by the plaintiff soon after he attained majority in favour of his maternal uncle (defendant) who was acting as the *de facto* guardian during the minority of the plaintiff, and there was no specific denial of the allegation in the plaint about the fiduciary relationship between the parties, it was held that the burden of proving good faith was on the defendant.[85]

4. BORROWINGS

Mere fact that a person was in need of money cannot be held that the money lender was in a position to dominate the Will of the borrower.[86] However, the helpless condition of a borrower may result in exercising undue influence by a money lender.[87] Where exorbitant rate of interest was stipulated and the borrower did not realise the real nature of the transaction, it was held it is sufficient to make out a case of undue influence.[88]

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77. *Palani Velu* v. *Neelavathi*, AIR 1937 PC 50.
78. *Inche Noriah* v. *Shaik Allie*, AIR 1929 PC 3.
79. *Sikandar Begam* v. *Zulfikar*, AIR 1938 PC 38. **see also** *Farid-un-nissa* v. *Mukhtar Ahmad*, AIR 1925 PC 204; *Kalibaksh* v. *Ramgopal*, 26 MLJ 121 (PC).
80. *Debi Prasad* v. *Chhotey Lal*, 1966 All 438.
81. *Lakmiah* v. *Chakkamma*, (1969) 1 Mys LJ 507; *Ballo* v. *Paras Ram*, AIR 1972 HP 33 (a case of a gift).
82. *Mohanlal Jagannath* v. *Kashiram Gokul*, AIR 1950 Nag 71.
83. *Guljan Bibi* v. *Nazir Uddin Mia*, AIR 1975 Gau 30.
84. *Subbamma* v. *Md. Abdul Hafiz*, AIR 1950 Hyd 55.
85. *Pannalal Biswas* v. *Dilip Kumar Mondal*, AIR 1977 Cal 297.
86. *Barkatunnisa* v. *Debi*, AIR 1927 PC 84.
87. *Harnam* v. *Rajaram*, 148 PLR 1911 **following** *Maneshar Baksh Singh* v. *Shadilal*, ILR 31 All 386 (PC).
88. *Chatring Mool Chand* v. *Whit Church*, ILR (1907) 32 Bom 208.

5. TRUSTEE

In the case of a transaction of purchase by a person occupying fiduciary position as in the case of trustee and beneficiary and the transaction is by the beneficiary whose interests are adversely affected, the purchaser trustee must show that there has been no fraud and there was no unjust enrichment in his favour and he acted in good faith.[89]

6. SOLICITOR AND CLIENT

Where a mortgage was executed by a person in favour of his pleader's son, it was held that the mortgagee was not one who stood in a position of active confidence of the mortgagor. A mortgage between a solicitor and a client should not ordinarily be scrutinized with the same care as in the case of gift or a sale at undervalue from the client. Merely because a clause was inserted in the mortgage deed fixing time, and the amount of payment by the mortgagor, it cannot be said to constitute an unfair advantage on the part of the mortagagee of mortgagor's position.[90]

Where a client made a gift in favour of his lawyer's wife as a token of gratitude, it was held that it was far from being an improvident act and as the transaction bore the stamp of righteousness and naturalness. It would show that it was spontaneous and valid.[91]

7. INSOLVENCY

Under the Provincial Insolvency Act, the burden lies on the insolvent to prove the exception provided in Section 42(1)(*a*) of that Act, *viz.*, that the transaction is a *bona fide* transaction.[92]

8. *PARDANASHIN* LADIES

In the case of deeds and powers executed by *pardanashin* ladies, it is requisite, that those who rely upon them should satisfy the court that they had been explained to, and understood by those who executed them.[93] In the case of a *pardanashin* lady the law throws around her a special coak of protection. It demands that the burden of proof shall in such a case rest not with those who attack, but with those who found upon a deed executed by her, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed, but was explained to and was really understood by her.[94]

The expression "*pardanashin*" is not to be confused with a lady observing *pardah*. The word has special legal significance and means one who is unable to understand the transaction by virtue of the manner in which she has been brought up.[95]

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89. *Nelliewapshare* v. *Pierce Leslie and Co. Ltd.*, AIR 1960 Mad 410.
90. *Nisar Ahmad* v. *Mohan Manucha*, AIR 1940 PC 204.
91. *Bireswar Sen* v. *Ashalatha Ghose*, AIR 1969 Cal 111.
92. *Jwala Singh* v. *Laboo Ram*, AIR 1969 Pat 28.
93. *Sudisht Lal* v. *Musummat Sheobarat Koer*, (1881) 8 IA 39 : ILR 7 Cal 245; *Annoda Mohan* v. *Bhuban Mohini*, (1901) 3 Bom LR 386 : 28 IA 71, ILR 28 Cal 546; *Shambati* v. *Jago Bibi*, (1902) 4 Bom LR 444 : 29 IA 127, ILR (1902) 29 Cal 749; *Mirza Sajjad Ali* v. *Nawab Wazir Ali*, (1912) 14 Bom LR 1055 (All) : 39 IA 156, ILR 34 All 455; *Kali Baksh* v. *Ram Gopal*, (1913) 15 Bom LR 147 : 41 IA 23, ILR 36 All 81; *Sunitabala Debi* v. *Dhara Sundari Debi*, (1919) 22 Bom LR 1 : 46 IA 272 : ILR 47 Cal 175; *Kamawati* v. *Digbijai Singh*, (1921) 24 Bom LR 626 : 48 IA 381 : ILR 43 All 525; *Farid-un-nissa* v. *Mukhtar Ahmed*, (1925) 28 Bom LR 193 : 52 IA 342 : AIR 1925 PC 204 : ILR 47 All 703; *Ramanamma* v. *Veranna*, (1931) 33 Bom LR 960 (PC) : AIR 1931 PC 100; *Tara Kumari* v. *Chandra Mauleshwar Prasad*, (1931) 34 Bom LR 222 : 11 Pat 227 : 58 IA 450 : AIR 1936 PC 303; *Sheoparsan Singh* v. *Narsingh Sahai*, (1932) 34 Bom LR 890 (PC); *Kundan Lal* v. *Mushraffi Begum*, (1936) 38 Bom LR 783 : 163 IA 326 : ILR 11 Luck 346 : AIR 1936 PC 207; *Palanivelu A.V.* v. *Neelavathi*, (1937) 39 Bom LR 720 PC; *Kharbuja Kuer* v. *Jangabahadur Rai*, AIR 1963 SC 1203, **relied on in** *Annapurna Barik Dei* v. *Inda Bewa*, AIR 1995 Ori 273 (para 5).
94. *Bank of Khulna, Ltd.* v. *Jyoti Prokash Mitra*, (1940) 42 Bom LR 1139 : 67 IA 377 : AIR 1940 PC 147; *Tulsiram* v. *Chunnilal*, ILR (1940) Nag 149 : AIR 1938 Nag 391; *Jaibunnisa* v. *Abdul Ghafoor*, AIR 1984 Pat 257, (a *pardanashin* lady pleaded that her signature was obtained by fraud, held, heavy burden of proof lay upon the other party).
95. *Andhi Kuer* v. *Rajeshwar Singh*, AIR 1972 Pat 325; *Ghulam Zubra* v. *Habla Begum*, AIR 1985 J&K 22, a lady leading public life and appearing in courts is not *Pardanashin*.

A *Pardanashin* lady accused will not be exempted from personal attendance in court as a matter of right. But at the same time the court must reasonably use the discretion of granting such exemption under Section 205 of the Criminal Procedure Code, 1973, after due consideration of all the attending circumstances including the social status, custom and practice of the accused as well as the necessity of her personal presence having regard to the nature of the offence and the stage of the trial. No strict test as to the *pardanashin* status can be laid down, and non-observance of rigidity with regard to *pardah, e.g.* attending social and religious functions or going to bathe in the river, etc. with veils on would not take the accused out of that category. The court is to be guided by the prevailing habits and customs.[1]

As illiterate and rustic village woman is entitled to the same benefits as are available to a *pardanashin*. In the case of an old woman suffering from infirmity, ignorance, illiteracy, mental deficiency, inexperience and dependence upon others, intended to create a *wakf* and not a sale, it was held that a heavy burden of proof lay upon those who alleged it to be sale.[2]

Similar burden lay upon those who dealt with a person suffering from apparent mental or physical incapacity.[3]

The Privy Council held that where there was a relation of confidentiality between the parties, and where a person who was in a position to dominate the Will of a *pardanashin* lady had obtained a deed in his favour and the deed showed on its face to be harsh and unconscionable, the person benefited by the deed had to rebut the presumption in such circumstances against the deed.[4] The Privy Council held that "the onus is on the party who relies on a deed executed by a *pardanashin* lady to satisfy the court that it had been explained to and understood by her before the execution or after it, showing that she adopted the deed with full knowledge and comprehension. That the disposition must be substantially understood and must really be the mental act, as its execution is the physical act of the person who makes it.[5] In all cases where the document is executed by a *pardanashin* lady, it should be shown by the person who obtained the deed that the transaction is fair and equitable and it was explained to her and she understood the meaning and effect of the instrument she was executing.[6] In some cases it was held that for upholding the transaction it had to be proved that the contents of the document are fair and equitable and it was explained to her and that she knew and understood the meaning and also the effect of the contents of the instrument she was executing.[7] Where the legal adviser of a *pardanashin* woman obtained a mortgage deed for the money he advanced to the lady, it was held that such transaction should be examined with close scrutiny and the court should insist on the mortgagee to show that the transaction was fully understood by the mortgagor and was a fair and honest transaction.[8]

For rebutting the presumption mere adducing proof that legal advice or independent advice was taken is not sufficient, but it must further show that it was acted upon by the *pardanashin* lady.[9] In the case of sales or gifts executed by *pardanashin* ladies, the person whether a purchaser or a donee must show conclusively that the transaction was honest and *bona fide* and the lady had some independent advice before execution of the document.[10] If the contents of the documents are intricate they must be

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1. *Rajlakshmi Devi* v. *State*, ILR (1953) 1 Cal 78.
2. *Ashok Kumar* v. *Gaon Sabha, Ratauli*, AIR 1981 All 222; *Narayan Mishra* v. *Champa Dibya*, AIR 1986 Ori 53; *Paranath Rai* v. *Tilesara Kaur*, 1965 ALJ 1080; *Ramdeo* v. *Dulari Devi*, AIR 1996 All 253 (paras 18 and 19); sale-deed obtained by fraud without reading out and explaining to illiterate woman, void *ab initio*, *Upendra Mahanto* v. *Champa*, 1996 AIHC 3449 (para 6) (Ori); *Palaniammal* v. *Rangasamy*, 1999 AIHC 4394 (paras 56 and 57) (Mad).
3. *Daya Shanker* v. *Bachi*, AIR 1982 All 376 (FB). (the Court explained the meaning and scope of "fiduciary relations").
4. *Thakurji* v. *Ramdei*, AIR 1930 PC 139. **See also** *Satyadeo Prasad* v. *Chander Joti Debi*, AIR 1966 Pat 110; *Jubeda Khatun* v. *Sulaiman Khan*, AIR 1986 Gau 71; *Narayan Mishra* v. *Champa Dibya*, AIR 1986 Ori 53
5. *Farid-un-nissa* v. *Mukhtar*, 1925 PC 204; **approved and relied** by the Supreme Court in *Kharbhuja Kuer* v. *Jangbahadur Rai*, AIR 1963 SC 1203.
6. *Md Ali* v. *Ramjan*, 24 Cal WN 977 (PC); *Person* v. *Narsingh*, 55 CLJ 323 (PC); *Kalyan Mal* v. *Ahmadduin*, 38 Cal WN 1157 (PC); *Kharbuja Kuer* v. *Jangbahadur*, AIR 1963 SC 1203; *Mayur Bhanj State Bank* v. *Bhabatosh Das*, AIR 1961 Ori 178; *Guljan Bibi* v. *Naziruddin*, AIR 1975 Gau 30.
7. *Bazloor* v. *Shamsoonissa*, 11 MIA 551; *Sudishi Lal* v. *Sheobarat*, ILR 7 Cal 245 (PC); *Kishorilal* v. *Chunilal*, 9 Cal LJ 172 (PC), *Md Ali* v. *Ramjan*, 24 Cal WN 977 (PC); *Kharbuja Kuer* v. *Jangbhadur Rai*, AIR 1963 SC 1203, *Kalyan Mal* v. *Ahmad Uddin*, AIR 1934 PC 208; *Sheoprasan Singh* v. *Munshi Narasingh Sahay*, AIR 1932 PC 134
8. *Mahabir* v. *Taj Begum*, 19 Cal WN 162 (PC).
9. *Inche Noriah* v. *Shaik Allie*, AIR 1929 PC 3.
10. *Shri Kishan* v. *Kashmiro*, 1926 PC 172.

adequately explained and the degree of intelligence of the lady would be a material factor to be considered whether she understood the meaning and effect of those contents, though independent legal advice is not in itself essential.[11]

Even in cases where a *pardanashin* lady had independent advice the court will scrutinize the transaction very closely to see that it is a fair one.[12] Even if it is established that the lady had an intellegent understanding of the deed, still the question of undue influence may arise, depending on the facts of the case, in view of the relationship between the donor and the donee.[13] Even if there is proof showing absence of undue influence, ignorance of the contents of the deed or the effect of the contents may be sufficient to invalidate the deed.[14]

Her free and intelligent consent to a transaction is necessary.[15]

The rule of special protection to a *pardanashin*, old and illiterate woman should not be applied in each and every case but should be applied in the light of the facts of each case.[16]

The transactions entered into with a *pardanashin* lady fall broadly into two groups: namely, (1) cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and (2) cases where a person as an absolute stranger and dealt with her at arm's length. In the former class of cases the court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases the court will require the confidence and influence to be proved intrinsically. In all these cases the fairness of the bargain is the crucial test.[17]

9. ILLITERATE PERSON—*NON EST FACTUM*

Common Law defence of *non est factum* to actions on specialities in its original was available where an illiterate person, to whom the contents of a deed had been wrongly read, executed it under a mistake as to its nature and contents, he could say that it was not his deed at all. In its modern application, the doctrine has been extended to cases other than those of illiteracy and to other contracts in writing. In most of the cases in which this defence was pleaded the mistake was induced by fraud; but that was not, perhaps a necessary factor, where fraud exists, but on the ground that the mind of the signor did not accompany the signature; in other words, that he never intended to sign, and therefore, in contemplation of law never did sign, the contract to which his name is appended.

In *Foster* v. *Mackinnon*[18] the defendant was inducted to endorse a bill of exchange on the false representation that it was a guarantee similar to one he had signed on a previous occasion. He was not liable when sued even by an innocent endorsee of the bill. BYLES, J. said :

> "..... the defendant never intended to sign that contract or any such contract. He never intended to put his name to any instrument that was or thereafter might become negotiable. He was deceived, not merely as to its the legal effect but as to the 'actual contents' of the instrument."

In Chitty on 'Contracts' 25th Edition—Vol. 1, General Principles, in Chapter 5, under Section 343 (at pages 194 and 195), the learned author says :

> "The law on this subject was completely reviewed and restated by the House of Lords in *Saunders* v. *Anglio Building Society*[19] and the distinction between the character or nature of a document and the contents of the document was rejected as unsatisfactory. It was stressed that the defence of *non est factum* was not lightly to be allowed where a person of full age and capacity had signed a written document embodying contractual terms. But it was nevertheless held that in exceptional circumstances the plea was available so long as the person signing the document had

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11. *Ramanamma* v. *Viranna*, AIR 1931 PC 1100.
12. *Nathusa* v. *Mohammad Siddique*, AIR 1939 Nag 159.
13. *Karunamoyee Debi* v. *Maya Moyi Debi*, AIR 1948 Cal 84.
14. *Bank of Khulna* v. *Jyoti Prokash Mitra*, 45 Cal WN 259 : AIR 1940 PC 147.
15. *Hem Chandra* v. *Suradhani Debiya*, AIR 1940 PC 134 : 67 IA 309; *Vinayak Wamanrao* v. *Sk. Md. Hanif*, ILR (1953) Nag 281 : AIR 1954 Nag 11; *Pathumma* v. *Vasudevan*, ILR 1951 TC 320.
16. *Kulsuman-nisa* v. *Ahmadi Begum*, AIR 1972 All 219.
17. *Pathumma* v. *Vasudevan*, AIR 1954 Tra/Co 160.
18. 1869 LR (4) CP 704.
19. 1970 (3) All ER 961.

made a fundamental mistake as to the character or effect of the document. Their Lordships appear to have concentrated on the disparity between the effect of the document actually signed and the document as it was believed to be (rather than the nature of the mistake) stressing that the disparity must be "radical", "essential", "fundamental" or "very substantial."

In *Foster* v. *Mackinnon*,[20] the action was by the endorsee of a bill of exchange. The defendant pleaded that he endorsed the bill on a fraudulent representation by the acceptor that he was signing a guarantee. He was held not liable. In holding that such a plea was admissible, the Court observed :

It (signature) is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signor did not accompany the signature; in other was, that he never intended to sign ..... He was deceived, not merely as to the legal effect, but as to the 'actual contents' of the instrument. A contract or other transaction induced or tendered by fraud is not void, but only voidable at the option of the party defrauded. The transaction remains valid until it was avoided.[21] The legal position will be different if there is a fraudulent misrepresentation not merely as to the contents of the document but as to its character. With reference to fraudulent misrepresentation as to character, it has been held that the transaction is void and with reference to contents, it is merely voidable.[22] Where the executant was under a *bona fide* belief that she was executing a gift-deed only but in fact two documents were got executed by her, one a gift deed and another a sale-deed. It was a case of fraudulent misrepresentation as to the character of document executed by her and not merely as to its contents or as to its legal effect. She never intended to enter into the contract to which she unknowingly became a party. Her mind did not accompany her thumb impression. It was held to be a totally void transaction.[23]

In a case an illiterate old father wanted to executed a will in respect to his property in favour of his son who took his father's signature on a partition deed before the Sub-Registrar by showing the properties to be joint family properties. The father signed the document in good faith. The document was unusually attested by seven witnesses including one utter stranger not known to both the parties. Most of the witnesses did not see executant signing the document. As a result of the deed the son got the entire property which he sold off and also drove his old father out of his house. All these made clear that a fiticious deed was brought into existence. The lower appellate Court held that the document was *non est* and void. The second appeal was dismissed holding that the father could sue for the declaration of title and recovery of possession without praying for setting aside the partition.[24] Where the sole witness the scribe of a sale-deed, executed by an illiterate lady, made no statement that the contents of the document were read out and explained to her and there was no other direct or circumstantial evidence in respect of it, it was held that due execution of the document was not proved and the document was invalid.[25]

10. LITERATES

In the case of a literate woman with considerable intellectual capacity and habits having dealings with another persons, it was held that no presumption would arise that the person stood in a position of active confidence to her.[26]

11. BLIND

Mere signature of a blind person on the sale-deed cannot have any force. Where an illiterate and blind woman is alleged to have executed a sale-deed, the execution of which is denied by her, a heavy burden is laid on the purchaser to prove that she not only agreed to sell but she knew what was being written and the document was in accordance with the terms of the agreement.[27]

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20. 1869 LR (4) CP 704.
21. *Ningawwa* v. *Byrappa*, AIR 1968 SC 956, at p. 958 : 1968 (2) SCR 797, at pp. 800-01. The Court referred to *Foster* v. *Mackinnon*, 1869 LR (4) CP 704 with approval.
22. *Ningawwa* v. *Byrappa*, AIR 1968 SC 956 : 1968 (2) SCR 797, at p. 801.
23. *Dularia Devi* v. *Janardan Singh*, AIR 1990 SC 1173 : 1990 (Supp) SCC 216 (paras 6 and 7), **following** *Ningawwa* v. *Byrappa*, AIR 1968 SC 956 : 1968 (2) SCR 797.
24. *Selvarasu Kounder* v. *Sahadeva Kounder*, AIR 1998 Mad 58 (para 23).
25. *Kuma Dei* v. *Md. Abdul Latif*, AIR 1994 Ori 111 (para 9), **relying on** *Kharbiya Kuer* v. *Jangbahadur Rai*, AIR 1963 SC 1203.
26. *Satya Narain* v. *Nanki Devi*, AIR 1968 All 224.
27. *Shivamma* v. *Abdur Rahman*, ILR (1952) Hyd 668 : AIR 1953 Hyd 25.

12. HUSBAND AND WIFE

The Privy Council held that where an illiterate wife mortgaged her properties for the benefit for her husband who was managing her properties, the presumption of undue influence would arise.[28]

A film actress filed a suit for declaration of title on the ground that the conveyance deed was signed by her without being aware of the nature of the document. It was held that though the plaintiff and the defendant were living together as wife and husband, as her case was not that she was unable to resist the defendant in getting the property from her, the suit can be taken as based on fraud and not on undue influence. In the absence of particulars of fraud, plaintiff cannot succeed.[29]

13. SPIRITUAL ADVISER AND DISCIPLE

Where a gift was made by a *pardanashin* lady in favour of her priest, it was set aside on the ground of undue influence.[30]

In a suit for cancellation of a deed of gift executed by the plaintiff in favour of the defendant, the plaintiff was well advanced in years, and the defendant was his spiritual adviser. The gift comprised the whole of the plaintiff's property, and the only reason for its execution was the plaintiff's desire to secure benefits to his soul in the next world. Almost immediately after the execution of the deed the plaintiff repudiated it, and sued for its cancellation on the ground of fraud. It was held that having regard to the fiduciary relation subsisting between the parties, the burden rested upon the defendant to show that the transaction was made without undue influence and in good faith; and, in the absence of such proof, the plaintiff was entitled to obtain cancellation of the deed.[31]

14. GUARDIAN AND WARD

It has been held that where a son made a gift in favour of his father, the father has to show that he has not abused his position and the gift was not brought about by any undue influence on his part and the donor had independent advice when the gift was made.[32]

The presumption under the section cannot go beyond the relations stated therein. Any other presumption has to be brought under Section 114.

15. WILLS

A Will is not a "transaction between two parties" within the meaning of Section 111, because a Will is a unilateral document. Hence a Will may be treated as an exception to the principle contained under Section 111. However, in the case of a Will also a person who is benefited under the Will may be in a position of active confidence towards the testator in some cases.

The Supreme Court observed "When once it has been proved that a Will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it."[33] It was further held that at times phychological factors and the frame of mind of the testator may determine his action; however, the possibilities of fraud or fabrication, particularly in cases of old and feeble persons cannot be ruled out and the courts have to scrutinize the surrounding circumstances very carefully; there is no presumption of law or fact in this country that a woman to whom a man is engaged to be married is in a position to dominate his Will so as to override his own real intentions; it is not mere influence, but undue influence

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28. *Tumbabai* v. *Yeshwant Jog*, 1945 PC 8. **See also** *Buzloor Ruheem* v. *Shamoonnissa*, (1867) 11 MIA 551 (wife selling the property to her husband).
29. *Bhupendrakumar* v. *M.K. Lakshmi*, AIR 1990 Mad 46 (DB).
30. *Kamini* v. *Krishna*, 16 Cal WN 649.
31. *Mannu Singh* v. *Umadat Pande*, ILR (1890) 12 All 523.
32. **See also** *Pannalal* v. *Dilip Kumar*, AIR 1977 Cal 297; (where the impugned deed was in favour of maternal uncle immediately after the executant attained majority).
33. *Naresh Charan* v. *Paresh Charan*, AIR 1955 SC 362 **following** the dictum in *Boyce* v. *Russborough*, (1857) 6 HLC 249 **followed in** *Craig* v. *Lamoureux*, 1920 AC 349 **see also** *Surendra Pal* v. *Saraswati Arora*, AIR 1974 SC 1999; *Narayana Iyer* v. *Venkitasubramonia Iyer*, AIR 1957 Ker 115.

that has to be proved by the party who sets up the plea. It was a case of a Will in favour of a newly wedded wife and the testator died sometime after the marriage.[34]

The Privy Council held that in order to defeat a Will on the ground of undue influence, it must amount to coercion, fraud, or duress.[35] Section 111 applies to Wills also.[36]

It was held by the Madras High Court "There is a difference between the case of Wills and cases of contracts or gifts or settlement deeds as regards the burden of proof. In the case of Wills, it is for the person who impeaches the Will as having been executed under influence to set up and prove it. But in the case of gifts, or settlements where the donee or the settlor is shown to have been a person in real or apparent authority or in a fiduciary relationship to the donee, or settlor, or where the donor or settlor's mental capacity was temporarily or permanently affected by reason of age, illness or mental or bodily distress, the onus is upon the donee or settlor to prove that the gift or settlement was not brought about by *undue influence*."[37]

Evey influence is not under influence, and the mere fact that a bequest is in favour of a person who was looking after the testator at or about the time of the Will does not by itself indicate that the will was executed under undue influence; in such cases the burden lies on the testator or persons claiming under him to prove *undue influence*.[38]

Presumption as to certain offences.

[39][**S. 111-A. (1) Where a person is accused of having committed any offence specified in sub-section (2), in—**

(a) any area declared to be a disturbed area under any enactment, for the time being in force, making provision for the suppression of disorder and restoration and maintenance of public order; or

(b) any area in which there has been, over a period of more than one month, extensive disturbance of the public peace,

and it is shown that such person had been at a place in such area at a time when firearms or explosives were used at or from that place to attack or resist the members of any armed forces or the forces charged with the maintenance of public order acting in the discharge of their duties, it shall be presumed, unless the contrary is shown, that such person had committed such offence.

(2) The offences referred to in sub-section (1) are the following, namely:—

(a) an offence under Section 121, Section 121-A, Section 122 or Section 123 of the Indian Penal Code (45 of 1860);

(b) criminal conspiracy or attempt to commit, or abetment of, an offence under Section 122 or Section 123 of the Indian Penal Code (45 of 1860).]

Birth during marriage, conclusive proof of legitimacy.

S. 112. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

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34. *Surendra Pal* v. *Saraswathi Arora*, AIR 1974 SC 1999.
35. *Gomtibai* v. *Kanchhedilal*, AIR 1949 PC 272, **relying on** *Boyse's* case.
36. *Nandalal* v. *Dasarathi*, 61 Cal LJ 304 : AIR 1936 Cal 15.
37. *Venkatarama Aiyar* v. *Krishnammal*, AIR 1927 Mad 259.
38. *Prithwis Kumar Mitra* v. *Bibhuti Bhushan Mitra*, ILR (1966) 1 Cal 408.
39. Section 111-A, inserted by the Terrorist Affected Areas (Special Courts) Act, 1984, (w.e.f. 14-7-1984).

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COMMENTS

1. PRINCIPLE AND SCOPE

The section is based on the principle that when a particular relationship, such as marriage, is shown to exist, then its continuance must *prima facie* be presumed.[40] Under the section the fact that any person was born:—

(a) during the continuance of a valid marriage between his mother and any man, or

(b) within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless the parties had no access to each other at any time when he could have been begotten.

Evidence that a child is born during wedlock is sufficient to establish its legitimacy and shifts the burden of proof to the party, seeking to establish the contrary.

The presumption under this section is a conclusive presumption of law which can be displaced only by proof of non-access between the parties to the marriage at a time when accoding to the ordinary course of nature the husband could have been the father of the child.[41] Access and non-access connote existence and non-existence of opportunities for marital intercourse.

Sections 41, 112 and 113 are the only sections which deal with matters which are to be regarded as 'conclusive proof'. No rule of the kind can be based on considerations of evidence because enquiry is altogether excluded. The basis of the rule in the first case (Section 112) seems to be a notice that it is undesirable to enquire into the paternity of a child whose parents have access to each other. This section refers to the point of time of the birth of the child as the deciding factor and not to the time of conception of that child the latter point of time has to be considered only to see whether the husband has no access to the mother.[42]

It is the principle of law that *"Odiosa et inkonesta non sunt in lege prae sumenda"* (Nothing odious or dishonourable will be presumed by the law). So the law presumes against vice and immorality. One of the strongest illustrations of the principle, is the presumption in favour of legitimacy of children in a civilized society. But, where illegitimacy seems as common as marriage and legitimacy, a presumption of legitimacy cannot be drawn and legitimacy or illegitimacy will have to be proved like any other fact in issue.[43]

The presumption under Section 112 should be drawn by all courts, Civil, Criminal and revenue governed by the Evidence Act.[44]

The provisions of Section 112 are as much applicable to the offspring of a marriage between Hindus, as it is to children of spouses professing other faiths including Mohammadan.[45]

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40. *Bhima* v. *Dhulappa*, (1904) 7 Bom LR 95.
41. *Seethalakshmi* v. *Ponnuswamy*, ILR (1966) 2 Mad 373. **See also** *Goutam Kundu* v. *State of W.B.*, 1993 Cr LJ 3233 (paras 22 and 24) (SC) : AIR 1993 SC 2295; *Ajaya Kumar Naik* v. *State of Orissa*, 1995 Cr LJ 82 (para 6) (Ori).
42. *Palani* v. *Sethu*, ILR (1924) 47 Mad 706 : AIR 1924 Mad 677; *Palsingh* v. *Jagir*, ILR (1926) 7 Lah 368 : AIR 1926 Lah 529(2).
43. *Lal Haribansha* v. *Nikunja Behari*, ILR 1960 Cut 230 **relying on** 35 IA 41.
44. *Subamma* v. *Venkata Reddi*, ILR (1950) Mad 394, 395.
45. *Boramma* v. *Dharmappa*, AIR 1969 Mys 17; *A.G. Ramachandran* v. *Shamsunnisa*, AIR 1977 Mad 182; **relying on** *Sampatia Bibi* v. *Mir Mahboob* AIR 1936 All 528; *Sibt Md.* v. *Hameed*; AIR 1926 All 589.

2. MOHAMMADAN LAW

According to Mohammadan law a child born six months after marriage or within 280 days after divorce or the death of the husband is presumed to be his legitimate offspring. If the question for decision be one of evidence only it will be governed by this section[46] and the child will be considered legitimate if born within six months after marriage of its parents[47]. A child born more than two hundred eighty days after the dissolution of his mother's marriage with her first husband but less than six months after her marriage with her second husband was held entitled to inherit as the legitimate son of the second husband.[48]

Under the Mohammadan law the legitimacy has to be considered with reference to the date of conception.[49]

It was held that even if at the date of their marriage the parties were foreigners and even if the parties had not abandoned their domicile of origin which was in Iran and acquired their domicile in India, it is a clear principle of law that where it is established that there has been a marriage in fact and particularly if the marriage is followed by cohabitation, there would be a presumption that there has been a marriage which is valid in law, though that presumption, of course, is rebuttable.[50]

This section has no application when maternity is in dispute and not paternity.[51]

The presumption under Section 112 only applies in favour of marriage and legitimacy, it is not applicable to any particular form of marriage so as to create a particular status to the child.[52]

Unless it is established beyond doubt that a woman was the exclusively kept mistress of the man and relationship was virtually one of monogamy, it cannot be legitimately presumed that the child was born to the woman through that man.[53]

3. DURING THE CONTINUANCE OF A VALID MARRIAGE BETWEEN HIS MOTHER AND ANY MAN

The presumption as to paternity in this section only arises in connection with the offspring of a married couple. The section applies to the legitimacy of the children of a married person only.[54] On the birth of a child during marriage the presumption of legitimacy is conclusive no matter how soon the birth occurs after the marriage.[55]

Even children born with only a gestation period of six months have been known to survive and live. Where a child was born eight months after date of marriage there could be no doubt that she could very well be the child of the father.[56] There must be marriage between the parties who make acknowledgement of paternity, Mere admission of paternity is not enough proof of legitimacy when the existence of marriage is not shown.[57] When the wife was driven out by the husband within few days after the marriage on the ground of her concealed pregnancy and a child was born within four months after being driven out, it was held that no presumption under Section 112 can be raised.[58]

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46. *Mazhar* v. *Budh Singh*, ILR (1884) 7 All 297 (FB); *Kaniza* v. *Hasan Ahamad Khan*, ILR (1925) 1 Luck 71 : AIR 1926 Oudh 231.
47. *Sibt Mohammad* v. *Mohammad Hameed*, ILR (1926) 48 All 625 : AIR 1926 All 589; *Muhammad Allahabad Khan* v. *Muhammad Ismail Khan*, ILR (1888) 10 All 289.
48. *Nur-ul-hassan* v. *Muhammad Hassan*, (1910) PR No. 78 of 1910 (Civil); *P.* v. *R.* (1911) PR No. 77 of 1911 (Civil).
49. *Mohd. Allahabad Khan* v. *Md. Ismail*, ILR (1888) 10 All 289.
50. *Jamshed A Irani v. Banu J. Irani*, (1966) 68 Bom LR 794.
51. *Nand Kishwar Bux* v. *Gopal Bux Rai*, AIR 1940 PC 93.
52. *Molapo Mojele* v. *Thaso Lerotholi Mojela*; AIR 1928 PC 276.
53. *Durai-raju* v. *Neela*, 1976 Cr LJ 1507 (Mad); **following** *Mahadeva Rao* v. *Yesoda Bai*, AIR 1962 Mad 141.
54. *XXX* v. *Mason*, (1896) 1 UBR (1892-1896) 74.
55. *Umra* v. *Muhammad Hayat*, (1907) PR No. 79 of 1907 (Civil).
56. *Ponnammal* v. *Andi Aiyyan*, ILR (1953) TC 726.
57. *Fatma Binti* v. *Administrator General*, AIR 1949 PC 254.
58. *Abdul Rahiman Kutti* v. *Aysha Beevi*, AIR 1960 Ker 101.

When proof is given of the marriage on a certain date, the court may under Section 4 consider the marriage as subsisting on a subsequent date also unless and until it is disproved.[59] Under the section the presumption of legitimacy follows the subsistence of a valid marriage.[60]

It is upon the person who claims to be the legitimate issue of his parents to bring forward satisfactory evidence in support of their marriage.[61]

The law presumes in favour of marriage and against concubinage. Continuous coabituation between a man and a woman for a number of years may raise the presumption, though it is rebuttable. Where a marriage took place many years ago though the evidence is unsatisfactory it cannot displace the presumption.[62] Where it was proved that a man and woman have been having cohabitation for a long period, that cohabitation would produce a presumption that they were married spouses. But if the woman with whom there was such cohabitation is proved to be a public woman, that presumption would be unavailable.[63] Although the law presume in favour of marriage and against concubinage it does not presume that concubinage ripens into marriage by mere efflux of time or birth of children.[64]

Children born to a married women cannot be held to be the progeny of the paramour.[65]

A person claiming as an illegitimate son must establish the alleged paternity in the same manner as any other disputed question of relationship.[66] The presumption that children born of a married woman, during the lifetime of her husband are the legitimate offspring of that woman and her husband, is not conclusive proof of their legitimacy and must be regarded as fully rebutted where the woman admittedly lived four years with another person and they both asserted such children to be the offspring of their union.[67]

There must be continuance of valid marriage if presumption is to be made under this section.[68]

Where a wife came to her husband's home a few days before he died and remained there up to the time of his death and it was shown that a child alleged to be that of her husband, was the child of the wife, and that it was born within the time necessary to give rise to the presumption under this section, it was held in the absence of any evidence to show that the husband could not have had connection with his wife during the time she was residing with him the presumption as to the paternity of the child given by this section must prevail. The fact that the husband was, during the period within the child must have been begotten, suffering from a serious illness which terminated fatally shortly afterwards, was held not sufficient to rebut the presumption.[69]

A woman '*shudra*' by caste deserted her husband and lived with another man and a child was born from that relationship. The paternity of the child was acknowledged by the relatives. The child would be a legitimate one as the matrimony was acknowledged by the relatives and abandoning by a '*shudra*' woman of her husband amounted to divorce.[70]

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59. *Ismail Ahmed* v. *Momin Bibi*, AIR 1941 PC 11; *Chandu Lal* v. *Bibi Khatemonnessa*, AIR 1943 Cal 76; *Bhima* v. *Dhulappa*, (1904) 7 Bom LR 95.
60. *Perumal Nadar* v. *Ponnuswami Nadar*, AIR 1971 SC 2352; *P.V. Sabu* v. *Mariakutty*, AIR 1998 Ker 86 (para 18).
61. *Thakur Amjal* v. *Nawab Ali Khan*, (1906) 9 Bom LR 264 (PC).
62. *Badri Prasad* v. *Dy. Director of Consolidation*, AIR 1978 SC 1557 **followed in** *Milkhi Ram* v. *Milkhi Ram*, AIR 1996 HP 116 (para 15); *Nizam-patnam* v. *Kondiparti*, AIR 1948 Mad 198; *Gnanamuthu* v. *Anthoni*, AIR 1960 Mad 430.
63. *Rafiuddin* v. *Zubedabi*, AIR 1968 Mys 155; *Ghazanfar Ali* v. *Kaniz Fatema*, ILR 32 All 345. **See also** *M. Shanmugha Udayar* v. *Sivanandam*, AIR 1994 Mad 123 (para 33); *Ranganath Parmeshwar P. Mali* v. *E.G. Kulkarni*, AIR 1996 SC 1290 (para 6); *S. Ajarma Bi* v. *S. Khurshid Begum*, AIR 1996 SC 1663 (para 4); *Chowdegowda* v. *C. Nagaraju*, AIR 1996 SC 3485 (para 4), **reversing** RSA No. 204 of 1994, Dt. 17-3-1995 (Kant).
64. *Basanti* v. *Pohlu*, AIR 1952 Bilaspur 13.
65. *Sreenivasan* v. *Kirubal Ammal*, AIR 1957 Mad 160; *Laldevi* v. *Munilal*, ILR 1959 Punj 1269; *Bhagavathi Amma* v. *Aiyappan Pillai* (husband's brother was the paramour) AIR 1953 Tra/Co. 470.
66. *Gopalasami Chetti* v. *Arunachellam Chetti*, ILR (1903) 27 Mad 32, 33.
67. *Bahadur Singh* v. *Viru*, (1905) PR No. 28 of 1906 (Civil).
68. *Tileswar Ahom* v. *Kohuli Ahomani*, AIR 1951 Assam 148.
69. *Narendra Nath Pahari* v. *Ram Gobind Pahari*, ILR (1901) 29 Cal 111 (PC) : 4 Bom LR 243, 29 IA 17.
70. *M. Govindaraju* v. *K. Munisami Gounder*, AIR 1997 SC 10.

4. MEDICAL EVIDENCE

It was held by the Supreme Court in *Mahendra Manilal Nanavati* v. *Sushila Mahendra Nanavati*[71] that the usual period of gestation from the date of first coitus is between 265 and 270 days and delivery is expected in about 280 days from the first day of menstruation period to a woman conceiving a child; the medical opinion as is disclosed by text books on obstetrics and Gynaecology refer to some rare exceptions of live births even with a gestation period of a few days less than 180 days.

Where the child was born after 171 days of the first coitus between the husband and wife, and the delivery was normal, normally the court should hold that the child was not the child of the husband unless there is evidence which would justify the court in holding otherwise.

When the husband failed to prove that the child who was born 7 months after the marriage was a prematurely born child the presumption is in favour of legitimacy and the child will be entitled to maintenance.[72]

5. WITHIN TWO HUNDRED AND EIGHTY DAYS AFTER ITS DISSOLUTION, THE MOTHER REMAINING UNMARRIED

The section does not lay down a maximum period of gestation, and therefore does not bar the proof of the legitimacy of a child born more than two hundred and eighty days after dissolution of marriage, the effect of the section being merely that no presumption in favour of legitimacy is raised, and the question must be decided simply upon the evidence for and against legitimacy.[73] A person born within two hundred and eighty days after the death of his father is pressumbly his legitimate son.[74] When a person claims under this section, to be the son of a deceased person, he must prove that he was born within two hundred and eighty days after the death of his father.[75]

The maximum period of gestation cannot be more than 360 days (*Modi's Medical Jurisprudence and Toxicology,* 13th Ed, p. 313.

The Bombay High Court held that the fact in determining the legitimacy of a posthumous child born beyond the period of 280 days the principles enunciated in divorce cases and that cases during lawful wedlock would not in principle make any difference; as the questions of adultery and legitimacy are closely interlocked, one completely dependent upon the other, the quantum of proof must be the same in each case and the evidence must show that the child is not a legitimate child beyond any reasonable doubt. The mere fact that 306 days had lapsed after the death of the father when the child was born, would not be sufficient to hold that the posthumous son was an illegitimate son.[76]

The presumption of legitimacy can be drawn if a child is born beyond the period of 280 days, which is a reasonable period of normal period of gestation.[77]

Where a child was born 8 months after the marriage and the husband pleaded that he was incapaciated for having sexual intercourse for one months from the date of marriage on account of some operation undergone, it was held that even assuming that the husband was so incapaciated the time available over 7 months was sufficient to raise the presumption that he was the father of the child.[78]

It was held that a child born 223 days after the husband's death was legitimate.[79]

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71. AIR 1965 SC 364.
72. *Dukhtar Jahan* v. *Md. Farooq,* AIR 1987 SC 1049.
73. *Rahmat Ali* v. *Musti Allahdi,* (1883) PR No. 1 of 1884 (Civil) *Uttamrao Rajaram* v. *Sitaram,* (1962) 64 Bom LR 752.
74. *Ghulam Mohy-ud-din Khan* v. *Khizar Hussain,* ILR (1928) 10 Lah 470 *Misir Bhairon Prasad* v. *Gopi Kunwar,* (1930) 32 Bom LR 871, PC.
75. *Narendra* v. *Ram Govind,* (1901) 4 Bom LR 243 : ILR 29 Cal 11 29 IA 17; *Karapaya Servai* v. *Mayandi,* ILR (1933) 12 243 : 36 Bom LR 394 (PC).
76. *Uttam Rao* v. *Sitaram,* AIR 1963 Bom 165.
77. *Maganlal* v. *Bai Dahi,* AIR 1971 Guj 33 **relying on** *Uttam Rao* v. *Sitaram,* AIR 1963 Bom 165; *Wood* v. *Wood,* (1947) 2 All ER 95.
78. *Ponnamal* v. *Andi Aiyan,* AIR 1953 Tra/Co. 434.
79. *Triloke Nath* v. *Lachmin,* (1903) 30 IA 152 : ILR 25 All 403 : 7 Cal WN 617 (PC).

Child born after 470 days after husband's death was held illegitimate.[80]

Where a child was born 6 months 4 days after the marriage and it was found it was a normal delivery and it was not a case of premature birth of the child, it was held that the presumption is rebutted.[81]

Though ordinarily the period of gestation is 10 days + 9 months after the date of last menstruation, the child may be born earlier than 280 days on account of existence of certain individual factors. A child born on the 240th day after sexual intercourse is not unnatural, and so the child is legitimate.[82]

Where a muslim woman delivered a child 220 days after the marriage it was held that as the period is sufficient for conception and birth of a child, it would be legitimate.[83]

Where a woman left the husband 10 days after the marriage and was living as a concubine of the appellant and a child was born 7 months after the woman leaving her husband and when there was no evidence that the birth of the child was premature or that the woman was living as a concubine of the appellant even before her marriage it was held that the appallent cannot be presumed to be the father of the child.[84]

6. UNLESS IT CAN BE SHOWN THAT THE PARTIES TO THE MARRIAGE HAD NO ACCESS TO EACH OTHER

Under the section the child born in wedlock should be treated as the child of the person who was at the time of its birth, the husband of the mother, unless it is shown that he had no access to the mother at the time of its conception quite irrespective of the question whether the mother was a married woman or not at the time of the conception.[85] Where the wife was pregnant on the date of marriage and the husband had no access to the wife before marriage, there was no question of calling in aid the presumption under Section 112.[86]

By 'having no access' is meant having no opportunity of sexual intercourse, and in order to displace the conclusive presumption it must be shown that no such opportunity occurred down to a point of time so near to the birth as to render paternity impossible. To rebut the legal presumption under this section, it is for those, who dispute the paternity of the child, to prove non-access of the husband to his wife during the period when with respect to the date of its birth, it must, in the ordinary course of nature, have been begotten.[87] Mere fact that the husband and wife were residing separately in close proximity of distance, is not sufficient to prove non-access.[88]

The Supreme Court observed "The presumption, which Section 112 contemplates, is a conclusive presumption of law which can be displaced only by proof that the particular fact mentioned in the section namely non-access between the parties to the marriage at a time when according to the ordinary course of nature the husband could have been the father of the child."[89] Access and non-access connote existence and non-existence of opportunity for marital intercourse. Non-access can be established not merely by positive or direct evidence, it can be proved undoubtedly like any other physical fact by evidence, either direct or circumstantial, which is relevant to the issue, though as presumption of legitimacy is highly favoured by law it is necessary that proof of non-access must be clear and

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80. *Tirkangauda* v. *Shivappa*, AIR 1944 Bom 40.
81. *Madanlal* v. *Sudesh Kumari*, 1988 Del 93; *D.M. Raju* v. *Sarah Janaki*, (162 days after first coitus) AIR 1974 Mys. 61.
82. *Rangaswamy* v. *Nagamma*, AIR 1973 Mys 178, 183.
83. *Assia* v. *Ayidru*, (1974) 2 Ker ILR 295 **relying on** *Mulasingh* v. *Emperor*, AIR 1924 Lah 413; *Sibt Mohammad* v. *Mohammad Hameed*, AIR 1926 All 589. *Ponnammal* v. *Andi Aiyyan*, AIR 1953 Tra/Co. 434; *Clark* v. *Clark*, (1939) 2 All ER 59.
84. *Ponnuswamy Reddiar* v. *Vasantha*, (1967) 1 MLJ 102.
85. *Palani* v. *Sethu*, ILR (1924) 47 Mad 706; *Palsingh* v. *Jagir*, ILR (1926) 7 Lah 368.
86. *P.V. Sabu* v. *Mariakutty*, AIR 1998 Ker 86 at pp. 20-24.
87. *Narendra* v. *Ram Govind*, (1901) 4 Bom LR 243 : 29 Cal 111 : 29 IA 17; *Karapaya Servai* v. *Mayandi*, ILR (1933) 12 Ran 243 : 36 Bom LR 394 (PC); *Bhima* v. *Dhulappa*, (1904) 7 Bom LR 95; *Bhagwan Baksh Singh* v. *Mahesh Bokksh Singh*, (1935) 38 Bom LR 1 (PC).
88. *Satya Devi* v. *Brij Lal*, 1996 AIHC 5006 (paras 10 and 13) (HP), child born within 7 months from time husband had come on leave, held legitimate.
89. *Venkateswarlu* v. *Venkatnarayana*, AIR 1954 SC 176.

satisfactory.[1] The non-access would include incapability of access on account of impotency, want of virility because of immature age or other physical incompetency.[2]

The presumption can be rebutted only if the marriage of the parents is shown to be invalid or the parties to the marriage had no access to each other at any time when the child could be begotten.[3] The presumption would stand rebutted if it is shown that the husband had severed all physical relations with the wife.[4]

The standard of proof of non-access is similar to that in a criminal case.

It is upon the person who claims to be the legitimate issue of his parents to bring forward satisfactory evidence in support of their marriage.[5]

Even where the husband and wife were living apart in the same village long before the birth of the child, unless the husband is able to establish absence of access, presumption raised under the section will not be displaced.[6]

The principle of this section does not apply to the case of a paramour and the presumption can be rebutted when the mother of the child is not a wife but a mistress and it may be open for the mistress to prove that the real father of the child born during the period of her concubinage is different from her paramour.[7]

Where a wife came to her husband's house a few days before he died and remainded there up to the time of his death and it was shown that a child alleged to be that of her husband was the child of the wife and that it was born within the time necessary to give rise to the presumption under this section, it was held, in the absence of any evidence to show that the husband could not have had connection with his wife during the time she was residing with him, the presumption as to the paternity of the child given by this section must prevail. The fact that the husband was during the period within which the child must have been begotten was suffering from a serious illness which terminated fatally shortly afterwards was held, under the circumstances, not sufficient to rebut the presumption.[8]

A child was born after marriage but before *gauna* or *bidai* (departure to husband's place). It was held that there was no presumption of legitimacy unless proof of access was offered.[9]

Merely because the husband was suffering from a serious illness, it is not a sufficient reason for holding that the presumption which arises under Section 112 cannot be attracted.[10] Access means effective access and therefore physical incapacity to procreate is non-access. Where non-access on account of immature age is alleged it would be necessary to prove first the precise age of the husband on the date of conception and secondly to negative the possibility of premature virility at that age owing to precocious development. Without such proof non-access based on the alleged incapacity of the husband cannot be made out.[11] To repudiate the presumption it must be proved that the access was impossible on account of impotency, serious illness or it must be shown by very convincing evidence that though opportunity existed there was no sexual intercourse during the period the child could have been begotten.[12] The husband has to prove that it was physically impossible for him to have cohabited with his wife during the time in which the child was conceived.[13]

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1. *Krishnappa* v. *Venkatappa*, AIR 1943 Mad 632; *Hanumantha Rao* v. *Ramachandrayya*, AIR 1944 Mad 376; *Vira Reddy* v. *Kistamma*, AIR 1969 Mad 235; *Mohinder Kaur* v. *Narindar Singh*, AIR 1960 Punj. 169.
2. *Rozario* v. *Ingles*, ILR (1893) 18 Bom 468.
3. *Abdulla* v. *Beepathu*, ILR (1967) 1 Ker 361; *Boramma* v. *Dharamappa*, AIR 1969 Mys 17.
4. *Thimmakku* v. *B. Rangappa*, AIR 1977 Kant. 115.
5. *Thakur Amjal* v. *Nawab Ali Khan*, (1906) 9 Bom LR 264 (PC).
6. *Perumal* v. *Ponnuswami*, AIR 1971 SC 2352; *Ammathayee* v. *Kumaresan*, AIR 1967 SC 569.
7. *Maina* v. *Deorao Sonaji*, 1942 Nag 383.
8. *Narendra Nath Pahari* v. *Ram Gobind Pahari*, ILR (1901) 29 Cal 111 (PC) : 29 IA 17.
9. *Baj Rangi* v. *Dy. Dr. of Consolidation*, AIR 1982 All 335.
10. *Mallappa* v. *Guramma*, (1965) Bom 129; **reversed on** another point in *Guramma* v. *Mallappa*, AIR 1964 SC 510; *Jothindranath Chowdary* v. *Dwarakanath Day*, ILR (1893) 20 Cal 111 (PC).
11. *Bhagwan* v. *Mahesh*, 40 Cal WN 360 PC; *Jagannatha* v. *Chinnaswamy* (Held actual cohabitation or sexual intercourse amounts to access) 61 MLJ 878; *Shivajirao* v. *Bapurao*, AIR 1957 MP 174; *Appu* v. *Danley*, 1963 Ker LT 1038 : 1963 Ker LT 1002; *Gopalan* v. *State of Kerala*, (1962) 2 Ker LT 138; *Kumhiraman Nair* v. *Annakutty*, ILR (1967) 1 Ker 116; *Madavan Sukumaran* v. *Prushpavathi*, ILR (1975) 1 Ker 222.
12. *Puran* v. *Angoori*, ILR (1976) 2 Del 337.
13. *Durghatia* v. *Ayodhyaprasad*, (1963) Vin Pra 28.

A youth of 15 years was held not-incapable of procreation.[14]

In a case the parties married in 1969, the husband underwent vasectomy operation on 8-1-76, both were living together and the wife gave birth to a child on 30-8-1978, it was held that the husband had not proved that in or about November 1977, when the child was conceived, he was unable to procreate. So the child should be presumed to be legitimate.[15] When there is no satisfactory evidence that even during the period the wife was living with another person, her husband had nothing to do with her, it was held that children born must be presumed to be the children of the husband.[16] Where a child was born on 13-5-1949 and divorce was obtained on 30-5-1949, and the father filed petition for divorce on the ground of the wife's immoral life, it was held that in the absence of satisfactory evidence of non-access between the parents during the pendency of the divorce petition this section is applicable and the finding about the legitimacy of the child was correct.[17] The presumption of legitimacy under Section 112 will not be displaced by the mere fact that the husband and wife were living apart in the same village long before the birth of the child, unless the husband is able to establish the absence of access, when the child could have been begotten.[18] Where the wife was living with her parents during 1½ years before the birth of the child and the parents house was only two miles away from the husband's village it was held that it is reasonable to assume that the husband had opportunity of intercourse, and so the presumption remained unrebutted.[19]

Where it is shown that during the time the child could have been begotten the husband was out of India no presumption of legitimacy can arise and an admission by the wife in her husband's divorce petition that, the child was born to her husband can be of no avail.[20] Where the wife left for England on 11-6-53 and she gave birth in England to a male child on 12-5-54 and during that period the husband never left the shores of India it was held that it was impossible for the husband to have access to her and so the husband was not the father of the child.[21] Where the child was born two years after the husband and wife separated and it was proved they had no access after separation, it was held that the presumption stood rebutted.[22] Child born 334 days after the parents were proved to have had no matrimonial intercourse was held illegitimate as there was no access by the husband, during the period which the child could have been begotten.[23] Desertion for a period of two years resulted in a divorce; the wife gave birth to a child during that period; the husband pleaded 'no access' as she had gone to a village remote from Delhi, and he went there only once with a *barat* (Marriage party) and was beaten up by in laws. Held, he had discharged the burden of proving non-access and, therefore there was no presumption of legitimacy.[24]

Presumption of legitimacy is available when the evidence is conflicting between the husband and the wife as to their common residence and accessibility to wife is not completely ruled out.[25] Even if it is proved that the mother committed adultery with a number of men it will not of itself suffice to prove the illegitimacy of the child if she had access to her husband during the time the child could have been begotten.[26] In the absence of proof of non-access, even though wife was living apart and leading an

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14. *Sm. B. Veragam* v. *Manoranjan Samanta Kumar*, ILR (1963) Cut. 415.
15. *Chirutha Kutty* v. *Subramainan*, AIR 1987 Ker. 5.
16. *Kundan Singh* v. *Hardan Singh*, AIR 1953 All 501.
17. *M M Khan* v. *S.A. Khan*, (1971) 3 SCC 810; *Janamma* v. *Kuttappa Panicker* (Child born 18 days after the date of dissolution) **relying on** *Venkateswarlu* v. *Venkatnarayana*, AIR 1954 SC 176; *Karapaya Servai* v. *Mayandi*, 1934 PC 49; *Krishnappa* v. *Venkatappa*, AIR 1943 Mad 632.
18. *Perumal* v. *Ponnuswami Nadar*, AIR 1971 SC 2352; **affirming** *Seethalaxmi Ammal* v. *Ponuswamy Nadar*, ILR (1966) 2 Mad. 373; *Venkateswarlu* v. *Venkatanarayana* and **relying on** AIR 1954 SC 176; *Ammathayee* v. *Kumaresan*, AIR (1967) SC 569; *Karapaya Servai* v. *Nayandi*, AIR 1934 PC 49; *Ramachandra* v. *Ramsurat*, (1982) All LJ 1355; *Kasthuri* v. *Ramasamy*, 1979 Cr LJ 741 : 1980 Mad LJ (Cri) 125; *Dhedu Sheoram* v. *Malhanbai*, AIR 1966 MP 252; *Raghavan* v. *Gouri Kitty Amma*, AIR 1960 Ker 119.
19. *Sehanlal* v. *Dharampati (Smt.)*, (1967) HP 38.
20. *Parameswaran Nair* v. *Janaki Amma*, AIR (1972) Ker 80; **referred to** *Venkateswarlu* v. *Venkatnarayana*, AIR 1954 SC 176; *Karapaya* v. *Mayandi*, AIR (1934) PC 49.
21. *Raymond Francis Isar* v. *Roma Jyotrimoi Isar*, ILR 1957 Punj 181 (SB).
22. *Paras Ram* v. *Dayal Das*, AIR 1965 HP 32.
23. *Howe* v. *H.*, 38 Mad 466.
24. *Ram Kishan Singh* v. *Savitri Devi*, AIR 1982 Del 458.
25. 1972 Ker LT 512 : 1972 Mad LJ (Cri) 549.
26. *Vasu* v. *Santha*, 1975 Ker LT 533.

unchaste life the child would be deemed to be legitimate.[27] If the husband has had access, adultery on the wife's part will not justify a finding that another man was the father[28] but where there was evidence that the mother of the child had illicit intimacy with a certain person, to prove illegitimacy of the child, it should be established that such a person had opportunity of access to her at the time of conception as in the instant case she was working in the house of that certain person, moving closely with the inmates and helping him in hotel business which was held to be sufficient to show, he having opportunity of access to her.[29]

Where there may be an opportunity to have access still the husband can prove that there was no actual cohabitation.[30] Where wife and husband are living in the same room it should be presumed that the pregnancy was due to cohabitation with the husband.[31] Where the consumation of marriage and access between the husband and wife were admitted and the medical opinion supported the wife, legitimacy of child would be presumed.[32] Where there was a family custom that husband and wife will have no coitus unless particular ceremony is performed and when it was not performed, but the husband and wife were living under the same roof four months together, it was held that non-performance of ceremony was not proof of non-access. The onus lies heavily on the person alleging illegitimacy and non-access may be proved by legal evidence admissible to prove any other physical act.[33]

A woman married a man in September, 1903; the marriage was dissolved in May 1904; she married another in June, 1904 a son was born to her in September, 1904 during the continuance of her marriage with her second husband. It appeared that the latter had access to her during her first marriage. In a suit by the son to recover the property of the second husband on his death, it was contended that the plaintiff was not the legitimate son of the second husband. It was held that the plaintiff was in law the legitimate son of the second husband of the woman, and was entitled to his properties.[34] The question for decision was the paternity of the defendant, who was born of one *H* on October, 17, 1919; *i.e.*, two hundred and seventy nine days after January 10, 1919, the date of the death of her first husband. She had entered into a second marriage on February, 25th, 1919 with another and defendant was born during the continuance of that marriage. It was held that as this section referred to the point of time of the birth of the child as the deciding factor and not the time of conception of that child, the presumption was that the second husband was the father of the defendant.[35] Where a married woman married a second time claiming that her first marriage has been dissolved and begot a child while she was living with her second husband and when it was found that her first marriage was not legally dissolved and it was subsisting in the eye of law and where there is evidence to show that her first husband had no access to her at the time when the child was begotten by her, it was held that the child was the progeny of the person with whom she was living (Second husband).[36]

7. EVIDENCE OF HUSBAND AND WIFE

Reading S. 120 with this section it is clear that there is no prohibition of the parents of a child from deposing whether or not they had at any time, when the child would have been begotten, access to one another.[37]

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27. *Krishnappa* v. *Venkatappa*, AIR 1943 Mad 632.
28. *Nga Tun E.* v. *Michou*, (1914) 2 UBR 23; *Jagannatha Mudali* v. *Chinnaswami Chetti*, ILR (1931) 55 Mad 243 : AIR 1932 Mad 39.
29. *Oona Gowri Shankara Rao* v. *Oona Rajeshwari*, 1996 Cr LJ 1158 (para 9) (AP).
30. *Kasi Ammal* v. *Ramasami Reddiar*, AIR 1949 Mad 881.
31. *Sew Kumhar* v. *Mongru Kumharin*, AIR 1959 Cal 454.
32. *Devesh Pratap Singh* v. *Sunita Singh*, AIR MP 174 (para 12).
33. *Dhedu Sheoram* v. *Malhanbai*, AIR 1966 MP 252.
34. *Palani* v. *Sethu*, ILR (1924) 47 Mad 706 : AIR 1924 Mad 677 **on appeal**, *Sethu* v. *Palani*, ILR (1925) 49 Mad 553 AIR 1926 Mad 628.
35. *Pal Singh* v. *Jagir*, ILR (1926) 7 Lah 368 : AIR 1926 Lah 529 (2).
36. *Appu* v. *Danley*, 1965 Mad LJ (Cri) 215 : 1963 Ker LT 1038.
37. *Hanmantha Rao* v. *Ramachandrayya*, AIR 1944 Mad 376; *Kasi Ammal* v. *Ramasami Reddiar*, AIR 1949 Mad 881; *Doutre* v. *Doutre*, AIR 1939 All 523, *King* v. *King*, AIR 1945 All 190; *Sane* v. *D.S. Sonavene and Co.*, AIR 1946 Bom 110, *Shantabai* v. *Dalchand*, ILR (1954) Nag 204 : AIR 1953 Nag 374.

The principle of English Common Law according to which neither a husband nor a wife is permitted to give evidence of non-access, after marriage to bastardise a child born in lawful wedlock, does not apply to legitimacy proceedings in India.[38]

According to the Bombay High Court a wife can be examined to prove non-access of her husband during her married life, without independent evidence being first offered to prove the illegitimacy of the children[39]. The Bombay High Court has also held that the rule of English law laid down in *Russell* v. *Russell*[40] that the declaration of a father or mother cannot be admitted to bastardise the issue born after the marriage is not applicable in India[41]. The Madras High Court has held that the wife is a competent witness to prove access or non-access by her husband[42]. The Allahabad High Court has held that the English rule that such evidence is inadmissible because it is evidence which tends to bastardise the child is not applicable to the Courts in India; there is nothing in the Indian Evidence Act which renders this evidence inadmissible. In a suit for divorce by the husband on the ground of the wife's adultery, alleged to be established by the fact of her having given birth to an illegitimate child, evidence by the husband of non-access to the wife at any time when the child could have been begotten is admissible; and an admission by the wife that the child is illegitimate is also admissible in evidence[43]. The Calcutta High Court has similarly held that there is nothing in this section to show that the husband or wife is precluded from giving evidence in order to show thatt they had no access to each other at any time when the child could have been begotten.[44]

The rule laid down in *Russell* v. *Russell*[45] has now been abrogated by the Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 & 14 Geo VI, c. 100), S. 7, which says that notwithstanding any rule of law the evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did not take place between them during any period.

8. PROOF

It was held that an extract of the birth register containing the name of the mother and the information given by her about the father would not be binding on the presumed father.[46] An entry in the birth register containing the name of the mother only, does not warrant the inference that the child was not legitimate.[47]

9. MAINTENANCE

The mother can claim maintenance for her child from her paramour if he could prove that she was exclusively under his control and that her husband had no access to her even if the marriage was subsisting.[48]

Despite the subsistence of marriage, child could be proved to have been born to a paramour. Otherwise the husband would be compelled to maintain the child as legitimacy has to be presumed.[49] It is not quite impossible for children born to a married woman to be legally held to be the progeny of the paramour. If that is proved the paramour has to pay the maintenance to the child.[50]

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38. *Venkateswarlu* v. *Venkatanarayana*, AIR 1954 SC 176 : 1954 SCR 424.
39. *Rozario* v. *Ingles*, ILR (1893) 18 Bom 468.
40. (1924) AC 687.
41. *Bai Kamala* v. *Babubhai*, (1925) 28 Bom LR 607 : AIR 926 Bom 348.
42. *Mayandi Asari* v. *Sami Asari*, ILR (1931) 55 Mad 292 : AIR 1932 Mad 44.
43. *Doutre* v. *Doutre*, ILR (1939) All 573 : AIR 1939 Mad 522; *Hargovind Soni* v. *Ram Dulari*, AIR 1986 MP 57, proof of adultery and presumption of legitimacy.
44. *Shyam Singh* v. *Saibalni Ghosh*, ILR (1947) 1 Cal 9 : AIR 1947 Cal 183.
45. 1924 AC 687.
46. *Mahadevrao* v. *Yasode Devi*, 1961 Mad 141.
47. *Manicka Mudaliar* v. *Ammakunnu*, AIR 1942 Mad 129.
48. *Chathu-kutty* v. *Janaki Amma*, 1972 Cr LJ 696 (Ker); **following** *Sreenivasan* v. *Kurubai Ammal*, AIR 1957 Mad 160; *Kalla Maistry* v. *Kanniammal*, AIR 1963 Mad 210; *Munuswamy* v. *Usha Rani*, 1975 Mad LW (Cri) 240 (Mad); *Raghavan* v. *Gouri-kutty Amma*, AIR 1960 Ker 119.
49. *Sivadasan* v. *Govindan*, 1985 Cr LJ 1553 (Ker).
50. *Narayana Menon* v. *Bharathi Amma*, 1964 MLJ (Cri) 390 : 1962 Ker LT 138.

Where the wife and husband were living together for 5 years and the husband drove her out doubting her chastity on the basis of anonymous letters, the wife and children were held entitled to maintenance and the presumption regarding the children's legitimacy arises under Section 112.[51] In a case a daughter, born during the pendency of petition for maintenance by the wife, claimed maintenance from her father but he denied paternity. Evidence showed that the wife was pregnant when she left the husband's house and the husband failed to prove her having any illicit relation with anyone. He had admitted her paternity in an earlier petition. Besides, there was other evidence supporting her claim. It was held that she was entitled to maintenance.[52]

10. BLOOD TESTS; DNA FINGER PRINTING

It is now usual whenever a question of paternity of a child arises, to direct the use of blood tests. Such evidence is of great value in issues concerning the paternity of a child. Blood groups according to scientist have a causative relation between the trait of the progenitor and that of the progeny. In other words the blood composition of a child may be of some evidence as to the childs' paternity. A detailed study of the scientific process is given in WIGMORE'S EVIDENCE (III Edition) at page 168. In *B.* v. *Attorney General*[53], ORMROD J. referred to the blood groups in the blood analysis and found that the blood group of the person alleged to be the father and of the child were entirely inconsistent and that it was for the expert who did the tests to say positively that the child was not the son of the alleged father. COMROD J. observed that such a test saves the court from having to rely on the presumption regarding paternity. In *F* v. *F*[54] in a divorce proceeding by the husband on the ground of the wife's adultery the question of paternity of a child was in issue. On the medical evidence based on the test of blood samples, it was held that the child was not the child of the husband and hence the wife had committed adultery.

In, In re : *Le*[55] it was held that the court had power to order an infant to be subjected to a blood group test notwithstanding that the guardian *ad litem* did not consent. In *S* v. *S*[56] the House of Lords held that the refusal of the guardian to have the child's blood tested was improper for it was in the interests of the child and also of justice that the court should have before it the best evidence available including modern scientific evidence provided by blood which might resolve the issue conclusively.

At present in England the aspect of evidence is controlled by the Family Law Reforms Act, 1969 which provides for obtaining of blood test evidence in any case where paternity is in issue.

The blood group tests are useful only to exclude the possibility that a man is the father. Sophisticated blood tests are now being adopted which are so advanced as capable of providing a very high or low probability of paternity. Tests made of the DNA (Deoxy Ribo Nucleic Acid in blood or other bodily substances or tissues) can provide what can practically be regarded as certainity in paternity cases. The technique is known as 'finger printing'. The essential difference between conventional blood tests and DNA 'finger printing' lies in the extremely polarised possibilities. If a man is not the father of the child, the odds of failing to get an exclusion in such a case are roughly 30,000 millions to one. If the man matifies the child in blood group, even then odds that he is not the father are of a similar magnitude. The probabilities are of such an astronismical scale that they reduce the results to absolute certainity. The process however is said to be very labour intensive and needs meticulous expertise and much experience and it also takes several days to complete (See - DNA Finger Printing and the Law by ROBIN M WHITE and JEREMY J.D. Greenwod - 51 (1988) Modern Law Review P. 145.

11. BLOOD GROUP TESTS AND DNA FINGER PRINTING CANNOT BE USED

It is however doubtful whether blood group tests or DNA 'finger printing' can be made use of in cases governed by Section 112. Section 112 provides "the fact that any person was born during the continuance of a valid marriage between his mother and any man during the substance of the marriage or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to

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51. *Chakor* v. *Prerna*, (1985) 1 Hindu LR 485 (Bom).
52. *Alpana* v. *Mohanlal*, 1993 Cr LJ 1008 (HP).
53. (1966) 2 All ER 145.
54. (1968) 1 All ER 242.
55. (1968) 1 All ER 20; *B.R.B.* v. *J.B.*, (1968) 2 All ER 1023.
56. 1972 AC 24.

each other when he could have been begotten" but where consumation of marriage and access between the husband and wife were admitted, no adverse inference could drawn against the wife for refusing to submit to DNA Test though due to her personal problem.[57]

Considering the imperfection of science on this subject, a Division Bench of Calcutta High Court refused to allow blood test to determine paternity.[58] Thus the only way the conclusive proof can be rebutted is by proving non-access. No other method of rebuttal is permissible under the Act. It was observed: "The conclusive presumption of law under Section 112 can be displaced on strong, distinct satisfactory, and conclusive evidence of non-access between the parties at the time when the child would have been begotten. The court *cannot base a conclusion on evidence different from that required by law* or decide on balance of probabilities which will be the result if blood test evidence is accepted. Further blood test is a constraint on personal liberty of a person and therefore cannot be carried out without his consent, though there is no illegality in refusing a blood test and at the most, adverse inference can be drawn in case of refusal. It therefore, follows that blood tests or DNA 'finger printing' test may not be admissible in cases under Section 112 as one more method of rebutting the conclusive proof cannot be introduced into Section 112.[59]

In view of the provision of Section 112, there is no scope of permitting the husband to avail of the blood test for dislodging the presumption of legitimacy and paternity arising out of this section.[60] Blood group test to determine the paternity of a child born during wedlock is not permissible.[61]

It is therefore, suggested that a proviso on the following lines may be added to Section 112.

"Provided that this will not preclude evidence of blood samples or bodily specimens to be taken to show that a person is or is not excluded from being the father of another person".

It is also necessary to confer powers on the courts to have such tests conducted. It is to be noted that Art 20(3) of the Constitution does not come into play except in criminal cases.

The Supreme Court laid down the following as to the permissibility of the blood test to prove the child's paternity :

(1) That the Courts in India cannot order blood test as a matter of course.

(2) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong *prima facie* case in that the husband must establish non-access in order to dispel the presumption arising under Section 112.

(4) The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis.[62]

The son also cannot be forced to undergo medical test to prove his paternity if he was born during lawful wedlock of his father and mother, more so when his mother was not alive.[63]

Proof of cession of territory.

S. 113. A notification in the Official Gazette that any portion of British territory has before the commencement of Part III of the Government of India Act, 1935 (26 Geo. 5 Ch. 2), been ceded to any Native State, Prince or Ruler, shall be conclusive proof

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57. *Devesh Pratap Singh* v. *Sunita Singh*, AIR 1999 MP 174 (para 14).
58. *Leelabati* v. *Kashinath*, 73 CWN 19.
59. *Vasu* v. *Santha*, 1975 Ker LT 533. **See also** *Ningamma* v. *Chikkaiah*, AIR 2000 Kant 50 (paras 21 and 24); father denying paternity, can't be compelled to DNA Test, *Syed Mohd. Ghouse* v. *Noorunnisa Begum*, 2001 Cr LJ 2028 (paras 8 and 9) (AP); *Kamti Devi* v. *Poshi Ram*, AIR 2001 SC 2226 (paras 4, 10 and 11).
60. *Gautam Kundu* v. *Shaswati Kundu*, Criminal Revision No. 800/92 (Cal).
61. *Tushar Roy* v. *Sukla Roy*, 1993 Cr LJ 1659 (Cal), **distinguishing** *Bharti Raj* v. *Sumesh Sachdeo*, AIR 1986 All 259 and *Swati Lodha* v. *State of Rajasthan*, 1991 Cr LJ 939.
62. *Goutam Kundu* v. *State of W.B.*, 1993 Cr LJ 3233 (para 26) (SC) : AIR 1993 SC 2295, **relied on in** *Sajeera* v. *P K Salim*, 2000 Cr LJ 1208 (para 15) (Ker).
63. *G.M. Sudarshan Reddy* v. *Master Abhinay*, 2000 AIHC 4981 (paras 8 and 11) (Kant).

that a valid cession of such territory took place at the date mentioned in such notification.

COMMENTS

This section was enacted to exclude inquiry by Courts of Justice into the validity of the acts of the Government so far as cession of territory to any Indian State was concerned. But the section is a dead-letter because it was declared to be *ultra vires* by the Privy Council in a case in which it was decided that the Governor-General-in-Council being precluded by 24 & 25 Vic. c. 67, S. 22, from legislating directly as to sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subject, could not, by any legislative Act, purporting to make a notification in the Government Gazette conclusive evidence of a cession of territory, exclude inquiry as to the nature and lawfulness of that cession[64]. The section now is obsolete.[65]

Presumption as to abetment of suicide by a married woman.

S. 113-A. When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

***Explanation.*—For the purposes of this section, 'cruelty' shall have the same meaning as in Section 498A of the Indian Penal Code (45 of 1860).**

COMMENTS

This section was inserted by the Criminal Law (2nd Amendment Act 46 of 83) with effect from 26-12-1983. This section states that when a married woman, if shown to have committed suicide within a period of seven years from the date of her marriage and her husband or relative of her husband had subjected her to cruelty, then the presumption arises that such suicide had been abetted by her husband or by such relative of her husband. It does not apply to other cases of abetment to commit suicide.[66] The explanation makes it clear that the expression cruelty shall have the same meaning as given in Section 498-A of the Indian Penal Code.

The Supreme Court observed: "The greed for dowry, and indeed the dowry system as an institution, calls for the severest condemnation. It is evident that legislative measures such as the Dowry Prohibition Act have not met with the success for which they were designed.

Repeated instances are being highlighted in various newspapers in the country. There are also social organizations focussing the attention of public on this issue. To ventilate the grievances about atrocities on newly married brides due to dowry or other such similar demands from their husbands or in-laws, women social workers had taken up the cause in a movement in the country and due to the effective persuasion by such social compulsions, S. 498-A, I.P.C. and S. 113-A, Evidence Act, have been introduced on 25th Dec., 1983. The aforesaid provisions are obviously intended to cure the existing evil in the society. The evil at many times resulted in atrocities on married women and various acts of cruelty were being practised. No doubt, there were some provisions available in the Penal Code such as S. 306, I.P.C., but the instances were such which could not come to light due to their occurrence in the house of their in-laws. Naturally, the victims could not take recourse to public authorities to ventilate their grievances. After all, the social conditions, family traditions, etc., prevented the brides to take any recourse to public authorities. They could not even convey the atrocities to their parents. It is therefore to

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64. *Damodar Gordhan* v. *Deoram Kanji*, (1875-1876) 3 IA 102 : ILR (1876) 1 Bom 367.
65. *Maganbhai* v. *Union of India*, AIR 1969 SC 783, 794. One of the effects of cession is that the inhabitants of the territory can enforce only such rights as the new sovereign recognised; *Govindrao* v. *State of M.P.*, AIR 1982 SC 1201.
66. *Vedprakash* v. *State of M.P.*, 1995 Cr LJ 893 (para 19) (MP).

curb this social evil which resulted in atrocities on women that the aforesaid provisions are introduced."[67]

This section applies even if the suicide took place prior to the insertion of this section[68] as this section is procedural in nature, it is retrospective in operation.[69] In the case of offence of abetment of suicide by a married women, past events of cruelty taking place prior to the amendment can be considered; it does not amount to giving retrospective operation to the amended provision u/s. 113-A.[70]

Where the wife died within three months of marriage and the dead body was removed to another place and cremated without intimation to her parents and there was presence of poison on the mattress on which she was taken to another place, it was held that bail should be refused to the husband and others who were suspected at the stage anterior to the filing of the challan.[71]

If it is not established that the deceased had been subjected to cruelty Section 113-A is not applicable.[72] In a case of harassment of wife for outstanding items of dowry, the demand was met and the matter was settled, one and a half months after which she committed suicide but there was no evidence of further demand or torture. It was held that the probability of existence of nexus between cruelty and suicide suffered a set back and it was unsafe and unjust to raise the presumption under this section.[73] A domestic quarrel took place between the deceased and her sister-in-laws over some milk and thereafter, they abused and dragged her to the courtyard. This was held to be not amounting to cruelty within the meaning of S. 498A, I.P.C. and the presumption under this section could not be raised.[74] The deceased did not complain about harassment and cruelty to her mother who was nearest to her and the accused put forth the explanation that the deceased was short tempered and was not happy due to his poor financial condition which was held to be plausible though not proved and was accepted.[75]

It must be proved that the wife was subjected to cruelty as defined u/s. 498-A, Indian Penal Code. Where the husband came late in the night after taking liquor daily inspite of the protests from the wife, it was held that that fact alone cannot be taken as cruelty, and that the essential ingredients of cruelty are not fulfilled in the case for raising the presumption.[76] But, drinking and coming late coupled with the fact of beating and demanding dowry amounts to cruelty and a presumption can be drawn under Section 113-A.[77] Where the death of the deceased was due to burns and she gave a dying declaration suggesting that her husband and mother-in-law consistently harassed, tortured and beat her for bringing inadequate dowry and it was corroborated by other relations of the deceased and when the death took place within seven years of the marriage, it was held a presumption under Section 113-A arises as to abetment.[78]

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67. *Bhagawant Singh* v. *Commissioner of Police,* AIR 1983 SC 826.
68. *Romesh Kumar* v. *State of Punjab,* 1986 Cr LJ 2087 (P&H).
69. *Arvind Kumar* v. *State of M.P.,* 2001 Cr LJ 2317 (paras 7 and 8) (MP).
70. *Vasanta* v. *State of Maharashtra,* 1987 Cr LJ 901 (Bom); **following** *Sajjan Singh* v. *State of Punjab,* AIR 1964 SC 464; (under the Prevention of Corruption Act).
71. *Arjun Singh* v. *State of Rajasthan,* 1987 Cr LJ 610 (Raj).
72. *Shyama Devi* v. *State of West Bengal,* 1987 Cr LJ 1163 (Cal)(DB); *Ashok Kumar* v. *State of Punjab,* 1987 Cr LJ 1412 (P&H); *Basappa Dattu Hegade* v. *State of Karnataka,* 1994 Cr LJ 1602 (Kant); *State of M.P.* v. *Geetabai* , 1998 Cr LJ 2724 (para 20) (MP). Wife committing suicide with 5 years from the date of marriage, no proof of harassment by husband or in-laws, no presumption, *Dhobilal* v. *State of M.P.,* 1998 Cr LJ 4108 (para 12) (MP). Husband beating wife in the house of third person, more than seven years from marriage, wife committing suicide after 3-4 days, no presumption available, *Chhagan* v. *State of M.P.,* 1998 Cr LJ 2179, **relying on** *State of Punjab* v. *Iqbal Singh,* AIR 1991 SC 1532 : 1991 Cr LJ 1897; *Babaji Charan Barik* v. *State,* 1994 Cr LJ 1684 (paras 8 and 9) (Ori); *Nandlal* v. *State of M.P.,* 2000 Cr LJ 794 (paras 15-19) (MP).
73. *Samir Samanta* v. *State,* 1993 Cr LJ 134 (paras 12 and 14) (Cal). The Court **referred** to *Sharad Birdichand Sarda* v. *State of Maharashtra,* AIR 1984 SC 1622 : 1984 Cr LJ 1738 and *Niharbala* v. *State,* 1988 (2) Cal HN 398 : 1989 Cr LJ NOC 38 (Cal). **Also see** *State of Haryana* v. *Suresh Kumar,* 1993 Cr LJ 1400 (P&H).
74. *Laxmi Bai* v. *State of M.P.,* 2000 Cr LJ 3597 (para 4) (MP).
75. *Sarwan Kumar* v. *State of H.P.,* 2000 Cr LJ 4002 (paras 28, 30, 35, 38, 40 and 41) (HP). Evidence of harassment or cruelty not sufficient to hold that the deceased was driven to commit suicide because of it, *State of Maharashtra* v. *Ashok Chotelal Shukla,* AIR 1997 SC 3111 : 1997 Cr LJ 3761.
76. *Jagadish Chander* v. *State of Haryana,* 1988 Cr LJ 1048 (P&H).
77. *Bikshapathi* v. *A.P. State,* 1989 Cr LJ 1186 (AP).
78. (1985) 12 Cr LT 310 (P&H); (1985) 12 Cr LT 156 (P&H); *Kodam Gangaram* v. *State of A.P.,* 1999 Cr LJ 2181 (para 8) (AP); *P.P. Rao* v. *State of U.P.,* 1994 Cr LJ 2632 (para 17) (AP); *Sanagala Yagna Sree* v. *State of A.P.,* 1996 Cr LJ 1249 (paras 5-7) (AP), **following** *State of W.B.* v. *Orilal Jaiswal,* AIR 1994 SC 1418 : 1994 Cr LJ 2104. The Court referred to *C. Veerudu* v. *State of A.P.,* (1988) 2 Andh LT 171 : 1989 Cr LJ NOC 52 and *Munnu Raja* v. *State of Madhya Pradesh,* AIR 1976 SC 2199 : 1976 Cr LJ 1718; *Saroj Satija* v. *State,* 1996 AIHC 37 (para 11) (Del);

The requirement of proof beyond reasonable doubt is not altered by the introduction of Section 498-A, I.P.C. or Section 113-A of this Act.[79]

Presumption under this section is not mandatory.[80]

1. "HAVING REGARD TO ALL THE OTHER CIRCUMSTANCES OF THE CASE"

These words in this section give wide powers to the Court to appraise evidence and come to conclusion whether there was some extraneous cause for a woman to commit suicide. These in-built safeguards do not violate the right to life and fair procedure provided under Arts. 20(3) and 21 of the Constitution.[81] The 'all the other circumstances of the case' requires that cause and effect relationship between cruelty and suicide has to be established before drawing the presumption.[82]

2. APPLICABILITY OF S. 113-A TO HUSBAND

The provisions of the presumption under Section 113-A are not applicable against the wife due to whose cruelty the husband commits suicide. In the instant case the husband committed suicide due to her alleged characterless manner.[83]

Presumption as to dowry death.

S. 113-B. When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

***Explanation.*—For the purpose of this section, "dowry death" shall have the same meaning as in S. 304B of Indian Penal Code (45 of 1860).**

COMMENTS

This section was inserted by the Dowry Prohibition (Amendment Act 43 of 1986). This section provides that when a married woman had been subjected to cruelty or harassment for or in connection with any demand for dowry before her death, the court shall presume that such person had caused the dowry death. The Explanation says, that the expression 'Dowry Death' shall have the same meaning as it has in Section 304-B of the Indian Penal Code.

The applicability of this section is limited to cases 'when the question is whether a person has committed dowry death of a woman' and that too requires the proof of two further facts : firstly, it should be shown that soon before her death such a woman was subjected by such person to 'cruelty' or 'harassment' and secondly, that the cruelty by such person was 'for or in connection with any demand for dowry'.[84] These provisions are not violative of Arts. 14, 20(3) and 21 of the Constitution.[85]

Where the death of the married woman occurred on account of asphyxia due to hanging within three years of her marriage, and is otherwise than under normal circumstances, it would still be a death coming

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Arjun Kushwah v. *State of M.P.*, 1999 Cr LJ 2538 (paras 11, 14 and 15) (MP); *Anoop Kumar* v. *State of M.P.*, 1999 Cr LJ 2938 (paras 25-31 and 33) (MP); *Sayeed Miya* v. *State of M.P.*, 1999 Cr LJ 4398 (paras 8-10) (MP); *Pawan Kumar* v. *State of Haryana*, 2001 Cr LJ 1679 (paras 8 and 9) (SC) : AIR 2001 SC 1324; *Arvind Kumar* v. *State of M.P.*, 2001 Cr LJ 2317 (paras 13, 19 and 20) (MP); *Ramphal* v. *State of Rajasthan*, 2001 Cr LJ NOC 54 (Raj) : (2001) 1 Raj Cri C 55; *Vanamala Amaranadh* v. *State of A.P.*, 2001 Cr LJ 4498 (para 12) (AP).

79. *State of W.B.* v. *Orital Jaiswal*, 1994 Cr LJ 2104 (para 14) : AIR 1994 SC 1418. Proof of demand of dowry and maltreatment not sufficient to raise presumption. *Prem Das* v. *State of H.P.*, 1996 Cr LJ 951 (paras 46, 47 and 49) (HP). No evidence showing harassment within meaning of Expl. (b) of S. 498-A, I.P.C., no presumption. *State of H.P.* v. *Nikku Ram*, AIR 1996 SC 67 (paras 15-17).
80. *Nilakantha Pati* v. *State of Orissa*, 1995 Cr LJ 2472 (para 29) (Ori).
81. *Krishan Lal* v. *Union of India (FB)*, 1994 Cr LJ 3472 (paras 16 and 17) (P&H).
82. *Ramesh Kumar* v. *State of Chhattisgarh*, 2001 Cr LJ 4724 (para 12) (SC).
83. *Alka Grewal* v. *State of M.P.*, 2000 Cr LJ 672 (para 4) (MP).
84. *Bhoora Singh* v. *State*, 1993 Cr LJ 2636 (para 14) (All).
85. *Krishan Lal* v. *Union of India*, 1994 Cr LJ 3472 (para 23) (P&H).

within the scope of 304-B, when cruelty or harassment by her husband or any relative of her husband in connection with any demand for dowry, is proved.[86]

In a case of death of a newly wedded girl of burn injuries, the father of the deceased stated in the F.I.R. itself that the deceased committed suicide because of harrasment and torture by her in-laws for bringing insufficient dowry and that the deceased gave her information to him, it was held that the deceased died commiting suicide at the instigation of her husband and in-laws and the presumption under Section 113-A is also available. It was also held that the provision Section 113-A is proceedural and therefore has retrospective application.[87]

In the case of dowry death, it was held that the actual participation of husband or his relative in the commission of the offence is not required to be proved.[88]

Where in a case of unnatural death of the wife, the evidence showed that there was dowry demand and cruelty on the part of the husband, presumption under this section was available.[89] The wife was sent back to her parent's home due to dispute regarding dowry and was brought back after the '*panchayat*' resolved the dispute. Her death occurred 10-15 days after the '*panchayat*' during the period of which there was no evidence of cruelty or harassment with demand of dowry. Presumption of dowry death could not be raised.[90] The accused husband demanded some amount from the father of the deceased wife six months after the marriage which was paid to him. He again demanded money after about two years from the first demand and the wife died after two years from the second demand. It was held that presumption under Section 113-B could not be raised.[91] Where in a case of dowry death the prosecution witness, the husband, stated that her death was due to diarrhoea and he was neither declared hostile nor cross-examined on that issue, the presumption under Section 113-B could not be raised.[92]

1. "SOON BEFORE"

"Soon before" is very relevant and it has to be shown that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. It is a relative term and it would depend upon circumstances of each case and no strait jacket formula can be laid down as to what would constitute a period soon before the occurrence. It would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question.[93] In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct which may be spread over a

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86. *Public Prosecutor, A.P. High Court* v. *T. Basava Punnaiah*, 1989 Cr LJ 2330 (AP).

87. *Gurbachan Singh* v. *Satpal Singh*, AIR 1990 SC 209. **Also see** *Prem Singh* v. *State of Haryana*, AIR 1998 SC 2628; *Pawan Kumar* v. *State of Haryana*, AIR 1998 SC 958 : 1998 Cr LJ 1144; *Venugopal* v. *State of Karnataka*, (1999) 1 SCC 216 : 1998 SCC (Cri) 1592; *Ram Kumar* v. *State of Haryana*, (1998) 9 SCC 1 : 1998 SCC (Cri) 833. Death of young wife, physical and mental torture and harassment by in-laws on account of insufficient dowry and also squint in her eyes, presumption as to dowry death, *Baldev Krishan* v. *State of Punjab*, AIR 1997 SC 1666 : 1997 Cr LJ 1162; *G.M. Natarajan* v. *State*, 1995 Cr LJ 2728 (paras 10 and 11) (Mad). Wife committing suicide within two years of her marriage, certain injuries found on her right thigh demand of dowry, presumption, *Ajay Singh* v. *State*, 1998 Cr LJ 3178 (J&K); *Jaswant Singh* v. *State of Haryana*, 1994 Cr LJ NOC 176 (P&H); harassment and cruelty with dowry demand on ground of being barren, *P.P. Rao* v. *State of U.P.*, 1994 Cr LJ 2632 (AP); *State of Kerala* v. *Rajayyan*, 1995 Cr LJ 989 (paras 7, 20 and 22) (Ker); horrendous bed room murder of young married girl, strong evidence demand for dowry, presumption, *State of U.P.* v. *Ramesh Prasad Misra*, AIR 1996 SC 2766 (para 13); *B.P. Chaurasia* v. *State of Bihar*, 2001 Cr LJ 3541 (paras 15, 16 and 17) (Pat); *Mahesh Kumar* v. *State*, 2001 Cr LJ 4417 (paras 37 and 38) (All); *Jageshwar Mahto* v. *State of Bihar*, 2001 Cr LJ 4589 (paras 12A and 14) (Jhar).

88. *Ramarao* v. *State of AP*, 1990 Cr LJ.

89. *Hem Chand* v. *State of Haryana*, AIR 1995 SC 120 (para 6).

90. *Sham Lal* v. *State of Haryana*, AIR 1997 SC 1873 : 1997 Cr LJ 1927 (paras 12 and 13). Death of wife within 7 years of marriage, no evidence of demand of dowry or cruelty, no presumption, *Hajarimal* v. *State of Rajasthan*, 1998 Cr LJ 4253, at pp. 4258-4259 (Raj). No unimpeachable evidence of dowry harassment, no presumption arises, *Fatima Kom Mastansab Nadaf* v. *State of Karnataka*, 1999 Cr LJ 1175, at p. 1176 (Kant); *Devinder* v. *State of Haryana*, 1994 Cr LJ 1679 (P&H); *Ratanlal* v. *State of M.P.*, 1993 Cr LJ 3723 (paras 17-19) (MP); *Bhakhar Ram* v. *State of Rajasthan*, 1995 Cr LJ 1345 (paras 21 to 25) (Raj); *Ranganathan* v. *Veerapandian*, 1996 Cr LJ 540 (paras 18 and 19) (Mad).

91. *Rajinder* v. *State of Haryana*, 2000 Cr LJ 2492 (paras 18 and 20) (P&H).

92. *Gati Behera* v. *State of Orissa*, 1997 Cr LJ 4331 (Ori). **See also** *Sant Gopal* v. *State of U.P.*, 1995 Cr LJ 312 (para 62) (All); *Jai Ram* v. *State of Rajasthan*, 1995 Cr LJ 1020 (paras 16-19) (Raj).

93. *Keshab Chandra Panda* v. *State*, 1995 Cr LJ 174 (para 6) (Ori).

period of time. If the cruelty or harassment or demand for dowry in shown to have persisted, it shall be deemed to be "soon before death," if any other intervening circumstance showing the non-existence of such treatment is not on record, before the alleged such treatment and the date of death. It does not mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which under the circumstances, be treated as having become stale enough. In the instant case the deceased was subjected to continuous harassment with demand of dowry which continued till she met her parents, two days after which she died. The existence of harassment would be deemed to be "soon before death".[94] In absence of material to infer that the deceased was subjected to cruelty soon before her death and there being a positive evidence on record that the probable cause of the suicide of the deceased was quarrel with some persons, legal presumption under this section could not be drawn against the accused.[95]

Court may presume existence of certain facts.

S. 114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

ILLUSTRATIONS

The Court may presume—

(a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars;

(c) that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;

(d) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence;

(e) that judicial and official acts have been regularly performed;

(f) that the common course of business has been followed in particular cases;

(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

(h) that if a man refuses to answer a question: which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

(i) that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:—

as to *illustration* (a)—a shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business :

as to *illustration* (b)—*A*, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. *B*, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of *A* and himself:

as to *illustration* (b)—a crime is committed by several persons. *A*, *B* and *C*, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating *D*, and the accounts corroborate each other in such a manner as to render previous concert highly improbable;

as to *illustration* (c)—*A*, the drawer of a bill of exchange, was a man of business. *B*, the acceptor, was young and ignorant person, completely under *A*'s influence;

as to *illustration* (d)—it is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course;

as to *illustration* (e)—a judicial act, the regularity of which is in question, was performed under exceptional circumstances;

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94. *Kanj Raj* v. *State of Punjab*, 2000 Cr LJ 2993 (paras 14-16 and 19) (SC) : AIR 2000 SC 2324.

95. *Mangal Ram* v. *State of M.P.*, 1999 Cr LJ 4342 (para 24) (MP). **See also** *Budhi Singh* v. *State of H.P.*, 2000 Cr LJ 4879 (paras 26 and 27) (HP).

as to *illustration* (f)—the question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbance;

as to *illustration* (g)—a man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family;

as to *illustration* (h)—a man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked;

as to *illustration* (i)—a bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

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COMMENTS

1. PRINCIPLE AND OBJECT

Sections 104 to 113 direct on whom burden of proof will lie. The court is bound in every instance to presume against that party on whom the burden of proof is directed to lie. No option is given to the court as to whether it will presume the fact or not. But there are various presumptions where room is left for the court to exercise its powers of inference; the court can throw the burden of proof on whichever side it chooses. This sections deals with cases of that description. It declares that the court may, in all cases whatever, draw from the facts before it, whatever inferences it thinks just. The terms of the section are such as to reduce to their proper position of mere maxims, which are to be applied to facts by the courts in their discretion, a large number of presumptions to which English law gives, to a greater or less extent, an artificial value. Nine of the most important of them are given by way of illustrations.[1] No doubt the illustration is only an example or at the utmost it is a guideline. Nonetheless, it has a logical basis. Section 114 helps the Court in deciding on whom is the burden of proof in certain situations. A presumption on facts is to be raised to assist the Court for determining as to the burden of proof in a set of circumstances. As the Court can draw certain inferences either on the basis of cumulative conclusion of circumstances or on a single circumstance, it would be in a position to fix up the responsibility on one or the other party in the case with the burden to reverse such inferred presumptions.[2] Under this section the Court can draw only inferences. It does not authorise the Court to legislate as to the manner in which human beings should conduct themselves in a given set of circumstances.[3]

The effect of this provision is to make it perfectly clear that Courts of Justice are to use their own common sense and experience in judging the effect of particular facts, and that they are to be subjected to no particular rules whatever on the subject. The illustrations given are, for the most part, cases of what in English law are called presumptions of law: artificial rules as to the effect of evidence by which the court is bound to guide its decision, subject, however, to certain limitations which it is difficult either to understand or to apply, but which will be swept away by the Section 114 in question.[4]

A presumption is not evidence or proof. It only shows on whom the burden of proof lies.[5] In effect, presumptions of law or fact may shift the burden of proof, and they may be rebutted not only by evidence but also by presumption of law or fact.[6]

A man is presumed to know and intend the natural consequences of his acts.[7]

Where the special Act prescribes a rule of evidence contrary to this section, and the burden of proof is placed by a particular statute, Section 114 recedes and has no application in such a case and it is not *ultra vires*.[8]

Where the facts are once ascertained, presumptions arising from conduct cannot establish a right which the facts themselves disprove.[9]

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1. STEPHEN'S INTRODUCTION TO EVIDENCE ACT.
2. *Net Raj Singh* v. *State of M.P.*, (1997) 3 SCC 525 : 1997 SCC (Cri) 506.
3. *State of Rajasthan* v. *Bhera*, 1997 Cr LJ 1237 (Raj).
4. *Gazette of India*, March 30, 1872 Supplement pp. 234-235.
5. *Sodhi Transport Co.* v. *U.P.*, AIR 1986 SC 1099.
6. *Kundanlal* v. *Custodian, Evacuee Property, Bombay*, AIR 1961 SC 1316.
7. *Hayath Usta* v. *State*, AIR 1967 Goa 11; *Kuzhuvaramadavil Madhvan* v. *State*, 1994 Cr LJ 450 (para 9) (Ker).
8. *Mangilal* v. *State of Maharashtra*, AIR 1970 SC 1829; *Kanyaba Parameshwari* v. *Union of India*, AIR 1960 Ori 103.

Section 114 is a permissive and not a mandatory section. Court may refuse to raise a presumption in a particular case although such a presumption might have been properly raised in other cases.[10] This section authorises the court to make certain presumptions of fact. They are all presumptions which may naturally arise; but the Lagislature, by the use of the word 'may' instead of 'shall' both in the body of the section and in the illustrations, shows that the court is not compelled to raise them but is to consider whether in all the circumstances of the particular case they should be raised.[11]

Persons, not entitled to take delivery of goods mentioned in Railway luggage ticket, took delivery of goods. The railway clerk was under a misconception that those persons were entitled to take the goods and handed over the goods. Persons found in possession of such goods soon after delivery can be presumed to be in possession of stolen goods.[12]

The section does not lay down hard and fast rule with regard to the circumstances in which any fact or facts may be presumed to exist nor does it contain an exhaustive list of such facts, though it gives a few illustrations from various walks of life.[13]

Wherever the informative facts proved overbalance the probability that the inference would be a sound and just one, the court will exercise its sound discretion in electing not to rest upon the presumption.[14] Section 114 is a general section dealing with presumptions of facts which are inferences of certain fact patterns drawn from the experience and observation of the common course of nature, the constitution of the human mind, the springs of human action, the usages and habits of society and ordinary course of human affairs.[15] A presumption can be drawn only from the facts and not from other presumptions by a process of probable and logical reasoning.[16] In reaching the conclusion the Court can use the process of inferences to be drawn from facts produced or proved. Such inferences are akin to presumptions in law. Law gives absolute discretion to the Court to presume the existence of any fact which it thinks likely to have happened.[17] For the purpose of reaching one conclusion, the Court can rely on a factual presumption. Unless the presumption is disproved or dispelled or rebutted, the Court can treat the presumption as tantamounting to proof. However, it is unsafe to use that presumption to draw yet another discretionary presumption unless there is statutory compulsion.[18]

Presumptions may be either of law or fact, and when of law may be either conclusive (presumptions *juris et de jure*) or rebuttable (presumptions *juris*), but when of fact (*presumptiones hominis*) are always rebuttable. Mixed presumptions are those which are partly of law and partly of fact.[19]

The section provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.[20]

The chief function of rebuttable presumptions of law is to determine on whom the burden of proof rests.[21]

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9. *Kishorilal* v. *Chattibai*, AIR 1959 SC 504; Gangadhar v. Manjulal, 1960 Punj 42.
10. *S. Mammad* v. *K. Mammad*, AIR 1957 Ker 63.
11. *Muthukumaraswami Pillai* v. *King-Emperor*, ILR (1912) 35 Mad 397 (FB); *Sadashib Das* v. *State*, (1957) Cut 680.
12. *Purshottam Mahadev* v. *State*, AIR 1963 Bom 74.
13. *Mahabir Singh* v. *Anant Ram*, AIR 1966 All 214.
14. NORTON, 299.
15. *Gitika Bagchi* v. *Subhabrota Bagchi*, AIR 1996 Cal 246 (paras 38 and 39), **relying on** *Syad Akbar* v. *State of Karnataka*, AIR 1979 SC 1848 : (1980) 1 SCC 30. **See also** *M. Narsinga Rao* v. *State of A.P.*, 2001 Cr LJ 515 (paras 16 and 17) (SC) : AIR 2001 SC 318.
16. *Suresh Budharmal Kalani* v. *State of Maharashtra*, AIR 1998 SC 3258 (para 5) : 1998 Cr LJ 4592.
17. *M Narsinga Rao* v. *State of A.P.*, 2001 Cr LJ 515 (paras 16 and 17) (SC) : AIR 2001 SC 318.
18. *M. Narsinga Rao* v. *State of A.P.*, 2001 Cr LJ 515 (para 18) (SC) : AIR 2001 SC 318, **following** *Suresh Budharmal Kalani* v. *State of Maharashtra*, AIR 1998 SC 3258 : 1998 Cr LJ 4592.
19. PHIPSON, 10th Edn. p. 2012); **See commentary on Section 4.**
20. *G.P. Lakshmi* v. *T.B. Rajamma*, 2000 AIHC 4885 (para 29) (Kant).
21. *Sayad Akbar* v. *State of Kant*, AIR 1979 SC 1848 : 1979 Cr LJ 1374; **explaining** the difference between the operation of a presumption of fact and that of law.

Section 114 enables the court to presume the existence of probable facts, regard being had to the human conduct and common course of events as to the common sense being used as a judicial tool.[22] Rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation, and confidence of facts and circumstances.[23]

Section 114 authorises the court to draw presumption. If it is refuse to presume a fact under this section, it is not open to the party to question the failure on the part of the court to raise the presumption. This is only a permissive provision enabling, the judge to support his judgement but, by no means, it envisages a mandatory duty.[24] The words 'may presume' in Section 114 clearly indicate that courts cannot be compelled to draw presumptions. It is left to the court to make and not to make presumptions according to the circumstances of the case. Whether a presumption should be raised or not depends upon the facts and circumstances of each case. It is not an error of law if the court does not draw the presumption, Section 114 is a permissive but not a mandatory section.[25]

It was held by the Privy Council that there can be no presumption in favour of a fact which offends a legal principle. For example, that a tenancy by a *shebait* is a permanent tenancy as it would be a breach of a duty of a *shebait*.[26]

This Section 114 permits the court to raise a presumption with regard to oral evidence as well as documentary evidence.[27]

If a presumption is not available under one section, nothing prevents the court from drawing the presumption under another section.[28]

There is no scope for presumption when facts are known.[29]

The illustrations given under this section are not exhaustive. They are merely a few examples of this class of "natural" presumptions, and they do not exclude the other numerous cases in which such presumptions are constantly drawn. No hard and fast rule can be laid down as to what inference can be drawn; it all depends upon the facts and circumstances of each case.[30] Illustrations appended to Section 114 are only intended as guide to working and applications of section. They do not restrict presumptions regarding existence of facts covered by illustrations.[31] The illustrations appearing under Section 114 are not intended to lay down rules of law which are exhaustive of the presumptions that may be made under that section itself. They are only examples of circumstances in which certain presumptions may be raised. Whether or not a presumption under Section 114 can be drawn in a particular case depends on the facts and circumstances of the case.[32] The section has given as many as nine illustrations (*a* to *i*), but they are not exhaustive. They serve as examples and guide to the court as to whether presumptions can be raised on the facts proved in particular cases. It is to be noted that all such presumptions under this section are rebuttable. The section does not impose on the court strict adherence to any rule/rules in drawing presumptions. The illustrations are merely examples of circumstances in which certain presumptions may be good and other presumptions, of a similar kind in similar circumstances, may be made under the provisions of the section itself. Every one of the illustrations is followed by an exception.[33]

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22. *Tukaram Ganpat Pandare* v. *State of Maharashtra*, AIR 1974 SC 514 : 1974 SC (Cri) 580, see Section 4 also.
23. *Sodhi Transport Co.* v. *State of U.P.*, AIR 1986 SC 1099.
24. *Indian Express Newspaper (Bombay) Ltd.* v. *Basumati Pvt. Ltd.*, AIR 1969 Bom 40, *S. Mammad* v. *K. Mammad*, AIR 1957 Ker 63.
25. *Lakkappa* v. *Thimmappa*, AIR 1953 Mys 48; *Oudh Ram* v. *State*, 1982 Cr LJ 1656 (Delhi); *Prafulla Kumar Niogi* v. *Nilratan Ghosh*, (1964) 68 Cal WN 532; *Rex* v. *Sibnath*, AIR 1943 FC 75.
26. *Naina Pillai* v. *Ramanathan*, AIR 1924 PC 65.
27. *East India Trading Co.* v. *Badaat & Co.*, AIR 1959 Bom 414.
28. *Romjas* v. *Surendra Nath*, AIR 1980 All 385.
29. *R. Venkitramah* v. *Central Road Traffic Board*, AIR 1953 TC 392.
30. In re : *Kasaboyina Muttiga*, AIR 1958 AP 255 : 1955 Cr LJ 596; *Mahabir Singh* v. *Anant Ram*, AIR 1966 All 214; *Madadeo Prasad* v. *Emperor*, AIR 1946 Pat 1.
31. *Lal Hari Bansha* v. *Nkunja Behari*, ILR 1960 Cut 230.
32. *Chimna* v. *State*, AIR 1961 Raj 35 : (1961) 1 Cr LJ 310.
33. *Emperor* v. *Chhidda*, ILR (1944) All 694; *Bhagaban Panda* v. *Dullav Panda*, AIR 1991 Ori 66.

However, in doing so (raising presumptions), the court is to bear in mind the common course of natural events, human conduct and practices prevalent in private and public dealings as well as the facts and circumstances of the case in hand.

Where the court disbelieves the case of the plaintiff and that of the defendant it cannot decree the suit on the basis of presumption only.[34]

There are several presumptions recognised in Hindu law, Mohammadan law, criminal law, *etc., e.g.*, the original status of a Hindu family must be presumed to be joint and undivided; in a Joint Hindu family the whole property of the family is joint estate; in the absence of express contract a Mohammadan dower is presumed to be prompt; every person is presumed to be acquainted with the law of the land; the accused is presumed to be innocent.

2. SOME EXAMPLES OF STATUTORY PRESUMPTIONS

See Sections 118, 119-122, 137 of the Negotiable Instruments Act; Sections 53 and 101 of the Transfer of Property Act; Section 6 of the Land Acquisition Act (I of 1894). There are various other statutory presumptions.

3. COMMON COURSE OF NATURAL EVENTS

Under this section the court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the case. In a case under Prevention of Corruption Act where the accused took out the currency notes and flung them across the wall, the Supreme Court held that the court may presume that the accused must have obtained them from the witness who a few minutes earlier was shown to have been in possession of the notes.[35] Where it was found that the persons behind the manufacturer and the buyer were the same, it was apparent that the buyer was associated with the manufacturer, *i.e.*, the assessee and then regard being had to common course of natural events, human conduct and public and private business it could be presumed that they had interest, directly or indirectly, in the business of each other as per Section 114.[36]

Section 114 of the Evidence Act does not lay down any hard and fast rule for raising presumptions. It gives a few illustrations from various walks of life. The section provides a guiding principle, namely, that the court shall be led by its own experience and knowledge of the common course of natural events, and public and private affairs.[37]

This expression is appropriate in regard to such matters as the period of gestation or the continuance of life. The legitimacy of a child may have to be decided by reference to the term during which in the ordinary course of nature gestation may continue. A case of adultery must be judged having due regard to the social conditions and the manner in which the parties are accustomed to live. If there is evidence enough to show that they had reasonable opportunities of having sexual intercourse in the conditions of life in which they live for days together then the Court may be justified in raising an inference of adultery.[38] From the fact that a man and woman lived together for a number of years under the same roof a presumption can be drawn that they lived as husband and wife and their children were legitimate.[39] Where there is a long and continuous course of co-habitation between a man and woman, the law presumes in favour of marriage and against concubinage under this section, even in the absence of satisfactory direct evidence of marriage. Such presumption of marriage can only be repelled by evidence

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34. *G. Vasu* v. *Syed Yaseen*, AIR 1987 AP 139 (FB).
35. *Hazari Lal* v. *State (Delhi Admn.)*, AIR 1980 SC 873.
36. *Calcutta Chromotype Ltd.* v. *CCE*, (1998) 3 SCC 681 : (1998) ELT 202, **relying on** *Union of India* v. *Atic Industries Ltd.*, (1984) 3 SCC 575 : 1984 SCC (Tax) 217; *CCE* v. *T.I. Millers Ltd.*, 1988 SCC (Tax) 347; *Snow White Industrial Corporation* v. *CCE*, 1989 SCC (Tax) 431; *TELCO* v. *State of Bihar*, AIR 1965 SC 40; *LIC of India* v. *Escorts Ltd.*, (1986) 1 SCC 264 and *McDowell and Co. Ltd.* v. *CTO*, 1985 SCC (Tax) 391. **Contra :** *CCE* v. *Abex Rubber Co.*, (1998) 9 SCC 400 : (1998) 99 ELT 489.
37. *Mahabir Singh* v. *Anant Ram*, AIR 1966 All 214.
38. *Devyani* v. *Kantilal Gamanlal*, (1963) 65 Bom LR 24.
39. *Balasubramanyam* v. *Suruttayan*, AIR 1992 SC 756.

of the clearest character.[40] Failure to reply to a suit for maintenance creates a presumption that the man admits marriage.[41]

Under this section the Court is entitled, if it appears reasonable in all the circumstances of the case, to draw an inference that the accused committed a murder or took part in its commission, from the facts that he has been found in possession of the property proved to have been in the possession of the murdered person at the time of the murder or is able to point out the place where such property is concealed and admits having concealed it there and that he fails to give any explanation of his possession of the property, which can be accepted. The possession of stolen ornaments belonging to the murdered soon after the murder is, therefore, material evidence against the accused not only on the charge of robbery but also on the charge of murder.[42]

A Government servant was found in possession of assets disproportionate to his earnings and he was also not able to explain it, a presumption of corruption arose.[43] There was an allegation in an election petition that the respondent threatened voters with divine displeasure in his speeches. The petitioner did not produce any witness, nor notes made by him at the speeches. His assertion was presumed to be not true.[44] The statement of a judge as to what happened before a court or tribunal is generally presumed to be correct.[45] In case of preventive detention on the recommendation of an Advisory Board constituting a judge made after hearing lengthy arguments, it was held that the detention must be presumed to have been done on consideration of all material.[46] When an Income Tax Officer extended time for filing a return it must be presumed that extension was granted after satisfying himself that a case for extension was made out.[47]

The Allahabad High Court, dissenting from the view expressed in 1940 Peshawar 47, held that Section 114 itself does not consider the words "course of natural events" as interchangeable with animal conduct. If the words are not so interchangeable then it is obvious that the facts relating only to human conduct can be taken into consideration. The conduct of an animal, such as, a calf going to the house of its master and in starting to lick the udders of its mother does not appear to be covered by the term 'course of natural events'.[48]

Court can presume under Section 114 that in common course of natural events hemp can catch fire even without any misconduct on the part of the railway administration or its servants.[49]

In Civil and criminal cases, the court presumes the existence of facts based on the materials (documents and oral testimony) placed before it. Such presumptions are the result of the judge's own experience, human conduct, practices in public and private business as applies to the facts of the particular case.[50] As an example of an inference to be drawn from the conduct of a person the following is apposite. It is settled law that where property is entrusted to a servant, it is the duty of the servant to give a true account of what he does with the property so entrusted to him. If such servant fails to return the property or to account for, gives an account which is shown to be false and incredible, it is ordinarily a reasonable inference that he has criminally misappropriated the property so entrusted to him and dishonestly converted it to his own use. In such cases the court is entitled to draw hositle inferences and presumptions from the action and statements of the servant.[51]

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40. *Chandu Lal Agarwala* v. *Khalilar Rahman*, ILR (1942) 2 Cal 299; *Parameshwari Bai* v. *Muthojirao Sciendia*, AIR 1981 Kant 40; *Algammal* v. *Rakkammal*, AIR 1982 Mad 354; The presumption extends to the legitimacy of children also. *Ashok Kumar* v. *Usha Kumari*, AIR 1984 Del 347; *Mangilal* v. *Chandrawati Kumari*, (1911) 38 IA 122; *Rajagopal Pillai* v. *Pakkiam Ammal*, (1968) 2 Mad LJ 411 (DB); *Mandakini* v. *Chandrasen*, AIR 1986 Bom 172 living together since 1944; *Badri Prasad* v. *Dy. Dr. of Consolidation*, AIR 1978 SC 1557, (social living as man and wife for 50 years).
41. *Shankerappa* v. *Sushalibai*, AIR 1984 Kant 112; *Virendra Singh* v. *Vimal Kumar*, AIR 1976 SC 2169 (presumption from omission to contradict the statement of a witness).
42. *Ramprashad* v. *King Emperor*, AIR 1949 Nag 277.
43. *State of Maharashtra* v. *Wasudeo*, AIR 1981 SC 1186.
44. *V.K. Saklecha* v. *Jagjiwan*, AIR 1974 SC 1957.
45. *Union of India* v. *T.R. Varma*, AIR 1957 SC 882 : 1958 SCR 499.
46. *State of Rajasthan* v. *Shamsher Singh*, AIR 1985 SC 1083.
47. *Commissioner of Income Tax* v. *M. Chandrashwar*, AIR 1985 SC 114.
48. *Ram Bharosey* v. *State*, AIR 1952 All 481.
49. *Dominion of India* v. *Gobardandas Shrobb*, AIR 1952 Cal 384.
50. *Mahabir Singh* v. *Anantram*, AIR 1966 All 214.
51. *Sona Meah* v. *King Emperor*, ILR (1924) 2 Ran 476, 477 : AIR 1925 Rang 47; **See also** *Emperor* v. *Abdul Gani*, (1925) 27 Bom LR 1373.

Where one joint owner was permitted to be in possession for a long period of over 50 years and that too without any protest or objection, a presumption arose that he was the exclusive owner.[52]

A statement in a judgement as to things happening before the judge is not ordinarily permitted to be questioned.[53]

A catalogue which embodies a statement of the firm regarding the price at which it is prepared to sell its articles is not hearsay and is admissible in evidence in proof of the price.[54]

There is presumption that every person in his private character does his duty and unless the contrary is proved, it is presumed that all things are rightly and regularly done.[55]

4. NON-EXAMINATION OF A NUMBER OF WITNESSES

Where the prosecution did not examine a number of witnesses cited by the investigating agency, presumption cannot be drawn against the prosecution.[56]

5. NON-EXAMINATION OF INVESTIGATING OFFICER

In a criminal trial, non-examination of the investigating officer does not *per se* vitiate the trial.[57]

6. THEFT AND STOLEN GOODS [ILLUSTRATION (*a*)]

This illustration raises two presumptions, *viz.*, that the person in possession of stolen goods soon after the theft is either (1) the thief, or (2) has received the goods knowing them to be stolen. The question as to which of the two presumptions is to be drawn will depend upon the facts of each particular case. This is a presumption which the court is not bound to draw but it is in the option of the court to draw it. But it does not, in any way, shift the burden of proof to the accused.

The presumption under this illustration arises only when the prosecution has established, (1) the ownership of the article in question, (2) theft of the article, and (3) its recent possession by the accused. Before a presumption can arise, it must necessarily be proved that the goods found in possession of the accused had been stolen.[58] Where the prosecution failed to prove that the theft of the ornaments of the deceased and their murder formed the part of the same transaction, no presumption could be drawn from their recovery from the possession of the accused that they had committed the murder.[59] The presumption contemplated in this illustration is not a presumption as to the fact of possession, but the presumption of guilt which arises from the accused not accounting for his possession of stolen goods which he is proved to be in possession soon after the theft. This presumption of guilt cannot, therefore, arise before such actual possession is proved, or before the accused, an opportunity being given, fails to account for his possession.[60]

The question whether presumption under Section 114, illus. (*a*) against the accused is a matter which depends upon the evidence and the circumstances of each case. Some of the circumstances are:—the nature of the recovered articles, the manner of their acquisition by the owner, the nature of evidence about their identification, the manner in which the articles were dealt with by the accused, the place and circumstances of their recovery, the length of the intervening period and the ability or otherwise of the accused to explain the recovery.[61]

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52. *Khan Ali Md. Khan* v. *Abdul Rahim*, AIR 1981 J&K 57.
53. *State* v. *Orissa Oil Industries Ltd.*, AIR 1982 Ori 245.
54. *Hasanali* v. *Dara*, ILR (1948) Nag 922.
55. *Zeenat* v. *Prince of Wales Medical College*, AIR 1971 Pat 43.
56. *Nachhatar Singh* v. *The State*, 1994 Cr LJ NOC 327 (J&K).
57. *Behari Prasad* v. *State of Bihar*, 1996 Cr LJ 1653 (para 22) (SC) : AIR 1996 SC 2905.
58. *Sohan Singh* v. *State*, ILR (1955) Patiala 601.
59. *Raju Ram* v. *State of Rajasthan*, 1994 Cr LJ 2348 (Raj).
60. *Emperor* v. *Hari*, (1904) 6 Bom LR 887, 893; **See** *Satya Charan Manna* v. *Emperor*, ILR (1924) 52 Cal 223 : AIR 1925 Cal 666; *The Crown* v. *Saifal*, ILR (1936) 18 Lah 227; *Nand Lal* v. *King-Emperor*, ILR (1941) 17 Luch 182; *Kishore* v. *State*, ILR (1951) Raj 761.
61. *Ghanshyam Das Shrivatsava* v. *State of M.P.*, AIR 1973 SC 1183; *Baiju* v. *State of M.P.*, AIR 1978 SC 522; *A. Deivendran* v. *State of Tamil Nadu*, 1998 Cr LJ 814 (para 20) : AIR 1998 SC 2821.

A presumption of fact must be such as would naturally arise. Regard must be had to all the material circumstances before determining whether presumption could justifiably be drawn.[62]

The onus of proving all the ingredients of the offence charged, never shifts from the prosecution in cases in which a presumption under Section 114, illus. (*a*) can be invoked.[63]

The drawing of presumption under Section 114, illus. (*a*) is discretionary and a court may refuse in the special circumstances of a case to draw such a presumption.[64] Where the reliable evidence of the eye-witness had proved the guilt of dacoity against only the two accused, the five other accused found with looted property could not be held guilty of dacoity with murder.[65] Mere recovery of an article belonging to the deceased from the possession of the accused cannot connect him with the offence of murder by invoking this section.[66]

The presumption raised under illustration (*a*) of Section 114 does not contravene the provisions of Article 21 of the Constitution.[67]

Where there is no proof whether the moveable property of the deceased was found in possession of the accused, whether they were removed from the possession of the deceased during his life time or after his death, no presumption can be drawn under Illus. (*a*) of Section 114 that he was a thief or receiver of stolen property.[68] Where the accused snatched the attache containing cash by sprinkling chilli in the eyes of the victims who correctly identified them during the T.I. parade and the looted property was recovered as a result of their disclosure, presumption under Section 114 was attracted and involvement of the accused in the offence was proved.[69] In the absence of any other circumstance it is not possible to raise a presumption by invoking illustration (*a*) to S. 114 on the basis of the recovery that the accused is the person who committed the offence of murder, particularly when the recovery itself was doubtful.[70]

A property cannot be presumed to be stolen property simply because it was purchased by the purchaser at a throw away price.[71]

The Supreme Court has held that the presumption permitted to be drawn under this illustration has to be read with the important time-factor.[72] If the gap of time is too large, the presumption that the accused was concerned with the crime itself gets weakened. The presumption is stronger when the discovery of the fruits of crime is made immediately after the crime is committed.[73] The question what period is covered by the expression "soon after" depends upon the circumstances of each case. The court is not bound to draw this presumption, and it must always ask itself whether in the circumstances of the particular case the presumption is one which in fairness to the accused can be drawn.[74] In a subsequent decision the Supreme Court held that one year gap between murder and recovery did not destroy the presumption that the person in possession was himself the robber and murderer. Recent possession is a question of fact. No time-limit can be prescribed.[75] Where stolen articles of a very common description, consisting of jewellery of a very ordinary type and by no means of distinctive appearance, were found in the possession of a person six months after the commission of a dacoity, such possession was not deemed sufficient to call upon the accused to explain his possession. Where a stolen old brass bell was found in

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62. *Jamnadas Parashram* v. *State of M.P.*, (1963) 1) Cr LJ 433 : AIR 1963 MP 16.
63. In re : *Shaik Server*, AIR 1957 AP 1006; *Badal Samser Ali* v. *State*, AIR 1952 Assam 97; *Bama Jena* v. *State*, AIR 1958 Ori 106; *Umesh Mukund Mashelkar* v. *State*, 1977 Cr LJ 298 (Goa); *Sadasiv Das* v. *State of Orissa*, AIR 1958 Ori 51.
64. *Sadasiv Das* v. *State*, 1958 Ori 51.
65. *State of M.P.* v. *Samaylal*, 1994 Cr LJ 3407 (para 9) (MP).
66. *Surjit Singh* v. *State of Punjab*, AIR 1994 SC 110 (para 7).
67. *State* v. *Parkash Singh*, AIR 1956 Punj 224.
68. *Guman* v. *State of M.P.*, 1989 Cr LJ 1425 (MP).
69. *Ramesh Kumar Soni* v. *State of M.P.*, 1997 Cr LJ 3418 (MP).
70. *Ram Charan* v. *State of U.P.*, 1997 Cr LJ 3198 (All).
71. 1978 Raj Cr C 145.
72. *Tulsi Ram Kanu* v. *State*, AIR 1954 SC 1.
73. *Shivappa* v. *State of Mysore*, AIR 1971 SC 196; *Harendra Nath* v. *Kaliram Das*, AIR 1972 SC 246; *Ayodhya Singh* v. *State of Rajasthan*, AIR 1972 SC 2501.
74. *Emperor* v. *Mavji Nanji*, (1941) 43 Bom LR 629; *Alisher* v. *State of U.P.*, AIR 1974 SC 1830; *Ganga Singh* v. *State of Rajasthan*, 1978 Cr LJ 269; (stolen wrist watch easily available in market recovered four months later — no presumption can be drawn); *Kirpa* v. *State*, AIR 1952 HP 68.
75. *Earabhadrappa* v. *State of Karnataka*, AIR 1983 SC 446.

the possession of an old iron dealer thirteen days after the theft, the presumption under this section was not drawn. It was held similarly where a stolen buffalo was found in the possession of a person four or five months of the theft.[76]

The plain meaning of illus. (*a*) to Section 114 is that both presumptions are possible and which of the two should be adopted in a case depends upon the circumstances. If the interval between the theft and the accused being found in possession of the stolen articles is very small, the presumption can be that he is the thief. If, on the other hand, the interval is relatively long, the presumption can be that he is the receiver. If the interval is very long, the court may not even draw any presumption.[77] Mere recovery of jewelleries etc. belonging to the informant after two months of the occurrence from the accused was not sufficient to convict them for murder by taking recourse to the presumption under Section 114, illustration (*a*) but they could be convicted under Section 411, I.P.C.[78]

Accused was found in possession of stolen goods within two days of theft. He failed to furnish any explanation for his possession. Held that, the presumption under illus. (*a*) of Section 114 can be drawn and the accused can be convicted under Section 411, IPC, as receiver of stolen property.[79] The accused was charged for receiving stolen cycle. The alleged document showing that the cycle was pledged with him, was not proved. He did not give any explanation with regard to other cycles found in his possession. Held that, a presumption under Section 114, illus. (*a*) could be raised and the accused can be convicted under Section 411, I.P.C.[80]

The mere fact of recent possession of stolen property is, in general, evidence of theft, not of receipt of stolen property with guilty knowledge.[81] It would be a reasonable presumption that people had committed theft or burglary if they were seen the next day with the stolen property in circumstances which suggested that they were dividing up the booty. Such an inference would not be an inference of law; it would be a pure inference of fact. It would be open to the accused to explain that they were there for some purpose, but in the absence of such explanation, the presumption will be that they had taken part in the offence.[82]

As soon as the prosecution produces evidence to the effect that the person has been found in possession of the money stolen, the presumption at once arises under Section 114 that the possessor is either a thief or the receiver of the stolen property and this presumption when unexplained shall be regarded as conclusive fact.[83]

Presumption whether a person is a thief or receiver of stolen property depends upon facts and circumstances of each case. The accused, found in possession of Telegraph Wires, denied recovery but

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76. *Emperor* v. *Sughar Singh*, ILR (1906) 29 All 138; *Nga Yauk* v. *Queen-Empress*, (1885) SJLB 366; *Goga* v. *State of J&K*, AIR 1959 J&K 105; *Emperor* v. *Mavji Nanji*, (1941) 43 Bom LR 629; *Hashim* v. *Crown*, (1942) Kant 186.

77. *Pershadi* v. *State of Allahabad*, 1955 Cr LJ 1125 : AIR 1955 All 443; *Chandra Pal* v. *State of Allahabad*, 1954 Cr LJ 1439 : AIR 1954 All 684; (time-factor is relevant to draw the presumption) *Kishan Sarma* v. *State of Assam*, AIR 1968 Assam 13; *Chavadappa Pujari* v. *Emperor*, AIR 1945 Bom 292; In re : *Singaram*, AIR 1954 Mad 152 **(dissenting from)**.

78. *A. Deivendran* v. *State of Tamil Nadu*, 1998 Cr LJ 814 (para 22) : AIR 1998 SC 2821. Recovery of crime articles from accused after a long delay of three months, no presumption of involvement in crime, *Shabad Pulla Reddy* v. *State of A.P.*, AIR 1997 SC 3087 : 1997 Cr LJ 3753. **Also see** *Union Territory of Goa* v. *Boaventura D'Souza*, 1993 Cr LJ 181 (para 8) (SC) : AIR 1993 SC 1199.

79. *Virumal Mulchand* v. *State of Gujarat*, AIR 1974 SC 334 : 1974 Cr LJ 277. Murder-cum-dacoity, accused in possession of stolen article after two days of occurrence, not concealing it, keeping it on person, presumption of receiving stolen property and not that of involvement in dacoity, *Net Raj Singh* v. *State of M.P.*, (1997) 3 SCC 525 : 1997 SCC (Cri) 506. Recovery of ornaments of deceased at instance of accused proved but no evidence to connect him with offence of murder, presumption of receiving property known to be stolen could be drawn against him, *Public Prosecutor* v. *Yerra Arjuna*, 1998 Cr LJ 179 (AP); *Surjit Singh* v. *State of Punjab*, 1993 Cr LJ 3901 (para 7) (SC).

80. *Satnarain Sao* v. *State of Bihar*, AIR 1972 SC 1561.

81. *Nga Kywet* v. *Queen-Empress*, (1900) 1 LBR 39; *Nga Don Be* v. *The Crown*, (1902) 1 LBR 332; *Karpini* v. *Queen Empress*, (1896) PJLB 276; *Mi Myit* v. *Queen-Empress*, (1897) 1 UBR (1897-1901) 171.

82. *Emperor* v. *Chhidda*, (1944) All 694. Recovery of stolen articles from possession of accused 'soon after' commission of dacoity, presumption of being dacoits, *State of Karnataka* v. *Rajan*, 1994 Cr LJ 1042 (para 39) (Kant); *Gulab Chand* v. *State of M.P.*, AIR 1995 SC 1598 (para 4); *Kunwarlal* v. *State of M.P.*, 1999 Cr LJ 3632 (paras 33 to 35) (MP); *Shri Bhagwan* v. *State of Rajasthan*, 2001 Cr LJ 2925 (paras 8-10 and 13) (SC) : AIR 2001 SC 2342.

83. *Manipur State* v. *Laisram Bokul Singh*, AIR 1954 Manipur 13.

gave no satisfactory explanation of their possession. Held that the accused can be presumed to be received of stolen goods.[84]

Where the incriminating article is one which may change hands quite frequently and is commonly available and the recoveries were made nearly four months after theft, presumption under Section 114 illus. (*a*) cannot be raised against the accused.[85]

When the recovery was after six months it can be said to be of recent possession, unless explained by the accused.[86]

The words 'receives' and 'retains' are generally used together and though illus. (*a*) expressly refers to dishonest receipt of stolen property, a presumption about dishonest retention of the stolen property may equally be made by virtue of that illustration even though in the charge it is stated that the accused dishonestly received (not retained) the stolen property.[87]

In order to rebut the presumption under Section 114, illus. (*a*) as regards recent possession of stolen goods by the accused, the explanation of the accused of such possession must be so reasonably convincing as to throw a doubt on his guilt; but a mere denial of the prosecution story, or any assertion inconsistent with facts proved by the prosecution cannot amount to an explanation to make the presumption unavailable to the prosecution.[88]

Where the accused was found merely sitting in a taxi after it was stolen, they cannot be in possession of the taxi; the presumption against them of theft does not arise.[89] Where ornaments were recovered from an open filed which is accessible to all and sundry, it cannot be concluded that the accused was in possession of these articles as there is presumption of innocence of the accused and heavy onus rests on the prosecution to dislodge the presumption.[90] Even though the place where the articles were discovered was accessible to others, the fact that those articles were burried till the accused dug them out, shows that he must have burried them there.[91] Though the stolen property was not recovered from the house of the accused, but there was evidence to show that the articles were secreted in a bush and brought out by the accused, it was held that the property was in possession of the accused.[92] A watchman was murdered and jewels were robbed. There was evidence to show that the accused was present at the time of murder. Later the stolen jewels were recovered at his instance from a hidden place in his house. His conviction under Section 302 read with Section 392 of IPC is proper.[93]

Contraband gold was being carried on the person of the nephew of the accused. Both were travelling together. It was held that the newphew was used as the instrument of uncle's possession and the nephew was carrying the gold for the uncle.[94]

Presumption under Section 114, illus. (*a*) is discretionary and may not be available in all cases. Where the factum of theft and recent possession was proved but there was no evidence to show that the property was in possession of someone else before it passed into the hands of the accused, presumption would be that the accused is either a thief or a receiver of a stolen property.[95]

If a stolen property, almost at the moment it is stolen, is passed on by the thief to a companion, the proper inference to be drawn is that the second person (companion) is in concert with the thief and not that he merely received the stolen property.[96]

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84. *State of Orissa* v. *Udava Padhan*, AIR 1965 Ori 123. **See also** *Ram Karan* v. *State of Rajasthan*, 1996 Cr LJ 3521 (paras 35 and 39) (Raj).
85. 1984 (2) Cr LC 23.
86. *State of M.P.* v. *Manka*, ILR 1959 MP 590 : 1960 JLJ 358; *State* v. *Dhanmati Kisanin*, ILR 1965 Cut 323.
87. *Bama* v. *State*, (1958) Cut 131.
88. *Lakshman* v. *Government of Mysore*, AIR 1952 Mys 83.
89. *State of Maharashtra* v. *Najibullah Shaikh*, (1984) 86 Bom LR 156.
90. *Trimbak* v. *State of M.P.*, AIR 1954 SC 39; *Shoba Param* v. *State of M.P.*, AIR 1959 M.P. 125.
91. *Karbi Babu* v. *State of Saurashtra*, 1955 Cr LJ 1522 : AIR 1955 Sau 93; *Hotilal* v. *State*, AIR 1953 All 572.
92. *Koli Jera Jodha* v. *State of Saurashtra*, AIR 1954 Sau 115; *Chunilal* v. *Union of India*, AIR 1964 Him. Pra 27.
93. 1970 Mad LJ (Cri) 161 (Mys).
94. *Gopal Dass* v. *State*, AIR 1959 Punj 113.
95. *Rajjaua* v. *State*, AIR 1959 All 718.
96. *Ganga* v. *State*, AIR 1957 All 678.

No presumption under Section 114, illus. (*a*) can be drawn from the mere fact that the stolen medicine, was recovered from a box kept underneath the accused's bed-sheet unless the prosecution also proves that no one other than the accused had access thereto.[1]

If the court comes to the conclusion on facts that the accused has hidden the property, one important step in resorting to the aid of illus. (*a*) to Section 114, namely possession, is satisfied.[2] In order to draw presumption under Section 114, illus. (*a*), proof of possession of stolen goods but not of possession of the place where those goods were hidden and found, is necessary.[3]

A presumption arises against a person found in possession of stolen goods soon after theft. The word 'possession' as used in Section 114(*a*), implies not only dominion but also consciousness in the mind of the person having such dominion. Where the facts prove exclusive possession, mere knowledge is enough to prove 'dominion' but where the facts indicate 'joint possession', there should be something in the evidence to show that this knowledge is not mere knowledge but guilty knowledge.[4] Where articles belonging to the deceased family were recovered from the possession of the accused soon after the incident which they could not explain and the murder and robbery of the articles were found to be part of the same transaction, it could be concluded that the accused and none else had committed murders and robbery.[5] Where property stolen in dacoity was recovered from the accused within 24 hours of the incident, inference as to the commission of dacoity could be drawn against them.[6]

Mere fact of knowledge of the accused of the existence of stolen property in a certain place accessible to all is not conclusive proof of possession of those articles by the accused.[7]

7. JOINT POSSESSION

But to raise this presumption legitimately, the possession of the stolen property should be exclusive as well as recent. If, for instance, the articles stolen were found on the person of the accused, or in a locked-up house or room, or in a box of which he kept the key, there would be fair ground for calling on him for his defence; but if they were found lying in a house or room in which he lived jointly with others equally capable with himself of the theft, or in an open box to which others had access, this would raise no definite presumption of his guilt.[8]

A postman was charged under Section 52, Post Offices Act, for secreting certain registered articles in an *almirah* of the house in which the accused lived jointly with his father. The prosecution proved that those articles were found in the *almirah*. The key of the *almirah* was with the father. The circumstances that the *almirah* contained, as part of the registered articles in question, certain other articles belonging to the accused cannot sustain an inference that the *almirah* was in the exclusive possession of the accused or even in the joint possession with his father. The fact that the accused had opportunity to get at the articles is not sufficient to infer exclusive possession of the articles by the accused. No presumption can, therefore be drawn against the accused that he had secreted them from the mere fact that the articles were found in the *almirah* which, at best, may be regarded as being in the joint possession of the accused and his father. But even an inference of joint possession would not be legitimate.[9]

Where a husband was storing looted property in the house and the wife was merely acquiescing in keeping such property, she cannot be regarded as a passive partner in the crime and a charge under Section 412, IPC., cannot sustain against the wife.[10] Where the accused was residing in the house with

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1. *Phanindra Kumar* v. *State*, AIR 1972 Gauhati 127 (Assam).
2. In re : *Kirukku Mayandi*, AIR 1958 Mad 384.
3. *Kacharji Hariji* v. *State of Gujarat*, AIR 1969 Guj 100.
4. *Khuman* v. *State*, ILR (1955) 2 All 464.
5. *Ronny* v. *State of Maharashtra*, AIR 1998 SC 1251 : 1998 Cr LJ 1638 (para 31) (SC). Recovery of stolen article soon after robbery and murder from possession of accused, presumption of committing crimes. *Mukund* v. *State of M.P.*, AIR 1997 SC 2622 : 1997 Cr LJ 3182. Recovery of stolen revolver from possession of accused soon after theft, presumption of committing theft, *State of M.P.* v. *Dhirendra Kumar*, AIR 1997 SC 318.
6. *Robert Peter Kadam* v. *State of Maharashtra*, 1998 Cr LJ 3879 (para 12) (Bom), **relying on** *Gulab Chand* v. *State of M.P.*, AIR 1995 SC 1598 : 1995 AIR SCW 2504.
7. *State* v. *Usman*, (1965) 2 Cr LJ 569 (Ori); *Motilal* v. *State*, 1959 Pat 54; *Kacharji Hariji* v. *State of Gujarat*, 1969 Guj 100.
8. BEST ON EVIDENCE, 12th Edn., S. 212, p. 197.
9. *Radha Kishan* v. *State of U.P.*, AIR 1963 SC 822.
10. *Parsandi* v. *State*, (1963) 1 Cr LJ 344 (All).

other persons and stolen property was recovered from that house, no presumption can be drawn to hold him guilty under Section 411.[11] Where the stolen property is recovered from an open verandan which is in the joint possession of two accused, conviction of only one accused under Section 411, IPC., cannot be maintained.[12]

Where the stolen property is recovered from a house occupied by several persons, there can be no presumption that the place was in exclusive possession of the accused.[13] In the case of a family living jointly in the same house, the head of the family is presumed to be in possession of any such illicit article found in the house. Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. Possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity to the object. There is no presumption that a father or head of family is in possession of everything contained in his house; neither can it be presumed that he is having control of anything so found. Grave miscarriage of justice, might follow from the application of such a rule. A virtuous father might have the misfortune of having a son living with him, who is an unmitigated rascal and if this presumption is to be made, this virtuous father must be presumed to be in possession of everything brought by the rascal son into the house.[14] Merely because the accused is the head of a family and owner of the house, he cannot be presumed to have constructive knowledge of the hidden instrument used for the offence.[15]

The mere fact that an accused person points out the place in which the stolen property is concealed does not give rise to any presumption under this section or justify his conviction for the offence of receiving stolen property, still less for the offence of theft.[16] But where property forming part of the stolen property is produced by a person from his house, a presumption under it can be drawn against him.[17]

When an accused makes a statement, "I have concealed the property at a particular place and I will produce it", and if it is discovered in consequence of that statement, it is evidence of his possession, even though the stolen articles are kept or concealed in another man's property, because unless he had possession he would not have kept them at that place. Where, however, an accused without stating that he has concealed stolen property merely produces it from a place to which other people can have access, it is not sufficient to establish his possession even though the property may be concealed, because it is consistent with any other person having done so and the accused may have merely knowledge of it.[18]

Recovery in pursuance of information is an important piece of evidence. The only evidence against an accused person was that stolen properties were recovered, on the information given by him, from a hollow of a tree situated in a jungle. Since the land on which the tree stood or the tree itself did not belong to the accused, the mere recovery cannot show that he was in possession of the stolen property or that, after committing the theft, he had kept the article inside the tree.[19] In a case of murder by poisoning, the recovery of incriminating articles from a place which is easily accessible to exertnal agency and not in the exclusive possession of the accused or the articles are not in the exclusive use of the accused, the recovery cannot treated as incriminating piece of evidence.[20] The mere recovery of the articles at the instance of the accused and the absence of any explanation by him as to how he came to know the place of hiding, is not sufficient for the court to conclude that the accused had placed the articles there and he could not have got information is some other manner about the presence of the articles at that place.[21]

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11. *Anirudha Agasti* v. *State of Orissa*, 1985 Cr LJ (NOC) 7.
12. *Motilal* v. *State*, AIR 1959 Pat 54.
13. *Abdul Kareem* v. *State of Mysore*, 1972 Cr LJ 217 (Mys).
14. In re : *Wahib Basha*, AIR 1961 Mad 162; *Weston* v. *Peary Mohan*, AIR 1914 Cal 396 (SB); *Emperor* v. *Budh Lal*, ILR (1907) 29 All 598; *Managar Koiri* v. *Emperor*, AIR 1936 Pat 512; *Mahabir Singh* v. *State*, AIR 1951 Pat 296; *Gopinath* v. *State*, 1958 Ori 287.
15. In re : *Kodur Thimma Reddy*, AIR 1957 AP 758.
16. *Emperor* v. *Yesaba Sakhoba*, (1938) 40 Bom LR 927 : AIR 1938 Bom 463.
17. *Emperor* v. *Shivputraya*, (1930) 32 Bom LR 574 : AIR 1930 Bom 244, *Ameerjan* v. *State of Mysore*, (1951) Mys 210.
18. *Emperor* v. *Chavadappa Pujari*, (1944) 47 Bom LR 63 : AIR 1945 Bom 292; Recovery from under a stone or under a birdge cannot be said to be a recovery from an open place. *Lachhman* v. *State of Orissa*, AIR 1985 SC 486.
19. *Deo Bux* v. *State* , AIR 1956 Bhopal 40.
20. *State of Orissa* v. *Kaushalya Devi*, AIR 1965 Ori 38.
21. *State of Rajasthan* v. *Indraj*, AIR 1957 Raj 234.

Unless the connection between the articles alleged to have been stolen and those recovered from the house of the accused has been established, no presumption could be drawn under Section 114(*a*) either that the person is the thief or receiver of stolen articles.[22]

8. UNLESS HE CAN ACCOUNT FOR HIS POSSESSION

The words "unless he can account for his possession" do not mean that any sort of explanation in regard to possession would be acceptable. The explanation offered must be reasonable. The words do not mean that the accused must prove it positively that he had received the property in the manner indicated by him.[23]

The accused denied the circumstantial evidence and kept silent. This suggests that the accused had nothing which he had to explain. Held, that in such a case the court cannot assume that the accused had refused to offer an explanation on the ground that he had a right to keep silent.[24]

The words "can account for its possession" do not mean that the accused must prove it positively that he received the property in the manner indicated by him. If the explanation given is not inherently improbable or palpably false and the court or the jury trying the case find it to be reasonably true, the adverse presumption shall be deemed to have been rebutted. The meaning of the words "reasonably true" appears to be that the explanation must be sufficient to cast a doubt on the guilt of the accused and in that case unless the prosecution proves beyond reasonable doubt that the accused received the property knowing it to be stolen, the benefit of the doubt shall go to him.[25] This illustration does not mean that the burden of proof is shifted on to the accused,[26] so that he must prove affirmatively that he came by the goods innocently. It is sufficient if he can give an explanation which may raise a doubt in the mind of the court as to the guilt of the accused, which in the opinion of the court may possibly be true.

But the possession of stolen property even if accompanied by a failure to give an account as to how such possession was acquired, or by a false account, or by accounts which are contradictory, or by a concealment of the property, would raise not a violent or strong presumption, but a probable presumption merely.[27] It is not the law that if the accused fails to account for his possession of the goods said to be stolen, he must be convicted, if the other proved facts of the case do not predicate guilt. The accused is not required to prove his explanation by adducing substantive evidence. In many cases it may be impossible for him to do so, particularly if he alone knows the facts, for he is not bound to give evidence on oath on his own behalf.[28]

Where a conviction under Section 411 of the Indian Penal Code was based on the presumption aforesaid, the court saying that the burden of proving his *bona fide*s was thrown on the accused and that the oral testimony on behalf of the accused to prove that he had purchased the goods from a certain person was not very reliable, it was held that the conviction was legal.[29] Where a calf belonging to another person was purchased by the accused for an inadequate price, just after a day it was stolen, and the accused is unable to explain as to how he came to be in possession of it, the inference that the accused knew it to be stolen property can be reasonably drawn.[30] If circumstances indicate that possession was not in natural course of things, the fact that a false explanation is given by accused renders prosecution case stronger.[31]

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22. In re : *Boddu Sanyasi Patrudu*, AIR 1957 AP 482; *Sabitri Sharma* v. *State of Orissa*, 1987 Cr LJ 956.
23. *Pulpil Singh* v. *State of Allahabad*, AIR 1955 All 696.
24. *Maloji Rao* v. *Sankar Saram*, 1955 All 443.
25. *Emperor* v. *Jagannath*, ILR (1945) All 11; *Amar Singh* v. *M.P.*, AIR 1982 SC 129, recovery of property shortly after dacoity; *Virumal Mulchand* v. *State of Gujarat*, AIR 1974 SC 334; (stolen goods found possession within 2 days); *Thulia Kali* v. *State of T.N.* AIR 1973 SC 501; (a person from whose custody things are recovered must be examined).
26. *Prem Bahadur* v. *State of Sikkim*, 1978 Cr LJ 945.
27. *Ina Sheikh* v. *Queen-Empress*, ILR (1885) 11 Cal 160, 163.
28. *Keshabdeo Bagat* v. *Emperor*, (1944) 1 Cal 595 : AIR 1945 Cal 93.
29. *Emperor* v. *Hori Lal*, ILR (1933) 56 All 250 : AIR 1933 All 893.
30. *Ram Bharosey* v. *State*, AIR 1952 All 481. Stolen property recovered at the instance of the accused three months after the alleged theft was committed, failed to account to his possession, presumption. *Karni Singh* v. *State of Rajasthan*, 1999 Cr LJ 1791, at p. 1792 (Raj).
31. *Babulal* v. *State*, AIR 1950 All 630; *Manipur State* v. *Laisram Bokul Singh*, AIR 1954 Manipur 13.

In an offence under Section 411, IPC., the possession of the stolen articles by the accused was recent, but the explanation was given by him raising serious doubts about sustainability of the charge. Held that the accused was entitled to acquittal.[32] Where the explanation of the accused is plausible and satisfactory, presumption under Section 114 does not arise.[33]

The burden case on the accused by Section 114, illus. (*a*) to account satisfactorily for his possession of stolen property is not so onerous as the burden on the prosecution to prove the offence beyond all reasonable doubt in every respect. If the accused offers no explanation, the court may infer guilty knowledge. But, if the explanation leaves the court in doubt, the accused should be held not guilty.[34]

The presumption under Section 114, illus. (*a*) can be raised only if the person found in possession is unable to account for his possession.[35]

When the charge is under Section 411 of I.P.C., and the accused denies knowledge of the fact that the goods in his possession were stolen, the question is whether a prudent man ought, under the circumstances of the particular case, to act on the supposition that the accused had that knowledge.[36]

If the explanation offered by the accused person is plausible although a court or a jury may not be convinced of its truth, the accused is entitled to an acquittal. The prosecution must show that the explanation is false.[37]

It is not for the accused to prove beyond all reasonable doubt that his explanation if the possession is true. It is enough if the explanation is one which appears to the court to be reasonable.[38]

9. EXTENTION OF THE PRINCIPLE—NOT CONFINED TO THEFT ONLY

The presumption in this illustration is not confined to the charge of theft, but extends to all charges, however, penal not excluding even murder. Therefore, where a person charged with dacoity is shown to have been in possession of part of the stolen property soon after the dacoity, it may be presumed that he was one of the dacoits or that he received the property knowing it to have been stolen at the dacoity. The principle of illu. (*a*) applies not only to cases of ordinary theft but also to cognate offences such as dacoity and robbery. The presumption arising under this illustration extends to all charges, however penal, including murder.[39]

No hard and fast rule can be laid down as to what inference should be drawn from a certain circumstances. Where, however, the only evidence against the accused is the recovery of stolen property, though may indicate that the theft and murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of stolen property was the murderer. Suspicion cannot take the place of proof. Unexplained recovery of the articles from the house of the accused may lead to the only inference that he is either a receiver of stolen property or a person who committed theft, but it does not necessarily indicate that the theft and murder took place at one and the same time.[40]

The accused was found in possession of property of a murdered person on the day of murder. The accused could not offer any satisfactory explanation as to how he came to be in possession of the property. It was held that the circumstantial evidence was sufficient to hold the accused responsible for the murder.[41] Where ornaments or things of the deceased are found in the possession of a person soon after the murder a presumption of guilt may be permitted. If several months expire in the interval,

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32. *Karnal Singh Uttam Singh* v. *State of Maharashtra*, AIR 1976 SC 1097.
33. *Union of India* v. *Kasambhai Umerbhai Kureshi*, 1979 Cr LJ 1173 (Goa).
34. *Sadasiv Das* v. *State*, 1958 Cr LJ 534 (Ori) : AIR 1958 Ori 51.
35. *Sapa Laz Singh* v. *State*, AIR 1953 All 136; In re : *Ameerjan*, AIR 1951 Mys 34.
36. In re : *Shaik Server*, AIR 1957 AP 1006.
37. In re : *Dasan Gangaraju*, AIR 1950 Mad 778; *Asokan* v. *State*, ILR (1962) 1 Ker 215.
38. *Hingora Haji* v. *Government of Kutch*, 1952 Kutch 10, *State* v. *Magha* AIR 1952 Raj 97
39. *Ramasarup* v. *King-Emperor*, ILR (1929) 9 Pat 606; *Queen-Empress* v. *Sami*, ILR (1890) 13 Mad 426, *Bandhan Sao*, (1960) Pat 361, *Dhyani Gope* v. *King-Emperor*, ILR (1946) 25 Pat 262 : AIR 1947 Pat 205, *Pritam Singh* v *State*, (1954) Pun 907.
40. *Sanwat Khan* v. *State of Rajasthan*, AIR 1956 SC 54, *Bhikha Gober* v. *Emperor*, AIR 1943 Bom 458, *Jani Shah* v *State of A P*, AIR 1958 AP 273, *Vali Isa Mahmed* v. *State*, (1963) 1 Cr LJ 755 (Guj) AIR 1963 Guj 135, In re *Singaram*, AIR 1954 Mad 152, *State* v. *Manga*, 1973 Cr LJ 1075 (Raj), In re *Thangaswami*, ILR 1963 Mad 476
41. *Sunderlal* v. *State of M P*, AIR 1954 SC 28, In re : *Govinda Reddy*, AIR 1958 Mys 150, *Kanbi Babu* v. *State of Saurashtra*, AIR 1955 Sau 93.

presumption may not be permitted to be drawn having regard to the circumstances of the case.[42] It was held that where the accused was charged for murder and robbery, the mere fact that a period of one year had lapsed for the recovery would not lead to the presumption that the accused was only a receiver of stolen property and had not committed the murder, particularly when the accused was absconding during that period; presumption can be drawn that he committed both murder and robbery.[43]

Ornaments of the deceased were recovered at the instance of the accused. Those ornaments were worn by the deceased when last seen. Inference that the accused must have murdered the deceased cannot be drawn in the absence of any evidence to connect him with murder. Onus lies on the prosecution to prove its case. The accused is liable to be convicted under Section 411 and not under Section 302 or Section 394, I.P.C.[44]

However, Rajasthan High Court held that if theft and murder are inter-connected and the stolen property was recovered from the accused, presumption of murder can be raised.[45]

Where the accused was found to be in possession of the ornaments of the deceased victim, it was held that the presumption under Section 114 could be applied to convict the accused for theft but could not be availed of for conviction of murder in the absence of any linking evidence.[46]

The presumption from the possession of articles belonging to the deceased by the accused persons immediately after the murder or robbery should be drawn only where some evidence in present to show that the accused persons were seen with the deceased immediately before his death or that the deceased was last seen alive in the company of the accused persons.[47] Where stolen articles were recovered at the instance of the accused soon after the occurrence of the dacoity, the accused is liable to be convicted not only under Section 412, I.P.C., but also under Section 391, I.P.C. with the aid of Section 114.[48]

When possession of the recovered property with the accused was not established he could not be convicted under Section 395, I.P.C. on the basis of presumption under Section 114(*a*).[49]

Where stolen goods were recovered from the accused three days after docity, possible presumption are:—

(1) he took part in the dacoity;

(2) received goods knowing them to be stolen, in the dacoity.

Choice of presumption depends upon the facts of each case.[50]

Where an article taken away by the dacoits was found in the possession of the accused after about two months of the dacoity, it would not be either fair or safe to draw the presumption that he took part in the dacoity.[51]

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42. *Tulsiram Kanu* v. *State of Nagpur*, AIR 1954 SC 1; *Pershadi* v. *State*, AIR 1955 All 443; In re : *Madugula Jermaiah*, AIR 1957 AP 611; *Ravunni Nair* v. *State of Kerala*, AIR 1957 Ker 65 : 1957 Cr LJ 751; *Kesavan Gopalan* v. *State*, AIR 1954 *Tra & Co.* 456; *State* v. *Mohanlal*, AIR 1958 Raj 338; In re : *Kalia Perumal*, AIR 1954 Mad 1088; *K.N. Vijayan* v. *State of Tra. & Co.*, AIR 1953 *Tra & Co.* 402; *King-Emperor* v. *Sheo Shankar Singh*, AIR 1954 Pat 109; *State of Orissa* v. *Bishnu Charan Mudali*, 1985 Cr LJ 1573; *Shivsahai Singh* v. *State of M.P.*, 1985 Cr LJ 730; *Dukhidei* v. *State of Orissa*, AIR 1965 Ori 33; *State of Maharashtra* v. *Baba Joseph*, ILR (1971) Bom 577; *Baiju* v. *State of M.P.*, AIR 1978 SC 522; *State of Rajasthan* v. *Nanu Ram*, 1977 Raj LW 241; *Prem Bahadur* v. *State of Sikkim*, 1978 Cr LJ 945; *Gudh Ram* v. *State of Delhi*, 1982 Cr LJ 1956 (Del); *Gopalan* v. *State of Kerala*, 1985 Cr LJ (NOC) 3; *State of M.P.* v. *Sarveshwar Prasad*, 1977 MPLJ 620; *Malsawan Lushai* v. *Manipur Administration*, AIR 1966 Manipur 2; *Himangshu Pahri* v. *State of West Bengal*, 1986 Cr LJ 622 (Cal)(DB); In re : *Kaliaperumal*, AIR 1954 Mad 1088; *Dalip Kumar and Huralala alias Rana* v. *State*, (1984) 2 Crimes 927 (Del. Admn).

43. *Earabhadrappa* v. *State of Karnataka*, 1983 SC 446.

44. *Nagappa Dondiba Kalal* v. *State of Karnataka*, AIR 1980 SC 1753; *Vijay Kumar* v. *State*, ILR 1978 HP 255; *Chenia* v. *State*, AIR 1966 Ori 156.

45. *State of Rajasthan* v. *Prabhu*, 1971 Raj LW 311 (DB) : AIR 1956 SC 54.

46. *Roshan Beevi* v. *Jt. Secretary of Tamil Nadu*, 1984 Cr LJ (Mad) 142 (FB).

47. *Singaram* v. *Public Prosecutor*, ILR (1954) Mad 602.

48. *Lachhman Ram* v. *State of Orissa*, AIR 1985 SC 486; *Shivappa* v. *State of Mysore*, AIR 1971 SC 196; *Bama Jena* v. *State of Orissa*, AIR 1958 Ori 106; *Pritam Singh Sohan Singh* v. *State*, AIR 1954 Punj 201 : ILR (1954) Punj 907; *State of Maharashtra* v. *Baba Joseph*, 1971 Cr LJ 296 (Bom); *Shobha Param Kachhi* v. *State of M.P.*, 1959 Cr LJ 476 : AIR 1959 MP 125; *Dashirai Riang* v. *State of Tripura*, AIR 1964 Tripura 54.

49. *Amarsingh* v. *State of M.P.*, AIR 1982 SC 129.

50. *Sheonath* v. *State of Uttar Pradesh*, AIR 1970 SC 535.

51. *Akmat Ali* v. *State of Tripura*, AIR 1957 Tripura 48.

It was held that where a rifle was recovered five months after the dacoity no presumption can be drawn.[52]

There is no rule of law which permits from the possession of stolen goods, a presumption of an offence of lurking house prespass by night or house-breaking by night (Section 457 of I.P.C.).[53]

Where accused was in possession of a large quantity of heroin, it was held that it can be presumed that it was illegally imported for distribution. In the case of possession of cocaine, however, it was held that no presumptin of illegal importation can be drawn as it is lawfully purchased in large quantities in the United States.[54]

Presumption arises as soon as it is shown that accused had received the stated amount and such amount was not the legal remuneration. It is not necessary that before presumption arises prosecution must prove that money was paid as a bribe.[55]

Before any presumption is drawn the attention of the accused should be drawn to the particular recoveries made from each of them in the dacoity case.[56] Before a presumption could be drawn against an accused, he has to be asked to account for his possession.[57]

10. TESTIMONY OF ACCOMPLICE [ILLUSTRATION (b)]

An accomplice is one who is a guilty associate in crime. Where the witness sustains such a relation to the criminal act that he could be jointly indicted with the accused, he is an accomplice.[58] It is a rule of prudence and practice which practically amounts to a rule of law that the evidence of an accomplice ought not be acted upon unless it is corroborated as against the particular accused in material respects.[59]

Corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.[60]

The confession of a co-accused cannot be used to corroborate the evidence of an accomplice.[61]

The corroboration in the case of an accomplice must point to the identification of the person charged with the particular act with which the direct evidence connects him.[62] The corroboration in material particulars must be such as to connect or identify each of the accused with the offence.[63]

The evidence of an accomplice ought to be regarded with suspicion. The degree of suspicion which will attach to it must vary according to the extent and nature of the complicity.[64] There should be such corroboration of the accomplice's evidence as will satisfy a prudent person that the approver can be regarded as a truthful person. The corroboration may even be by circumstantial evidence. The nature of the corroboration will depend on and vary with the circumstances of each case.[65] "...It is not necessary that there should be independent corroboration of every material circumstance. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice or the complainant is true and that it is reasonably safe to act upon it and the corroboration need not be by

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52. *Rajjan* v. *State*, 1980 All LJ 635 : 1971 All CrR 136; (two years after the theft) , 1973 BLR 280; (five months later cycle was recovered at a different place from the accused); 1984 CrLR (Raj) 587.
53. *Hazara Singh Hakim Singh* v. *State of Punjab*, AIR 1960 Punj 286; *Madan* v. *State*, ILR (1957) 7 Raj 296.
54. *James Turne* v. *U.S.*, 24 Law Ed 2d 610.
55. *Sailendra Nath Bose* v. *State of Bihar*, AIR 1968 SC 1292.
56. *Bijuli* v. *State of Orissa*, 1985 Cr LJ 1977 (Ori).
57. *Satchidananda Haldar* v. *State*, AIR 1958 Cal 414.
58. *Ramaswami* v. *Emperor*, ILR (1903) 27 Mad 271, 277.
59. *Emperor* v. *Mataprasad*, (1942) 45 Bom LR 64; *State* v. *Ram Singh*, ILR (1954) Cut 309; *Rampal Pithwa Rahidas* v *State of Maharashtra*, 1994 Cr LJ 2320 (para 9) (SC).
60. *Noor Ahmed* v. *Emperor*, ILR (1933) 62 Cal 527.
61. *Provincial Government* v. *Raghuram*, ILR (1942) Nag 749.
62. *Emperor* v. *Kalwa*, ILR (1926) 48 All 409 : AIR 1926 All 377.
63. *Rebati Mohan Chakravarthy* v. *Emperor*, (1928) 56 Cal 150.
64. *Srinivas Mall Bairoliya* v. *Emperor*, (1947) 49 Bom LR 688 PC.
65. *Vemireddy Satyanarayan Reddy* v. *State of Hyderabad*, AIR 1956 SC 379; *Kanbi Karsan Jadav* v. *State of Gujarat*, AIR 1966 SC 821.

direct evidence. It is sufficient if it is merely circumstantial evidence of the connection of the accused with the crime.[66]

Where the accomplice is not really a criminal but a spy or informer his evidence does not require any corroboration.[67]

The rule in this illustration is to be read along with Section 133 which states "An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." Neither rule is to be ignored in the exercise of judicial discretion. In point of law an accomplice is a competent witness against an accused person (*vide* Section 133). But great caution in weighing his testimony is dictated by prudence and reason. Unless the case is a very exceptional one, an accomplice's evidence should not be accpeted as being sufficient.[68]

In England it is regarded as the settled course of practice not to convict a prisoner, except under very special circumstances, upon un-corroborated testimony of an accomplice.[69] The corroboration which the common law requires is corroboration in some material particular tending to show that the accused committed the crime charged. It is not enough that the corroboration shows the witness to have told the truth in matters unconnected with the guilt of the accused.[70]

One accomplice cannot corroborate another. However, if several accomplices simlutaneously and without previous concert give a consistent account of the crime implicating the accused, the court may accept the several statements as corroborating each other, but it must be established that the several statements of accomplices were given independently and without any previous concert.[71]

It is now well-settled that the minimum amount of corroboration required to make it safe to act on the testimony of an approver is that the evidence must be corroborated not only as to the *corpus delicti* but also as to the identity of the accused persons. The corroborative evidence must show or tend to show that the story of the approver that the accused committed the crime is true; in other words, the corroborative evidence must be such which confirms not only the evidence that the crime has been committed but also the evidence that the accused committed that crime.[72] In a case where there are a large number of accused it is essential that the evidence of an accomplice be corroborated by evidence which implicates each of the accused individually. Independent evidence which corroborates the evidence of an accomplice so far as one of several co-accused is concerned is not necessarily evidence which corroborates the statement of the accomplice so far as the other accused are concerned.[73] All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice is true. Corroboration can also be both by direct or circumstantial evidence.[74]

The Bombay High Court has laid down the following four principles with regard to the nature and extent of corroboration:

(1) that it is not necessary that there should be independent confirmation of every material particular;

(2) that independent evidence must not only make it safe to believe that the crime was committed, but in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice complainant that the accused committed the crime;

(3) that the corroboration must come from independent scources; and

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66. *Raman Lal Mohan Lal Pandya* v. *State of Bombay*, AIR 1960 SC 961.
67. *Queen-Empress* v. *Bastu*, (1897) PJLB 365. **contra** *Mi The U* v. *Queen-Empress*, (1881) SJLB 146: complainant or informer Minister is not accomplice. *C.R. Mehta* v. *State of Maharashtra*, 1993 Cr LJ 2863 (paras 13 and 30) (Bom).
68. In re : *B.K. Rajagopal*, ILR (1944) Mad 308 (FB). **See also** *S.C. Bahri* v. *State of Bihar*, 1994 Cr LJ 3271 (para 43) (SC).
69. *Reg* v. *Gallagher*, (1875) 13 Cox 61.
70. *Rex* v. *Baskerville*, (1916) 2 KB 658; **See** comment on Section 133, *infra*.
71. *Hussain Umar* v. *Dalipsinghji*, AIR 1970 SC 45.
72. *Ram Singh* v. *Crown*, ILR (1950) Punj 209; *Bhima Shaw* v. *State*, ILR (1956) Cut 195.
73. *Kedar* v. *Rex*, ILR (1949) All 152.
74. *A. Devendran* v. *State of T.N.*, (1997) 11 SCC 720.

(4) that the corroboration need not be direct evidence that the accused committed the crime—it is sufficient if it is merely circumstantial evidence of his connection with crime.[75]

Where the evidence of an accomplice is not totally unsupported by re-assuring circumstances, the accused could be convicted on the basis of such evidence.[76] Where the evidence of the approver was that he participated in the commission of the offence but not to the same extent as the main accused, his statement could not be said to be of exculpatory nature and on that score his statement could not be excluded from consideration.[77] Where the testimony of the approver was corroborated in respect of only the Accused-1 and not in respect of the Accused-2, conviction of the former was upheld but the later was given benefit of doubt.[78]

Rape Cases.—The Supreme Court of India has held that though a woman who has been raped is not an accomplice, her evidence has been treated by the courts on somewhat similar lines, and the rule which requires corroboration of such evidence save in exceptional circumstances has now hardened into law.[79] The view that though corroboration should ordinarily be required in the case of a grown up woman, it is unnecessary in the case of a child of tender years is not correct. The true position is that in every case of this type the rule about the advisability of corroboration should be present to the mind of the Judge; whether corroboration is unnecessary is a question of fact in every case.[80] As a rule of prudence the Court normally looks for some corroboration of her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated.[81] The above statement of law is substantially altered by Section 114-A of this Act where in certain circumstances, the Court should presume that a woman did not consent to rape where she states in her evidence that she did not consent. In other words the court has to *prima facie* proceed that her evidence is true. In a case of rape, absence of injuries or the accused on the prosecutrix *per se* is not sufficient to indicate her consent.[82]

Where an alleged rapist gave evasive replies and gave no explanation about the injury on his penis and human blood on his pant, adverse inference could be drawn against him.[83]

See also commentary under Section 133.

11. BILL OF EXCHANGE [ILLUSTRATION (c)]

The presumption on which this illustration is founded is in accordance with the maxim *omnia praesumuntur rite esse acta*, *i.e.*, all things are presumed to be done in due form. The principle of the maxim "has, in many instances, been recognised in support of the solemn acts of even private persons.... Thus, if an act can only be lawful after the performance of some prior act, due performance of that prior act will be presumed. Again, although in the case of contracts not under seal a consideration must in general be averred and proved, yet bills of exchange and promissory notes enjoy the privilege of being presumed, *prima facie*, to be founded on a valuable consideration. The law raises this presumption in favour of these instruments, partly because it is important to preserve their negotiability intact, and partly because the existence of a valid consideration may reasonably be inferred from the solemnity of the instruments themselves, and the deliberate mode in which they were executed. (TAYLOR 12th Edn., S. 148, p. 139).

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75. *L.S. Raju* v. *State of Mysore*, (1953) 55 Bom LR 191 : AIR 1953 Bom 297.
76. *State of Tamil Nadu* v. *Suresh*, AIR 1998 SC 1044 : 1998 Cr LJ 1416 (para 22) (SC), **reversing** Cri A Nos. 782-83 of 1989, decided on 8-2-1991 (Mad).
77. *A. Devendran* v. *State of T.N.*, (1997) 11 SCC 720.
78. *Gajalaxmi* v. *State of T.N.*, 1997 SCC (Cri) 410.
79. *Sheikh Zakir* v. *State of Bihar*, AIR 1983 SC 911. **See also** *Babulal* v. *The State of Madhya Pradesh*, 1994 Cr LJ NOC 283 (MP).
80. *Rameshwar* v. *State of Rajasthan*, 1952 SCR 377 : AIR 1952 SC 54; *Bhonri* v. *State*, (1952) 2 Raj 817.
81. *Gurcharan Singh* v. *State of Haryana*, AIR 1972 SC 2661. But corroboration can be waived in the light of apparent circumstances. *Krishan Lal* v. *State of Haryana*, AIR 1980 SC 1252.
82. *State of U.P.* v. *Padam Singh*, 1996 AIHC 169 (para 12) (All).
83. *J.V. Wagh* v. *State of Maharashtra*, 1996 Cr LJ 803 (para 13) (Bom).

An effect of the presumption is that the plaintiff has not to produce account books to substantiate consideration. The burden is upon the other party.[84]

The explanation to this illustration speaks of "a man of business", which in its well-known popular sense must mean a man habitually engaged in mercantile transactions or trade.[85]

Sections 118 and 119 of the Negotiable Instruments Act lay down certain other presumptions. The Lahore High Court has held that Section 118 of the Negotiable Instruments Act replaces the explanation attached to this illustration and therefore the rule laid down in this illustration is modified by Section 118. What was permissible in the Evidence Act was converted into a statutory obligation in the Negotiable Instruments Act. While illustration (*c*) is confined to the acceptance or endorsement of a bill of exchange, Section 118 of the Negotiable Instruments Act applies to the making or drawing of it also.[86]

The Madras High Court has held that the difference between this section and Section 118 of the Negotiable Instruments Act consists only in this, that under the first, the court has a discretion to make the presumption or not, whereas, under the second, the Court is bound to start with the presumption; but once the presumption is made there is no difference between the cases; in the manner of displacing the presumption or disproving the "presumed" fact. Any presumption as to quantum of consideration as distinguished from the mere existence of consideration, has accordingly to be drawn, not by virtue of Section 118 of the Negotiable Instruments Act or even under this section, but only from the recitals, if any, that the instrument may contain. As to such recitals, it has long been established that that being *prima facie* evidence against the parties to the instruments, they may operate to shift on the party pleading the contrary, the burden of rebuting the inference raised by them. But the weight due to recitals may vary according to circumstances and, in particular circumstances, the burden of rebutting them may become very light, especially when the court is not satisfied that the transaction was honest and *bona fide*.[87]

Section 118 of the Negotaiable Instruments Act enacts a special rule of evidence which operates between parties to the instrument or persons claiming under them in a suit or proceeding relaing to the bill of exchange and does not affect the rule contained in this section in cases not falling within Section 118 of the Negotiable Instruments Act.[88]

Where the drawer issued an undated cheque as security for loan transaction, the issuance of the cheque was admitted and there was no dispute regarding signature, amount and the name shown in the cheque, it could be presumed that the cheque was supported by consideration which presumption could not be rebutted merely because there were some transactions between the drawer and the drawee of the cheque.[89] It can be presumed that insertion of date in an undated cheque by the payee holder of the cheque is with the implied consent of the drawer of the cheque.[90] Presumption of due execution of a pronote by an illiterate woman could be drawn if one respectable witness proved the same, though another witness denied it when he was not a reliable witness.[91] Presumption under Section 114, illus. (*c*) can be raised in case presumption under Section 118(*a*) of the Negotiable Instruments Act is not available.[92]

Where the plaintiff withholds relevant evidence presumption under Section 118 of the Negotiable Instruments Act is rebutted.[93] If the defendant shows that the cash consideration originally pleaded for the *hundi* did not pass, he must be taken to have discharged the onus which lay upon him in view of the presumption, that is attached to the *hundi* as a Negotiable Instrument. The onus then shifts on the plaintiff to prove that there was consideration.[94]

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84. *Gulab Chand* v. *Satya Vrat*, AIR 1983 SC 54.
85. *Ningawa* v. *Bharmappa*, ILR (1897) 23 Bom 63, 66.
86. *Bannumal* v. *Munshi Ram*, (1935) 17 Lah 107, 113 : AIR 1935 Lah 599.
87. *Narasamma* v. *Veeraju*, ILR (1934) 58 Mad 841, 850 : AIR 1935 Mad 796; **see also** *Tirumala Iyengar* v. *Subbaraja*, 1982 Mad 219; *Narayana Rao* v. *Ramachandra*, 1959 AP 376; *Radheshyam* v. *Kashinath*, AIR 1957 MB 82.
88. *Official Receiver* v. *Abdul Shakoor*, AIR 1965 SC 920; *Ananda-manjari* v. *Tripura Oondari*, 14 IA 101 (PC) : ILR 14 Cal 740.
89. *Bhaskaran Chandrasekharan* v. *V Radhakrishnan*, 1998 Cr LJ 3228, at page 3230 (Ker).
90. *Bhaskaran Chandrasekhran* v. *V. Radhakrishnan*, 1998 Cr LJ 3228, at p. 3231 (Ker).
91. *Gutta Bhadrayya* v. *Kalagara Kanakamma*, AIR 1925 PC 47.
92. *Shrikishan* v. *Bhanwarlal*, AIR 1974 Raj 96.
93. *Kundanlal* v. *Custodian of Evacuee Property, Bombay*, AIR 1961 SC 1316.
94. *Krishna and Co.* v. *Firm Bhagar Ram Giridhari Lal*, 1969 Punj 552.

12. CONTINUANCE [ILLUSTRATION (d)]

This illustration is founded on the presumption which exists in favour of continuance or immutability.

If a thing or a state of things is shown to exist, an inference of its continuity within a reasonably proximate time both forwards and backwards may sometimes be drawn. The rule that the presumption of continuance may operate retrospectively also had been recognised in India. How far the presumption may be drawn backwards and forwards depends upon the nature of the thing and surrounding circumstances.[1]

Sections 107 and 109 deal with particular applications of the principle of which this illustration is the general expression.

The oridinary legal presumption is that things remain in their original state.[2] If a person is shown at one time to be a member of a joint Hindu Family, it will be held under this illustration that he never separated at all unless the contrary is proved. Presumption should not be raised against but in favour of the existing state of things.[3] A State of affairs which is shown to exist at one time in the past is presumed to continue as it is.[4] Entries in *Khatauni* as to occupration of a particular person raise a presumption as to contunity of possession of that person and the presumption is not nautralised by payment of rent by some one else.[5] A momentary delivery of possession, even of real possession and not of symbolic possession, not followed up by subsequent possession and enjoyment, will not raise, in the case of cultivated land, the presumption that it is continued for years.[6]

There is no scope for any presumption under Section 114(*d*) to hold that the value ruling at the time of previous assessment remained unchanged even during the time of revaluation, when the assessee himself had admitted that the value had increased.[7]

13. JUDICIAL AND OFFICIAL ACTS [ILLUSTRATION (e)]

The rule emboided in this illustration flows from the maxim *omnia praesumtuntur rite et solemniter esse acta i.e.,* all acts are resumed to have been rightly and regularly done. "The true principle intended to be conveyed by the rule, *'omina praesumuntur rite et solemniter esse acta,'*... seems to be, that there is a general disposition in the court of justice to uphold official, judicial, and other acts, rather than to render them inoperative, and with this view, where there is general evidence of acts having been legally and regularly done, to dispense with the proof of circumstances, strictly speaking essential to the validity of those acts, and by which they were probably accompanied in most instances, although in other the assumption rests solely on gounds of public policy."[8]

This illustration only means that, if an official act is proved to have been done, it will be presumed to have been regularly done, but it does not raise any presumption that an act was done for which there is no evidence and proof.[9] The presumption under Section 114(*e*) is that of the regularity of the official acts

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1. *Ambika Prasad* v. *Ram Ekbal Rai,* AIR 1966 SC 605; *Kesava Kurup* v. *Thomas Idicula,* AIR 1969 Ker 21.
2. *Jariut-ool-Butool* v. *Hosseinee Begum,* (1867) 11 MIA 194, 209.
3. *Secretary of State* v. *Jyoti Prasad,* AIR 1926 PC 41.
4. *Jaiprakash* v. *Lilabai,* AIR 1963 Bom 100.
5. *Purni Devi* v. *Shibu Mahton,* AIR 1971 Pat 249.
6. *Uthamaram Nathusam Sait* v. *Hude Gopalkrishnayya,* AIR 1957 Mad 463.
7. *Corporation of Calcutta* v. *Nani Gopal,* AIR 1956 Cal 269.
8. BEST 12th Edn. S. 353, p. 312; *Narendra Lal Khan* v. *Jogi Hari,* ILR (1905) 32 Cal 1107, 1121; *Imperator* v. *Leslie Gwilt,* (1944) 47 Bom LR 431 : ILR (1945) Bom 681; *Narayan* v. *State of Maharashtra,* AIR 1977 SC 183, presumption as to public purpose in acquisition; *Kashmiri Lal* v. *State of Punjab,* AIR 1984 P&H 87; (notification is different from order. The latter does not amount to public knowledge); *Achchey Lal* v. *V.C. Gorakhpur University,* AIR 1985 All 1 (DB); (admissions beyond prescribed limit can be questioned); *Narayan* v. *Gowbai,* ILR 37 Bom 415.
9. *Pratap Singh* v. *Mammohan Dey,* AIR 1966 SC 1931; *M.B. State* v. *Beharamji D. & Co.,* AIR 1958 MP 71; *Krishna Murthy* v. *Abdul Subhan,* AIR 1965 Mys 128; *State of Rajasthan* v. *Shamsher Singh,* AIR 1985 SC 1083; (opinion expressed by a board under MISA); *Sone Lal* v. *State of U.P.,* AIR 1978 SC 1142; (Regular entries in public documents, allegation of fabrication and delay in lodging FIR); *Shankaralingappa* v. *Nanje Gowda,* AIR 1981 Kant 78; (entry in record of rights); *Laxmibai* v. *Thoerppa,* AIR 1982 Kant 248; (entries in death register) *State of Bombay* v. *Aziz Khan,* AIR 1956 Bom 680; *Zeenat Tej* v. *Principal of Wales Medical College, Patna,* AIR 1971 Pat 43; *Jai*

whether judicial or executive, and not that of the acts themselves being done. The presumption is rebuttable.[10]

It is a settled law that in interpreting the Constitution neither motives nor bad faith nor abuse of power be presumed unless in an individual case it is assailed and arises for consideration on that premise. On the contrary, the presumption is that official acts have been regularly performed.[11]

Illus. (*e*) to Section 114 permits presumption to be drawn in matters of procedure. It does not permit a presumption to be drawn where the question does not relate to the manner of doing an official act but goes to the root of the validity of that order.[12] In a case regarding land acquisition, non-impleadment of the Land Acquisition Officer, will give rise to the presumption under Section 114(*e*).[13] The presumption that official acts must be presumed to have done in accordance with rules and laws is not a conclusive one and is not available where there is a clear evidence to the contrary.[14] The normal presumption that all official acts are properly performed must be always recognised and given effect to in the absence of evidence to the contrary.[15] There would be a presumption of regularity in respect of official and judicial acts and it would be for the party who challenges that regularity to plead and prove his case. In this case it was contended on behalf of an advocate who was found guilty of professional misconduct that the Bar Council was not consulted before referring the matter to the District Judge for enquiry. It was held that the fact that in the order of reference to the District Judge there is no explicit statement that the Bar Council had previously been consulted is not decisive on the point.[16] Courts will normally presume that a discretion vested in a Government functionary has been exercised fairly, and this presumption is stronger still when the discretion is vested in the highest executive authority of all, the Governor of the State.[17]

Illustration (*e*) means that act has been done with due care and attention.[18]

Whether a presumption should or should not be made must depend upon the particular circumstances of each case.[19]

Where a statement appears in the judgement of a court that a particular thing happened or did not happen before it, it ought not ordinarily to be permitted to be challenged by a party unless both the parties to the litigation agree that the statement is wrong, or the court itself admits that the statement is erroneous.[20] A presumption arises under this section as to legality and correctness of a court's proceedings.[21] The very fact that a Magistrate convicted and sentenced the accused raises a presumption

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Dutt v. *State of U.P.*, AIR 1979 SC 1303; *Purushotham* v. *Emperor*, 1946 Bom 492; *State of Maharashtra* v. *Narayan Ramchandra Nagpure*, ILR (1977) 1 Bom 927; *Shanker* v. *Syndicate Bank*, ILR (1979) 1 Kant 1326; *Municipal Council, Rajamundry* v. *Sundhari Rawganayakalu*, AIR 1955 And Pra 107; *Raghunath Pani* v. *Radha Kanto Deb*, 1961 Ori 73; *Uli Bewa* v. *Mana Bewa*, ILR (1963) Cut 451.

10. *Niharenddu Dutta* v. *A.E. Porter*, AIR 1945 Cal 107. **See also** *State of Haryana* v. *Hari Ram Yadav*, AIR 1994 SC 1262 (paras 10 and 11); *Ranganathan* v. *State*, 1996 Cr LJ 2040 (paras 41 and 42) (Mad).
11. *S.R. Bommai* v. *Union of India*, AIR 1994 SC 1918 (para 147).
12. *State* v. *Bhanwar Lal*, (1973) Cr LJ 1749 (Raj); *Swadeshi Cotton Mills Co. Ltd.* v. *State Industrial Tribunal, U.P.*, 1956 All 689.
13. *T.N Housing Board* v. *A. Viswam*, AIR 1996 SC 3377 (paras 11 and 12), **reversing** SA No. 1526 of 1988, Dt. 7-4-1994 (Mad).
14. *Rama Mohan Das* v. *Basudav Dass*, AIR 1950 Ori 28.
15. *Ajit Singh* v. *Punjab*, AIR 1967 SC 856; (order of appointment of an officer); *Mohamed Abdul* v. *State of Mysore*, AIR 1966 Mys 61; *Public Prosecutor* v. *Viswanatha Chetty*, AIR 1960 AP 96; *Machiraju Mahalakshmamma* v. *Suryanarayana*, AIR 1955 Andhra 192; *Sagara Singh* v. *Chajju Ram*, AIR 1964 J&K 88; *Ganga Ram* v. *Phulwati*, 1970 All 446 (FB); *Ghulam Ahmad* v. *Government of J&K*, 1960 J&K 136; *Madhusudan* v. *Assistant Registrar of Co-operative Societies*, 1978 Cr LJ 570 (Cal); *Ram Das* v. *Bihar*, 1966 Ori 150; *Bishanlal* v. *The I.T. Officer Ambala*, AIR 1957 Punj 26; *Harpal Singh* v. *Union Territory, Chandigarh*, AIR 1978 Punj 68; *Syed Anwar Ahmad* v. *Asst. Custodian General Evaluee Property, U.P.*, ILR (1972) 2 All 641; *Saddruddin Khushal* v. *Asst. Collector Custom*, 1979 Cr LJ 1265 (Goa); *Jai Shankar Prasad* v. *State of Bihar*, AIR 1993 Pat 22 (paras 9 and 10A).
16. *P.J. Ratnam* v. *D. Kani-karam*, AIR 1964 SC 244.
17. *Ravindra Kumar* v. *State of U.P.*, AIR 1961 All 361.
18. *Ram Krishana* v. *State of MP*, ILR 1970 MP 510.
19. *Harkishan Das* v. *Crown*, (1943) 25 Lah 245 (FB).
20. *Bank of Bihar* v. *Mahabir Lal*, AIR 1964 SC 377; *State of Orissa Oil Industries Ltd.*, AIR 1982 Ori 245; *State of Maharashtra* v. *Ramdas Shrinivas Nayak*, AIR 1982 SC 1249; *Union of India* v. *T.R. Varma*, AIR 1957 SC 882; *Veeraswamy Chetty* v. *Varadiah Chetty*, AIR 1957 AP 493; *Deonandan Ojha* v. *Ramdeyal Ojha*, AIR 1971 Pat 102.
21. *Raghubir Singh* v. *Rajeshwari Devi*, ILR (1933) 9 Luck 90 : AIR 1933 Luck 466; *Sheikh Ala Baksh* v. *Thakur Durga Baksh Singh*, ILR (1933) 9 Luch 162; *Laikunnissah* v. *Hari Pd.*, AIR 1980 All 63; (Court auction sale, presumption of validity) *Rama Krishna* v. *Lakshminarayana*, AIR 1984 Kant 45; (presumption that all official acts are in

that the accused was not a minor at the time he was convicted. It is for the accused to rebut that very strong presumption.[22] Every judicial tribunal set up by a statute must be deemed to act properly and within powers conferred on it by the Legislature.[23] Presumption that the court performed its duty arises and onus is on the party alleging non-compliance by the court within Order XXXII, Rule 7 of the C.P.C., to prove that no leave was obtained for compromise.[24] There is a presumption that an order made by a court of law was made after considering all the material on record and after hearing both sides.[25] There is a presumption that the evidence was read over to the witness, interpreted and admitted by the witness to be correct in view of the endorsement certified by the court at the bottom of the deposition.[26] When it is stated in the order sheet that a certain order was read out and explained to persons proceeded against, it should be assumed that it was read out and explained.[27] As there is a presumption in law that court proceedings have been regularly conducted and it must be presumed that oath had been duly administered to the witness when he appeared in the witness box for giving evidence.[28]

When the records show that notices have been sent it must ordinarily be presumed that statutory requirements have been complied with and statutory notices given.[29] When the entry in the order sheet shows that notice has been served, it is *prima facie* evidence of the fact that notice has been served.[30] Where the Magistrate did not record in the order sheet the ascertainment of intactness of seal and mark and non-tampering of signature of the accused of the sample received from Local Health Authority before sending it to the Director of Central Food Laboratory which was not challenged before the Magistrate, presumption of regular performance of judicial act could be drawn.[31] If there is difference between the facts recorded in the order sheets and the statement of any party to a proceeding, where the facts recorded in the order sheet must be held to represent the correct state of affairs.[32]

But in the undermentioned cases it was held that entries in suit registers showing that notices were issued do not mean that the notices were served. Such entries by themselves cannot prove service.[33] The mere entry in the order sheet is no proof that the notice had been served.[34] When there is no mention of a contention in the judgements of courts the presumption is that contention was not put forth and urged.[35]

Presumption of regularity of acts extends to testamentary documents.[36]

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accordance with proper order); *Rudnap Export-Import* v. *Eastern Associates Ltd.*, AIR 1984 Del 20, (presumption of validity of documents authenticated by a foreign judge); *Sarangdhar Sinha* v. *Parvati Kuer*, AIR 1968 Pat 370; *Thounaojam Munal Singh* v. *Karam Iboyaima Singh*, 1971 Cr LJ 62 : 1971 Mani 1; *Mushiat Ullah* v. *Abdul Wahab*, AIR 1972 All 539; *Electric Power Devices Co.* v. *Sr. Divnl. Manager, LIC of India*, 2001 AIHC 2975 (para 9) (Kant).

22. *Shankar Narayan Mohite* v. *State of Bombay*, AIR 1956 Bom 582.
23. *Mangaldas N. Verma* v. *Comm. of I.T. and Excise Prohits Tax*, AIR 1954 Bom 184 (FB); *Ramanajamma* v. *Nagamma*, AIR 1968 AP 223.
24. *Lalji Sah* v. *Sat Narain Bhagat*, AIR 1962 Pat 182; *Thakur Prasad Singh* v. *Raghubar Prasad Singh*, AIR 1952 Pat 469.
25. *Newad Ram* v. *Kishan*, AIR 1952 Raj 149.
26. *Mangilal* v. *State of A.P.*, 1989 Cr LJ 2265 (AP).
27. *Vasu Deoojha* v. *U.P. State*, AIR 1958 all 578.
28. *Jogendra Singh* v. *State of Bihar*, AIR 1968 Pat 74.
29. *Dhanapati Devi* v. *Corpn. of Calcutta*, AIR 1952 Cal 467 : 1952 Cr LJ 975; *Dodde Gowda Kapani* v. *State of Mysore*, AIR 1964 Mys 55; *Mushiat Ullah* v. *Adbul Hussain Khan*, AIR 1972 All 539; *Natabar Chaudhary* v. *Shankar Mahton*, AIR 1957 Pat 487; *Aravindaksha Menon* v. *Lakshmi Narayanan*, ILR (1956) Tra & Co. 1130.
30. *Harakali Bose* v. *Janaki Devi Choudharani*, AIR 1956 Pat 161; *Sachitanandan Prasad* v. *Janak Prasad*, AIR 1958 Pat 5771; *Aswini Kumar* v. *Karmat Ali*, AIR 1948 Cal 165.
31. *Kailash Chand Gaggar* v. *State of Assam*, 1993 Cr LJ 2632 (para 5) (Gau), **relying on** *Kesvan* v. *Food Inspector*, 1988 Cr LJ 898 (FB) (Ker).
32. *State* v. *Basdeo Bawri*, (1961) 1 Cr LJ 621 (Assam); *Krishna Pillai* v. *Paru Kutty Ammal*, AIR 1952 Mad 33; *Nimar Cotton Press* v. *Sale Tax Officer*, AIR 1956 Nag 27.
33. *Karali Prasad* v. *Probodh Chandra*, AIR 1950 Cal 513; *Mohiuddin* v. *Pirthi Chandlal*, AIR 1915 Cal 444.
34. *Mohiuddin* v. *Pirthichand Lal*, AIR 1915 Cal 444.
35. *Dhanji Ram Sharma* v. *Union of India*, AIR 1961 Punj 178.
36. *Satipada Chatterjee* v. *Annikali Debya*, ILR (1955) 1 Cal 94.

The statement of an arbitrator as to amount of fees he received must be presumed to be correct.[37]

The presumption under Section 114(*e*) is a rebuttable one and once it is rebutted by the party challenging the settlement, the onus would be on the successful party to support the settlement.[38]

Where the officer concerned did not depose as to the compliance of the mandatory procedure under S. 50 of the N.D. & P.S. Act to inform the accused of his right to be searched in the presence of a Gazetted Officer or a Magistrate, the Court could presume that the possession of illicit articles by the accused was not established.[39]

Where some of the teachers, appointed under Intermediate Education Act, did not possess the requisite experience for promotion, their appointment could not be presumed to have been made by promotion. However their appointment, being governed by statutory regulation, is an official act and presumption of regularity attaches to it.[40] Where the record of the selection committee showed that the selection was based on merit but the same was challenge after eight years, the presumption of the genuineness of the official acts would apply.[41] Where the Additional Advocate General filed the special appeals on behalf of the State Govt., it could be presumed that he was duly authorised to file the said appeals.[42] Burden of proving that formalities required by law were not complied with at the time of giving symbolic possession to plaintiff, is on the defendant and not on plaintiff, as there was presumption in favour of plaintiff.[43] Where a copy of sale certificate is affixed in a conspicious place of one plot, there can be no presumption that affixture as required by law was made in respect of all plots if all of them are not in one place.[44] Where there is a defect in the proclamation of sale, the judgment debtor cannot be presumed to have information about the defective proclamation of sale.[45] The order of detention passed by the Deputy Commissioner is without jurisdiction. Doctrine of presumption of regularity cannot be invoked to presume that he acted in his capacity as District Magistrate.[46]

It may be presumed that the official act of forwarding of the report of the public analyst with necessary intimation has been performed regularly.[47]

When property is attached in execution of a decree, it can be presumed that the property was attached by the administration in accordance with the law.[48] Attachment must be presumed to be valid in the absence of proof to the contrary. Irregularities in attachment does not render it invalid.[49] Where a court has sent a copy of the order of attachment of agricultural lands to the collector's office for its publication, the Collector is presumed to have carried out his official duty of publishing the same as desired by the court.[50] When an assessee appears on the adjourned date of hearing without notice, inference is that the assessee did appear on the previous date of hearing and thereby acquired knowledge of the next date of hearing.[51] When the original suit agreement was lost from the custody of the court, and when the plea was not raised before the trial court that it was not properly stamped, it was held that it has to be presumed that the agreement was properly stamped and Section 35 of the Stamp Act has no application.[52] Presumption as to the validity of a compromise decree is that at the time when it was

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37. *Shambhu Dayal* v. *Pt. Basdeo Sahai*, 1970 All 525 (FB).
38. *Krupasindu Misra* v. *Gobinda Chandra Misra*, AIR 1980 Ori 199.
39. *Saiyad Mohd. Saiyad Umar* v. *State of Gujarat*, 1995 Cr LJ 2662 (paras 6 and 7) (SC), **following** *State of Punjab* v. *Balbir Singh*, (1994) 3 SCC 299 : 1994 AIR SCW 1802.
40. *Naseem Bano* v. *State of U.P.*, AIR 1993 SC 2592 (para 12), **reversing** 1985 UPL BEC 84.
41. *Kirpa Ram Mathur* v. *State of U.P.*, AIR 2001 SC 3071 (paras 7 and 11).
42. *Regional Transport Authority, Jodhpur* v. *Sita Ram*, AIR 1993 Raj 76 (paras 5, 6 and 7).
43. *Ahad Najar* v. *Ram Chand*, AIR 1965 J&K 31.
44. *Puttamma Shedthi* v. *Sheena Shetty*, AIR 1952 Mad 849.
45. *Rajagopal Naidu* v. *Muthulakshmi Ammal*, AIR 1969 Mad 5.
46. *Dhanpatrai Periwal* v. *State of West Bengal*, AIR 1954 Cal 518.
47. *Ratanlal Agarwala, Jorhat* v. *State of Assam (FB)*, 1993 Cr LJ 2747 (para 24) (Gau), **overruling** *State of Assam* v. *Jagat Singh*, (1992) 1 Gau LR 62.
48. *Tika Ram* v. *State of Allahabad*, AIR 1960 All 453; *Padmavathi Ammal* v. *Maruthachalam Pillai*, ILR (1966) 1 Mad 600; *Ramesan* v. *Kunhipalu*, AIR 1977 Ker 119.
49. *Ratha Harijan* v. *Narasingha Rana*, AIR 1961 Ori 22.
50. *Krishna Mukhlal* v. *Sha Bhagwan*, AIR 1974 Guj 1.
51. ILR (1978) 1 All 225.
52. *Harijiwan Sahu* v. *Jai Ram Sahu*, AIR 1989 Pat 96.

passed the court was satisfied that a valid compromise was arrived at there in between the parties thereto.[53]

14. ISSUE OF WARRANT PRESUMPTION AS TO

BEAUMONT. C.J. said "It is, I think, desirable that a warrant issued under the terms of a particular statute should show on its face that the conditions precedent required by the statute have been complied with, but it is not in my view essential that the warrant should so show. There is a presumption under Section 114, illus. (*e*), Evidence Act, which enables us to presume that the officer issuing the warrant has performed his duty correctly, and until that presumption is displaced, it is not, in my opinion, necessary for the officer to give any evidence in the matter."[54]

Where a warrant of arrest is on the face of it not defective the court would be entitled to draw a presumption in accordance with the provisions of Section 114(*e*).[55]

15. PRESUMPTION OF GOVERNMENT AND OFFICIAL ACTS

When law requires an act to be done in a particular manner and there is no evidence to the contrary, there is presumption that they have been performed in the manner provided in law.[56]

The factual recitals or observations made in a judgment or order are taken to be correct unless rebutted.[57] The matters of judicial record are unquestionable inasmuch as that they are not open to doubt. Hence is a case of divorce decree, the allegation by the wife that her signature on the petition was obtained per force, could not be entertained[58] but where it was found that the date hearing objection in the order sheet was a gazetted holiday, it was inferred that for preparing the manipulated order sheet some date was picked up at ran down which unfortunately turned out to be a gazetted holiday. Thereafter taking a false plea that objections were heard on a holiday and swearing in a false affidavit also by the Spl. Land Acquisition Officer do not raise a presumption that official acts are done in a regular manner[59] and *ex parte* decree cannot be presumed to be passed on merits.[60] In view of the Section 114, illustration (*e*), the act of the Appellate Authority rejecting the application for condonation of delay could be presumed to have been regularly performed, if nothing contrary was established.[61]

The presumption that all judicial and official acts would be regularly performed though is rebuttable yet it restrains to anticipate that the officers entrusted with statutory duty would act in contravention of law.[62] The presumption under Section 114(*e*) will come to the aid of the party, only if the party proves the fact that the judicial or official act has been, in effect, done or performed and that too in accordance with law.[63]

Official work is presumed to be correct unless faulted or disproved by cogent evidence.[64] Since there is a presumption that all official acts are properly done, it must be held that the Deputy Superintendent of Police who conduted the departmental enquiry had the authority to do so.[65] The presumption can be drawn, if the Court is satisfied that the action in question is traceable to a statutory

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53. *Nandalal Mahton* v. *Haubat Mahton*, AIR 1965 Pat 345.
54. *Emperor* v. *Vallibhai*, 34 Bom LR 1447.
55. *Daitari Das* v. *State of Orissa*, AIR 1956 Orissa 97. **See also** *Ranga Lal Sen* v. *Emperor*, AIR 1936 Cal 788.
56. *Lokesh Chandra* v. *State*, 1998 AIHC 3387 (para 15) (Raj).
57. *State of Maharashtra* v. *Admane Anita Moti*, AIR 1995 SC 350 (para 3).
58. *Shahnaz Shaharyari* v. *Vijay Y. Gawande*, AIR 1995 Bom 30 (paras 19 and 24). The Court referred to *State of Maharashtra* v. *Ramdas Shrinivas Nayak*, AIR 1982 SC 1249 : 1982 Cr LJ 1581 (para 4 p. 1251).
59. *Kanwar Sahkari Awas Samiti Ltd* v. *State of U.P.*, 1999 AIHC 3210 (paras 27 and 30) (All).
60. *International Woollen Mills* v. *Standard Wool (U.K.) Ltd.*, AIR 2001 SC 2134 (para 17), **overruling** *Sheikh Abdul Rahim alias S.A. Rahim* v. *Mohammed Din*, AIR 1943 Cal 42.
61. *Gurdharlal M. Pittie* v. *A.A. for Industrial & Financial Reconstruction*, AIR 1998 Del 400 (para 2).
62. *Mohan Singh* v. *Regional Transport Authority, Jaipur*, 1998 AIHC 4758 (para 25) (Raj).
63. *Vijaya College Trust* v. *Kumta Co-operative Arecanut Sales Society Ltd.*, AIR 1995 Kant 35 (para 10).
64. *Kartar Singh* v. *D.D.A.*, AIR 2000 Del 184 (paras 12 to 16). **See also** *Collector, Sundergarh* v. *Marienus Kusan*, 2001 AIHC 82 (para 2) (Ori).
65. *Chhotka* v. *State*, AIR 1958 Cal 482; *Corporation of Calcutta* v. *Krishna Mohan Kundu*, AIR 1954 Cal 254; *Balkrishna S. Joshi* v. *State of M.B.*, AIR 1957 MB 130; *Anwar Khan* v. *Bhoor Singh*, AIR 1952 Raj 152; *Ambika Prasad* v. *State of U.P.*, ILR (1960) 2 All 131.

power even when the authority concerned has omitted or committed an error in reciting the correct provision of law.[66]

Legislature must be presumed to know the facts and conditions rendering a statute expedient and beneficial.[67] Unless the contrary is proved the court has to presume that an impugned act has been validly enacted and that all the necessary formalities or its enactment have been duly complied with.[68] It must be presumed that in making nominations to the State Legislative Council, the Governor must have acted on the advice of his Council of Ministers. Court is entitled to presume regularity of official acts.[69] Where the Government issues a notification that a certain land is urgently required for public purposes, it may be presumed that the Government's decision on the issue of urgency is properly done.[70] When the Government accords sanction for prosecution, it is presumed that the official acts have been regularly performed.[71]

There is a presumption when a statutory authority makes an order, that it has followed the prescribed procedure.[72]

Where a Deputy Secretary to Government makes an order in his own right without authenticating it as issued in the name of the President, the order is not valid. The presumption of official act could not be invoked.[73] Where the Govt. authority made appointment of as many as 6000 odd employees without any written order *i.e.*, without issuing any appointment letter, thus without following the prescribed procedure, the presumption under Section 114(*e*) does not get attracted.[74]

Presumption is that every public officer performs his duty honestly and in accordance with law.[75] Presumption of correctness arises in respect of those documents which were prepared and maintained by the public officers in due discharge of their duties as per requirement of rules.[76] Where *mala fides* or abuse of power is alleged in respect of an official act, the presumption is that officials discharge their duties honestly and in accordance with law. This presumption is heightened in the case of high officials occupying senior positions in contradistinction to minor and petty officials.[77] In a writ petition against Government, the burden of proof of the petitioner pleading *mala fides* is heavy. Presumption of proper performance of duty by a public servant cannot be rebutted by making mere vague allegations.[78] Where a statute has conferred the privilage of exercising discretion on a responsible officer the court can legitimately presume that he has not acted capriciously.[79]

Public Officers are assumed to act fairly. But this presumption holds goods only as long as the aggrieved party is not able to adduce facts proving the likelihood of discrimination.[80]

The court is entitled to presume that official acts have been performed in their regular course.[81] Courts are entitled to presume that Government orders have been made in due course of its authority.[82] Where the order of detention under J&K Public Safety Act was signed by the Additional Home Secretary to Government who was competent to sign the said order, there arises the presumption of its validity.[83]

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66. *B.S.E. Brokers Forum, Bombay* v. *S.E.B.I.*, AIR 2001 SC 1010 (paras 20 and 21).
67. *Raval & Co.* v. *K.G. Ramachandran*, AIR 1967 Mad 57 (FB).
68. *Narayana* v. *Shankar Narayana*, AIR 1953 Tra & Co. 53.
69. *Biman Chandra Bose* v. *Governor, W.B.*, AIR 1952 Cal 799.
70. *Ishwarlal Girdhar Lal Joshi* v. *State of Gujarat*, AIR 1968 SC 870.
71. *M.S. Reddy* v. *State Inspector of Police, A.C.B., Nellore*, 1993 Cr LJ 558 (para 43) (AP).
72. *Gopal Narain* v. *State of U.P.*, AIR 1964 SC 370; (imposition of tax); *Lallomal* v. *I.T.O., Kanpur*, AIR 1959 All 775; *Khurkhur* v. *State*, AIR 1970 All 198 (FB).
73. *P.B. Pardasani* v. *State*, AIR 1967 Punj 174.
74. *Ashwani Kumar* v. *State of Bihar*, AIR 1996 SC 2833 (paras 20 and 21).
75. *State* v. *Magha*, ILR 1951 Raj 429.
76. *Twarku* v. *Surti*, AIR 1997 HP 76.
77. *Bhupindar Singh* v. *State of Haryana*, AIR 1968 Punj 406.
78. *Darshan Singh* v. *State*, 1975 Cr LJ 1974 (Punj).
79. *Jyoti Sarup* v. *Board of Revenue U.P.*, AIR 1953 All 25.
80. *Uttar Pradeshiya Shramik Maha Sangh, Lucknow* v. *State of U.P.*, AIR 1960 All 45; *Joseph Thomas* v. *State of Kerala*, AIR 1958 Ker 33.
81. *Brojendra Kumar Saha* v. *Union of India*, AIR 1961 Cal 217.
82. *Magermans A.H.* v. *S.K. Ghose*, AIR 1966 Cal 552; *Mahikchand Cwaotelal*, 1968 MP 138.
83. *Mohd. Yasun Ahanger* v. *State*, 1993 Cr LJ 727 (paras 6 and 8) (J&K).

There can be no presumption against the express provisions of law which are embodied in any statutory enactment or in any rules made under such enactments or even against principles enunciated in judicial precedents.[1]

In the absence of contrary evidence, the State Government should be presumed to act with complete propriety and without any *bias*.[2]

Entries in a birth registered maintained in a police station under U.P. Police regulations were presumed to be correct.[3] The presumption under Section 114, illus. (*e*) to the effect that the court may presume that official acts have been regularly performed is hardly applicable to an entry about the age in the electoral roll which is made on hearsay and is not verified or attested.[4]

Presumption of correctness attached to counting of votes is not destroyed when a single mistake is detected while counting ballot papers of an election.[5]

There is no necessity for drawing a presumption under Section 114(*e*) where the statute directs a document to be filed and the certificate shows on the face of it to have been filed. The filing is sufficiently proved by the certificate.[6]

A person who challenges a revenue sale, has to prove irregularities. Entries in books of Collector will be presumed to be correct under Section 114(*e*).[7] Entries in Collector's books are presumed to be correct having regard to illus. (*e*) and (*f*).[8]

There is presumption that an Act done by municipality has been done according to prescribed procedure.[9] The confidential reports submitted by the medical examiners of the Life Insurance Corporation will have to be accepted as true.[10] The certificate by Board of Censor is relevant but does not create a presumption that Sections 292 and 293 of I.P.C. are not violated.[11] When official act is done, it is presumed to have properly done.[12] Waxilmulars is a village administration paper prepared with due care after due enquiry by a public servant in the discharge of his official duty and so presumption of correctness attachees to it.[13] Where the business of the Government relating to the state affairs was published in Government publiction, it may be presumed to be correct unless rebutted.[14] Before any presumption can attract to an order under Defence of India Rules, it must be shown to be, on the fact of it, regular and to conform to the provisions of the rule under which it purports to have been made.[15] Where an order passed by the authority has been published by it in the Official Gazette, it may be presumed that it was aware of the provisions of Rule 119, Defence of India Rules, and that the publication in the Gazette was caused in compliance with all its provisions.[16] An Officer passing an order should be presumed that he was authorised to pass the order until the contrary is shown.[17] Where a Municipal Council Constituted Committee and delegated some of its powers and functions to them, the

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1. *Oinam Ibomcha Singh* v. *Ninghthoujam Mangi Singh*, AIR 1957 Manipur 18.
2. *Workers and Staff Association of Govt. Soap Factory* v. *State of Mysore*, AIR 1971 Mys 22.
3. *Ram Das* v. *State of Maharashtra*, (1970) 2 SCC 124 : AIR 1977 SC 1164.
4. *Charanjit Lal* v. *Lehri Singh*, AIR 1958 Punj 433.
5. *Tribeni Ram* v. *Satyadeo Singh*, AIR 1966 All 20.
6. *Durga* v. *Secretary of State*, AIR 1954 SC 62.
7. *Najib Mohammad* v. *Rahman Khan*, AIR 1952 Ori 131.
8. *Mahommed Solaiman* v. *Birendra Chandra Singh*, ILR (1922) 50 Cal 243 : 50 IA 247; *Emperor* v. *Shib Charan*, AIR 1938 All 386.
9. *Commissioner of Gaya Municipality* v. *Chamari Ram*, ILR (1967) 45 Pat 246.
10. *L.I. Corporation* v. *B. Chandravathamma*, AIR 1971 AP 41.
11. *Raj Kapoor* v. *State (Delhi Admin)*, AIR 1980 SC 258.
12. *Soni Bachu Lakhman* v. *State*, AIR 1960 Guj 37.
13. *Avadh Kishore Das* v. *Ram Gopal*, AIR 1979 SC 861.
14. *R.C. Nayak* v. *A.R. Antulay*, AIR 1986 SC 2045.
15. *Rex* v. *Sibnath*, AIR 1943 FC 75.
16. *Mahadeo Prasad Jayaswal* v. *Emperor*, AIR 1946 Pat 1.
17. *State of Uttar Pradesh* v. *Benaras Electric Light and Power Co. Ltd.*, AIR 1973 All 74; *Ammathi Sadhukhan* v. *A.K. Chatterjee*, AIR 1951 Cal 90.

delegation must be presumed to be validly made.[18] There is no presumption by which a delegation of power could be presumed.[19]

Where the powers of requisition are delegated to Collectors by the State and the Collectors are satisfied about the necessity for requisition, the State is presumed to be satisfied with regard to such requisition.[20] The presumption is that the public purpose of the Eviction Act for which the person is sought to be evicted from the public land was duly specified in the notice in compliance with the requirement of the Act.[21] Notification under Section 4 of the Land Acquisition Act is an official Act. Unless contrary is proved, it may be presumed to have been properly done.[22] Where land was acquired by the Government for a company, it may be presumed that land was acquired for purpose of business of the company.[23] Persons mentioned in notice under Section 9(3) of Land Acquisition Act must be presumed to be the only persons interested.[24] It may be presumed that the consent of Government under Section 40 of Land Acquisition Act has been granted.[25]

The presumption that the facts stated in a Government notification are correct is not an absolute presumption and may be rebutted by proper evidence.[26] Presumption as to the correctness of public purpose notified by the Government, is rebuttable and the court can examine the purpose.[27]

Cases.—Where the investigating team conducted search and seizure within the limits of another police station without informing the concerned police station to avoid delay and subsequently, the investigating officer wrote two letters regarding it to the concerned police station, it could be presumed that the official acts were performed regularly.[28] Where the Returning Officer had called the candidate and the proposer to remain present at the time of scrutiny of the nomination form but they did not turn up when their names were called on microphone and therefore after examining the forms by himself he rejected his nomination paper because of wrong electoral roll number mentioned therein, presumption arises that the official acts were done in accordance with rules and procedure.[29] Where the application of a candidate for admission was duly processed and scruitized through sub-committee which recommended her admission on being fully satisfied about eligibility, there arose the presumption as to performance of official act. Further, after persuance of the course for one year, withholding of her examination result for the verification of eligibility for admission was held to be illegal, especially when she took no undue advantage by deception or subterfuge.[30] Where notices for default of payment of debt under the State Financial Corporation Act were signed by the Branch Manager of the Corporation and not the Manager who was empowered under the Act, it was held to be proper as the Branch Manager had acted with properly delegated authority.[31] Where the cancellation of the mining lease on the ground of the report of the enquiry by the Government that the mining area fell within the forest area was challenged by the petitioner who did not place the report on the Court record, presumption as to correctness and regularity of official acts in submitting the report could be drawn.[32] Where delivery of the allotted land under the Punjab Security of Land Tenures Act, 1953 was the official act of the revenue authorities a presumption has to be raised that all the antecedent formalities were duly complied with.[33] Merely because the file containing the community-cum-residence certificate issued earlier to the

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18. *Venkateshwararao* v. *Masulipatam Municipal Council by Commissioner S. Subbarao*, AIR 1952 Mad 608.
19. *Mahabir Prasad Litha* v. *Purulia Electric Supply Corp. Ltd.*, AIR 1958 Cal 661 : 1958 Cr LJ 1394; *Union of India* v. *Parmindar Singh*, AIR 1962 Raj 244.
20. *Dhan Devi* v. *Bakhshi Ram*, AIR 1969 Punj.
21. *Jaidutt* v. *State of U.P.*, AIR 1979 SC 1303.
22. *Hakim Fazal Mohd* v. *State of W. Bengal*, ILR (1969) 1 Cal 529.
23. *Commissioner of I.T.* v. *Rohtas Industries Ltd.*, AIR 1966 Pat 338.
24. *Hakim Fazal Mohd* v. *State of W. Bengal*, ILR (1969)1 Cal 529.
25. *Aurora Ram Ditta Mal* v. *State of Uttar Pradesh*, AIR 1958 All 126.
26. *New India Assurance Company Ltd.* v. *Central Govt. Industrial Tribunal, Dhanbad*, AIR 1953 Pat 321.
27. *Jaishi Ram Goel* v. *Punjab through Secretary Industries Dept., Punjab Government*, AIR 1962 Punj 177.
28. *Ronny* v. *State of Maharashtra*, AIR 1998 SC 1251 : 1998 Cr LJ 1638 (para 30) (SC). **Contra :** Auction of shop, acceptance of plaintiffs bid, plea that her bid not accepted, not proved, presumption of official acts performed regularly, *Krishna Rani Kwatra* v. *Delhi Development Authority*, AIR 1999 Del 194 (para 12).
29. *Rafiq Khan* v. *Laxmi Narayan Sharma*, (1997) 2 SCC 228. **Also see** *Sanjay Kumar Bajpai* v. *Union of India*, (1997) 10 SCC 312.
30. *Lumbini Baruah* v. *Cotton College, Guwahati*, AIR 1997 Gau 87.
31. *Kshudiram Pal* v. *West Bengal Financial Corporation*, AIR 1998 Cal 52, at p. 54.
32. *Kamal Singh* v. *State*, AIR 1998 All 220 (para 7).
33. *Krishna Kumari* v. *State of Haryana*, (1999) 1 SCC 338.

petitioner was destroyed, the genuineness and correctness of the certificate could not be doubted unless there were other circumstances to rebut the presumption as to official acts.[34]

16. REGISTERING OFFICER

Facts recorded by the Registrar on the document could be presumed to be correct.[35] It may be presumed that a document is validly presented to the Registrar who proceeded to register the same.[36] A certified copy of a registered document can be accepted as correct copy under Section 114(*e*).[37] When a document contains a number and page of the register in which it is copied, a presumption can be raised that the certified copy and the endorsement must have been copied from the Register Book.[38]

A presumption could be drawn that the Registrar has discharged his official duties in accordance with law and certificate of registration also under certain circumstances be taken as evidence of execution. But if the executant herself comes before the Court and denies the execution of the document and if there are other circumstances supporting such denial, the presumption stands rebutted and the plaintiff is expected to produce better evidence.[39] Where the procedure laid down by law is not followed, validity of registration cannot be presumed in favour of the party.[40] That a document is registered does not raise a presumption that the Registrar must have read it out to the execution.[41]

17. NOTARY PUBLIC

There is presumption that a notary public must have satisfied himself in discharge of his official duties that the person executing the power of attorney is the proper person. Fact that the notary does not say so in his endorsement is not material.[42] Where an illiterate lady executed a document by affixing her thumb impression before a notary and there was no endorsement by the notary to the effect that the contents of the document were explained to her and the notary was not examined as a witness, no presumption under Section 114 can be raised regarding the execution of the document.[43]

Where an affidavit was not sworn in India, but before an Oaths Commissioner in Pakistan, presumption of regularity of official act would not apply.[44]

18. SANCTION ORDERS

When a letter intimating that sanction had been granted, is received, presumption would arise that sanction had in fact been accorded and that official act of granting sanction was regularly performed.[45] Where the sanction of a complaint by a Police Inspector is addressed to the I.G. of Police and there was nothing on record to show the Inspector was duly authorised, presumption that Inspector's action was not unauthorised can be drawn.[46]

19. REGISTERED POSTAL ARTICLES, LETTERS ETC.

Existence of acknowledgments in respect of registered articles in post office would raise a presumption that those articles were delivered to the addressee. Presumption may be rebutted by

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34. *P.S. Manoharan* v. *State of Tamil Nadu*, AIR 1999 Mad 208 (para 17).
35. *Kameshwara Rao* v. *Suryaprakasa Rao*, AIR 1962 AP 178; *Jhunkaribahu Alias Katrawali w/o Laxmiprasad* v. *V Phoolchand Alias Manikchand*, AIR 1958 MP 261; *G.P. Lakshmi* v. *T.B. Rajamma*, 2000 AIHC 4885 (para 31) (Kant).
36. *Mahaluxmi Bank Ltd.* v. *Kamakhyalal Goenka*, AIR 1958 Ass 56; *Apaya Dundyappa* v. *Govind Dattatraya*, AIR 1956 Bom 625; *Fuljari Lal* v. *Ram Sarup*, AIR 1953 MB 177.
37. *Rabindra N. Das* v. *Santosh Kumar Mitra*, AIR 1975 Cal 381; *Sudayan Ammal* v. *Saleyath Marry*, AIR 1973 Mad 421.
38. *Ramdayal* v. *Bhanwarlal*, AIR 1973 Raj 173 (FB).
39. *Backiam* v. *Krishnan*, 2000 AIHC 2317 (paras 22 and 23) (Mad).
40. *Nandeshwar Chakravarty* v. *Mahendra Nath Sarma*, AIR 1956 Ass 123.
41. *Chinnamma* v. *Devanga Sangha*, AIR 1973 Mys 338.
42. *Jugraj Singh* v. *Jaswant Singh*, AIR 1971 SC 761.
43. *Haji Abdul Gaffar* v. *Maden L. Khandblwal*, ILR (1966) 2 Cal 235.
44. *Ghulam Mohammad* v. *Badshah Begum*, AIR 1970 J&K 159.
45. *Tulsi Ram* v. *State of U.P.*, AIR 1963 SC 666; *State of Rajasthan* v. *Ram Dayal*, 1984 Cr LJ 1224 (Raj); *Rampukar Singh Watchman* v. *State*, AIR 1954 All 223; *Gurbachan Singh* v. *State*, AIR 1970 Delhi 102.
46. *Public Prosecutor* v. *Mulugu Jwala Subramanyam*, 1957 Cr LJ 1389 : AIR 1957 AP 987.

vidence of addressees that articles were in fact not received by them[47] but bare denial of his signature n the acknowledgement would not be sufficient to rebutt the presumption.[48] Where the postal cover is orrectly addressed and sent by registered post, the presumption with regard to service would arise under oth the provisions of Section 114 of the Evidence Act and Section 27 of the General Clauses Act. The vidence of actual tender and refusal to accept delivery is not necessary to bring about the resumption.[49] Where the notice returned with endorsement that the addressee was out of station, the otice would be deemed to be duly served.[50] Where a notice is sent by registered post, presumption will rise in favour of the sender.[51] Where the endorsement by the postman on the registered cover indicated hat he had gone to the address of the addressee several times but it was not clear whether he was present n the house or avoided to take delivery, his absence from the house cannot lead to the presumption of elivery. No steps were taken to send the notice by registered post again.[52] Where the registered notice ent by the landlord to the tenant was received back with endorsement "not claimed", it could not be eated to be one of refusal. The tenant denied the receipt of the notice on oath and the landlord produced o evidence to the contrary. No presumption of service of notice could be drawn.[53]

Ordinarily a statement of the addressee on oath that the postal cover, said to have been refused by im, was never tendered to him would be sufficient to discharge the presumption of service and shift the nus on the other side to establish by evidence that the service had been duly effected[54] but not the mere enial.[55]

20. ENTRIES IN RECORD OF RIGHTS, REVENUE RECORDS

Entries in record of rights can be presumed to be correct until presumption is rebutted[56] and if they emained unchallenged for a period of sixty years inspite of alienation of some of the property, the nchoate right became absolute as full ownership.[57]

The entries in the revenue records are generally to be accepted at their face value and courts should ot embark upon into their correctness. But the presumptiosn of correctness can apply only to genuine, ot forged or fraudulent entries. The distinction may be fine but it is real. One cannot challenge the orrectness of what the entry states, but the entry is open to attack that it was made fraudulently and urriptiously.[58]

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7. *Radha Kishan* v. *State of Uttar Pradesh*, AIR 1963 SC 822.
8. *Shashi Singh* v. *Sukh Swarup Kapoor*, 1996 AIHC 3013 (paras 11 and 19) (All).
9. *Jagat Ram Khullar* v. *Battumal*, AIR 1976 Delhi 111; *Zakir* v. *Mohammad Hussain Khan*, AIR 1977 All 476; *State of Maharashtra* v. *Nazmunnisa*, (1998) 9 SCC 191; *State of M.P.* v. *Ramdeo Agrawal*, 1995 Cr LJ 1512 (para 9) (MP); *Binod Bihari Singh* v. *Union of India*, AIR 1993 SC 1245 (para 10); *Prime Industries* v. *Rafeeq Ahmad*, 1997 AIHC 2419 (para 6) (Del); postman need not be produced, *Rais Ahmad* v. *Special /Addl. District Judge, Saharanpur*, 1998 AIHC 728 (para 4) (All), **relying on** *Ganga Ram* v. *Phulwati*, AIR 1970 All 446; *Dharam Vir* v. *Ram Chandra*, 1998 AIHC 786 (para 8) (All); *Ramesh Kumar Mittal* v. *Probal Kumar Ghoshal*, 1998 AIHC 1260 (paras 13 and 16) (Cal).
10. *Aparna Agencies, Hyderabad* v. *P. Sudhakar Rao*, 2000 Cr LJ 1005 (paras 7, 8, 12 and 13) (AP).
11. ***Abhoyjan Tea Co. Ltd.* v. *Agricultural I.T. Officer Shillong*, AIR 1966 Assam 84.**
12. ***Jameel* v. *State of U.P.*, 2000 Cr LJ 3049 (para 7) (All).**
13. *Lalmani Ramnath Tiwari* v. *Bhimrao Govind Pawar*, 2001 AIHC 2125 (paras 11 and 12) (Bom).
14. ***Jagat Ram Khullar* v. *Battu Mal*, AIR 1976 Del 111.**
15. *Chander Kanta Singhal* v. *Kapadia Exports*, 1998 AIHC 153 (para 22) (Del).
16. *Rajinder Chand* v. *Sukhi*, AIR 1957 SC 286; *Avadh Kishore* v. *Ram Gopal*, AIR 1979 SC 861; *Commissioner of Wealth Tax, A.P.* v. *Officer-in-Charge Paigah* AIR 1977 SC 113; *Jatindra Nath Malik* v. *Sushilendra Nath Palit*, AIR 1965 Cal 328; *Paras Ram* v. *Dayal Das*, AIR 1965 Him Pra 32; *Karthiayani Pillai* v. *Janaki Pillai Lekshmi Pillai*, AIR 1958 Ker 335; *Korada Gedha* v. *Raghoab pati*, AIR 1963 Ori 121; *Kalika Prasad Ojha* v. *Jhenjh Kuer*, 1964 Pat 241; *Ramgobind Singh* v. *Ramranbijai Singh*, AIR 1958 Pat 279; *Wasawa Singh* v. *Jagir Singh*, AIR 1965 Punj 494; *Mohanlal* v. *Mohum Ram*, AIR 1966 HP 61; *Jagat Chandra Marak* v. *Ulfat Ali Bhuiya*, AIR 1970 Tri 43; *Gulap Singh* v. *Union of India*, AIR 1977 Gau 41; *Shyama Sahu* v. *Anam Sahu*, AIR 1976 Ori 126; *Paramananda* v. *Hadibandhu*, 1997 AIHC 880 (para 5) (Ori); *Secretary to Government of India, Ministry of Defence, New Delhi* v. *Indira Devi*, 1999 AIHC 4682 (para 8) (AP), **relying on** *Shikarchand* v. *D.J.P. Karim Sabha*, AIR 1974 SC 1178; *S. Venkatappa* v. *Narayanappa*, AIR 2001 SC 2148 (para 14), **reversing** L.R.R. P. No. 2035 of 1990, Dt. 7-8-1996 **(Kant).**
17. *Krushna Panda* v. *Godabari*, 1997 AIHC 478 (paras 7 and 8) (Ori).
18. *Vishwa Vijay Bharati* v. *Fakhrul Hassan*, AIR 1976 SC 1485; **following** *Sonawati* v. *Sri Ram*, AIR 1968 SC 466.

Presumption arising from several entries in revenue records of large number of years in respect of ownership and possession of land with a certain person is not rebutted by mere stray entries in favour of others when evidence is of uncertain character and inadequate.[59] The presumption of correctness is confined only to the possession of the party on the date of record and does not confer any title on such party[60] but the entries in the remarks column have no presumptive value as to the rights/possession.[61]

Where the decision given by the trial court and the lower appellate court long before the publication of record of rights, was in conflict with the entries in the record of rights, the presumption as to correctness of the entries in the record of rights does not prevail.[62]

An entry in the Record of Rights stands on a different footing than other sort of entries in other village papers or mutation papers and the law does not attach so much sanctity to them as it does to the entry in the Record of Rights, which is presumed to be correct.[63]

The presumption regarding the correctness of entries in record of rights attaches also to non-agricultural lands.[64]

Where there is a conflict between the old record of rights and the recent one, the presumption is that the recent record is correct unless it is proved by evidence to be incorrect.[65]

Entry in *Khasra* is not conclusive proof of any right. There must be cogent evidence and the rights of parties cannot be determined on mere surmises and conjectures.[66] *Khasra* entries have only presumptive value[67] and so are the entries in *nazul* register but the presumption of their correctness is rebuttable.[68]

The truth of relationship may be presumed from the entries made in settlement pedigree tables.[69]

All formalities in respect of mutations must be presumed to have been complied with. No proof of such compliance is necessary. It is for the other party to rebut the presumption.[70] Entries in mutation registers do not confer any title. Mutation is not evidence of title.[71] Mutation of property does not create or extinguish title nor it has presumptive value of title.[72] Where mutation was done in compliance to the orders of the Sub-Divisional Officer, without placing and proving the said order, the said mutation entry could not be relied upon.[73]

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59. *Bhimeshwara Swami Varee Temple* v. *Padapudi Krishna Murthi*, AIR 1973 SC 1294.

60. *Nirmalendu Chakrabarty* v. *State of West Bengal*, 1997 AIHC 1861 (para 24) (Cal).

61. *J.R. Ahir* v. *P.R. Yadav*, AIR 2000 MP 223 (paras 5 and 6), **relying on** *Churamani* v. *Ramadhar*, 1991 MPLJ 311.

62. *Kazi Md. Hossain* v. *Sibram Bondopadhaya*, AIR 1967 Cal 10; *Abdulsab* v. *Special Deputy Commissioner*, ILR (1976) 2 Kant 1430.

63. *Janandan Rai* v. *Mandeo Rai*, AIR 1997 Pat 124.

64. *Satish Chandra Karmakar* v. *Shaikh Sahadat Hossain*, AIR 1973 Cal 264.

65. *Haji Mumtajuddin* v. *Debendra Nath Seal*, AIR 1959 Cal 78; *Rewa Shankar* v. *Narasinghji Maharaj*, AIR 1957 HP 16.

66. *Sukhbasi Lal* v. *Durjan Singh*, AIR 1963 All 119; *Beant Singh* v. *Natha Singh*, 1955 HP 48.

67. *Kashiram* v. *State*, AIR 1996 MP 246 (para 9).

68. *Nagar Palika Bulandshahr* v. *Hanuman Prasad*, 1996 AIHC 3148 (paras 13 and 14) (All).

69. *Mangal Singh* v. *Manphul Singh Jaimal Singh*, AIR 1961 Punj 251.

70. *Raj Kumari* v. *Co-op. Insurance Co. Ltd., Amritsar*, AIR 1951 Punj 126.

71. *Ram Sarup* v. *State of Punjab*, 1987 Cr LJ 928 (P&H); *Talat Fatima Hasan* v. *Nawab Syed Murtaza Khan*, AIR 199 All 122; *State of H.P.* v. *Keshav Ram*, AIR 1997 SC 2181, **reversing** RSA No. 122 of 1986, Dt. 4-5-1994 (HP) *Nawalshankar Ishwarlal Dave* v. *State of Gujarat*, 1994 Cr LJ 2170 (para 4-A) : AIR 1994 SC 1496; Presumption i favour of entry in record of rights, burden to prove it incorrect lay on party challenging it. *Anwar Hossain Sheikh* v *Santu Kumar Mondal*, AIR 1997 Cal 120; *Sawarni* v. *Inder Kaur*, AIR 1996 SC 2823 (para 7), **reversing** RSA No 1253 of 1994, Dt. 22-11-1994 (P&H); mutation does not affect the possessory right of a person. *T. Siddeshi* v *Deputy Commissioner*, AIR 2001 Kant 297 (para 5).

72. *Purshottam Dass Tandon* v. *Military Estate Officer*, AIR 2000 All 127 (para 16) : 2000 AIHC 2818. **See also** *Kel Behera* v. *State of Orissa*, 2001 AIHC 2806 (para 6) (Ori).

73. *Akshara Nand* v. *State of H.P.*, 1996 AIHC 1894 (para 7) (HP).

Jamabandhi has no presumptive value as record of rights.[74] Entries in the Municipal *Jamabandhis* cannot prove title[75] but preparation of *phaisal patti* by the Tehsildar, being his official act, presumption would attach to it under Section 114(*e*) of the same having been regularly performed.[76]

Entries in the annual village papers under Sections 45 and 50 of the Madhya Bharat Land Revenue and Tenancy Act, 1950 create presumption albeit rebuttable in favour of a person whose name is recorded.[77]

21. ANALYST'S REPORT

A report signed by a Public Analyst under the Prevention of Food Adulteration Act, 1954, without any other proof, is admissible in evidence under this clause.[78]

Rules 7 and 18 under Prevention of Food Adulteration Act, 1954 are mandatory. Presumption under Section 114(*e*) of Evidence Act, 1872 in regard to regularity of procedure followed by public analyst may be raised when there is proof that the food inspector had discharged his functions according to rules.[79]

Food Analyst's report says that he received the sample and the specimen of seal separately. It is to be presumed that he received them in the manner stated in the report.[80] The public analyst's report stating that the sample was properly sealed is not conclusive. Section 114 cannot be invoked.[81] Clean and dry bottles and others containers are to be used for drawing and storing samples, under Rule 14, Prevention of Food Adulteration Rules. There was no evidence by the prosecution to show that the rules were complied with. However, it was held that the court may presume compliance under Section 114.[82]

Where there was delay in compiling the report on the analysis of a sample, presumption that analysis of the sample was also delayed cannot be drawn.[83]

22. NOTICE REQUIRED UNDER AN ACT

Where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that libability, incurred to prove that the things prescribed in the Act, have been actually done. No presumption can be made in favour of the things prescribed by the Act having been done. If, for example, publication of a notice was essential under an Act in order to bind a person, such publication must be distinctly proved.[84] But the Privy Council has held that in the absence of evidence to the contrary it has to be presumed that the procedure laid down in a statute was duly followed and that proper statutory notice was given.[85] Where a warrant contains a preamble that the requirement of a section of an Act has been fulfilled, a presumption arises under this illustration that the officer issuing the warrant has performed his duty correctly.[86] Where the publication of notification regarding land acquisition proceedings was made locally, it could be

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4. *Gobind Singh* v. *Parsuram Ram*, ILR (1973) Cut 76. **See also** *Guru Amarjit Singh* v. *Rattan Chand*, AIR 1994 SC 227 (para 2).
5. *Ramji Batanji* v. *Manohar Chintaman*, AIR 1961 Bom 169.
6. *Pabbathi Reddy Sudarshan Reddy* v. *Pabbathi Reddy Sashirekhamma*, AIR 1996 AP 300 (para 10).
7. *Kasturchand* v. *Haribilash*, AIR 2000 SC 3037 (paras 16 and 17).
8. *State* v. *Chhotekhan*, AIR 1970 MP 29, (FB); *Babulal* v. *State of Gujarat*, AIR 1971 SC 1277; *Food Inspector, Vizianagaram Municipality* v. *Kurmapu Surya Prakasa Rao*, 2001 Cr LJ 1101 (paras 2 and 4) (AP), **holding** *Food Inspector, Mangalore Corporation* v. *A.G. Suvarna*, 1985 Cr LJ 709 (Kant) **not a good law in view of** *Kassim Kunju Pookunju* v. *Ramakrishna Pillai*, 1969 Ker LJ 50 : 1969 LAR 15 (SC).
9. *Marry Lazrado* v. *State of Mysore*, AIR 1966 Mys 244.
0. *Ram Prasad* v. *State of Bihar*, 1976 Cr LJ 651 (Patna); *State of Haryana* v. *Isher Dass*, 1985 Cr LJ 1061 (FB); *Subbayyan* v. *State of Kerala*, 1968 Cr LJ 1554 : AIR 1968 Ker 330; *Krishna Rajaram* v. *M V Koranne*, 1068 Bom 727 : AIR 1968 Bom 247; *Jammu Municipality* v. *Faquir Hussain*, 1968 Cr LJ 162 : AIR 1968 J&K 17; *Food Inspector, Tellicherry Municipality* v. *T V Usman*, 1986 Cr LJ 535; *Revta* v. *State of M P.*, 1987 Cr LJ 1967 (IB).
. *Nirmal Kumar* v. *State*, 1987 Cr LJ 46 (MP).
. *State of Assam* v. *Puranmal Agarwalla*, 1985 Cr LJ 46 (DB)(Gau).
. *Public Prosecutor* v. *Venkataswami*, AIR 1967 And Pra 131 : 1967 Cr LJ 603.
. *Ashanullah Khan Bahadur* v. *Trilochan Bagachi*, ILR (1886) 13 Cal 197; *Walvekar* v. *Emperor*, ILR (1926) 53 Cal 718 : AIR 1926 Cal 960.
. *Jitendra Nath Ghose* v. *Manmohan Ghose*, (1930) 57 IA 214 : ILR 58 Cal 301 : AIR 1930 PC 193.
. *Emperor* v. *Savlaram Kashinath*, (1947) 49 Bom LR 798 : AIR 1948 Bom 156.

presumed to be have been made as per a requirement of the Act unless proved otherwise.[87] The endorsement by the peon that he affixed the copy of notification at a conspicuous place in the locality, is sufficient to raise the presumption under Section 114(*e*). It need not be proved beyond shadow of doubt.[88]

The Calcutta High Court has held that the Privy Council has virtually overruled the decisions which laid down that it is not sufficient for the purpose of proving service of notice to rely on the presumption arising out of this section.[89]

23. REGULAR ENQUIRY

Where the order refusing the grant of *Ryotwari patta* was passed after conducting a regular inquiry under the Rules, presumption of the official acts being correctly done arose.[90]

24. VALID TITLE

Where the tenant had been in long possession, presumption of valid title and compeletion of all formalities preceding the allotment was raised.[91]

25. COMMON COURSE OF BUSINESS [ILLUSTRATION (f)]

This illustration leaves it to the discretion of the court to presume that a common course of business has been followed; but the court is not bound to presume it.[92]

In commercial transactions the presumption is that the usual course of business was followed by the parties thereto. Where the defendent does not prove any exceptional circumstances to conclude that regular course of practice was not followed in his case, a bare denial by him cannot be believed so as to rebut the presumption under Section 114(*f*).[93] When a notice issued by an officer of the Company purports to have been issued by order of the Board of Directors, the presumption is that it was issued pursuant to such an order in the common course of business.[94] The entry of the despatch number in a despatch register should ordinarily be presumed to be correct in the absence of any evidence to the contrary.[95] The practice followed by a peon was to despatch letters on the day he received it or on the next day, or else to return it at the office. There was an entry in the peon's book showing that the letter was received by the defendant but there was no date of receipt of the letter. It was held that the court could draw conclusion that the letter was received by the defendant either on the date when the letter was despatched or on the next day.[96] Where it is shown that the railway administration had sent to the booking station intimation of the arrival of goods, it may be presumed that the booking station received the intimation.[97] In a case of loss of goods in transit, the railway failed to produce 'outward tally book' and seal labels when required, an adverse inference could be drawn against it.[98] Though the place to which goods were to be booked was not stated in the agreement, but it implied that an understanding must have been to book the goods to the place where the plaintiff carried on his business in the absence of any other place agreed to.[99] In the usual course of business of the insurance company, marine premium debit was issued. A copy thereof was attached to copy of policy kept in the office. In such a case, the court is entitled to rely on presumption afforded by Section 114(*f*), that the practice of insurance company of attaching such a note to the policy had been followed in a particular case and proof of

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87. *Susanna* v. *State of Kerala*, 1997 AIHC 3879 (para 11), Vol. 6 (Ker).
88. *Ajay Krishna Singhal* v. *Union of India*, AIR 1996 SC 2677 (paras 9 and 12).
89. *Sasi Sekhar Sen Biswas* v. *Maharaja Bir Bikaram Kishore Manikya*, (1931) 35 CWN 1239 : AIR 1932 Cal 267.
90. *Mohsin S. Mehdi* v. *State of A.P.*, 1996 AIHC 3929 (paras 7 to 11) (AP).
91. *Krishna Kumari* v. *State of Haryana*, (1999) 1 SCC 338.
92. *Ram Das Chakarbati* v. *Official Liquidator*, ILR (1887) 9 All 366, 376.
93. *Salik Ram Sahu* v. *Bindeshwari Ram Rauniyar*, 1965 All LJ 839.
94. *East and West Insurance Co. Ltd.* v. *Kamala Jayantilal Mehta*, AIR 1956 Bom 537.
95. *Badri Prasad* v. *Satish Kumar Sharma*, AIR 1964 Raj 184.
96. *Sailabala Dassee* v. *H.A. Tappassier*, AIR 1952 Cal 455.
97. G.P. Venkataraman and Co. a Firm v. Union of India owning Eastern Railway, AIR 1958 Mad 321.
98. *Union of India* v. *Roop Narayan*, AIR 1997 Raj 123.
99. *Firm Seth Hajarimal, Proprietor Hamir Chand* v. *Gulab Chand Udechand Firm*, AIR 1956 Nag 118.

preparation of original premium note is not required.[1] Entries in the regularly maintained register of a nationalised company have been held to be perfectly reliable.[2]

A cheque of a customer was honoured beyond his balance without any agreement as to overdraft. It was presumed to be a loan[3]

Where two sets of account were seized, the court refused to draw the presumption that accounts showing less turn-over were correct.[4] Where the rate of rent specifically mentioned in the rent note was neither denied nor disputed by the tenant, fixation of standard rent as per rent note was held to be proper and the entries in the account books showing lesser rent were immaterial.[5] In a recovery proceeding of unpaid sale consideration by the Official Liquidator against the purchaser of goods, there was no evidence to prove the receipt of goods by the purchaser, no liability could be fastened on the purchaser merely on the basis of entries in the account books of the company, though regularly kept, more so when the account books were beset with many clerical/arithmetical errors.[6]

Persons dealing with statutory bodies are presumed to have notice of provisions of the Act governing such corporations.[7] Where there is no evidence to show that reserves were non-existent or they were being utilised for a purpose other than the business of company, presumption is that they were being utilized as working capital of the company.[8] Where the counsel of the accused puts defametory questions to the complainant, the court has to start with the presumption that the questions were put on the instructions of the client.[9] Reply to a plaintiff's notice received from the defendant by post, though typed and unsigned, may be presumed to be on behalf of the defendant.[10]

The Privy Council held: "The personal tender or delivery may take place anywhere; the vicarious tender or delivery must take place at the residence of the person intended to be bound by the notice. In the case of joint tenants, each is intended to be bound and it has long ago been decided that service of a notice to quit upon a joint tenant is *prima facie* evidence that it has reached the other joint tenants."[11]

Where the notice of termination of tenancy was issued by the lawyer on behalf of the plaintiff/landlady which was proved by her father/agent, it would be presumed that the father was authorised to instruct the lawyer to give notice and onus to disprove it would lie on the defendant /tenant.[12]

26. POSTAL SERVICE

If a letter is put into a post office, that is *prima facie* proof, until the contrary appears, that the party to whom it is addressed received it in due course.[13] Post marks on letters are *prima facie* evidence that the letters were in the post at the time and palce therein specified... if a letter properly directed, is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in that department of public service, that it reached the destination at the regular time, and was received by the person to whom it was addressed.[14]

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1. *Hira H. Advani* v. *State of Maharashtra*, AIR 1971 SC 44.
2. *SKARSM Ramanathan* v. *NTC Ltd., New Delhi*, AIR 1985 Ker 262.
3. *Bank of Maharashtra* v. *United Construction Co.*, AIR 1985 Bom 432; (False *explanation* does not create any presumption): *Abdul Karim* v. *State of Mysore*, 1979 Cr LJ 1123 SC : AIR 1979 SC 1506.
4. *State of Kerala* v. *M M Mathew*, AIR 1978 SC 1571; *K.M. Patel* v. *Firm, Mohd Hussain Rahimbux*, AIR 1981 SC 977; (accounts not produced).
5. *Girdhari Lal* v. *Prabhu Dayal*, 1997 AIHC 170 (para 9) (Raj).
6. *Hada Steel Products Ltd.* v. *Enjay Engineering Enterprises*, AIR 1995 P&H 327 (para 5).
7. *Nimar Industrial Corporation Pvt. Ltd., Khandwa* v. *M P Electricity Board*, AIR 1973 MP 281.
8. *Employees of Azam Jahi Mills Ltd.* v. *Workmen*, AIR 1967 SC 1222.
9. Ayeasha Bi v. Peerkhan Sahib, 1954 Cr LJ 1239 (Mad).
10. *Nathu Ram* v. *Firm Bhoneylal Hiralal*, ILR (1971) 21 Raj 472.
11. *Harihar Banerji* v. *Ramshashi Roy*, AIR 1918 PC 102; **see also** *Commissioner of Hazaribagh Municipality* v. *Fulchand Agarwala*, AIR 1966 Pat 434; *Bhushan Chandra Paul* v. *Bengal Coal Co Ltd*, AIR 1966 Cal 63.
12. *Umesh Chandra Srivastava* v. *Sheela Srivastava*, 2000 AIHC 1463 (para 7) (All)
13. BEST 12th Edn., S. 403, p. 344.
14. TAYLOR 12th Edn., S. 179, p. 163; *Harihar Banerji* v. *Ramanshashi Roy*, AIR 1918 PC 102; *Amulya Charan* v. *Cropn of Calcutta*, AIR 1950 Cal 256; *Balgovind Rastogi* v. *Bhargava School Book Depot*, AIR 1958 All 369; *Abhoyjan Tea Co. (P) Ltd.* v. *Agricultural I.T Officer, Shillong*, AIR 1966 Assam 84; *Union of India* v. *Kalinga Textiles*, AIR 1969 Bom 401; *Bhushan Chandra Paul* v. *Bengal Coal Corpn. Ltd.*, 1966 Cal 63; *Hazaribagh Municipality* v. *Ful Chand*, AIR 1966 Pat 434; *K.V. Subbayya* v. *P.R.R. T. Co.*, AIR 1972 AP 72; *Jagat Ram* v.

The presumption under Section 114 stands rebutted when the addressee states on oath that such a letter was not tendered to him or refused by him.[15]

See the undermentioned cases where it was held that a mere denial of receipt of notice served by post will not be sufficient to rebut the presumption arising under Section 114 of the Evidence Act.[16]

A notice under Order 37, C.P.C. sent through registered post was received by some one on behalf of the defendant. It could be presumed that it was delivered to the defendant.[17] The presumption is stronger when the letter is sent by registered post and the acknowledgement is signed by someone at the other end[18] and it would not be necessary to examine the postman simply because the receipt of the notice was denied by the addressee/trustee[19] and the Court need not wait for service by ordinary process.[20] The existence of acknowledgements in respect of letters given in the post office would raise a presumption that those articles were delivered to the addressee.[21] Where a notice is required to be served by post under any Central or State Government and a notice is dispatched by a registered post an obligatory presumption of due service would arise.[22] Where the post cover has been correctly addressed and has been sent by registered post, the presumption with regard to service would arise under both provisions of Section 114 of the Evidence Act and Section 27 of the General Clauses Act.[23] Where there is an endorsement of postman that a letter sent by registered post was refused, there is presumption of service of the letter of notice. Bare statement of the addressee on oath denying tender and refusal to accept, is not sufficient to rebut the presumption.[24] Where a notice sent by registered post was returned with endrosements 'not claimed' and 'mis-sent' made by postal peon who visited the premises twice it should be taken considering the first endorsement *i.e.* "not claimed" that the letter was refused giving rise to the presumption of due service.[25] The effect of sending a letter to the post office will in general, be regarded as presumptively proved, if the letter be shown to have been handed to or left with the person whose duty it was in the ordinary course of business to carry it to the post office.[26] Where a draft was purchased and sent by post to the payee who was residing at a distence of 38 miles, presumption would be that there was implied request to send it by post and the act of posting itself would amount to delivey of draft.[27] From the invitation cards, bearing the postal stamps of the place of posting and also that of the place of destination, an inference could be drawn that in the normal course they were posted and received by the addressee.[28] Where a post card is received through the Post Office, presumption that it was written by the

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Battamal, AIR 1976 Del 111; *Omprakash Bahel* v. *A.K. Shroff*, AIR 1973 Del 39; *Memon Adambhai Haji Ismail* v. *Bhaiya Ram Das*, AIR 1975 Guj 54 (FB).

15. *Meghji Kanji Patel* v. *Kundanmal Chamanlal Mehtani*, AIR 1968 Bom 387; *Jagat Ram Khullar* v. *Battamal*, AIR 1976 Del 111; *Ram August Tewari* v. *Bindeshwari Tewari*, AIR 1972 Pat 142; *Shri Dutt Singh* v. *Ram Dass*, AIR 1980 All 280; *Jaidutt* v. *State of U.P.*, (1979) 2 SCR 175 : AIR 1979 SC 1303.
16. *Pakharsingh* v. *Kishan Singh*, AIR 1974 Raj 112; *Asa Ram* v. *Ravi Prakash*, AIR 1966 All 519; *Kanak Lata* v. *Amal Kumar*, AIR 1970 Cal 328; *Sukumar Guha* v. *Naresh Chandra Ghose*, AIR 1968 Cal 49.
17. *O.N. Tikku* v. *Karan Singh*, AIR 1989 J&K 25.
18. *Hazaribagh Municipality* v. *Fulchand*, AIR 1966 Pat 434.
19. *Shashikant Sadashiv Bagwe* v. *State of Maharashtra*, AIR 1995 Bom 172 (para 7).
20. *Piara Singh* v. *Amrik Singh Lyalpuri*, AIR 1994 NOC 335 (Del).
21. *Radha Kishan* v. *State of U.P.*, AIR 1963 SC 822; *Jagannath* v. *Amarendra Nath* 1957 Cal 479; *Commissioner of I.T., West Bengal* v. *Malchand Surara, Calcutta*, AIR 1956 Cal 537; *Green View Radio Service* v. *Laxmibai Ramji*, AIR 1990 SC 2156.
22. *Mona Ranjan Das Gupta* v. *Suchitra Ganguly*, AIR 1989 Cal 14.
23. *Jagat Ram Khullar* v. *Battamal*, AIR 1976 Del 111. **See also** *Fazal Ahmad* v. *K.N. Jain*, 2001 AIHC 464 (para 11) (All).
24. *Har Charan Singh* v. *Shiv Rani*, AIR 1981 SC 1284; *Anil Kumar* v. *Nanak Chandra Verma*, AIR 1990 SC 1215; *Puwada Venkateswara* v. *C.V. Ramana*, AIR 1976 SC 869; (it is not necessary always to examine the postman); *M.P. Swamy* v. *Mangaram Agarwalla*, AIR 1979 Ori 11; *Shyam Narayan* v. *Raghunath Prasad*, AIR 1977 Pat 155; *Chanda Babu* v. *Changani Ram*, AIR 1963 All 250; *Saeed Ahmed* v. *Syed Qamar Ali*, AIR 1973 All 24; *Ram Autar* v. *Savitri Devi*, AIR 1976 All 515; *Munshilal* v. *Nazir* ILR (1967) 2 All 49; *Shamsadbi* v. *Gunavantibai*, ILR (1973) Bom 432; *Sarkar Estates Pvt. Ltd.* v. *Kusumika Iron Works Pvt. Ltd.*, AIR 1961 Cal 439; *Munni Devi* v. *Pushpalata Mondal*, ILR (1967) 1 Cal 550; *Kunju Vishwanadhan* v. *Ramkrishnan Surendran*, 1998 Cr LJ 3553, at p. 3555 (Ker); *Ilias Sk.* v. *State of W.B.*, 1997 AIHC 1055 (para 6) (Cal).
25. ILR (1977) 1 Cal 588.
26. *Chunilal Dwarkanath* v. *Hart Ford Fire Insurance Co. Ltd.*, AIR 1958 Punj 440.
27. *Tukaram Bapuji Nikam* v. *Belgaum Bank Ltd.*, 1976 Bom 185.
28. *Vandavasi Karthikeya* v. *S. Kamalamma*, AIR 1994 AP 102 (para 25).

purported sender cannot be drawn. The only presumption that can be drawn is that it reached the addressee in an ordinary course.[29]

However it has been held that the effect to be given to the word "refused" on a registered cover as proof of the tender of the packet to the addressee is one of fact and will depend upon the circumstances of each case.[30]

The presumption stood rebutted when the addressee showed that the whole family was out of station at the material time on a *mooran* ceremony.[31] Where a notice was sent by a registered post was returned as "refused", the court is to be careful in drawing any presumption because it is not unusual for the postman to make such endrosements without proper care and sometimes deliberately.[32] In the absence of proof to show that the sender gave correct particulars of the addressee on the notices and on the forms of acknowledgement, and the defendant had categorically denied receipt of any notice and also to have signed the acknowledgement, the presumption under Section 114 of the Evidence Act, and Section 27 of the General Clauses Act, cannot arise and the onus to prove service of notice would be on the sender.[33]

Postal receipt in proof of despatch of registered notice along with a copy of notice bearing correct address, would arise a presumption, in the absence of return of the notice by the Dead Letter Office, that the notice reached the destination. Insufficient address of the addressee on the postal receipt does not rebut the presumption.[34] Where the demand notice under the Negotiable Instruments Acts was sent under registered post acknowledgement due but neither postal cover nor the acknowledge-ment was returned, it could be presumed that the addressee had received the notice.[35]

Where notice for recovery of maintenance was sent to the husband by Registered Post and not as contemplated under Section 125(3), Cr.P.C., the same being illegal, the question of any inference about its receipt to be drawn does not arise.[36]

Presumption of corresponedence through post arises only when it is proved by calling the writer or one who was conversant with his writing or atleast the person who posted it. Similarly, refusal by an addressee can be presumed when the endorsement to that effect by the postal peon is proved by calling him or some one to prove his handwriting.[37] If the notice is addressed to joint lessees and it is tendered and refused by one of them, constructive knowledge to other lessees may be presumed.[38] Where a parcel sent by V.P.P. was delivered to the addressee but money was not recovered, from him, the person sending the parcel is entitled to presumtion under Section 114 that the common course of business has been followed and that parcel was duly delivered and payment was received by post office.[39]

The presumption created by refusal to take a letter is not be littled by the inability of the postman to identify the addressee after a gap of time.[40]

Presumption is not merely as to delivery but also as to knowledge of contents.[41]

A "certificate of posting" not only raised the presumption that the letter was duly posted but also the presumption that the letter was received by the addressee.[42] The law does not raise an unrebuttable

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29. *Ashokkumar Uttamchand Shah* v. *P.M.A. Chanchad*, AIR 1999 Guj 108 (para 16).
30. *Gopal* v. *Krishna*, (1901) 3 Bom LR 420.
31. *Rama Devi* v. *Ram Prakash*, AIR 1985 All 17; (But not by showing that the signatory had no authority to sign); *Kirty Basu* v. *Peasy Mohan Sarkar*, AIR 1985 Cal 162; (mere denial of service is not a rebuttal); *Suhila Devi* v. *Manoharlal*, AIR 1985 All 178; *Hajrabi Abdul Gani* v. *Abdul Latif Azizulla*, AIR 1996 Bom 192 (para 7). The Court referred to *Anil Kumar* v. *Nanak Chandra Verma*, AIR 1990 SC 1215.
32. *Kumbhar Naran* v. *Nanalal*, AIR 1988 Guj 5.
33. *Munshi Ram* v. *Shakuntala Devi*, AIR 1978 J&K 31.
34. *Ayisa beevi* v. *Aboo Backar*, AIR 1971 Ker 231.
35. *G.S. Srikanth* v. *Sri Lakshmi Financiers*, 1999 Cr LJ 329, at p. 332 (AP).
36. *V.P. Shivanna* v. *Bhadramma*, 1993 Cr LJ 418 (para 6) (Kant).
37. *Parshotam Lal* v. *Kalyan Singh*, AIR 1971 J&K 20.
38. *Shri Nath* v. *Saraswati Devi*, AIR 1964 All 52.
39. *Union of India* v. *Firm Ram Gopal*, AIR 1960 All 672.
40. *Ram Sheree* v. *Khadiji Bibi*, AIR 1981 All 5.
41. *Harcharan Singh* v. *Shiv Ram*, AIR 1981 SC 1284; *Shri Nath* v. *Saraswati Devi*, AIR 1964 All 52.
42. *Chhaya Devi* v. *Lahoriram*, (1963) 67 Cal WN 819; *Achamma Thomas* v. *F.R. Farmer*, AIR 1970 Mys 77; *Santosh Kumar Gupta* v. *Chinmogee Sen*, 1966 Cal 615; *Kashilal Agarwalla* v. *Jawaharmal*, AIR 1966 Ass 104; *J.N. Eranna Rao* v. *D.H.S. Setty & Co.*, AIR 1960 AP 331; *Dhanapati Devi* v. *Corpn. of Calcutta*, AIR 1952 Cal 467; *Meghji*

presumption that the postal article sent under certificate of posting was received by the addressee/ petitioner in due course.[43] Where summons was published in the newspaper and a copy of the said newspaper was sent to the party on his address under certificate of posting and its delivery was not rebutted, there arose presumption regarding service of summons.[44] However it was held that a certificate of posting raises a presumption that the letter has been posted but no presumption as to its receipt by the addressee can be drawn.[45] A certificate of posting raises a presumption that a letter was posted as described in the certificate, but the presumption does not go to the extent of covering the contents of the letter.[46] Presumption under Section 114 available for service under certificate of posting should not be given effect to where a notice sent by registered post is returned with the endorsement "Left".[47] A certificate of posting is easy to procure and does not inspire confidence.[48]

It may be presumed that an M.O. was tendered to the addressee living in the same town within about a week or ten days from the date of remittance.[49] There is a presumption that the postal authorities returned the amount sent by money order to the sender if it could not be delivered to the payee.[50] Where a money order is sent by a tenant within the statutory period and the landlord refuses to receive it, there is sufficient tender and the tenant must be deemed to have fulfilled his part of duty. It is not necessary to examine the postman to prove refusal.[51] In the absence of proof that mony order is correctly addressed, presumption that money order must have reached the addressee cannot be drawn.[52]

An order of Government Communicated by telegram, neither expressed in the name of the Governor nor authenticated by proper authority, must be presumed to have been validily posted when there is clear avertment of the existence of such an order.[53]

Mere entries in the Despatch register are not sufficient to raise the presumption of due service on the addressee in the absence of an affidavit or other evidence to show that the copies were handed over to or left with the person whose duty it was in the ordinary course of business to carry them to the post office.[54]

27. WITHHOLDING EVIDENCE [ILLUSTRATION (g)]

This illustration deals with the presumption arising from withholding evidence. The conduct of the person withholding the evidence may be attributed to a supposed consciousness that the evidence, if produced, would operate against him.[55]

It is not a sound practice for those desiring to rely on a certain state of facts to withhold from the court the best evidence which is in their possession which would throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof.[56]

Malsee Ltd. v. *P.C. Oammen*, AIR 1963 Ker 306; *Santosh Kumar* v. *Chinmoyee Sen*, AIR 1966 Cal 615; *Babulal Talokchand Shah* v. *Purshotham*, ILR 1963 Bom 583; *Dineshwar Prasad* v. *Manorama Devi*, AIR 1978 Pat 256; *Amrutlal Weljibhai Rathod* v. *Vishwas Deorao Patil*, 1989 Bom 410; *Jagdish Kaur* v. *Rabindra Singh, Madoda*, AIR 1991 Del 50.

43. *Ramesh Rajaram Patil* v. *Addl. Commissioner, Aurangabad Division*, AIR 1995 Bom 91 (para 8).
44. *EMESS Advertising Service* v. *Hindustan Times Ltd.*, AIR 1998 Del 14.
45. *B.L. Shrivastava* v. *M.M.L. Shridhar*, AIR 1975 MP 21; *Prem Prakash Kapoor* v. *Gobind Ram Kapoor*, AIR 1976 J&K 37.
46. *Baldeo Das* v. *Maina Bibi*, ILR (1973) 1 Cal 469.
47. *Surajmull Ghanshyamdas* v. *Smadarshan*, AIR 1969 Cal 109.
48. *Gadakh Y.K.* v. *Balasaheb Vikhe Patil*, AIR 1994 SC 678 (para 60).
49. *Parameshwari Devi* v. *Abrar Husain*, AIR 1971 All 22; *Mahabir Singh* v. *Anant Ram*, AIR 1966 All 214.
50. *Bibhuti Bhusan Ray* v. *State of W.B.*, ILR (1975) 1 Cal 99.
51. *Rajaram* v. *Ganapatlal Vaishya*, AIR 1973 MP 268; *Sobhraj* v. *Bhanwarlal*, AIR 1975 Raj 196.
52. *Man Mohan Chawla* v. *Jaswant Singh Sethi*, ILR 1969 Del 316.
53. *Barada Kanta Bishya* v. *Assam Board of Revenue*, AIR 1967 Assam 22.
54. *Kallawwa* v. *Tamanna Murari Patil*, AIR 1977 Kant 45. **See also** *Surender Bala* v. *Sundeep Foam Industries P. Ltd.*, AIR 2000 Del 300 (pp. 302 and 303).
55. *Srichand K. Khetwani* v. *State of Maharashtra*, AIR 1967 SC 450 : 1967 Cr LJ 1536 : In re : *Baswaraja Swami*, AIR 1967 Mys 210; *Kusum Anand* v. *Mohinder Kaur*, AIR 1999 Del 221 (para 15); *Rakesh Kumar* v. *State*, 2001 Cr LJ 2978 (paras 9 and 10) (Del).
56. *Gopal Krishna* v. *Mohamed Haji*, (1969) 71 Bom LR 48, SC; *Ramdas Oil Mills* v. *Union of India*, AIR 1977 SC 638, non production of accounts.

BEST ON EVIDENCE, Section 411, states that this rule of presumption under illus. (g) is based on the principle that no one shall be allowed to take advantage of his own wrong. The rule contains the well known maxim *"Omnia praesumnutur contra spoliation"*. Where a person withholds wrongfully evidence, every presumption to his disadvantage, consistent with the facts admitted or proved, has to be adopted.

"The non-production of evidence that would naturally have been produced by an honest and, therefore, fearless claimant permits the inference that its tenor is unfavourable to the party's cause". (WIGMORE Section 285).

In case of withholding best evindence adverse inference can be drawn[57] but no adverse inference can be drawn for non-production of a notification published in the Official Gazette which is a public document and has the effect of law.[58]

The presumption of adverse inference cannot displace the contrary inference supported by adequate evidence.[59]

Before drawing the adverse inference, the court must be satisfied about the existence of the relevant evidence in the possession of the party which could be produced.[60]

Where neither party produces any evidence, even though any of them can produce it, if available, absence of evidence does not help either party.[61]

Where available evidence is not produced, it is not obligatory but optional to draw a presumption under Section 114(g) of the Evidence Act. It is one of fact, depending upon the whole set of facts.[62] The original F.I.R., alleged to have been sent to the Magistrate, was not produced and its alleged carbon copy bore neither the initials of the Magistrate nor the seal of the Court was affixed on it. Neither its date of receipt nor any serial number of *tapal* receipt register was given. Adverse inference could be drawn that the F.I.R. was not received by the Magistrate.[63] Where in an accidental claim petition, the true relationship between the truck-owner and the appellant company which had entered into a hire-purchase agreement with the truck-owner as a security for an alleged loan granted by the appellant to the truck-owner, had been suppressed by withholding from the Court the real documents executed between them, the Courts below were held justified in drawing an adverse inference against the appellant and fastening joint liability on it.[64] Where a witness stated that he had received letters threatening the deceased and that the same are with the police, a failure to produce them created an adverse presumption.[65]

Withholding best evidence available to a party and relying upon the abstract doctrine of onus of proof may result in drawing adverse inference against that party.[66] Whether or not an adverse inference from the non-production of the best evidence by a person on whom the burden of proving a fact lies, should be drawn, is not an inflexible rule but is dependent upon the circumstances of each individual case.[67] The court may draw an adverse inference from the failure of a party to produce the best evidence in its possession to prove a fact when the initial burden in regard to the proof of which has been discharged by the other party.[68] Where the Collector or the State Govt. failed to produce affidavits or any material record showing requirement of the land for public purpose despite directions of the Court, it was held that an adverse inference of non-application of mind on the part of the authorities while

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57. *Patel Naranbhai* v. *Dhulabhai*, AIR 1992 SC 2009.
58. *Deputy Managing Director, CESC Ltd* v. *Naba Kumar Mondal*, AIR 2000 Cal 97 (para 14).
59. *Ramchendrudu* v. *D. Janakiramanna*, AIR 1920 PC 84.
60. *Devidas* v. *Shrishailappa*, AIR 1961 SC 1277; *Ramayya* v. *Laxminarayana*, AIR 1934 PC 84; *Mahabir Singh* v. *Rohini*, AIR 1933 PC 87; *Chandra Deo* v. *Sheo Das*, AIR 1977 All 319.
61. *Ramrati Kuer* v. *Dwarika Prasad Singh*, AIR 1967 SC 1134.
62. *Indira Nehru Gandhi* v. *Raj Narain*, AIR 1975 SC 2299; *Harnath Malhotra* v. *Dhanoo Devi Agarwala*, AIR 1975 Cal 98.
63. *Ranganathan* v. *State*, 1996 Cr LJ 2041 (para 45) (Mad).
64. *Mohan Benefit (P) Ltd.* v. *Kachraji Raymalji*, (1997) 9 SCC 103 : 1997 SCC (Cri) 610.
65. *Sawal Das* v. *Bihar*, AIR 1974 SC 77.
66. *Habeeb Khan* v. *Valasula Devi*, AIR 1997 AP 53 (paras 30-32).
67. *Krishna Kumar Sinha* v. *Kayastha Pathashala (Prayag), Allahabad*, AIR 1966 all 570.
68. *Brijlal Suri* v. *State of Uttar Pradesh*, AIR 1954 All 393; *Vimal* v. *Bhaguji*, AIR 1995 SC 1836 (paras 18 and 20); *Kailash Talkies* v. *State*, AIR 1996 Raj 30 (paras 25 and 26).

requisitioning the land, could be drawn.[69] Where in a motor accident the insurer sought to avoid liability on the ground that the insured was a minor which fact was not allegedly suppressed from the insurer when the policy was issued and the insurer accepted the premium, adverse inference would be drawn against the insurer for non-production of the form of proposal of the policy[70] but where the defendant made no claim that any lease deed had been executed, no adverse inference could be drawn against the plaintiff claiming adverse possession for non-production of non-existing lease deed.[71]

The parties to a suit should bring before the court their best evidence, and when it is not produced the court is justified in concluding that it would, if brought into court,[72] not support the case of the party omitting to produce it.

Where a person is charged under the provisions of Food Adulteration Act, no adverse inference can be drawn against the accused for refusing to produce the bottle containing the sample given to him.[73]

In an admission test to medical colleges, a candidate was given a wrong type of answer-book which was replaced by a correct one after sometime. The candidate could attempt only 170 questions out of 200 and secured 94.555% marks and prayed that her answer-book should be assessed on the basis of only 170 questions. The examination authorities alleged that right type of answer-book was supplied to her without any loss of time. The candidate requested that her first answer book should be produced to assess the loss of time which the authorities failed to do. An adverse inference was drawn against them that if the same was produced, that would have substantiated her version.[74] Where surveillance and domicilliary visits by the police under the Police Regulations has to be discontinued unless some special reason is recorded by the S.P. but the same continued for twelve years without recording reasons and no counter-affidavit was filed by the police authorities, presumption could be drawn in favour of the petitioners and against the police authorities that there was nothing before the police to justify the surveillance.[75] Where the accused failed to get his injuries sustained in the incident examined for three days and the prosecution failed to produce injury report of the accused, it was held that inference that the injuries of the accused were manufactured, could not be reached.[76] In a situation where the material produced by the prosecution was itself sufficient to prove the guilt of the accused, Section 114(g) is of no assistance to him.[77] Adverse inference can be drawn from the non-production of the F.I.R. and the general diary by the police.[78] But the Apex Court has held that production of daily diary of the police station is not a matter of course in every prosecution case, hence no adverse inference can be drawn on its non-production.[79]

Withholding as distinguished from failure:

An adverse inference can be drawn against a party if there is withholding of evidence and not merely on account of the failure of the party to obtain evidence.[80]

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69. *W. Bengal Housing Board* v. *Banwarlal Mundhra*, 1996 AIHC 5560 (para 16) (Cal), **following** *H.D. Vora* v. *State of Maharashtra*, AIR 1984 SC 866. **See also** *Ghulam Muhammed Wani* v. *State of J.&K.*, 1997 AIHC 1227 (J&K); *Deokinandan Singh* v. *State of Bihar*, 1997 AIHC 1431 (para 9) (Pat).
70. *National Insurance Co. Ltd.* v. *Kusum Devi Mishra*, 1998 AIHC 3751 (para 9) (MP). **See also** *United India Insurance Co. Ltd.* v. *Shri Amitabha Dey*, AIR 1994 NOC 54 (Gau).
71. *S. Srinivasa Iyer* v. *Dakshinamurthi*, AIR 2000 Mad 388 (para 6).
72. *State of Andhra* v. *Gathala Abhishekam*, AIR 1964 AP 450; *P.L.A. Palanippa Chettiar* v. *A and F Harvey Ltd., Madura*, AIR 1953 Trav Co. 481; *Nicholas Schundas* v. *Nemazi*, AIR 1952 Cal 859; *Union of India* v. *Sri Rajendra Mills*, AIR 1971 Mad 53; *Shovana Mukherjee* v. *River Steam Navigation Co. Ltd.*, ILR (1977) 1 Cal 9; *Bharat Bhushan* v. *Ved Prakash*, AIR 1978 Del 199; *Rameshchandra Tukaram Talekar* v. *State of Gujarat*, 1980 Guj 1; *Harish Chandra Ray* v. *K.C. Singh*, AIR 1977 Ori 76; *Indian Trade and General Insurance Co. Ltd.* v. *Union of India*, AIR 1957 Cal 190; *Rangabati* v. *United Bank of India Ltd.*, AIR 1961 Pat 158; *Devji Shivji* v. *Mohanlal Odhabji Thacker*, AIR 1960 Pat 223; *Kanhailal* v. *Kantilal*, AIR 1968 Raj 278.
73. *State of Rajasthan* v. *Gopal Krishan*, AIR 1984 Cr LJ 311 (Raj).
74. *Tulasa Priya* v. *A.P. State Council of Higher Education*, (1998) 6 SCC 284.
75. *Rajesh Kumar* v. *State of U.P.*, 1999 Cr LJ 2388 (paras 9 and 9.1) (All).
76. *Shivaji Ganu Naik* v. *State of Maharashtra*, 1999 Cr LJ 471, at p. 475 (Bom).
77. *State of Maharashtra* v. *Jethmal Himatmal Jain*, 1994 Cr LJ 2613 (para 26) (Bom).
78. *Sevi* v. *State of Tamil Nadu*, AIR 1981 SC 1230.
79. *Kalpnath Rai* v. *State*, (1997) 8 SCC 732.
80. *Sricharid* v. *State of Maharashtra*, AIR 1967 SC 450; *C.M.P. Co-op. Societies* v. *State of M.P.*, AIR 1967 SC 1515. **See also** *Mahabir Singh* v. *Rohini Ramanadhwaj Prasad Singh*, (1933) 35 Bom LR 500 PC : AIR 1933 PC 87; *Himmat Mal* v. *Shah Magaji Khubaji*, ILR (1953) 3 Raj 815.

It is an established principle of law that it is for the suitor to decide which would be the best evidence to prove his case. For failure to produce a piece of evidence an adverse inference should not be drawn against the party who has chosen not to file it, unless the other side had called for that evidence.[81] Also where failure to produce substantive piece of evidence has not gone to the root of the prosecution case, no adverse inference can be drawn.[82]

Failure to examine a material witness by the defence must lead to the inference that the witness was deliberately withheld as he was not likely to support the defence.[83]

Where the prosecution in a prohibition case failed to take samples and have them sent to chemical Analyst for his opinion, the presumption is that the prosecution withheld evidence as it was not likely to support their case.[84]

No adverse inference can be drawn against a party from the circumstances that it has not examined all the witnesses mentioned by it.[85]

28. WITHHOLDING MATERIAL WITNESSES

A party's deliberate avoidance or feeling shy of giving evidence in the witness box, raises a presumption against his contention and the court would be justified in drawing an adverse inference against him.[86] Where it was sought that certain sale-deeds be declared to have been obtained by exercising undue influence and co-ercion on the executant and the plaintiff alleged that one of the purchasers had no means to pay the consideration, the said purchaser was not examined to seek explanation adverse inference should be drawn against the said purchaser that had she been examined, it would have gone against her.[87] Adverse inference may be drawn against the party under Section 114 of the Evidence Act, for failure on its part to call material witnesses.[88] Where a party fails to call as his witness the principal person involved in the transaction who is in a position to give a first-hand account of the matters of controversy and throw light on them and who can rebutt all allegations of the other side, it is legitimate to draw adverse inference against the party who was not produced such principal witness.[89] Where besides other evidence, there was on record a receipt book of subscription from public for the construction of the temple in question and the person concerned with it who was one of the applicants claimed that the temple was a private one, avoided to give evidence, an adverse inference was

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81. *Bilas Kunwar* v. *Ranjit Singh*, AIR 1915 PC 96; *Bihar Agents Ltd.* v. *Union of India*, AIR 1960 Pat 111.
82. ***Munshi Prasad* v. *State of Bihar***, 2001 Cr LJ 4708 (para 6) (SC) : AIR 2001 SC 3031.
83. *Doonath Dudhnath Mishra Amravati* v. *State of Maharashtra*, AIR 1967 Bom 1 : 1967 Cr LJ 21 (Bom).
84. ***Hashomal Mulchand* v. *J.S. Bajaj***, ILR (1966) Bom 892.
85. ***Kulsumun-nisa* v. *Ahmadi Begam***, AIR 1972 All 219.
86. *Abdul Ghafoor* v. *Jiuj Beharilal*, AIR 1957 All 346; *Subramanya Sastry* v. *Lakshminarasmma*, AIR 1958 AP 22; *Pranballav Saha* v. *Tulubala Dassi*, AIR 1958 Cal 718; *Gopal Das* v. *Ghisalal*, AIR 1957 Raj 264; *Ramchandram Murchandam* v. *India United Mills Ltd.*, AIR 1962 Bom 92; *Abdul Kareem* v. *Babulal*, AIR 1953 Bhopal 26; *Ghaki Mal Hukum Chand* v. *Punjab National Bank Ltd.*, AIR 1961 Punj 91; *Bhagwan Dass* v. *Bhishan Chand*, AIR 1974 Punj 7; *Ranji Jankiji* v. *Mannu Baba*, AIR 1978 Pat 48; *Ganda Mal* v. *Bhulloo Ram*, AIR 1951 J&K 5; *G.K. Carpenter* v. *N.N. Rawat*, 1920 MP 225; *Karnal Distillery Co.* v. *Ladli Parshad*, AIR 1958 Punj 190; *Jurmati Bewa* v. *Anwar Rasul*, AIR 1973 Gau 90; *Iswar Bhai C. Patel* v. *Harihar Behera*, AIR 1999 SC 1341 (para 29), plaintiff's husband, an attesting witness not coming to witness-box in spite of warrant issued by Court though there was no strained relation with wife, adverse inference drawn against plaintiff-wife, *Shayama Devi* v. *Premvati*, AIR 1996 All 57 (para 24); *Vidhyadhar* v. *Mankikrao*, AIR 1999 SC 1441 (paras 15 and 16); neither filing written statement nor entering witness box, *Narayan Venkatesh Pandith* v. *Syed Nuroddin Khadri*, 1999 AIHC 1443 (para 12) (Kant).
87. ***Kartick Prasad Gorai* v. *Neami Prasad Gorai***, AIR 1998 Cal 278 (para 24).
88. *Manaklal* v. *Dr. Prem Chand Singhvi*, AIR 1957 SC 425; *Irudayam Ammal* v. *Salayath Mary*, AIR 1973 Mad 421; *Pritam Das* v. *Akbari*, AIR 1973 MP 224; *Kul Bahadur Rai* v. *Dawa Tshering Lepcha*, AIR 1986 Sikkim 18; *Ambaram Halot* v. *State*, AIR 1952 Assam 129 : 1952 Cr LJ 1178; *Manu Biswal* v. *Lata Biswalani*, AIR 1965 Ori 13; *Pisipati Punnakotha* v. *Kallapalli Kolikamba*, AIR 1967 AP 83; *Ram Gopal* v. *Ram Kunwari*, ILR (1965) 15 Raj 529; *Sri Kishan Rathi* v. *Mondal Bros. and Company*, 1969 Cal 75; *Maya Mukherjee* v. *Orissa Co-operative Insurance Society*, AIR 1976 Ori 224; *Sudhu Mohanty* v. *Gourkrushna Mohanty*, AIR 1976 Ori 213; *Sunder Lal* v. *Dulari*, AIR 1979 Punj 154; *Purabi Banerjee* v. *Basudeb Mukherjee*, AIR 1969 Cal 293.
89. *Seth Maganmal* v. *Darbarilal*, AIR 1928 PC 39; *Thulia Kali* v. *State of T.N.*, AIR 1973 SC 501; *Virendra* v. *Jagjiwan*, AIR 1974 SC 1957; *Raghunath Paramanik* v. *State*, 1958 Cr LJ 651 : AIR 1958 Ori 92; *E. Lakshmamma* v. *T. Chinna Malla Reddy*, AIR 1985 SC 658 *(Minority of executant—Father and brother not examined regarding date of birth.*

drawn against him to hold that the temple was private.[1] In an election petition, it was alleged that voters were threatened with divine displeasure in a speech at a certain meeting. The petitioner failed to produce the material witness and the notes made by him at the meeting. It was held that adverse inference may be drawn the petitioner.[2] During an election a leaflet against a candidate was printed by a witness who stated that he received a letter from the returned candiate 'T' through one 'R'. It was held that from the ommission by 'T' to examine 'R' who was his election agent to contradict the witness, it could be presumed that 'R' was not prepared to contradict the statement of the witness.[3] In an election petition it was alleged that the agent of the returned candidate distributed hand bills containing serious allegations against the petitioner. It was held presumption can be drawn against the petitioner when he failed to produce the original matter or the printer.[4] In a suit for recovering damages against the owners of a vessel, there was allegation by the plaintiff that the owners of the vessel and the charterers of another vessel were one and the same entity and the vessel was owned by named individual. The defendant owners produced no document to disclose shareholding pattern of either the owner or the shareholding of the majority shareholder which was considered to be within the special knowledge of the owners and they were under obligation under Section 106 to disclose the name of the majority shareholder which they failed to do. The Court would be constrained to assume adversely to the interest of the owners under Section 114(*g*).[5] Where there was a collision between a bus and a car and it was contended by the bus owner that the car driver was rash and negligent, it was held that from the non-examination of bus driver without any explanation, adverse inference can be drawn against the bus owner.[6] In a claim for damages under the Motor Vehicles Act for causing injuries to the claimant on account of negligence in driving, the best evidence would be that of the driver. Non-examination of the driver would lead to a presumption that the claimants sustained injuries on account of negligent driving.[7] The presumption laid down in this illustration was held to apply to the case of counsel engaged in a suit who should not have been, under the circumstances, the counsel but should have been called as a witness.[8]

No adverse presumption need be drawn against the defendant who fails to depose in a suit filed against him when there is other evidence both documentary and oral.[9] The question of drawing adverse inference would arise only when there is no other evidence on record on the point in issue.[10] Where the evidence adduced by the prosecution was adequate to prove the charge, non-examination of another person who was on the scene of occurrence would not make such evidence unreliable.[11]

In proceedings for eviction of tenant, an adverse inference against the landlord for not examining himself, is not justified when his attorney knowing all the facts of the case deposed.[12] Where there were no inherent improbabilities in the evidence of witness examined by the plaintiff, non-examination of the plaintiff may not lead to any adverse inference against him.[13] Adverse inference under Section 114 cannot be drawn for mere non-examination of the plaintiff when other material witnesses are produced.[14] Non-examination of a certain witness by one of the contesting parties does not amount to withholding of evidence, entitling the Court to draw an adverse inference against that party. The complainant party can examine such witness.[15] In a case filed by the husband against the wife for judicial separation of the ground of desertion by the wife, the case of the wife was that she left the house with the consent or knowledge of her husband's parents. It was held when the court rejects the evidence of the respondent in

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1. *Marua Dei (Smt.)* v. *Muralidhar Nanda*, (1999) 1 SCC 377.
2. *Virendra Kumar Saklecha* v. *Jagijiwan*, AIR 1974 SC 1957.
3. *Virendra Singh* v. *Vimal Kumar*, AIR 1976 SC 2169.
4. *Younus Kunju* v. *R.S. Unni*, AIR 1984 SC 960.
5. *Alexandros Dryon S.A.* v. *Owners and Parties, M.V. PRAPTI*, AIR 1998 Cal 142 (para 12).
6. *Hira Devi* v. *Bhava Kanti*, AIR 1977 Gau 31 (FB).
7. *National Insurance Co. Ltd.* v. *Durdadadshya Kumar Samal*, AIR 1988 Ori 229. **See also** *Karnataka State Road Transport Corporation* v. *K. Chandrasekhara Raju*, 1998 AIHC 4042 (para 8) (Kant); *Kartar Kour* v. *Daval Singh*, 1999 AIHC 3314 (para 16) (MP).
8. *Weston* v. *Peary Mohan Dass*, ILR (1912) 40 Cal 898.
9. *Kansi Ram* v. *Jai Ram*, AIR 1956 HP 4.
10. *Jivaji Apti* v. *Ramachandra Gangadhar*, AIR 1981 SC 2235.
11. *Surendra Narain* v. *State of U.P.*, AIR 1998 SC 192 : 1998 Cr LJ 359.
12. *Padma Rama Moorthy* v. *M. Raghu*, ILR 1973 Kant 1100.
13. *Board of Religious Trust* v. *Acharya Maharath Amrit Das*, AIR 1974 Pat 95.
14. *Bijoy Kumar Karnani* v. *Lahori Ram Prasher*, AIR 1973 Cal 465. **See also** *T.M. Musaripparabil* v. *M.I. Narasimha Rao*, 1996 AIHC 732 (para 8) (AP).
15. *P. Veeraswami Naidu* v. *Pushpammal*, AIR 1996 Mad 131 (para 12).

support of her plea, it is not incumbent on the petitioner to adduce negative evidence of his mother to deny the plea of the respondent rejected by the court. No adverse presumption may be drawn against the petitioner.[16] Where, in an election petition, the successful candidate does not examine a particular witness to controvert facts alleged by petitioners witnesses in their evidence, the court cannot draw in adverse inference against the successful candidate since no onus is cast upon him to prove the particular facts.[17] Where in an application for staying the suit, the defendant expressed in the application his willingness and readiness to get the arbitration agreement enforced but did not enter the witness-box, no adverse inference could be drawn against him.[18]

Where it was alleged that the victim was raped when her husband was sleeping near her, failure to examine the husband is fatal to the prosecution and an adverse inference could be drawn[19] but where there was no evidence to show that anyone of the nearby house had witnessed the incident, no adverse inference could be drawn for non-examination of any such witness.[20]

The correct law as to the proper effect of the non-production of a witness cannot be decided in the abstract. It is a question of fact to be determined on a consideration of the circumstances of the individual case, in which *inter alia* the following factors should receive due consideration:

(i) Whether the witness is in a position to give relevant and material evidence.

(ii) Whether the witness is within easy reach of the prosecution or not, or whether there are circumstances justifying the withholding of a witness *viz.*, the witness is likely to be hostile to the prosecution.

(iii) The nature and intensity of the controversy raised by the defence on a particular issue on which the witness is expected to give evidence and.

(iv) Persuasiveness of the evidence which is on the record.[21]

29. MATERIAL WITNESSES (CRIMINAL)

In a criminal case failure to give evidence of relevant facts leads to the presumption that evidence which could be produced and is not produced would, if produced, be unfavourable to the person who withholds it.[22]

If the prosecution fails to examine material witnesses an adverse inference against the prosecution can be raised.[23] Merely because a material witness was not examined by the prosecution, a Criminal Court is not to lean to draw the adverse inference that, if he was examined, he would have given a contrary version. The illustration (g) in Section 114 is only a permissible inference and not a necessary inference. Unless there are other circumstances also to facilitate the drawing of an adverse inference, it should not be a mechanical process to draw the adverse inference merely on the strength of non-examination of a witness, even if it is a material witness.[24]

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16. *Lachman Utamchand Kirpalani* v. *Meena*, AIR 1964 SC 40.
17. *Motilal* v. *Chandra Pratap Tiwari*, AIR 1975 SC 1178.
18. *Om Prakash* v. *Dev Raj*, AIR 1995 P&H 349 (para 13).
19. *Vijayan* v. *State*, 1993 Cr LJ 2364 (para 20) (Mad).
20. *Sat Pal* v. *State of Punjab*, 1996 Cr LJ 406 (para 10) (SC) : AIR 1996 SC 201.
21. *State* v. *Abdul Aziz*, ILR (1971) 21 Raj 209.
22. *Mahendrapal* v. *State*, (1955) 2 All 325.
23. *Sawal Das* v. *State of Bihar*, 1974 Cr LJ 664 : AIR 1974 SC 778; *Karnesh Kumar* v. *State of U.P.*, AIR 1968 SC 1402; *Habeeb Mohammad* v. *State of Hyderabad*, AIR 1954 SC 51; *Gulam Mohammad* v. *State of Gujarat*, AIR 1980 SC 1558; *Thulia Kali* v. *State of T.N.*, AIR 1973 SC 501 : 1972 Cr LJ 1296; *Ganadesh* v. *State*, AIR 1968 Goa 63 : (1968) Cr LJ 925; *Kamla Kunwar* v. *Ratanlal*, AIR 1971 All 304; *Hardeo Singh* v. *State of Raj.*, ILR (1977) 27 Raj 326; *State* v. *Geda Baro*, ILR (1968) 20 Assam 440; *State* v. *Hiralal*, AIR 1957 All 342; *Major Harbans Singh* v. *Union of India*, ILR (1971) 1 Delhi 326; *State* v. *Badruddin*, AIR 1950 All 436 : 51 Cr LJ 1152; *Raghava Kurup* v. *State of Kerala*, AIR 1965 Ker 44 : 1965 (1) Cr LJ 173 (Ker); *Fakirchand* v. *State*, 1955 Cr LJ 1073 : AIR 1955 MB 119; *J.K. Devaiya* v. *State of Coorg*, AIR 1956 Mys 51; *Abdul Hamid* v. *State of Tripura*, AIR 1958 Tri 1 : 1958 Cr LJ 97 (Tri); *Public Prosecutor* v. *Sarolla Gopala Rao*, 1971 Cr LJ 536 (AP); *Guljara Singh* v. *State of Rajasthan*, AIR 1971 Raj 68 : 1971 Cr LJ 498 (Raj); *Bhanda Garh* v. *State of Assam*, 1984 Cr LJ 217 (Gau); *Subedar Samandar Singh* v. *State*, AIR 1968 Punj 72; *Bhuban Bejoy Singh* v. *Emperor*, ILR (1939) 60 Cal 1361 : AIR 1933 Cal 600; *Darya Singh* v. *State of Punjab*, AIR 1965 SC 328.
24. *Harpal Singh* v. *Devinder Singh*, AIR 1997 SC 2914 : 1997 Cr LJ 3561.

The Supreme Court observed : "All the circumstances vouched by the eye-witnesses unerringly and irresistibly led to the conclusion that the two contusions and the head injury were received by the accused after he had stabbed the deceased; non-production of any other witness, loses its significance much less can it afford a ground for drawing an adverse inference against the prosecution".[25]

Where the prosecution chose to examine two out of five eye-witnesses who were interested and inimical to the accused and were not corroborated by other independent witnesses, it was held that the evidence of the two eye-witnesses has to be rejected.[26]

Failure to examine independent witnesses who were admittedly in the room next to which the accused was taken, and recovery of articles was made, makes the entire case of recovery unacceptable.[27] Where the prosecution examines only interested, though independent witnesses are available, adverse inference against the prosecution is justified[28] but not where the accused was suddenly apprehended from a thoroughfare without any pre-plan.[29] Where the prosecution dropped the independent witnesses after examining the injured witnesses, it could not be inferred that it was done with an oblique motive.[30] Where the statement of the independent witness recorded under Section 162, Cr.P.C. was found to be not against the prosecution, no adverse inference could be drawn by their non-examination.[31] Where independent persons of the locality were not willing to tell the police that they had seen the incident, veracity of the evidence of the witnesses examined as eye-witnesses could not be doubted merely on the ground of non-examination of independent witnesses.[32]

Prosecution has discretion as to what witnesses should be called. It is not necessary to call all the witnesses to spell out the same fact and the court will not interfere with that discretion unless it can be shown that prosecution is influenced by some oblique motive.[33]

When the prosecution examines witnesses from a distant locality and does not examine the only witness from the same locality where the search was made by the police, an adverse inference may be made against the prosecution.[34] Where the prosecution filed along with the *chalan* a list of witnesses and did not examine them, it was held, that the non-production of such witnesses raised a presumption that the evidence, if given by those witnesses, would be unfavourable to the prosecution.[35] Where the question was of minority, not examining the brother and father who were the most natural witnesses of age created an adverse presumption.[36] Where the prosecution fails to produce a certain witness who was examined in the previous trial for the same offence, a presumption that he would not have supported the prosecution had he been produced, can be raised.[37] Where the charge was based on the statement given by the accused to the inspecting officer and attested by two witnesses and the prosecution failed to produce the attesting witnesses, it was held that an adverse inference could be drawn from the fact of

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25. *State of Maharashtra* v. *Krishna Murthi*, AIR 1981 SC 617. **See also** *Ram Kumar* v. *State of Haryana*, 1996 Cr LJ 2441 (para 16) (SC) : AIR 1996 SC 3185 (Non-production of witnesses other than eye-witnesses).
26. 1978 All CrR 48; *Hardeo Singh* v. *State of Rajasthan*, (1979) 6 CrLT 326; *Amar Singh* v. *State of Haryana*, AIR 1973 SC 2221; *Mangal Singh* v. *State of M.B.*, AIR 1957 SC 199.
27. *Ghulam Mahmood* v. *State of Gujarat*, AIR 1980 SC 1558.
28. *Bir Singh* v. *State of U.P.*, AIR 1978 SC 59; *State of Orissa* v. *Bhagabat Mahanta*, ILR (1978) 1 Cut 517.
29. *Kaka Singh* v. *State of Haryana*, AIR 1995 SC 1949 (para 2) : 1995 Cr LJ 3234.
30. *Chacko* v. *State of Kerala*, AIR 1998 SC 2250 : 1998 Cr LJ 3281.
31. *Nisar Ahmad Fajmohmed Kaji* v. *State of Gujarat*, (1998) 9 SCC 23 : 1998 SCC (Cri) 967.
32. *State of Bihar* v. *Ram Padarath Singh*, AIR 1998 SC 2606.
33. *Abdul Gani* v. *State of M.P.*, AIR 1954 SC 31 : 1954 Cr LJ 338; *Milawa Singh* v. *State*, ILR (1969) 19 Raj 161; *Mamchand* v. *State*, 1981 Cr LJ 190 (P&H); *Phani Bhushan Gupta* v. *State*, AIR 1968 Tri 57; *Mahendra Singh* v. *State*, 1972 Cr LJ 1590 (Del); *Sampuran Singh* v. *Haryana*, 1980 Cr LJ 951 (Punj)(DB); *Peare* v. *State*, 1957 Cr LJ 263 (All); *Yakub Khan Ibrahim Khan* v. *State of Bhopal*, 1955 Bhopal 17; *Superintendent and Remembrancer of Legal Affairs of W.B.* v. *Ram Ajodhya Singh*, AIR 1965 Cal 348 : 1965 (2) Cr LJ 79; *Lalua Dom* v. *State*, AIR 1955 Cal 461 : 56 Cr LJ 1174; *Khazan Singh* v. *State of Punjab*, 1989 CriLJ 1555; *Haridas Mundra* v. *State*, ILR (1962) 1 All 451.
34. *State* v. *Joseph*, 1963 (2) Cr LJ 454 (Ker).
35. *Des Raj Sharma* v. *State*, 1951 Punj 14.
36. *Emuga Lakshmamma* v. *Vennapuse Chinna Malla Reddy*, AIR 1985 SC 658 Similar presumption raised where police diary and register not produced *Seri* v. *T.N.*, AIR 1981 SC 1230; *State of Bihar* v. *S.K. Thacker*, AIR 1981 Pat 81. Land Acquisition Officer's failure to produce list of tenants and rent paid *Ramesh Candra* v. *State*, AIR 1980 Guj 1 (FB) Sample experimented upon not produced. *Lal Kunnissah* v. *Hari Prasad*, AIR 1980 All 63, non-production of records by railways.
37. *State* v. *Hardial Singh*, AIR 1953 Pepsu 66.

non-production of the attesting witnesses to the statement of the accused since they were both material witnesses.[38] Though the prosecution is not bound to call all available witnesses irrespective of considerations of number or reliability, witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution. Where the case against the accused was that he gave orders to the police to fire and the Deputy Commissioner of Police, who had accompanied the accused and had witnessed the occurrence, was not examined by the prosecution, it was held that the failure to examine him not only led to an adverse inference against the prosecution case but also cast serious reflection on the fairness of the trial.[39] If the prosecution does not examine independent witnesses but examines only partisan and interested witnesses adverse inference may be drawn against the prosecution.[40] Non-examination of material witness to prove the defence version in a criminal case is the strongest possible circumstance to discredit the defence version.[41] Failure on the part of the prosecution to explain injuries on the person of the accused can give rise to the following presumptions: 1. that the prosecution has suppressed information as to the nature of the occurrence; 2. that the witnesses who have denied those injuries are telling lies to the court; 3. that the defence of the accused that he committed the crime in self-defence becomes more plausible shifting the burden to the prosecution.[42] A maid-servant working in the *verandah* heard the cries of a married woman being pushed into the room and meeting her death there but she was not produced. This created a presumption against the prosecution.[43] Non-examination of the doctor who conducted the autopsy in a murder case by the prosecution is a drawback for the prosecution and may be fatal.[44]

In a Civil suit or a criminal case, it is not necessary that a party should examine all the possible witnesses. Where a party examines only a few witnesses and the court is inclined to draw an adverse inference from the non-examination of the remaining eye-witnesses, it is but equitable that it should be made clear to the party that other witnesses be also examined and in case of failure to do so, an adverse inference would be drawn.[45]

Non-production of a material witness would not introduce infirmity in the prosecution case where the prosecution case is based entirely on documentary evidence.[46] Non-examination of witnesses who were not eye-witnesses did not affect the prosecution case.[47] Where the prosecution did not examine the witnesses who came to the spot after the incident, it was held to be not fatal to the prosecution.[48] When some witnesses are not examined by the prosecution, a mere consideration that they might have thrown further light on the actual happenings would not justify the conclusion that the omission to examine them was with an oblique motive and would have gone to benefit the accused. Adverse inference may not be drawn in such cases.[49] To avoid proliferation of evidence the prosecution may drop the examination of certain witnesses and no adverse inference can be drawn from this.[50] Normally all the eye witnesses have

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38. *State of Orissa* v. *Bhourilal Agarwalla*, (1962) 1 Cr LJ 835; *Ladi Aggrwallani* v. *Bhagabandoi*, ILR (1966) 18 Assa 462.
39. *Habeeb Muhammad* v. *State of Hyderabad*, (1954) SCR 475 : AIR 1954 SC 51.
40. *Dasan* v. *State of Kerala*, 1987 Cr LJ 180 (Ker).
41. *Gajendra Singh* v. *State of U.P.*, 1975 Cr LJ 1494 : AIR 1975 SC 1703.
42. *Lakshmi Singh* v. *Bihar*, AIR 1976 SC 2263, at 2269; *Baljit Singh* v. *U.P.*, AIR 1976 SC 2273 the I.O. refused to produce copies of official records in his possession as to cultivation of land. *Gajendra Singh* v. *U.P.*, AIR 1975 SC 1703, non-examination of the most material witness in defence discredits defence, the witness being a lady is a lame excuse. Prosecution failing to explain injuries on accused, may lead to adverse inference. *Sukhdev Singh* v. *State of Punjab*, 1997 SCC (Cri) 831.
43. *Sawal Das* v. *State of Bihar*, AIR 1974 SC 779.
44. *State of U.P.* v. *Lakhmi*, AIR 1998 SC 1007 : 1998 Cr LJ 1411.
45. *Amar Singh* v. *Gangoo*, AIR 1956 Bhopal 6; *Orissa Road Transport Co. Ltd.* v. *Sibananda Patnaik*, ILR (1979) 1 Cut 82.
46. *Bali Ram Prasad* v. *State of Mysore*, 1973 Cr LJ 3 : AIR 1973 SC 506.
47. *Dalip Singh* v. *State of Punjab*, AIR 1979 SC 1173; *Dulal Chandra Ghosh* v. *State of West Bengal*, 1988 Cr LJ 1835 (Cal).
48. *Ram Kumar* v. *State of Haryana*, AIR 1996 SC 3185 : 1996 Cr LJ 2441.
49. *R K Dalmia* v. *Delhi Administration*, AIR 1962 SC 1821; In re : *Talapula Obula Naidu*, (1964) 2 Cr LJ 78 (AP) : ILR (1963) AP 349 **relied on** In re : *Vengala Reddy*, AIR 1956 AP 26; *Stephen Seventratne* v. *The King* AIR 1936 PC 289; *Malak Khan* v. *Emperor*, AIR 1946 PC 16; *Adal Mohammad* v. *Attorney General*, AIR 1945 PC 42; In re : *Rama-Chandran*, AIR 1957 Mad 505; *Narain* v. *State of Punjab*, AIR 1959 SC 484; *State* v. *Kalu*, AIR 1964 MP 182.
50. *Harpal Singh* v. *Devinder Singh*, AIR 1997 SC 2914 : 1997 Cr LJ 3561.

to be examined. If selection is made fairly and honestly and not with a view to suppressing inconvenient witnesses from the witness-box, no adverse inference can be drawn against the prosecution.[51] Where a reasonable explanation was given by the prosecution for not examining material witnesses and where the defence did not make an application to the trial court or the High Court but made an application for the first time before the Supreme Court during the course of arguments, it was held that no adverse presumption can be drawn against the prosecution.[52] Where the explanation of the prosecution for non-examination of the injured witness that he was gained over by the accused was borne out by record, an adverse presumption under Section 114, illustration (*g*) could not be drawn against the prosecution.[53] Where the prosecution fails to examine a material witness, but offers to produce the witness for cross-examination and the counsel for the accused does not take advantage of cross-examining the witness so offered, no adverse inference can be drawn against the prosecution.[54] The probative value of other witnesses would not be affected by the non-examination of some witnesses who were known by the prosecution to have been won over by the accused.[55] No adverse presumption can be raised against the prosecution on non-examination of the injured witness who lodged the F.I.R. but was won over by the accused.[56] No adverse inference can be drawn against the prosecution, if it does not examine witnesses gained over by the accused.[57] When the prosecution after having summoned a witness and made him appear, gives up that witness on the ground that he has turned hostile or he has been won over by the accused, the question of raising a presumption under Section 114(*g*) does not arise.[58] Where the prosecution did not examine a particular witness on the ground that his testimony would be a duplication of another witness already produced, it was held that the non-production of another witness did not militate against the prosecution.[59] Where the prosecution does not produce a non-material witness, no adverse inference can be drawn against it.[60] Not producing a factional witness creates no presumption.[61] In case of failure to examine persons whose statements were recorded by the police, as witnesses, no adverse inference can be drawn.[62] In committal proceedings instituted on a police report, absolute discretion is given to the prosecution in the matter of production of witnesses of the actual commission of the offence as per the new provision under Section 207-A, Cr.P.C. The law empowers the Magistrate to take evidence of any one or more of the other witnesses for the prosecution, if he considers it necessary in the interest of justice. No inference adverse to the prosecution can be drawn from such non-production of all the identification witnesses before the Committing Magistrate.[63] No adverse inference can be drawn against the prosecution for not-examining the head-constable before whom the prosecutrix and the accused were first produced when the evidence of the prosecutrix, in a rape case was found to be true and was fully corroborated.[64] Where the testimonies of the two independent witnesses, the Magistrate and the doctor were found to be reliable, no adverse inference could be drawn and no prejudice could be said to have been caused to the accused by non-examination of the daughter of the deceased or due to infirmities in framing of the charges.[65] No adverse inference can be drawn against the prosecution for failure on its part to explain minor injuries on the person of the accused.[66]

The prosecution is not bound to call witnesses irrespective of consideration of number and reliability. It is only those witnesses who are essential to the unfolding of the prosecution story, that

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51. *Moirangthem Tomba Singh* v. *State of Manipur*, 1984 Cr LJ 536 (Gau); *Jamser Ali* v. *State of Tripura*, AIR 1954 Tri 11; *Ibrahim Kuotty* v. *State of Kerala*, 1984 Cr LJ 221 (Ker)(DB); *Dashirai Riang* v. *State*, 1964 Tri 54; *Palsingh* v. *State of U.P.*, AIR 1979 SC 1116; *State of Rajasthan* v. *Bhola Singh*, AIR 1969 Raj 219 : 1969 Cr LJ 1002 (Raj).
52. *Dalbir Kaur* v. *Punjab*, 1977 Cr LJ 273 : AIR 1977 SC 472.
53. *Saudagar Singh* v. *State of Haryana*, AIR 1998 SC 28 : 1998 Cr LJ 62.
54. *State of Gujarat* v. *Raghunath*, 1985 Cr LJ 1357 : AIR 1985 SC 1092.
55. *Allauddin Mian* v. *State of Bihar*, AIR 1989 SC 1456.
56. *Saudagar Singh* v. *State of Haryana*, (1997) 11 SCC 546.
57. *Bakshish Singh* v. *State of Punjab*, 1957 SCJ 104; *Sadek S.K.* v. *State*, 1984 Cr LJ 29 (Cal).
58. *Mutteppa Dhareppa* v. *State*, ILR (1979) 2 Kant 2154 : 1980 Cr LJ 1065 (Kar).
59. *Rajpal Bhiraram* v. *State*, 1974 Cr LJ 1225; *Waisuddin* v. *State*, 1991 Cr LJ 134.
60. *Mehmood Beg* v. *State of Rajasthan*, 1973 Cr LJ 806.
61. *Ram Avtar Rai* v. *State of U.P.*, AIR 1985 SC 880.
62. *Gajanand Maganlal Mehta* v. *State of Gujarat*, 1987 Cr LJ 374 (Guj).
63. *Ghani* v. *State*, (1962) 2 Cr LJ 411 : ILR 1962(1) All 169.
64. *State of Karnataka* v. *Mehaboob*, Cr LJ 940 (Kar).
65. *Janabai Ranu Patole* v. *State of Maharashtra*, 1997 Cr LJ 3062 (Bom).
66. *Mansingh* v. *State of M.P.*, 1987 Cr LJ 693 (MP).

should be called by the prosecution. It is no part of the duty of the prosecution to supply ammunition to the defence for the purpose of blowing up the prosecution story.[67]

30. WITHHOLDING OF DOCUMENTS (CIVIL)

(a) Party

LORD SHAW referred to: "a practice, grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing accordingly to furnish to the courts the best material for its decision. With regard to third parties, this may be right enough; they have no responsibility for the conduct of the suit; but with regard to the parties to the suit, it is in their Lordships' opinion an inversion of sound practice for those desiring to rely upon a state of facts to withhold from the court the written evidence in their possession which would throw light upon the proposition".[68] But where it was held that where neither party produced any evidence though any of them could have produced it the absence of evidence was inconclusive.[69]

Where a party in possession of best evidence *i.e.*, material document which would throw light on the issue in controversy withholds it, the court may draw an adverse inference against him notwithstanding that the fact that onus of proof does not lie on him.[70] Where a party failed to produce documents asked

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67. In re : *Mettu Pentayya*, AIR 1960 AP 545 : 1960 Cr LJ 1402; *Stephen Seveniratne* v. *The King*, AIR 1936 PC 289; *Narain* v. *State of Punjab*, AIR 1959 SC 484; In re : *Boy Burranna*, AIR 1954 AP 46; *Kamla* v. *State*, ILR (1962) 12 Raj 144; *Abdul Gafur* v. *Govt. of Tripura*, AIR 1952 Tri 25; *Bir Singh* v. *State*, ILR (1974) HP 948.

68. *Murugesam Pillai* v. *Gnana Sambhanda Pandara Sannadhi*, AIR 1917 PC 6. **See also** *Rameshwar Singh* v. *Bajit Lal*, AIR 1929 PC 95 : AIR 1953 SC 225; *Hiralal* v. *Badkulal*, (fol 1917 PC 6 in preference to 1915 PC 96). *Mahabir Singh* v. *Rohini*, AIR 1933 PC 87; *Gopal Krishnaji Ketkar* v. *Md. Haji Latif*, AIR 1968 SC 1413; *Deviji* v. *Mohanlal*, AIR 1960 Pat 223; *Sriram* v. *Dukha Jena*, AIR 1966 Ori 66; *Agurchand* v. *Deochand*, AIR 1960 AP 101; *Hazaribagh Municipality* v. *Fulchand*, AIR 1966 Pat 434. **See contra** *B. Kunwar* v. *Ranjit Singh*, AIR 1915 PC 96; *Nagendra Kumar* v. *Eswari Sahu*, AIR 1958 Pat 329; *Ishwar Dass* v. *(Firm) Radha Mal*, AIR 1960 Punj 417; *Shanti Prasad Jain* v. *Kalinga Tubes Ltd.*, AIR 1962 Ori 202; *Soresh Chandar Das* v. *Balabhadra Pattanik*, ILR (1970) Cut 1143, *Peter Alan Basil* v. *East India Pharmaceutical Works Ltd.*, AIR 1976 Cal 182; *Niranjan Kaur* v. *New Delhi Hotels Ltd*, AIR 1988 Del 332; *Muniyappa* v. *Deputy Commissioner, Kolar*, 1998 AIHC 4017 (paras 9 and 13) (Kant).

69. *Ram Rati Kuer* v. *Dwarka Prasad Singh*, AIR 1967 SC 1134.

70. *Davidas* v. *Shrishailappa*, AIR 1961 SC 1277; *Gopal Krishnaji* v. *Md. Haji Latif*, AIR 1968 SC 1413; (though the onus in on the opposite party); *Virendra* v. *Jagjiwan*, AIR 1974 SC 1957; *Atyam Veerraju* v. *Pechetti Venkanna*, AIR 1966 SC 629; *Ramdas Oil Mills* v. *Union of India*, AIR 1977 SC 638; *Baljit Singh* v. *State of Uttar Pradesh*, AIR 1976 SC 2273; *Rangabati* v. *United Bank of India*, AIR 1961 Pat 158; *K.K. Hushenkhan* v. *Nijalingappa*, AIR 1968 Mys 18; *Gurusami Nandan* v. *Gopala Swami Odavar*, ILR 42 Mad 629; *Shankar Rao* v. *Kamta Prasad*, 1947 Nag 129; *Peter* v. *East India Pharmaceotical Works*, 1976 Cal 182; *Raghavamma* v. *Chenchamma*, AIR 1964 SC 136; *Sita Maharani* v. *Cheedi Mahto*, AIR 1955 SC 328; *P.C. Chunder & Co. Ltd.* v. *Ram Asis Ram Nonia*, AIR 1953 Cal 336; *Mannalal* v. *Dalchand*, ILR 1961 MP 117; *Jagannadham* v. *Padmabati*, AIR 1962 Ori 7; *Ganesh Chandra Khan* v. *State of W.B.*, ILR (1972) 1 Cal 171; *Premchand Surana* v. *Lakshmi Chand Parakh*, AIR 1971 MP 124; *Amarchand Pannalal* v. *Union of India*, AIR 1955 Assam 221; *Asiatic Steam Navigation Co. Ltd.* v. *Jethalal Dharamshi & Co. Ltd.*, AIR 1959 Cal 479; *Meghji Malsee Ltd.* v. *P.C. Oommen*, AIR 1963 Ker 306; *Nar Bahadur Gurung* v. *Anil Krishan Bhattacharya*, AIR 1957 Manipur 25; *Mansarover Agencies* v. *Governor General in Council*, AIR 1955 Mys 123; *Firm Pursottam Das* v. *Gulab Khan*, AIR 1963 Pat 407; *Bherulal* v. *Dhapubai*, 1963 MP 121; *Veeraiah Ambalam* v. *Karuppan*, ILR (1963) MP 121; *Al Yappan Pillai* v. *Bhagavathi Pillai*, AIR 1952 Trav Co. 471; *Commissioner of Hazaribagh Municipality* v. *Fulchand Agarwalla*, AIR 1966 Pat 434; *Shrinarayan* v. *Chamber of Commerce Ltd.*, ILR (1968) 18 Raj 1212; *Banambar Das* v. *Udayanath Pattanaik*, AIR 1961 Ori 148; *Harjit Singh* v. *S. Umrao Singh*, AIR 1980 SC 701; *Ramdas* v. *State of Maharashtra*, 1977 Cr LJ 955 : AIR 1977 SC 1164; *Baljit Singh* v. *State of U.P.*, 1976 Cr LJ 1745 : AIR 1976 SC 2273; *Gurnam Singh* v. *Surjit Singh*, AIR 1974 SC 2367; *Union of India* v. *Rai Singh Deb Singh Bist*, AIR 1974 SC 478; *Ridhikaran Ramadhin* v. *French Motor Car Company Ltd.*, AIR 1955 Ori 60; *Chandra Sekar Praharaj* v. *Pitambair Dibya*, AIR 1953 Ori 315; *Brahmdeo* v. *N.A. Committee*, AIR 1965 Pat 179; *Binani Properites (Pvt.) Ltd.* v. *M. Gulmali Abdul Hossain & Co.*, AIR 1967 Cal 390; *Roop Kishore* v. *Kesarimal*, ILR (1959) 9 Raj 938; *Burn & Co. Ltd.* v. *State*, AIR 1976 Cal 389; *Irudayam Ammal* v. *Salayath Mary*, AIR 1973 Mad 421; *State* v. *Jiwan Singh*, ILR (1980) HP 516; *Ram Murthy Gupta* v. *Suresh Chandra Agarwal*, AIR 1973 All 582; *Bikash Chandra* v. *Macniel*, ILR (1972) 1 Cal 157; *Murugesam Pillai* v. *Gnana Sambandha Pandara Sannadhi*, AIR 1917 PC 6; *Prananath Patnaik* v. *Banmali Patnaik*, AIR 1958 Ori 28; *Musadi* v. *Ganpathu*, AIR 1964 Him Pra 5; *Lakhmir Singh* v. *Union of India*, AIR 1957 Pat 633; *Kuttan Panicker* v. *State of Kerala*, (1963) 1 Cr LJ 669 (Ker); *People's Insurance Co. Ltd.* v. *Wood & Co., Ltd.*, AIR 1960 Punj 388; *Asa Ram* v. *M.C.D.*, AIR 1995 Del 164 (para 10); *Indian Bank, Secunderabad* v. *Boorugu Nagaiah Rajana*, AIR 2000 AP 289 (paras 29 and 36).

for by any Authority, the Authority would be entitled to draw inferences as it might think justified.[71] Where an assessee fails to put before the department of revenue, material in his exclusive possession, adverse inference can be drawn against the assessee.[72] Withholding of a document by the Government under the plea that it is a privileged document leads to adverse inference against the Government.[73] Where the defendant admits service of a notice but alleges that the notice was not valid and sufficient and does not produce the notice and fails to give any explanation for its non-production, it is proper and reasonable to infer that the notice was in the custody of the defendant and that if it had been produced, it would have shown that it was valid and sufficient.[74] Where in spite of the court's directions the defendant did not produce the documents and kept in the office which would throw light on the question of his negligence, it was held adverse inference that he was negligent, could be drawn.[75] The plaintiff, in order to prove misconduct and negligence of railway, may call upon the railway administration to produce evidence and if it does not produce it, the court may infer that, if evidence was produced, it would have gone against the defendant.[76] Where goods carried at railway risk are damaged, the burden is on the Railway Administration to place material before the court to show that as much care as was required was taken by them. Non-production of such material will justify raising an adverse inference against them.[77] When primary evidence is withheld by the Railway Administration, the court can draw adverse presumption against the administration.[78] Where the Railways failed to disclose to the consignor how the consignment was handled in transit, adverse inference can be drawn.[79] Where a stationary truck was damaged by a truck in motion, compensation was claimed from the owner of the truck in motion and its insurer, failure on the part of the insurer to produce the insurence policy gives rise to an adverse inference against the insurer.[80] An adverse presumption arose where a notification declared certain premises as shops without giving any opportunity to the owner. The relevant material justifying the notification was not produced in the court[81]. A worker claimed to have become permanent on account of continuous service. The Reserve Bank failed to produce any records. The worker's case was presumed to be true.[82] In a rent control case, the mere fact that the onus to prove the case is on the landlord, is immaterial where the appellant tenant has suppressed the land lord's notice, alleged to bear no signature, though in possession of the same. The tenant cannot be allowed to take advantage of abstract doctrine of the onus of proof. The court is justified in drawing presumption against the tenant in terms of Section 114(*g*).[83] Where a court directed the State Government to furnish information regarding a particular Government Scheme, adverse inference can be drawn for non-compliance with the direction.[84] Where despite directions of the Court the appellate-State failed to produce the merit list, an adverse inference was drawn that no merit list was prepared.[85] Where the respondent state failed to file counter-affidavit and produce records to substantiate its case despite Court direction, the appellant's case was accepted that he was entitled for promotion.[86] Where a party alleges that houses were purchased out of the sale-proceeds of land belonging to joint family and does not produce sale deed of land or extracts from land records to show existence of land, but offers oral evidence, adverse inference may be drawn for non-production of documents and oral evidence cannot be accepted.[87] Adverse inference can be

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71. *C.M.P. Co. op. Societies* v. *State of M.P.*, AIR 1967 SC 1815.
72. *Commissioner of Income-tax* v. *Best and Co. Ltd.*, AIR 1966 SC 1325.
73. *State of M.P.* v. *Sardarmal*, AIR 1987 MP 156.
74. *Kishan Prasad* v. *Union of India*, AIR 1960 Cal 264.
75. *State of Punjab* v. *Modern Cultivators*, AIR 1965 SC 17.
76. *Union of India* v. *Mahadeo Lal Prabhudayal*, AIR 1965 SC 1755; *Union of India* v. *Manchand Agarwalla*, AIR 1967 Cal 133; *Sarat C&W Mills* v. *Secretary of State*, 39 Bom LR 946 : AIR 1937 PC 152.
77. *Union of India* v. *Firm Munnalal Pasari & Sons*, AIR 1971 MP 131; *Union of India* v. *Rajendra Mills*, AIR 1971 Mad 53; *Union of India* v. *Gopal Das Ramesh Chand*, ILR (1976) 2 Del 508.
78. *Union of India* v. *L.R. Cotton Mills Ltd.*, AIR 1971 All 531.
79. *Union of India* v. *Harbansh Singh*, ILR (1965) 2 All 768; *Union of India* v. *Delhi Cloth and General Mills Company Ltd.*, AIR 1964 Punj 147.
80. *G. Krishna Rao* v. *C. Poornachandra Rao*, AIR 1987 Pri 18.
81. *Lipton India Ltd.* v. *West Bengal*, AIR 1984 Cal 109.
82. *H.D. Singh* v. *Reserve Bank of India*, AIR 1986 SC 132.
83. *Tirlok Chand* v. *Ram Kishan Dass*, ILR (1964) 1 Punj 28.
84. *Gulshan* v. *Zilaparishad*, AIR 1981 SC 1628.
85. *State of Bihar* v. *Kumar Promod Narain Singh*, (1997) 5 SCC 298.
86. *Bir Singh Chauhan* v. *State of Haryana*, (1997) 6 SCC 282. **See also** *State* v. *Rikhab Das Jain*, AIR 1994 Raj 114 (paras 4 and 6).
87. *Ch. Mansa Ram & Sons* v. *Secretary, Industries*, AIR 1960 All 570; *C.V. Hayagriv* v. *Mysore Silk Museum Regd.*, AIR 1971 Mys 227.

drawn against the plaintiff alleging co-ownership rights in some portion of the land if he fails to produce the sale deed by him.[88] Where a witness for the plaintiff admitted that the plaintiff had got records of property of his private estate and all the properties were mentioned therein but he did produce the records, a presumption was raised that had the records been produced, they would not have supported the plaintiff's case.[89] A very strong presumption must be raised against a party who withholds a document which is the best evidence and abstains himself from appearing in the witness box.[90] Under the Punjab Gram Panchayat Act an adverse presumption could be drawn that the second enquiry was not competent and was liable to be quashed when the first enquiry was withheld by the authorities.[91]

Where a company claimed depreciation it was held mere production of auditor's certificate is not sufficient in the absence of the balance sheet and profit and loss account.[92]

It cannot be held that in order to raise the presumption under Section 114(*g*), it is necessary to follow the procedure of giving a notice for production of documents under O. XI, C.P.C. or summon documents under O. XVI, C.P.C. The only important condition is that the party should prove that the document is in existence and is in the possession or custody of the party against whom the adverse inference is sought to be drawn.[93] An adverse inference may be raised by the court against a party withholding evidence in his possession notwithstanding the fact that the party is not called upon expressly to make an affidavit of documents and inspection and production of documents is not demanded.[94]

No adverse inference can be drawn against the insurance company producing incomplete policy with endorsement not showing the extent of its liability as the insured had not pleaded its unlimited liability. Besides the insurer was not bound to produce policy[95] and also against the owner of a motor vehicle whose liability was to be determined for an accident, for not producing the permit of the vehicle which he was never asked to produce.[96]

(b) Withholding Account Books

Non-production of account books which are relevant for determination of the issues in the case may give rise to an adverse inference against the party who fails to produce them.[97] An adverse inference can be drawn against a party for non-production of account books if the other side had asked the court to order that party to produce accounts and the party had failed to produce them.[98] Adverse inference can be drawn against the party for not producing relevant account books, even if they were not summoned by the opposite party.[99] Where the writ of *certiorari* issued by the High Court directing the Government of

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88. *Gurnam Singh* v. *Surjit Singh*, AIR 1974 SC 2367.
89. *Motilal Lakhotia* v. *Mewang Tobgyal Wangchuk Tenzing Namgyal*, AIR 1994 Sik 6 (para 10).
90. *Bawa Singh* v. *Jagdish Chand*, AIR 1960 Punj 573.
91. *Mewa Singh* v. *Secy D and P Dept., Govt. of Haryana*, AIR 1991 P and H 23.
92. *Metal Box Co.* v. *Their Workmen*, AIR 1969 SC 612.
93. *Agarchand Bhomraj Sowear* v. *Deochand*, AIR 1960 AP 101.
94. *Bilku Ram* v. *Jamandan Prasad*, Civil Appeal No. 941 of 1965, decided on April 15, 1968 (Supreme Court).
95. *New India Assurance Company Ltd.* v. *Suresh Chandra Patra*, AIR 1994 Ori 236 (paras 13 and 14).
96. *Oriental Fire & General Insurance Co. Ltd.* v. *B. Sitharam Singh*, AIR 1995 AP 268 (para 6).
97. *Jag Prasad* v. *Singari*, AIR 1925 PC 93; *G.S. Mahalaxmi* v. *Shah Ranchhoddas*, AIR 1970 SC 2025; *K.M. Patel* v. *Firm Mohamadhussain Rahim Bux*, AIR 1981 SC 977; *Dataram Jain* v. *Basant Kunwar*, AIR 1922 PC 378; *Ram Das Oil Mills* v. *Union of India*, AIR 1977 SC 638; *Firm Ramlochan Ram Lakshmi Prasad* v. *Maikha Sethani*, AIR 1960 Pat 271; *Central Bank of India*, v. *Firm Rur Chand*, AIR 1958 Punj 159; *Firm B. Das* v. *Watkins M & Co.*, AIR 1956 Punj 17; *Chidambaram Pillai* v. *Chidambaram Pillai*, AIR 1951 Trav Co. 87; *Krishan Dayal* v. *Chandu Ram*, ILR 1969 Del 1090; *B. Shambumal* v. *State of Bank of Mysore*, AIR 1971 Mys 156; *Krishan Dayal* v. *Chandu Ram*, ILR 1969 Del 1090; Das *Srinivasan* v. *Sundaramurthy*, ILR (1972) 1 Mad 377; *Valluri Sreeramulu* v. *Regd. Firm Valluri Venkataraju etc.*, ILR 1977 AP 267; *Rattan Singh* v. *State of Punjab*, ILR 1980 HP 1; *Tolaram* v. *Beenraj*, AIR 1957 Raj 256; *Vayapuri Mudaliar & Sons* v. *Sri Arunodhaya Textiles, Erode*, AIR 1996 Mad 19 (para 26).
98. *Devidas* v. *Shrishailappa*, AIR 1961 SC 1277; *Srinivas Das* v. *Surjanarayan*, AIR 1967 SC 256. **See also** *Veerraju* v. *Venkanna*, AIR 1966 SC 629. Prosecution is not required to prove injuries on the person of the accused. Hence, no presumption if they don't *Bhaba Nanda* v. *State of Punjab*, AIR 1977 SC 2252; *Official Receiver* v. *Krishanan*, AIR 1965 Ker 156; *Nathulal Mulchand* v. *Phoolchand Gorelal*, AIR 1955 VP 6; *Shankarlinga Nadar* v. *Commissioner of Income-tax*, AIR 1930 Mad 209.
99. *Bansidhar Ganga Prasad* v. *Chamanlal*, ILR (1975) 1 Del 445; **See contra** *Govind Laxshman Salapurkar* v. *Dattatraya Damodar Kelkar*, AIR 1991 All 226.

India to produce the records of accounts in the Court was not complied with, adverse inference could be drawn against the Government for keeping the best evidence away from the Court of law and the same was held to be against the principles of public justice.[1] Presumption as to consideration under a pronote under Section 118(*a*) Negotiable Instruments Act can be rebutted by evidence which need not necessarily be by direct evidence. In the case of a professional money lender adverse inference can be drawn if he suppressed his account books and can be held that in his case that he advanced money to the dependent was not true.[2]

In a suit for recovery of amount due on the basis of adjustment, the defendant was in possession of account books from which the balance could be ascertained. It is the duty of the defendant to produced the account books before the court. He cannot rely upon the abstract doctrine of onus of proof that it was not his duty to produce them unless he was called upon to do so.[3]

31. WITHHOLDING OF DOCUMENTS AND ACCOUNT BOOKS—WHEN PRESUMPTION CAN NOT BE DRAWN

(a) Documents

Where party fails to produce document in his possession adverse inference can be drawn and non-production would not affect the appreciation of other documents.[4]

Where there is no evidence on record to show that a document having an important bearing on a dispute is with the party or within his power and that it is withheld from the Court, the court would refuse to raise an adverse inference against that party.[5]

It is not incumbent on a party to produce documents, which, according to him, have no bearing on the case. It is for the other party to apply for inspection of documents which appear to him to be relevant and proper. If he fails to do so, neither he nor the court is entitled to draw any presumption regarding the contents of the documents.[6]

Court will not draw a presumption under Section 114(*g*) against a person from his non-production of a document, where it is not shown that he had withheld this evidence or had any concern in doing away or suppressing the evidence.[7] Where a party produced only some of the documents in his possession and did not produce some and so, if the opposite party did not ask or question about the documents which were not produced, then no adverse inference can be drawn against the party who did not produce some of the documents. But the court can take into consideration in weighing the evidence from the established facts that the documents which were not produced might have favoured the case of the opposite party.[8] When the party is not called upon to produce a document, adverse inference cannot be drawn from the mere non-production unless there is deliberate supression of the document.[9] Where the defendant did produce a document in the trial court, though at a later stage, and the plaintiff objected to its reception and the court shut it out, no adverse inference can be drawn against the dedendant from the

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1. *L.P. Naithani* v. *Allahabad Telephones, Allahabad*, AIR 1998 All 191 (para 9).
2. *A.S. Duraisami Chettiar* v. *S. Rathnaswami Gounder*, AIR 1992 Mad 132.
3. *Hiralal* v. *Badkulal*, AIR 1953 SC 225 **followed in** *H.S. Nanjudappa* v. *C.V. Shashidhara Murthy*, 1996 AIHC 1916 (para 9) (Kant), **following** *T.S. Murugesam Pillai* v. *M.D. Ghana Sambandha Pandara Sannadhi*, AIR 1917 PC 6; **See also** *Sri Ram Dayalu Das Babaji* v. *Dukha Jena*, AIR 1966 Ori 66.
4. *Ahmed Khan* v. *Ali Ebrahim Noor*, AIR 1925 PC 177. **See also** *Krishan Lal* v. *Mohd. Din*, AIR 1994 Del 10 (paras 26, 31, 33 and 34); *Jyoturindra Bhattacharjee* v. *Sona Bala Bora*, AIR 1994 Gau 99 (para 14).
5. *Devi Das* v. *Shri Shailappa*, AIR 1961 SC 1277; *Atra Devi* v. *Ramswaroop Prasad Singh*, AIR 1972 Pat 186.
6. *J.N. Eranna Rao* v. *D.H.S. Setty & Co.*, AIR 1960 AP 331; *Bilas Kunwar* v. *Desraj Ranjit Singh*, AIR 1915 PC 96; *The Ap car Collieries Ltd.* v. *Radha Gobinda*, AIR 1954 Cal 480.
7. *Narayan Waktu Karwadi* v. *Panjabrao Hukam Shambharkar*, AIR 1958 Bom 296; *Sojjanraj Swarup Chand* v. *Mehta Commer. Co.*, AIR 1973 Guj 57.
8. *Mahant Shri Srinivas Ramanuj Das* v. *Sarjanarayan Das*, AIR 1967 SC 256; *Latikabala Dasi* v. *Anil Behari*, AIR 1953 Cal 104; *Kannaiyalal Ramanarain & Co.* v. *Union of India*, AIR 1959 Pat 335; *George Davis Mooken* v. *O. Thomakutty*, AIR 1975 Ker 163; *The Apcar Collieries Ltd.* v. *Radha Govinda*, AIR 1954 Cal 480; *Workmen of B.C.P. Ltd.* v. *Blundell Fomita Paints*, ILR (1971) 2 Ker 134; *Sadhu Singh* v. *Chanda Singh*, AIR 1957 Punj 108; *George Davis Mooken* v. *O. Thomakutty*, ILR 1974 (1) Ker 289.
9. *Tejpal Singh* v. *Gaya Sahai*, AIR 1952 All 808; *Thirumalai Iyengar* v. *Subba Raja*, 1962 Mad 219; *Harinagar Sugar Mills Ltd.* v. *Sia Saran Sinha*, AIR 1961 Pat 232; *Union of India* v. *Shamsu Mian*, AIR 1956 Pat 71; *Sobharam Jokhuram* v. *Union of India*, AIR 1970 Pat 182; *Union of India* v. *Sheo Prasad Fulchand*, AIR 1967 Pat 328.

fact that the document was not produced by him in time.[10] In a suit for specific performance the intending purchaser plaintiff stated that he had deposited in a bank a sum more than the sale consideration, thereby giving the defendant to understand that he was willing and ready to purchase the property, as per the terms of the agreement for sale. The defendant did not enquire about the name of the bank where the deposit was made. Neither he nor the court asked the plaintiff to produce the pass-book. In those circumstances adverse cannot be drawn against the plaintiff for non-production of the pass-book.[11] Presumption that a document is antedated cannot be raised against the person producing it, on the ground of failure of petition writer to produce the register required to be maintained by him to show the date on which the document was written. It can only affect the value of petition-writer's evidence.[12] When burden of proving that the properties of the temple are held by the reigning *mahant* on trust for public purposes is on the Board of Religious Trust, the court cannot draw an adverse inference for failure of *Mahant* to produce the document where under the properties had been gifted to the founding *Mahant*.[13] No adverse inference can be drawn against a person from non-production by him of relevant documents when no burden of proof lies on him to prove a certain fact.[14] No presumption can be drawn in the case of non-production of a document by a rustic who is ignorant of the importance of the document.[15] When a relevant document or any other evidence (birth and death register) is available to both parties but none of them produces it, no adverse inference can be drawn from the non-production against plaintiff.[16]

(b) Account Books

A pre-requisite to the drawing of an adverse inference from the non-production of the account books is, to first establish that the party was maintaining accounts and yet failed to produce them to the court.[17]

When a party failed to produce relevant account books unless the opposite party made attempts to call the account books, it was held that no adverse ivference can be drawn.[18] Where the court accepts the reasons given by the plaintiff for non-production of the accounts or a relevant document the court cannot draw any adverse inference against the plaintiff for non-production of those documents.[19] Where, at the time the defendant compared the account with the plaintiff, he was shown all the books of account including the *Pukki Bahi* and the *Kachchi Chopadi* and it was not suggested by him that there had been interpolations by the plaintiff thereafter, and the plaintiff produced in court all the account books exceping the *Kachchi Chopadi*, held that much significance could not be attached to the plaintiff's failure to produce the *Kachchi Chopadi*.[20] Where, according to the plaintiff's case, his account books are not relevant, no inference can be drawn against him for non-production of his books.[21]

It is not obligatory on the part of the court to draw an adverse presumption under Section 114 in every case where account books are not produced. When other evidence which is equivalent to or which can be characterised as substitute for account books is available for the court to come to a reasonable conclusion, it could do so.[22]

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10. *J.N. Eranna Rao* v. *D.H.S. Setty & Co., Bellary*, 1960 AP 331.
11. *Indira Kaur* v. *Sheolal Kapoor*, AIR 1988 SC 1074.
12. *Mohanlal* v. *Anandi Bai*, AIR 1971 SC 2177.
13. *State of Bihar* v. *Biseshwar Das*, AIR 1971 SC 2057.
14. *Ananta Charan Pani* v. *Daitari Jee*, ILR 1969 Cut 796.
15. *Kondamuri Anasuyamma* v. *District Judge*, AIR 1991 AP 47.
16. *Thakur Ram Janki* v. *Jago Singh*, AIR 1962 Pat 131.
17. *Gopalan* v. *Chunnaya*, AIR 1958 Andh 630; *Chunkal Ojha* v. *Mulsankar Ojha*, ILR (1961) Cut 635.
18. *Ram Rati Kuer* v. *Dwarika Prasad*, AIR 1967 SC 1134; *Siddeswar Prasad* v. *B.S. Pramanick Sha*, AIR 1978 Cal 4; *George Davisa* v. *O Thomakutty*, AIR 1975 Ker 163; *Kalloo Gaji* v. *Rishabh Kumar*, AIR 1951 Nag 347; *Durga Charan Ram* v. *Achuta Pati*, ILR 1966 Cut 598; *Banarasi Dass* v. *Shakuntala*, AIR 1989 Del 184.
19. *Brahmadutta* v. *Dasuram*, ILR (1967) 19 Assam 449 SC **on appeal from** *Dasuram Mirjmal Firm* v. *Brahmadatta Bajaj*, AIR 1963 Assam 41; *Himatsingka Motor Works* v. *Harnath Basua*, AIR 1965 Assam 10; *Govinda* v. *Vaidyanath*, AIR 1952 Hyd 22; *Chiranjilal* v. *Rikhabdass*, AIR 1959 Raj 291.
20. *Suganchand* v. *Fulchand*, AIR 1957 MP 194.
21. *Udmiram Kardoodimal* v. *Balramdas Tularam*, AIR 1956 Nag 76.
22. *A. Kandaswamy Pillai* v. *P.M. Thegaraja*, AIR 1968 Mad 203; *Official Liquidator, Puri Bank Ltd.* v. *Ramaniklal Joshi*, AIR 1967 Ori 169.

32. *ALIBI* EVIDENCE

The omission on the part of the accused to produce all important evidence in support of his plea of *alibi* which could easily have been produced raises the presumption against him under illus. (*g*) to Section 114 Evidence Act, that it would, if produced, have been unfavourable to him.[23]

33. DETENUE

In the absence of affidavit by the State and non-production of relevant files relating to the grounds for detention and service thereof on the detenue within the prescribed period, it may be presumed that, if those files were produced, they would have supported the plea of the detenue.[24] Where the detenue refused to receive the order of detention and the grounds thereof and copies of documents, the order must be presumed to have been served on him.[25]

Where detenue stated that he sent a letter in which he retracted from his original statement before the order of detention and sent a photostat copy of the certificate of posting but did not send the copy of the letter it was held that it could not be presumed that such a letter was posted.[26]

34. MEDICAL EXAMINATION

Where a party refuses to submit to a medical examination in a case where the whole case depends on the state of his or her mind or body, it will be open to the court to draw an adverse inference or presumption against the recalcitrant party.[27]

However, it was held that where a party refused to give blood in a case for determining the paternity between the parties, an adverse inference could not be drawn against the party refusing to give blood.[28]

35. REFUSAL TO ANSWER QUESTIONS [ILLUSTRATION (h)]

Refusal to answer a question is a legitimate ground of unfavourable inference against the person who has to answer the question under Section 148(4), *infra*. But this illustration does not contemplate the case of witnesses who are not compelled to answer on grounds of privilege (*vide* Ss. 121-129).

An inference adverse to the accused might be drawn from refusal of the accused to answer when he was examined by the Magistrate before committing him.[29] Thumb impressions of the accused taken in spite of his protests cannot be made use of. But the court may, however, take into consideration his refusal, for drawing presumption against him.[30] When an accused refuses to give specimen writing in spite of a direction by the court to the accused, the court can legally draw presumptions against him. It will not amount to compelling the accused to be a witness against himself.[31] Where the benefit of exemption on import of a certain item initially given to the petitioner under the existing notification was sought to be recovered under a subsequently issued notification but despite Court's direction the Government failed to file a counter-affidavit to show the existence of any public interest or exceptional circumstances that prompted it to issue the subsequent notification, it was held that neither existed and the petitioner was entitled for the said benefit.[32]

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23. *Satya Vir* v. *State of Allahabad*, 1958 Cr LJ 1266 : AIR 1958 All 746.
24. *Md Shafi* v. *State of J&K*, 1970 Cr LJ 747 : AIR 1970 SC 688. **See also** *Mohd. Ramzan Dar* v. *State*, 1996 Cr LJ 1029 (para 7) (J&K).
25. *Changamma* v. *State of Karnataka*, 1991 Cr LJ 315 (Kar).
26. *L.M.S. Ummu Saleema* v. *B.B. Gujaral*, AIR 1981 SC 1191.
27. *Sulabai* v. *Jagannath*, (1971) 74 Bom LR 295 : 1972 Cr LJ 1392. **See also** *George Philip* v. *Saly Elias T.*, AIR 1995 Ker 289 (paras 8 and 10), **relying on** *Sheebe Daniel* v. *Alexander*, 1989 (1) KLT 405
28. *Ramachandra Shankar Kad* v. *Shankar Genu Kad*, AIR 1968 Bom 388.
29. *Ramanarayan Mor* v. *State of Maharashtra*, (1964) 2 Cr LJ 44 : AIR 1964 SC 949.
30. *Balraj Bhalla* v. *Ramesh Chandra*, 1960 Cr LJ 297 : AIR 1960 All 157.
31. *Ram Swarup* v. *State*, 1958 Cr LJ 134 : AIR 1958 All 119; *Shashi Bhushan Pati* v. *State Bank of India*, AIR 1986 Ori 218
32. *Choksi Tube Co. Ltd.* v. *Union of India*, (1997) 11 SCC 179.

Fisheries rights in certain tanks were acquired to rehabilitate certain fishermen displaced on other tanks which under Section 6(3) of the Land Acquisition Act is for public purpose and is consistent with Section 114(*h*) also.[33]

36. DISCHARGE OF OBLIGATION [ILLUSTRATION (i)]

This presumption is funded on the natural supposition that a man will protect his own interests by securing his bond before or at the time of discharging it. Where the instrument of a debt and the security for that debt are found in the hands of the debtor, the *prima facie* presumption is that the debt has been discharged.[34] If a pronote is in the hands of the maker, there is a presumption that it has been paid of. If the drawee alleges that the maker came into possession of the pronote unlawfully, the onus is on him to prove it. This illustration only refers to presumption that may be raised. It does not follow that such presumption would shift the onus of proof. In a suit for money due on a mortgage bond, the plaintiff produced only a copy of the document, alleging in his plaint that it had been lost. The defendant admitted its execution, but alleged that the debt has been discharged, and in support of his allegation he produced the original document containing the endorsement of the mortgagee through her agent of payment of the debt. It was held that the production by the defendant of the bond with the endorsement of payment cast on the plaintiff the burden of proving that the debt was still outstanding.[35] Where the plaintiff filed a suit for recovery of amount due under a mortgage, the defendant produced only the bond creating obligation and denied liability and alleged theft of documents but the title deeds which were deposited by the defendant at the time of mortgage remained with the plaintiff, the privy council held that the presumption in favour of the defendants was considerably weakened by the fact of possession of title deeds of the defendant with the plaintiff.[36] In a suit for possession of property on the ground that there was a mortage by conditional sale, the mortgagor produced the original document showing an endorsement on it that the mortgage consideration was prepaid, it was held that a presumption can be raised in favour of the plaintiff.[37]

In a suit on a bond for money, plaintiff alleged that his non-production of the document was due to the fact that the defendant had stolen it. The defendant admitted the execution of the bond, but alleged that he had paid it; it was held that the burden of proof was on the defendant to prove payment; either by the production of the bond, or other evidence or by both.[38] Where plaintiff sued for money due upon *hundis* (bills of exchange), but alleged their loss, whilst defendant admitted execution, but pleaded payment and subsequent destruction of the documents, it was held that failing production of the *hundies* by the defendant there was no presumption that the *hundies* had been discharged and the onus was upon the defendant to prove payments.[39] In a suit for recovery of unpaid purchase money due under a sale-deed, the defendant produced a discharged pronote with stamps removed. It was held that the initial burden of proof of discharge is on the defendant and the burden can be discharged by proof of payment, by production of a document as it is one of the modes of proof. As the circumstances may show that the defence about the payment is not true. So, it is not obligatory on the court to draw a presumption of discharge of the liability.[40]

37. GENERAL PRESUMPTIONS

(a) Fact in dispute

An inference that a fact in dispute has been established can be drawn from the given objective facts, direct or circumstantial.[41]

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33. *Mrinalini Roy Ratna Prova Mondal* v. *State of W.B.*, AIR 1997 SC 2244.
34. *Bhog Hong Kong* v. *Ramanathan Chetty*, (1902) 29 IA 43 : ILR (1902) 29 Cal 334 : 4 Bom LR 378. **See also** *Blind Relief Association* v. *State of Maharashtra*, 2000 AIHC 1649 (paras 20 and 21) (Bom).
35. *Muhammad Mehdi Hassan Khan* v. *Mandir Das*, (1912) 39 IA 184 : ILR (1912) 34 All 511 : 14 Bom LR 1073.
36. *Alwar Naidu* v. *Kothandapani*, AIR 1927 PC 261.
37. *Mahendra* v. *Mehta Mohanlal Mathuradas*, AIR 1988 Guj 110.
38. *Chuni Kuar* v. *Udai Ram*, ILR (1883) 6 All 73; *Aung Myat* v. *Hla May*, (1918) 10 LBR 26.
39. *Dhian Singh* v. *Gurdit Singh*, ILR (1925) 6 Lah 297 : AIR 1925 Lah 521.
40. *A. Narasimha Murthi* v. *K.P. Jijjibabu*, (1973) 2 An WR 21.
41. *R. Puthunainar Alhithan* v. *P.H. Pandian*, AIR 1996 SC 1599 (paras 7 and 8).

(b) Accounts

When a debtor signs the accounts and acknowledges the debt, the presumption is that in signing he accepts the correctness of the accounts.[42]

It would be utterly perverse and indefensible under the law to take the view that the account books of money lenders must be presumed to be forged.[43]

The payment of an amount must be held to have been made on the date on which it was entered in the account books.[44]

(c) Attestation

Where a document appears to be attested by two persons and the evidence of one attesting witness falls short of proof of due attestation of the document, it was held that one could not presume from such signature that the document was attested by the other signatory also.[45]

On failure of the defendant to produce the document despite notice, presumption that the same was duly attested could be drawn.[46]

(d) Authenticity of document

Where the documents in question were unsigned photocopies and did not come from proper custody and were even contradicted by another document, their authenticity was doubtful.[47] Genuineness of a document cannot be presumed merely because the said document has been exhibited and an objection to its genuineness can be entertained.[48] If an instrument is signed by both the parties, it is presumptive of fact that both of them have executed it. Similarly, if it is signed by only one party, it does not mean that both the parties have not executed it together, as it is a question of fact to be determined.[49]

(e) Benami

Whether the nominal owner be a child, wife or a stranger, a purchase made with the money of another is *prima facie* assumed to be for the benefit of that other.[50]

There is no presumption that what stands in the name of the wife belongs to the husband[51]. Nor is there any presumption that when property stands in the name of a female member of a Hindu family, it is common property of the family.[52]

Where a locker is in joint names of husband and wife, ornaments kept therein must be presumed to belong to both.[53]

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42. *Ramdayal* v. *Maji Devdiji*, AIR 1956 Raj 12.

43. *Palaniappa Chettiar* v. *Rasu Naidu*, (1958) 1 MLJ 93.

44. *Ramani Raji Moholi* v. *Todanpuri Maniah*, AIR 1959 AP 103.

45. *Sita Dakuani* v. *Ramchandra Nahak*, ILR (1967) Cut 593.

46. *Kodri* v. *L.R.s of Fakira*, AIR 1994 NOC 182 (Raj).

47. *Collector of Customs* v. *Modi Spg. & Wvg. Mills Co. Ltd.*, AIR 1998 SC 2649.

48. *Hari Kumar* v. *Sat Narain Mehra*, 1996 AIHC 2700 (para 9) (Del), **explaining and distinguishing** *Ali Hasan* v. *Matiullah*, AIR 1988 All 57.

49. *Rajendra Pratap Singh* v. *Rameshwar Prasad*, (1998) 7 SCC 602, **following** *Asa Ram* v. *Ram Kali*, AIR 1958 SC 183 : 1958 SCR 988.

50. MAYNE'S HINDU LAW 13th Edn. (para 867); *Dhurm Das Pandey* v. *Shama Soondri Dibiah*, (1843) 3 MIA 229; *Ram Narain* v. *Maulvi Muhammed*, (1899) 26 IA 38; ILR 26 Cal 227; *Gopeekristo* v. *Gungapersaud*, (1854) 6 MIA 53; *Moulvie Sayyud* v. *Mt Bebee*, (1869) 13 MIA 232 : 13 WR (PC) 1; *Bissessur* v. *Luchmessur*, (1880) 6 IA 233 : 5 CLR 477; *Nagubhai* v. *Abdullah*, ILR (1882) 6 Bom 717; *Ashabai* v. *Haji Tyeb*, (1885) 9 Bom 115; *Kerwick* v. *Kerwick*, (1921) 47 IA 275 : ILR 48 Cal 260; *Dharani Kant* v. *Kristo Kumari*, (1886) 13 IA 70 : 13 Cal 181; *Siddiqa Begum* v. *Abdul Jabbar Khan*, ILR (1942) All 478; *Chowla* v. *Asst. Controller*, 1972 All WR 82; *Prabhakara Menon* v. *Rugmini Ammal*, 1974 Ker LJ 141; *Ramarao* v. *Sri Krishna Murthy*, AIR 1962 AP 226; *Prabati* v. *Firm Jaisami* 1962 Punj 185; *Kedarnath* v. *Prahlad Rai*, AIR 1960 SC 213; *Suryanarayana Reddy* v. *Veerareddy*, 1955 An WR 669.

51. 1970 Pat LJ 138.

52. MAYNE'S HINDU LAW, 13th Edn. (para 868).

53. *Brij Kishore Sinha* v. *Rekha Sinha*, AIR 1992 Pat 173.

The onus is on the person who alleges a transaction to be *Benami*, to make it out. The assertion that a transaction is not really what it professes to be will be regarded by the courts with caution and must be strictly made out by evidence. MAYNE'S HINDU LAW, 13th Edn., para 869.[54]

This aspect loses significance in view of the *Benami* Transactions Prohibition Act, 1988 (Act 45 of 1988).

(f) Criminal Law

Presumption arises that *mens rea* or guilty intent is an essential ingredient of offence. However, the legislature may enact a law giving rise to strict liability where existence of *mens rea* as an essential element is not necessary.[55]

The accused should always be considered to be innocent till his guilt is affirmatively and satisfactorily proved. This presumption of innocence continues throughout the trial and till the disposal of the case in the final court of appeal. Our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between clashing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish the marginal innocents.[56] Where an illegitimate child is found dead, there is no presumption that it was killed by its mother for such a presumption, if permitted, will destroy the presumption of innocence to which every accused is entitled.[57]

No question of presumption arises in respect of facts which prosecution has to prove. Existence of facts cannot be presumed unless they come under Section 114.[58] Where the detailed account of the firing of shot at the deceased was not given in the F.I.R. by the injured witness, no adverse inference could be drawn against the prosecution case as the witness, apart from discomfort on account of injury, was likely to be upset at the unfortunate killing of his close relation before his eyes.[59] In a case of physical torture or abuses hurled on the newly wed daughter-in-law committing suicide, it was held that generally maltreatment is not done in public, hence no adverse inference could be drawn due to non-examination of neighbours.[60] Where heroin and cash were seized under the N.D. and P.S. Act in the presence of the accused from the same place but there was no material on record to link the amount with the sale proceeds of heroin, it could not be presumed that the cash seized was the sale proceeds of heroin.[61]

When in a murder case, the accused falsely denied several relevant facts which had been conclusively established, the court would be justified in drawing an adverse inference against the accused.[62]

The fact that an accused person does not give a detailed statement immediately after the accusation is levelled against him, could hardly be a circumstance from which a presumption of guilt can be

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54. *Maung Po Kin* v. *Maung Po Shein*, ILR (1926) 4 Rang 518 (PC); *Mohamed Hajee* v. *Vednath Singh*, AIR 1938 Rang 26; *Bengal Coal Co* v. *Sita Ram*, AIR 1935 Cal 666; *Jitendra Nath* v. *Amarendra Nath*, AIR 1945 Cal 458, 461; *Bans Narain* v. *Chandrani Kuer*, AIR 1944 All 130, 132 (1), *Chittaluri Sitamma* v. *Saphar Sitapatirao*, ILR (1938) Mad 220; *Kailasam* v. *Sivabagyammal*, ILR (1943) Mad 794, 797; *Ratanchand* v. *Deochand*, AIR 1946 Bom 157; *Shiva Kumari* v. *Uday Pratap*, ILR (1947) All 642; *Asoke Chandra* v. *Chota Nagpur Banking Assn. Ltd.*, AIR 1948 Pat 247; *Sreemanchunder* v. *Gopaulchunder*, (1866) 11 MIA 28; *Azimut* v. *Hurdwaree*, (1870) 13 MIA 395; *Faez Buksh* v. *Fakeeroodeen*, (1871) 14 MIA 234; *Uma Pershad* v. *Gandharp Singh*, (1888) 14 IA 127; ILR 15 Cal 20; *Suleman Kadar* v. *Nawab Mehdi*, (1898) 25 IA 15 : ILR 25 Cal 473; *Nirmal Chunder* v. *Mohomed Siddick*, (1899) 25 IA 225 : ILR 26 Cal 11; *Ranga Aiyar* v. *Srinivasa Aiyangar*, ILR (1898) 21 Mad 56. Oral evidence is sufficient. *Palamiappa* v. *Arumugam*, (1864) 2 MHC 26; *Taramonee* v. *Shibinath*, 6 WR 191; *Kumara* v. *Srinivasa*, ILR (1888) 11 Mad 213. The non-production of the draft of the document would ordinarily be a fact for consideration. *Sarat Sundari* v. *Ram Kinkar*, AIR 1939 Cal 244; *Amit Mukherjee* v. *Bibhavati Dasi*, AIR 1979 Cal 344; *A Pillai* v. *A Hango*, AIR 1969 Mad 252; *Ramkunwarbai* v. *Rani Bahu*, AIR 1985 MP 73 (Purchase by manager in the name of other members). MAYNE'S HINDU LAW 13th Ed.,(para) 869 at page 1201.

55. *State of Orissa* v. *Jagdish Chandra Jena*, 1998 Cr LJ 4771 (para 8) (Ori).

56. *Shivaji Sahebrao Babade* v. *State of Maharashtra*, 1973 Cr LJ 1783 : AIR 1973 SC 2622.

57. *Bhargavi Amma Chellamma* v. *State of Kerala*, AIR 1964 Ker 241 : (1964) 2 Cr LJ 414 (Ker).

58. *Phankari* v. *State of J&K*, (1965) 2 Cr LJ 640 (J&K) : AIR 1965 J&K 105.

59. *Behari Prasad* v. *State of Bihar*, 1996 Cr LJ 1653 (para 21) (SC) : AIR 1996 SC 2905.

60. *State of W.B.* v. *Orilal Jaiswal*, 1994 Cr LJ 2104 (para 13) : AIR 1994 SC 1418.

61. *Jagwat Prasad* v. *Delhi Administration*, 1993 Cr LJ 21 (para 6) (Del).

62. *Pershadi* v. *State of U.P.*, 1957 Cr LJ 328 : AIR 1957 SC 211; *State of M.P.* v. *Muratsingh Harprasad*, 1971 Cr LJ 1804 (MP).

drawn.[63] No presumption can be drawn against the accused for not examining himself.[64] Absconding of the accused immediately after the occurrence though a circumstance against the accused, by itself, can not lead to any presumption that he is the murderer. Presence of a person around and at the time and place of occurrence is not sufficient to raise a presumption that he committed the crime.[65] Mere presence at the time of commission of offence is not sufficient to show that the accused was a member of an unlawful assembly.[66] Where the evidence on record was sufficient to prove the prosecution case beyond reasonable doubt, no adverse inference could be drawn for its failure to examine another person.[67] Conspiracy under Section 120-B, I.P.C. cannot be proved merely on the basis of inferences. The inferences have been backed by evidence. If the material put forward by the prosecution is insufficient to bring home the guilt of the accused, then he is entitled to discharge.[68] Prosecution is not under obligation to explain the superficial injuries found on the person of the accused. No adverse inference can be drawn from non-explanation.[69] Where the conduct of the eye-witness, the young daughter of deceased who had seen her father and brother being murdered, was normal and natural in going to her uncle first instead of going to the Police Station with the *Sarpanch* of the village in that hour of distress, no adverse inference could be drawn against her conduct though her conduct was not as the High Court thought it should have been.[70]

Where in a case of attack at odd hours, certain accused person was present with the other accused persons at the spot and he could offer no plausible explanation as to how and what for he was present there, it could be inferred that, though he was not an assailant, he was a participant in the mission of the accused who launched the attack.[71] Holding out of a threat of doing injury to another furnishes ground to presume that he who threatened the act was the perpetrator or instigator.[72] Unexplained possession of a jewel of a murdered person will be evidence u/s 114 not only regarding theft but also regarding the murder itself if the possession could not be reasonably got without committing the murder.[73] Ordinarily, when a man is found in enclosed premises at night, and when the explanation which he gives for being there is palpably untrue, the inference is that he was in the premises for some criminal purpose.[74] Where the accused was caught while he was entering a railway compartment and on search nine bars of gold with foreign markings were recovered, it was held that a presumption can be drawn that the gold had been illegally imported into the country u/s 111 (d) of the Customs Act and that the accused had necessary knowledge of the character of goods found in his possession. Where an accounts clerk in a bank was charged for withdrawing money from the complainant's accounts and for misappropriation, and in the receipt acknowledging the money the signature was proved to have been forged by the accused, it was held that a presumption for withdrawing the money under the signature for acknowledging the receipt of the money can be raised; and the accused was liable to be convicted.[75] Where an accused refuses to participate in the identification parade or to give specimen of his foot prints an adverse inference can be drawn against him.[76]

Corroboration is necessary for the evidence given by a victim of rape and no presumption can be drawn in such cases and the prosecution has to establish the offence beyond all reasonable doubt.[77] See in this connection Section 114A.

Where an accused was charged u/s. 420 of IPC for issuing cheques for paying balance of goods to the dealer and they were dishonoured and no attempt was made by the accused to pay in sufficient

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63. *Abdul Hakim* v. *State of Allahabad*, 1957 Cr LJ 117 : ILR (1957) 1 All 155.
64. *Baidyanath* v. *State of Bihar*, AIR 1968 SC 1393.
65. AIR 1982 SC 141.
66. *State of Bombay* v. *Bhairu Sattu Berad*, 1956 Cr LJ 1066 : AIR 1956 Bom 609.
67. *Rajendra Kumar* v. *State of U.P.*, 1998 Cr LJ 3293 (para 7) (SC).
68. *Arun Gulab Gawli* v. *State of Maharashtra*, 1998 Cr LJ 4481 (para 7) (Bom). **relying on** *P.K. Narayanan* v. *State of Kerala*, 1995 (1) SCC 142 : 1994 AIR SCW 5043.
69. *Prakash Datta Kamble* v. *State of Maharashtra*, 1999 Cr LJ 431, at p. 433 (Bom). **relying on** *Bhabha Nanda Sarma* v. *State of Assam*, AIR 1977 SC 2252 (para 2) : 1977 Cr LJ 1930.
70. *State of Punjab* v. *Surja Ram*, AIR 1995 SC 2413 (para 12).
71. *Prem* v. *Maharashtra*, 1993 Cr LJ 1608 (para 9) (Bom).
72. *Pershad* v. *State*, 1955 Cr LJ 1125 : AIR 1955 All 443.
73. *Crown* v. *Fateh Mukammad*, 51 Cr LJ 497 : 1950 Mad 309.
74. *Babulal Kandu* v. *Kanti Dutta Misra*, 1952 Cr LJ 778 : AIR 1952 Pat 252.
75. *Bank of India* v. *Maredi Shanker Rao*, AIR 1987 SC 821.
76. *Mukh Raj Sikka* v. *Delhi Administration*, AIR 1974 SC 1723; *State of H.P.* v. *Lavinder Singh*, 1973 Cr LJ 1023.
77. *Sheikh Zakir* v. *State of Bihar*, 1983 Cr LJ 1285 : AIR 1983 SC 911.

amount for encashment of cheques, it was held that the accused could be presumed to have committed the offence u/s. 420, IPC.[78]

When the prosecution fails to produce in the High Court, some articles connected with murder, though directed by the High Court to produce them, the presumption is against the State.[79]

Where it was shown that there had been attempts to mutilate or disfigure a thumb impression, when the expert examined it for the second time in court, though it was untampered on the first occasion, presumption was held to arise that an attempt had been made by the accused or by some one on their behalf by to mutilate or disfigure the thumb impression.[80] Where the accused is found in possession of paddy, presumption that the accused was a dealer in sale of food grain or atleast in storing food grain for sale can reasonably be drawn if the accused is a person carrying on business.[81] From the fact that accused was found intoxicated at a particular place it cannot be presumed that he must have consumed liquor at that place.[82] Where the complainant alleged the cancellation of marriage by the accused for non-fulfilment of the dowry demand on the basis of a letter written to him by the accused, his failure to produce the alleged letter would invite adverse inference against him.[83]

(g) N.D. & P.S. Act

Where the Officer conducting search and seizure failed to sign on the various documents alleged to have been executed at the spot, no presumption could be drawn that he was not present at the spot at that time or the accused was not apprehended.[84]

By seizure of contraband in the search, conducted in accordance with law, presumption of unlawful possession of contraband can be raised under Section 54 of the N.D. & P.S. Act but in an illegal search.[85] Where the C.F.S.L. form filled up at the spot of the search and seizure, was deposited with the *Moharar Malkhana* and was not deposited in the Office of C.F.S.L. along with the sample for comparison, presumption that the sample was tampered with could not be ruled out.[86]

(h) Working Order

Where the unlicensed Double Barrel Gun found in the possession the accused was of such a type that it could be fired by first filling it with gun powder and it was found by the Police Officer, trained in handling of guns, that its mechanism was in order, it could reasonably be inferred that it was in working condition and no evidence of an expert or armourer was required.[87]

Mere presence of two empty cartridges in the gun could not lead to the presumption that the gun was in working order.[88]

(i) Custom

Where the whole land in a *patti* which was once owned by the common ancestor was at the time of regular settlement in possession of his decendants according to ancestral shares and none of the descendants had acquired any land in the *patti* by purchase or introduced strangers in it by selling any portion of his ancestral holding, it was held that an inference could be drawn from the circumstances of equality of holdings and from a reference to these in terms of ancestral shares in the settlement, that the land had devolved by descent on the descendants.[89] There is an initial presumption in favour of the correctness of entries in *Riwaz-i-am*. But when a prevailing custom giving rights to females in regard to

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78. *Bhola Nath Arora* v. *State of Delhi*, 1982 Cr LJ 1482 (DB) (Delhi).
79. *Jagannath* v. *State of Himachal Pradesh*, 1982 Cr LJ 2289.
80. *Nasib Singh* v. *State*, (1974) 1 Punj 285.
81. *Kalipada Nandi* v. *State*, AIR 1950 Cal 427 : (Food Grains Central Order, 1945); *Kunhu Padhan* v. *Bhutulu Padhan*, (1962) 68 Cut 17.
82. *State* v. *Dhulaji Bavaji*, AIR 1963 Guj 234.
83. *S. Gopal Reddy* v. *State of A.P.*, 1996 Cr LJ 3237 (para 26) (SC) : AIR 1996 SC 2184.
84. *John Bamidele* v. *State*, 1996 Cr LJ 3649 (para 5) (Del).
85. *State of Punjab* v. *Baldev Singh*, 1999 Cr LJ 3672 (para 55) (SC).
86. *John Bamidele* v. *State*, 1996 Cr LJ 3649 (para 10) (Del).
87. *Jarnail Singh* v. *State of Punjab*, AIR 1999 SC 321 : 1999 Cr LJ 453, at p. 454.
88. *Jaspal Singh* v. *State of Punjab*, (1998) 7 SCC 289 : 1998 SCC (Cri) 1618.
89. *Sewa Singh* v. *Jangir Singh*, AIR 1956 SC 1.

inheritance is shown, the initial presumption about the correctness of rights to collaterals affecting the rights, of females contained in *Riwaj-i-am* would get weakened as the females have no opportunity of appearing before the revenue authorities who prepared *Riwaj-i-am*.[1] Where some *muslims* accused were found stooping over the dead body of a cow and cutting pieces of flesh, it was held that, since the accused were *muslims* who would not eat meat of an animal which died a natural death, it may be presumed that cow was killed by them.[2] Presumption that a person acts honestly applies as much in favour of a police officer as of other person, and it is not a judicial approach to distrust and suspect him without good grounds therefor.[3]

From a mere proof of the existence of a custom governing a community permitting brothers to take a common wife, it does not follow that there is a presumption that particular members of the community have acted in accordance with the custom.[4] There is no presumption that a particular tribe in a particular locality is governed by the custom which governs a great many other tribes in the same locality or in other localities.[5] The court cannot presume that the entire Hindu Law as regards inheritance and succession applies to Molesalam Muslim *garsias* of Baroda territory, unless pleaded and proved.[6]

(j) Death

In the case of simulatenous death presumption may be drawn that deaths occurred in the order of seniority in age and the younger died later than others.[7]

(k) Deeds

There is no presumption about correctness of the recitals in documents.[8] No presumption of due execution can be made from the apparent regularity of execution appearing on the face of a will.[9] Where a person admitted his signature on the document but pleaded what he signed on a blank paper, no presumption can be drawn that he had knowledge of the contents.[10] Where a document written in English is signed by a person who does not know English, without any evidence that the contents were explained to him, the mere signature does not by itself prove that the signatory has understood the contents of the document, and there is no presumption that the executant understood the contents of the document.[11] Where a document is executed by an illiterate and ignorant person and the document contains unconscionable terms, it is difficult to draw the usual presumption arising under Section 114.[12] In the absence of any evidence, the Court would not drawn an inference that the actual price of the property is more than that of the mentioned in the sale-deeds.[13] Where there was an agreement preceding the sale-deed, containing a clause of reconveyance and the sale-deed was executed in consequence thereto, absence of reference to the agreement of reconveyance in the sale-deed would not lead to an inference that the said right was given up by the executant of the sale-deed, unless there is a detailed plea and also evidence that the parties agreed to give it up before execution of the sale-deed.[14]

Where the signature or thumb impression on a document is admitted by the signatory, the presumption is that he must have executed the document.[15] There is a presumption that a document is executed on the day mentioned in it as the date of execution.[16] When it is held that the document was executed with full knowledge of its content and nature, the presumption is that it has come into effect.[17]

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1. *Kehar Singh* v. *Chanan Singh*, AIR 1968 SC 806.
2. *Bhondoo* v. *State*, (1967) 2 All 257.
3. *Raja Khima* v. *State of Saurashtra*, AIR 1956 SC 217.
4. *Kandu* v. *Kochi*, (1970) 1 SCWR 610 : (1971) 3 SCC 784.
5. *Abid Ali Khan* v. *Secretary of State*, AIR 1951 Nag 327; *Samon (Mst.)* v. *Shahu*, AIR 1935 Lah 93.
6. *Hajarkhan Kalubava* v. *Kesarkhan Kayamkhan*, AIR 1968 Guj 229.
7. *Manorama Bai* v. *Rama Bai*, AIR 1957 Mad 269.
8. *Venkata Chenchayya* v. *Ramalingam*, AIR 1957 AP 744.
9. *Tapesh Kumar Majhi* v. *Birbal Majhi*, AIR 1958 Cal 698.
10. *O.P. Verma* v. *Gehrilal*, AIR 1962 Raj 231.
11. *Nityananda Dutta* v. *Caledonian Insurance Co.*, ILR (1968) 1 Cal 442 : 72 CWN 733.
12. *Nathu Kalu* v. *Anandilal Bhikaji*, AIR 1953 MB 32.
13. *Tata Chemicals Limited, Bombay* v. *Sadhu Singh*, AIR 1994 All 66 (para 22).
14. *Babu Ram* v. *Indra Pal Singh*, AIR 1998 SC 3021 (paras 19 and 20).
15. *Lakshmamma* v. *M. Jayaram*, AIR 1952 Mys 114.
16. *Puthivapuravil Pocker* v. *V. Khalid*, AIR 1974 Ker 121.
17. *Parameswaran* v. *M. Chandrasekhara*, AIR 1956 Trav-Co. 196.

The practice prevailing in Madras Presidency is that where a person having a tangible interest in the property affected by a deed, attests the deed, his attestation should be taken as proof of his consent to and knowledge of the correctness of the recitals in the deed.[18] Where the certified copy of a sale-deed was obtained from the volume book maintained in the office of the Sub-Registrar, bearing his seal and certificate of it having been copied from it and compared and the scribe of original was also examined, correctness of the certified copy has to be presumed.[19] Where the plaintiffs claimed title over the suit property on the basis of the certified copy of the sale-deed executed more than 100 years ago in the name of their father, (the original being lost and the executant and attesting witnesses having died) and other documentary evidence *viz kist* receipts and *adangal* extracts were found to be in the name of the plaintiff, these documents lead to inference that the document of sale-deed might have come into effect and plaintiff's father obtained title which they inherited.[20]

(l) Election

Presumption of correctness attached to counting of votes is not destroyed merely because a single mistake in counting of ballot papers is defected.[21] Where it is found that the agents of a successful candidate indulged in acts of assault etc. at the polling station in his presence, it may be presumed that such acts were committed with the knowledge and consent of the candidate.[22]

When an election was challenged on the ground of improper acceptance of nomination, there is no presumption that all those votes would have gone to the petitioner.[23] Where a candidate contesting an election was an advocate President of the Bar Association and an influential member of several organisations, and he had formal acquiantance with the returning officer, no presumption of letter's partiality towards the candidate can arise.[24] Where no evidence was produced to show that the advertising agency received payment for the adds. released from the elected candidate who pleaded them to be issued and paid for by different parties whom the petitioner failed to examine to ascertain the truth, no responsibility could be fastened on the elected candidate in respect of them. Further, for the publication of identical adds. in different newspapers on the same dates, no inference could be drawn that they were issued by the returned candidate.[25]

(m) Grant

The word '*Devadayam*' is not decisive as to whether *inam* was granted to temple or was personal *inam* burdened with service. No presumption whether grant is one *in lieu* of wages or one burdened with service, may be drawn.[26] There is no presumption that what was granted was only the *melwaram* right, if the land was not fit for cultivation at the time of the grant.[27] Where the grant is in favour of deity by way of *inam*, there is no presumption that it is in respect of either *Kudivaram* or *Melwaram*.[28] There is no presumption that the grant was burdened with service of rendering *puja* from the fact that the grantees rendered *puja*.[29]

(n) Settlement

A land settlement is presumed to be valid and has *de facto* operation unless declared void by the competent authority.[30]

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18. *Ramaswamy Gounder* v. *Ananthapadmanabha Iyer*, (1971)1 Mad LJ 392.
19. *Sukumar Roy* v. *Rabindra Chandra Roy*, AIR 1994 Gau 67 (para 12).
20. *S. Rathnammal* v. *Mottadu*, 1998 AIHC 3094 (paras 26-28) (Mad).
21. *Tribeni Ram* v. *Satyadeo Singh*, AIR 1966 All 20.
22. *Ram Sharan* v. *Thakur*, AIR 1985 SC 24.
23. *Raghunath Misra* v. *Kishore Chandra Deo*, AIR 1958 Ori 260.
24. *Madhu Singh Mukh Ram* v. *Ram Saran Chand Mittal*, AIR 1966 Punj 66.
25. *Gajanan Krishnaji Bapat* v. *Dattaji Raghobaji Meghe*, AIR 1995 SC 2284 (para 69).
26. *Balarami Reddi* v. *Jaya Singh*, AIR 1957 AP 477.
27. *Varakare ddi Mallere ddi* v. *S.A. Hussain*, (1972) 2 An WR 327.
28. *Ram Prasad* v. *Ramachandra*, ILR (1971) Cut 540.
29. *Jibon Chandra Sarma Dolai* v. *Naren Kalita*, AIR 1955 Assam 23
30. *Trilochan Singh* v. *Commissioner of Land Records & Settlement Orissa*, 1996 AIHC 3428 (paras 4 and 6) (Ori).

(o) Status

Where a Govt. order specified certain societies as co-operative societies for certain purposes on th basis of their financial position and share capital and the Govt. included a society's name within tha ambit, there would be presumption that the Govt. had considered its financial position and shar capital.[31]

(p) Prevention of Corruption Act

Under Section 4(1) Prevention of Corruption Act, it has to be presumed that the amount, recovere from the accused was received by him as illegal gratification though such presumption is rebuttable.[3 The accused may rebut such presumption by showing a mere preponderance of probability in hi favour.[33] Under Prevention of Corruption Act a presumption of accepting gratification arises only whe the prosecution proves that whatever the accused received was 'gratification'.[34] To raise a presumptio u/s. 4 (1) of Prevention of Corruption Act the prosecution has to prove that the accused has receive "gratification other than legal remuneration", then receipt of "money" is sufficient to raise th presumption.[35]

Presumption arises as soon as it is shown that the accused had received the stated amount and suc amount was not the legal remuneration. It is not necessary that before presumption arises prosecutio must prove that money was paid as a bribe. See Prevention of Corruption Act (1947). S. 4, AIR 1968 S 1292 : 1968 Cr LJ 1484 : 1968 Lab IC 1412. Where accused received money which was not lega remuneration presumption can be raised under Section 4(1) of the Prevention of Corruption Act that was a bribe.[36] In a case under Prevention of Corruption Act (1947) Section 5(2) against a public servan for possession of assets disproportionate to his income, the prosecution need not disprove all possibl sources of his income.[37]

Presumption illegal gratification raised under S. 4(1) of the Prevention of Corruption Act can b rebutted by the accused by showing mere preponderance of probability in his favour.[38]

(q) Hindu Law—Applicability

Where a Hindu family migrates to another province governed by another law, presumption is that carries with it the law and custom prevailing at the time of migration in the territory from which th family migrated.[39]

(r) Presumption of Union

The joint and undivided family is the normal condition of Hindu society. An undivided Hind family is ordinarily joint not only in estate but in food and worship.[40] The presumption therefore is tha the members of a Hindu family are living in a state of union, unless the contrary is established.[41] Th

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31. *Kodinar Taluka Co-operative Union Ltd.* v. *State of Orissa*, 1998 AIHC 2377 (para 8) (Guj).
32. *M.P. Gupta* v. *State of Rajasthan*, 1974 Cr LJ 509 : AIR 1974 SC 773.
33. *Trilok Chand* v. *State of Delhi*, AIR 1977 SC 666 : 1977 Cr LJ 254. **Also see** *Balakrishnan* v. *State*, 1994 Cr LJ 125 (Mad).
34. *Mohmoodkhan Mahboobkhan Pathan* v. *State of Maharashtra*, (1997) 10 SCC 600 : 1997 SCC (Cri) 894.
35. *V.D. Jhingan* v. *State of U.P.*, AIR 1966 SC 1762.
36. *Dhanvantrai* v. *State of Maharashtra*, AIR 1964 SC 575.
37. *State of Maharashtra* v. *Wasudeo Rama Chandra Kaidalwar*, 1981 Cr LJ 884 : AIR 1981 SC 1186
38. *Periyaswamy* v. *Inspector, Vigilance & Anti-Corruption, Tiruchirapalli*, 1999 Cr LJ 2944 (paras 21, 22 and 2 (Mad).
39. *Vimalabai* v. *Hiralal*, (1990) 1 Hindu LR 306 (SC); *Balwant Rao* v. *Baji Rao*, ILR 48 Cal 30 (PC) : AIR 1921 PC 5 *Rana Sheonath* v. *Badansingh*, AIR 1922 PC 146 : (1922) 68 IA 446; *Pralhad Sheonarayan Chokhani* v. *Damod Ramkaran Vaishnao*, AIR 1958 Bom 79; *Sonabai wife of Raoji Koshti* v. *Lakhmibai wife of Hari Koshti*, AIR 19 Nag 76.
40. *Raghunadha* v. *Brozo Kishoro*, (1876) 3 IA 154, 191 : ILR 1 Mad 69, 81; *Neelkisto Deb* v. *Beerchunder*, (1869) MIA. 523, 540; *Dulachand* v. *Certificate Officer*, (1964) 68 CWN 349. (No objection taken at the time of assessme that family was disrupted — it shall be deemed as undivided as per Section 25A(2) of Income-tax Act, 1922
41. *Govind Dass* v. *Kuldip Singh*, AIR 1971 Delhi 151; *Bhagwan Dayal* v. *Reoti Devi (Mst.)*, AIR 1962 SC 287. **See al** *Raghavamma* v. *Chendhamma*, AIR 1964 SC 136 : (1964) 2 SCR 933; *Nanda* v. *Bishnabcharan*, ILR (1965) C 727 : ILR (1950) E Punj 233

general principle has no application in cases where one of the coparceners was admittedly separate from the other member of the family.[42] Merely because members lived and worked at different places but owned a joint family house in common it cannot be said that they did not form a joint Hindu family.[43] The strength of the presumption necessarily varies in every case. The presumption of union is stronger in the case of brother[44] than in the case of cousins, and the farther you go from the founder of the family the presumption becomes weaker and weaker.[45] Brothers may be presumed to be joint but conclusion of jointness with collaterals must be affirmatively proved.[46] The presumption in the case of father and son is in favour of jointness.[47] When one of the sons separates from the family, the other sons if they are minor will be presumed to have remained jointly with their father.[48] Where there is no reason to disbelieve evidence adduced by plaintiff to show that the *Tharwad* is undivided and that the original first plaintiff was the *Karnavan* and this evidence is unrebutted, it will be presumed that the original first plaintiff was *Karnavan* and that the *Tharwad* is undivided. A Hindu family will be presumed to be joint unless the contrary is established.[49]

However, it has been held that merely because a person allowed his brother to stay with him and after the brother's death brought up his orphaned children it could not support the inference of a subsisting joint family between them.[50] The man who has severed his union with his brothers, if he has children, becomes the head of a new joint family, composed of himself and his children, and their issue. And so, property, which was the self-acquisition of the first owner, as soon as it descends to his heirs becomes their joint property, with all the incidents of that condition.[51]

If one of the coparceners of the joint family separated and had his share of the property separated, there is no presumption that the other members of the family continued to be joint. Then the burden is on the person who asserts a particular state of things to prove the same and the question depends on the facts of each case.[52]

There is no presumption that a joint family possesses joint property.[53]

(s) Adoption

Where the execution and registration of the adoption deed were duly proved and performance of adoption ceremonies were also mentioned in it, simply because the '*pundit*' was not examined, presumption of its validity could not be negatived.[54]

Presumption as to the validity of a registered document relating to adoption is rebuttable on the basis of evidence.[55]

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42. *Namaic Charan* v. *Magumi Devi*, ILR (1959) Cut 602; *Ashim Mandal* v. *Panchanan Mandal*, 1990 (1) HLR 158.
43. *Katha Perumal* v. *Rajendra*, AIR 1959 Mad 409 : (1958) 2 MLJ 183.
44. *Nazi (Mst.)* v. *Mohanlal*, AIR 1957 Raj 128 (DB) : 1957 Raj LW 248.
45. *Moro Bishwanath* v. *Ganesh Vitha*, (1873) 10 Bom HCR 444, 468; thus passage is cited with **approval in** *Yellappa* v. *Thippanna*, (1929) 56 IA 13, 19 : ILR 53 Bom 213, 220; *Pritkoer* v. *Mahadeo Pershad*, (1895) 21 IA 134 : ILR 22 Cal 85, *Inder Kuer* v. *Prithipal Singh*, (1946) 72 IA 176 : ILR 20 Luck 391 : AIR 1945 PC 128, 129. **See also** *Kanhaya Lal* v. *Devi Dayal*, AIR 1936 Lah 514; *Atma Ram* v. *Umar Ali*, ILR (1941) Lah 39; *Muna Mahto* v. *Raghunath*, AIR 1933 Pat 153; *Ramlal* v. *Ramnivas*, ILR (1959) 9 Raj 276; *Rukhmabai* v. *Lala Laxminarayan*, AIR 1960 SC 335 : (1960) 2 SCR 253 : 1960 SCJ 433; *Indranarayana* v. *Roopnarayan*, AIR 1971 SC 1962 : (1971) 2 SCC 438, *Bhagwan Dayal* v. *Reoti (Mst.)*, AIR 1962 SC 287; *Chandreswar Singh* v. *Ram Chandra Singh*, AIR 1973 Pat 215, *Binod Jena* v. *Abdul Hamid Khan*, AIR 1975 Ori 159 : (1974) 1 Cut WR 572; *Choteylal* v. *Gajadhar Prasad*, 1954 All LJ 68 : AIR 1954 All 717; *Devi Singh* v. *Phulma*, AIR 1961 HP 10; *D.B. Godse* v. *Ramachandra Iyer*, AIR 1955 Mys. 107; *Balmukundji* v. *Gokaram Singh*, AIR 1956 All 124 : 1955 All WR 593 : 1959 MPLJ 1018 : ILR 1959 MP 559; *Ramgopal* v. *Mohanlal*, AIR 1960 Punj 226.
46. *Amarnath* v. *Sunderlal*, ILR (1968) 1 Punj 314.
47. *Panchani Singh* v. *Rani Raj Rajeshwari Devi*, 1970 All LJ 983 (DB).
48. *Harprasad* v. *Ram Devi*, AIR 1964 All 64.
49. *State Bank of Travancore* v. *Arvindan Kunju*, AIR 1971 SC 996.
50. 1969 UJ (SC) 654.
51. *Ram Narain Singh* v. *Partum Singh*, (1873) 11 BLR 397; 20 WR 189 this passage is cited and approved in *Hirachand Gangji* v. *Sojpal*, ILR (1939) Bom 512, 520 (MAYNE'S HINDU LAW, 13th Edition (para 278), page : 547).
52. *Bal Krishna* v. *Ram*, AIR 1931 PC 154; *Bhagwati* v. *Dulhin Rameshwari*, AIR 1952 SC 72; *Jatti* v. *Banwari*, AIR 1923 PC 136.
53. *Mudi Gowda* v. *Ramachandra*, AIR 1969 SC 1076; *Deepa* v. *Massan Singh*, 1984 SC 1171; *Shadilal* v. *Lal Bahadur*, AIR 1933 PC 85; *Nisar* v. *Mohan*, AIR 1940 PC 204.
54. *Baru* v. *Tej Pal*, AIR 1998 All 230 (para 10).
55. *Lal Man* v. *Dy. Director of Consolidation*, (1998) 8 SCC 693.

(t) Joint Property, not a Pre-Requisite

There is no presumption that a family, because it is joint, possesses joint property.[56] Possession of property is not under the *Mitakshara* law a necessary requisite for the constitution of a joint family[57] though where persons live together, joint in food and worship, it is difficult to conceive of their possessing no property whatever, such as ordinary household articles which they would enjoy in common. Hindu law does not require that properties of a joint family should be immovable properties or that they should be of appreciable value[58]. (MAYNE'S HINDU LAW, para: 278, page: 548). However, where there is no evidence on record to show that the partition between the members of a joint family has taken place, the property would be presumed to be a joint family property.[59]

The burden of proving that a particular property is joint family property is on the person who claims that it is joint family property. Where the possession of a sufficient nucleaus was either admitted or proved, acquisition made by a member is presumed to be joint family property. Then the burden shifts to the person claiming the property as his self-acquisition property.[60] After it has been proved that the property concerned was purchased from the joint family funds, only then the question of presumption that it was joint family property would rise.[61] Where the father and the sons, not a Joint Hindu Family, carried on business in partnership and property was purchased in the name of the eldest son, presumption would be that it was the property of the son in whose name the purchase was made. If the consideration was paid from the business, further presumption would be that the same was paid from the share of the concerned partner.[62]

Where the father of the defendants and that of the plaintiff are shown to have hailed from a common ancestor, the presumption would be that the land in question devolved upon both the branches and not on one branch alone. Amongst the co-sharers the inference of ouster cannot be lightly drawn, and the possession of one co-sharer will enure for that of another unless such ouster is pleaded and proved by specific evidence.[63]

(See para: 311, pages 583 to 586 and para 312, pages 587 to 589 of Mayne's Hindu Law 13th Edition).

The eldest member of a Joint Hindu family is presumed to be its Manager.[64] Where there was no evidence that the *karta* of the joint family had no other source of income and his widow brought evidence on record that the suit property was acquired out of the funds of the family, presumption arises that the said acquisition enured to the benefit of the family and hence was co-parcenary.[65]

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56. *Shadilal* v. *Lal Bahadur*, AIR 1933 PC 85 : 64 MLJ 298 PC; *Babu Nisar Ahmad Khan* v. *Babu Raja Mohan Manucha*, (1940) 67 IA 431, 439 : AIR 1940 PC 204; *Magan Lal* v. *Krishna Bibi*, AIR 1935 All 303; *Mohan Lal* v. *Ram Dayal*, (1942) 16 Luck 708 : AIR 1941 Oudh 331 (2); *Nimacharan* v. *Maguni Devi*, ILR (1959) Cut 602; *Chanamreddy* v. *Narayanareddy*, ILR (1956) Hyd 868; *Dipa* v. *Massan Singh*, 1983 HLR 424: Property of the last male holder inherited by his sister is her separate property; *Dharma Rao (B S)* v. *Kalidasan (KS)* 1989 (1) HLR 750 (Mad); *Gavala Ankamma* v. *Gavala Mahalaxmi*, AIR 1988 Ori 160; *B.B. Bangarshettar* v. *I.K.T. Pattanshetti*, 1988 Kant 174.

57. *Ramdas M. Pai* v. *Commr. of Income Tax*, (1978) 115 ITR 815 (Kant); *Krishnaprasad* v. *Commr. of Income Tax*, (1974) 97 ITR 493 Kant; *Income Tax Officer* v. *Sarada Thani*, 105 TR 67 (Ker).

58. *Janakiram* v. *Nagamony*, ILR (1926) 49 Mad 98, 104, 115-6.

59. *Gulabrao Maruti Bhagat* v. *Bhagwan Nana Bhagat*, 2001 AIHC 2146 (paras 15 and 16) (Bom).

60. *Baikuntha* v. *Sashi*, AIR 1972 SC 2531; *Amritrao* v. *Mukundrao*, AIR 1919 PC 91; *A. Nair* v. *Chinnamma*, AIR 1966 SC 411; *Appalaswami* v. *Suryanarayan Murti*, AIR 1947 PC 189; *Srinivas* v. *Narayan*, AIR 1954 SC 379; *Mallappa* v. *R. Yellappa Gouda*, AIR 1959 SC 906; *Mudi Gowda* v. *Ramachandra*, AIR 1969 SC 1076.

61. *B. Pushpavalli* v. *V.R. Sivasankaran*, 2001 AIHC 3836 (para 41) (Mad).

62. *K.R. Sathyanarayana Rao* v. *K.R. Venkoba Rao*, AIR 1998 Mad 276 (paras 14 and 18) The Court referred to *Krishnan* v. *Rengachari*, AIR 1965 Mad 340 (para 343) and *K. Obul Reddy* v. *B. Venkata Narayana Reddy*, AIR 1984 SC 1171.

63. *Chet Singh* v. *Shashi Shanker Pathak*, AIR 1993 All 168 (para 10).

64. *Sree Rama* v. *Krishnavenamma*, AIR 1957 AP 434.

65. *Packiyam Ammal* v. *Pattu Ammal*, AIR 1999 Mad 383 (para 12), **relying on** *Achuthan Nair* v. *Chinnammu Amma*, AIR 1966 SC 411 (para 7).

(a) Burden of Proof

Where a sale or mortgage is made by a father, the burden of proof is upon the alienee to show that the alienation is either for an antecedent debt or was made for legal necessity or the benefit of the family. Where it is proved that the alienation was for an antecedent debt, it is for the sons to show that the debt was contracted to the knowledge of the lender for immoral or illegal purposes[66], for it is strictly not a case of alientation by a managing member for a legal necessity or for the benefit of the estate.

Where an alienation of joint family property is made by a manager, the burden of proof lies upon the person who claims the benefit of the alienation to establish one of two things: (1) the transaction was in point of fact justified by legal necessity or was for the benefit of the joint estate, or (2) he had made reasonable and *bona fide* inquiry as to the existence of the necessity and satisfied himself that the Manager was acting for the benefit to the estate.[67] "The burden remains heavily upon the mortgagee to establish compliance with the conditions under which the Hindu law permits the interest of the minor members to be taken from them". But if the sons fail to produce family account books proved to be in their possession, the onus shifts on to them on account of the presumption arising under Section 114(*g*) of the Evidence Act against them.[68] If the purchaser had acted honestly, if the existence of a family necessity for sale was made out and the price was not unreasonably low, the purchaser was not bound to account for the application of whole of the price[69]. A lender of money may reasonably be expected to prove the circumstances connected, with his own particular loan, but cannot reasonably be expected to know, or come prepared with proof of antecedent economy and good conduct of the owner of the joint family estate. The proper presumption to be made will vary with circumstances, and must be regulated by, and dependent on them. Thus, where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonable expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan (The representation by the Manager accompanying the loan are part of the res *gestae* and evidence against those whom the Manager represents). It is obvious, however, that it might be unreasonable to require such proof from one not an original party, after the lapse of much time and enjoyment, and apparent acquiscence[70] Where a new security is substituted for an older one, or where the consideration for the older one was an old precedent debt of an ancestor not previously questioned, a presumption in favour of the validity of the transaction would in proper cases be reasonable.[71] It depends on the facts and circumstances of each case to the extent and nature of the enquiry that should be made by a lender whom the Manager approaches for the purposes of alienating joint family property in order to secure a loan[72] It is not sufficient for the creditor

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66. *Satnarain* v. *Beharilal*, (1924) 52 IA 22, 30 : ILR 6 Lah 1; *Nagaratnamba* v. *Ramayya*, AIR 1963 AP 177 : ILR (1963) AP 991 : (1962) 2 An WR 169 : 1963 (1) ALT 22; *Inderjeet* v. *Raghunath*, 1970 Raj LW 397 : AIR 1970 Raj 278.

67. *Sreeramulu* v. *Thandavakrishnayya*, (1942) 2 MLJ 452 (Recitals alone would be insufficient to shift the onus of proof), *Muthachi* v. *Kandaswami*, (1945) 1 MLJ 207 **distg.** *Bhagwan Singh* v. *Bishambar Nath*, ILR (1940) All 267 PC; *Munisami* v. *Rajagopal*, (1947) 1 MLJ 68; *Ramdin* v. *Ram-parichan*, AIR 1940 Pat 170. As the Privy Council remarked in *Kishori Lal* v. *Bhawani Shankar*, AIR 1940 PC 145.

68. *Shankar* v. *Kamta Prasad*, ILR 1946 Nag 844; *Kesavanarayana* v. *Lakshmavadhani*, (1983) 2 An WR 403 : (1967) 33 Cut LT 628 (DB); *Girdhar Singh* v. *Anand Singh*, AIR 1982 Raj 229; *Hari Satya Banerjee* v. *Mahadev Banerjee*, 1983 Cal 76; *Bansilal* v. *Kuldip Raj*, AIR 1981 JK 35 (It is sufficient if alience proves that the antecedent debt was discharged **relied on** AIR 1967 SC 574 and AIR 1967 SC 964.

69. *Arvind and Abasaheb Ganesh Kulkarni* v. *Anna and Dhanpal Parisa Chougule*, AIR 1980 SC 645.

70. *Murugesam Pillai* v. *Manickavasaka*, (1917) 44 IA 98 : 40 Mad 402 : AIR 1917 PC 6; *Hunooman persaud's case* (1856) 6 MIA 393.

71. *Hunooman Persaud* v. *Babooee*, (1856) 6 MIA 393, 418, 420; *Tandavaraya* v. *Valli*, (1863) 1 MHC 98; *Vadali* v. *Manda*, (1865) 2 MHC 407; *Saravana* v. *Muttayi*, (1871) 6 MHC 371; *Lalla Bunseedhur* v. *Koonwur Bindeserree*, (1866) 10 MIA 454, 471; *Maheshwar Syud Tasoowar* v. *Koonji Beharee*, (1870) 3 NWP 8; *Chowdhry* v. *Brojo Soondur*, (1872) 18 WR 77; *Sikher Chund* v. *Dalputty*, ILR (1880) 5 Cal 363; *Makundi* v. *Sarabsukh*, ILR (1884) 6 All 417; *Lal Singh* v. *Deo Narain*, ILR (1886) 8 All 279; *Gurusami* v. *Ganapathia*, ILR (1882) 5 Mad 337; *Anant Ram* v. *Collector of Etah*, ILR (1918) 40 All 171 (PC); *Sri Thakur Ram Krishna* v. *Ratanchand*, (1931) 58 IA 173 : ILR 53 All 190; *Soorendro Pershad* v. *Nundun Misser*, (1874) 21 WR 196; *Dalibai* v. *Gopibai*, (1902) 26 Bom 433; *Kandhialal* v. *Muna*, ILR (1898) 20 All 135; *Dattatraya Govind* In re : (1932) 56 Bom 519; *Raj Kishore* v. *Madan Gopal*, ILR (1932) 13 Lah 491; *Dwarka Ram* v. *Bakshi Parnaw*, ILR (1935) 14 Pat 595; *Girdharilal* v. *Mehr*, AIR 1935 Lah 42; *Guruswami Nadar* v. *Gopalasami*, (1919) 42 Mad 629 (as to trade debts).

72. *Mussa, at Mouli* v. *Brij Lal*, (1942) 24 Lah 345, 360 (FB).

simply to show that the money borrowed was spent for a family purpose which ordinarily is met by family income. He will have to further show that circumstances existed at the time which justified the borrowing.[73]

Regarding the burden of proof in the case of an alienation by a Hindu widow. See paras 691 to 693, pages 915 to 917 Mayne's Hindu Law 13th Ed.

Any person who seeks to displace the natural succession of property by alleging an adoption must discharge the burden that lies upon him by proof of the *factum* of adoption and the performance of any necessary ceremonies as well as all such facts as are necessary to constitute a valid adoption.[74] It is not necessary in all cases to produce direct evidence of the fact of the adoption: where it took place long ago, and where the adopted son has been treated as such by the members of the family and in public transactions, every presumption will be made that every circumstance has taken place which is necessary to account for such a state of things as is proved, or admitted, to exist.[75]

In case of presumption of valid marriage, it was pleaded that the marriage was prohibited by Hindu Bigamous Marriage Act, it was held that onus to prove the plea was on the party who sought to rebut the presumption.[76]

Where the burden to prove *bona fide* purchase by the subsequent purchaser was illegally shifted to the plaintiff without notice, adverse inference had to be drawn against the subsequent purchaser.[77]

Onus was on the Insurance Company to prove its allegation that the driver of the vehicle was not holding a valid driving licence on the date of accident and if the driver did not appear in spite of summons, adverse inference could be drawn against him.[78]

(v) Partition

Where there has been a partition, the presumption is that it was complete both as to parties (1) and (2) property. The presumption however is one of fact and not of law and will vary with the circumstances of each case.[79]

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73. *Babu Lal* v. *Satyanarain Prasad,* ILR (1941) All 680, 690. (MAYNE'S HINDU LAW 13th Ed. (para 395), Page 678). (Refer to paras 395 and 396, 397, pages 678 to 680 MAYNE'S HINDU LAW 13th Ed.).

74. *Haribhau* v. *Ajab Rao,* ILR (1946) Nag 978 : AIR 1947 Nag 143; *Krishnswami* v. *Venugopala,* (1949) 1 MLJ (NRC) 10; *Pratap Kishore* v. *Gyanendranath,* AIR 1951 Ori 313; *Doulatrao Jairamji* v. *Haris Chandra,* AIR 1972 SC 2446 : (1973) 2 SCC 307; *Kishorilal* v. *Chaltibai,* AIR 1959 SC 504 : (1959) Supp 1 SCR 698 : (1959) SC 560; *Mahadeva Royal* v. *Vira Basava,* AIR 1948 PC 114; *Malojirao Abajirao* v. *Tarabai Nathajirao,* 1956 Bom 397, *Ramadayal Ramchandralal* v. *Chaturbhujlal Ram Kisanlal,* AIR 1957 Nag 79; *Bajji (Mst)* v. *Bhairon,* AIR 1957 Raj 261; *Deokinandan* v. *Madanlal,* AIR 1958 AP 693 : ILR 1976 Cut 344; *Krushna Chandra* v. *Pradipta Dass* AIR 1982 Ori 114; *Debi Prasad* v. *Tribeni Devi,* AIR 1970 SC 1286 : 1 SCR 601 : (1970) 1 SCC 77; *Addagada Raghavamma* v. *Chinchamma,* AIR 1964 SC 136 : (1964) 2 SCR 933. (MAYNE'S HINDU LAW 13th Ed. (para 231), page: 424.

75. *Perkash Chunder* v. *Ghunnmonee,* SD of 1853, 96; *Nityanand* v. *Krishna Dyal,* (1871) 7 BLR 1; *Rajendro Nath* v. *Jogendro Nath,* (1870) 14 MIA 67; *Hur Dayal* v. *Roy Krishto,* 24 WR 107; *Saboo Bewa* v. *Nahagun,* 11 WR 380; *Vyas Chimanlal* v. *Vyas Ramachandra,* (1900) 24 Bom 473; *Sanveerangouda* v. *Basangouda,* AIR 1939 Bom 313; *Lal Achal Ram* v. *Kazim,* (1905) 32 IA 113, 121 : ILR 27 All 271; *Binda Kaur (Mt.)* v. *Lalita Prasad,* (1936) 42 CWN 161 : AIR 1936 PC 304; *Tammanna* v. *Parappa,* AIR 1945 PC 111 (discrepancies in evidence as to the respective positions occupied by parties and witnesses ought to be ignored, when the factum is disputed long after the ceremony and when there is a deed of adoption); *Pannalal* v. *Chaman Prakash,* AIR 1947 Lah 54. **See also** *Subbarayappa* v. *Papiah,* (1939) 44 Mys HCR 124; *Godavari Devi* v. *Subhakaran,* AIR 1954 Ajmer 57 (2); *Prem Chand* v. *Lakshmi Narain,* AIR 1955 MB 129; *Hariharasingh Sukhi Ram Channahu* v. *Deo Narayan Bodhram Chennahu,* AIR 1954 Nag 319; *Bhajan Das* v. *Narui Rani,* AIR 1954 Raj 17 : 1951 Rd 190 : 1951 AW (rev.) 169; *Sumantra Bai* v. *Rishabh Kumar,* AIR 1952 Nag 295; *Vittob* v. *Vittal,* AIR 1958 Bom 270 (30 years); *Suraj Bai* v. *Sadashiv,* AIR 1958 MP 100 (40 years); *Sitaram Singh* v. *Bhikni Devi,* AIR 1960 Patna, 452, *Venkatrama Rao* v. *Bhaskar Rao,* AIR 1962 AP 29; *Venkataratnam Venkatanarasayamma,* AIR 1964 AP 109 (50 years); *Balinki* v. *Gopa Krishna,* AIR 1964 Ori 117; *Jagdeo Singh* v. *Shiva Devi Singh,* AIR 1965 Patna 35; *Nandakishore* v. *Brij Behari,* AIR 1955 Raj 65; *Ajit Singh* v. *Fateh Singh,* AIR 1962 Punj 412; *Gouranga* v. *Bhaga Sahu,* AIR 1976 Orissa 43; *Debi Prasad* v. *Tribeni Devi,* AIR 1970 SC 1286 : (1970) 1 SCC 677 : (1971) 1 SCR 107; *Raghavamma* v. *Chenchamma,* AIR 1964 SC 136 : (1964) 2 SCR 933; *Sriddappa* v. *Chenna Basappa,* AIR 1973 Mys 245; *Jagannath* v. *Chenchela,* AIR 1973 Orissa 160. (MAYNE'S HINDU LAW 13th Edn. (para 231), page: 425).

76. ***Nirmala* v. *Rukminibai,* AIR 1994 Kant 247 (paras 16 and 17).**

77. *T. Poppan* v. *Karia Gounder,* AIR 2001 Cal 42 (para 22).

78. *U.I. Insurance Company Ltd., Kurnool* v. *M.T. Ramaka,* AIR 1994 AP 320 (para 8).

79. *Bala Bux* v. *Rukhumabai,* 30 IA 130 : ILR 30 Cal 725 (Parties); *Vaidyanatha Iyer* v. *Ayyaswami Iyer,* ILR 32 Mad 191; *Hari Baksh* v. *Babulal,* (1924) 51 IA 163 : ILR 5 Law 92 for other cases and discussion refer to MAYNE'S HINDU LAW 13th Edn. (para 489), page : 750.

(w) Insanity

Law presumes every one to be of sound mind until the contrary is proved. Burden of proving that he was not criminally responsible for crime by reason of his unsound mind is on the accused.[80]

Where previous insanity is admitted, presumption of sanity at the time of commission of act would be greatly weakened.[81] When the opinion of the medical expert is in favour of sanity, no adverse inference could be raised merely because the expert was not examined.[82]

(x) Intention and Knowledge

Every person is presumed to know the natural consequences of his acts.[83] Where a Police Constable beats an old man of sixty years weighing only 38 kg. which resulted in breaking of his ribs leading to his death, it would be presumed that he intended the consequences of act.[84] Intention of murder can be inferred from the nature and number of injuries.[85]

In Phipson 13th Ed. para 41-20, page: 1056 it is observed: "It was formerly thought that a man is presumed to intend the natural consequences of his acts; and where this presumption is conclusive no evidence contra will be allowed, though it is otherwise where it is disputable. But although this presumption was given the support of the House of Lords[86], the position, in criminal cases at least, is that no such presumption exists any more." "In criminal cases, some of the doubts and difficulties which arose as a result of the speeches in the House of Lords in *DPP* v. *Smith*[87] have been resolved by Section 8 of the Criminal Justice Act, 1967.

> "A Court or jury, in determining whether a person has committed an offence—(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence drawing such inferences, from the evidence as appear proper in the circumstances."

Paragraph (b) has been interpreted, however, as "no more than a legislative instruction that in considering their findings on intention or foresight the jury must take into account all the relevant evidence."

As a general rule, proof that a person knew that an act was likely to have certain consequences is relevant evidence which may found an *inference* that he intended those consequences when he did the act.[88] It seems, however, that in cases of murder a person can only be found to have intended a consequence which he did not desire if he foresaw the consequence *as a virtual certainty*, and that in such cases "a result foreseen as virtually certain *is* an intended result."[89] But this does not contradict the proposition that where it is relevant to prove that a consequence was *desired* it is relevant to prove that the person knew of the likelihood of such a consequence. In civil cases, it seems that the Courts will act on the presumption that a man intends the natural consequences of his acts."[90]

If it does survive in civil cases, it is clear that where there is any doubt as to the consequences of the act, evidence may be adduced on the subject. Thus, where A is alleged to have passed off his goods as those of B, and a comparison of the goods, explained by surrounding circumstances shows that A's

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80. *Ramdulare Ramadhin Sunar* v. *State of M.P.*, 1959 Cr LJ 844 : AIR 1959 MP 259.
81. *Sheralli Wali Mohammed* v. *State of Maharashtra*, AIR 1972 SC 2443; *Kashiram* v. *State of Madhya Pradesh*, 1957 Cr LJ 370 : AIR 1957 MP 104.
82. *Karthik Chandra Banerjee* v. *Munjurani Banerjee*, AIR 1973 Cal 545.
83. *D.P.P.* v. *Smith*, 1961 AC 290 (HL).
84. *State of Kerala* v. *Balkrishnan*, (1998) SCC (Cri) 571.
85. *Laxman* v. *State of Maharashtra*, AIR 1974 SC 1803; *Virsa Singh* v. *State of Punjab*, AIR 1958 SC 465.
86. *D.P.P* v. *Smith*, (1961) AC 290.
87. (1961) AC 290.
88. *R.* v. *Cooper*, (1849) 3 Cox CC 547.
89. *R.* v. *Woollin*, (1999) 1 AC 82, 93, per Lord STEYN [emphasis added].
90. PHIPSON ON EVIDENCE, 15th Edn. (2000), page 340 (para 15-08).

goods are calculated to deceive, the presumptijon will be conclusive, and evidence of A's intention to deceive or the reverse will be inadmissible; while, if such comparison and explanation leave the matter doubtful, his actual intent may be shown[1]. Departure from England without making business arrangements necessarily has the effect of defeating, or at least of delaying, creditors, and, therefore, is in itself proof of intent to produce that effect but evidence may be brought to show that in fact there was no such intention.[2]

Where the record of the case was not produced in the Court by the Collector in spite of sufficient opportunities, adverse inference that the record was intentionally withheld could be drawn.[3]

Section 8 of the Criminal Justice Act, 1967[4] provides that a court, or jury, in determining whether a person has committed on offence, is not bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions. Rather, it must decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances. "Section 8 deals with the matter of evidence.....it does not lay down in what cases the establishment of guilt is dependent on proof of intention or foresight or any other mental state".[5]

The presumption of intention is not a proposition of law, but a proposition of ordinary good sense. The burden to prove intention is on the prosecution.[6] Where a prosecution is lodged with knowledge that accused has committed no offence, presumption of malice can be made.[7]

Where the dead body of the victim of rape was found on the cot of the accused inside his house, in the absence of any satisfactory explanation from him, implication of the circumstance is definitely adverse to him as it must be in his special knowledge.[8] Where the landlord sent notice to the tenant offering him the reconstructed premises which and subsequent notices also the tenant refused to accept , it raises presumption that the tenant had the knowledge of the offer of the premises to him.[9]

(y) Lost Grant

When a person is found in possession and enjoyment of land for a considerable period of time under an assertion of title without challenge, Courts are inclined to ascribe a legal origin to such possession, and when on the facts a title by prescription could not be sustained, a presumption could be made that the possession was referable to a grant by the owner entitled to the land, but that such grant had been lost. Such a presumption is made for securing ancient and continued possession, which can otherwise be reasonably accounted for. But it is not a '*presumptio juris et de jure*' and the Courts are not bound to raise it, if the facts in evidence are against it. So also the presumption is not made if there is any legal impediment to the making of it. There will likewise be no scope for this presumption, if there is no person capable of making a grant, or if the grant would have been illegal and beyond the powers of the grantor.[10]

The presumption of lawful title is not a mere branch of the law of evidence. Courts have recourse to it in the absence of evidence. Their Lordships of the Privy Council observed: "The matter is one of presumption, based on the policy of law, but even considered as an inference from proved facts, the title presumed is a thing, which may well be regarded as likely to have happened. At the same time it is not a presumption to be capriciously made, nor is it one which a certain class of possessor is entitled to *de jure*. In a case such as this, where it is necessary to indicate what particular kind of lawful title is being

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1. *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch 893, 900-901.
2. Re : *Cohen*, (1950) 2 All ER 36, 39.
3. *Collector, Land Acquisition* v. *Zamindarani Brari Nambal*, AIR 1999 J&K 93 (para 19).
4. *Which came into operation on October* 1, 1967. **See** *R* v. *Wallett*, (1968) 2 Q B. 367; *R.* v. *Ives*, (1970) 1 Q B 208, and *R.* v. *Cooper*, (1949) 1 WLR 977.
5. *D P P* v. *Majewski*, (1976) 62 Cr. App. R. 262, 282, 288 H L. per Lod Edmund Davies, and **see** Lord Elwyn-Jones L.C. to same effect at p. 271. The relevance of the accused's intoxication at the material time is a question of substantive law-**see** ARCHBOLD'S CRIMINAL PLEADING 41st ed. 1448 et seq.
6. *Ram Kumar* v. *State of Rajasthan*, AIR 1970 Raj 60.
7. *Laxmi Chand S/o Hukmichand* v. *Dominion of India*, AIR 1955 Nag 265.
8. *State of A.P.* v. *Gangula Satya Murthy*, 1997 Cr LJ 774 (SC).
9. *Khaza Moinuddin* v. *Gayatri Iron Company*, 1999 AIHC 2576 (para 18) (AP).
10. *Monohar Das Mohanta* v. *Charu Chandra Pal*, AIR 1955 SC 228; *Satyanarayana* v. *Venkatapayya*, AIR 1953 SC 195; *Rangaraju Koundan* v. *Balasubramanian*, ILR (1968) 1 Ker 323; *Bachu Singh* v. *Bilaso Kuer*, ILR 46 Pat 977

presumed, the court must be satisfied that such a title was in its nature practicably and reasonably capable of being presumed, without doing violence to the probabilities of the case.....It is the completion of a right, to which circumstances clearly point, where time has obliterated any record of the original commencement."[11]

In order to claim a right of occupancy based on the ground of presumption of lost grant, it is necessary and incumbent on the tenants to trace the history of different lands in possession of different tenants and to establish before Court the length of possession.[12]

(z) Marriage—Husband and Wife

The presumption of law is in favour of marriage and against concubinage when a man and a woman have cohabited continuously for a long number of years[13] and omission to mention her name and that of her sons in the will executed by the husband's father and also the absence of their reference in the compromise entered into between her husband and his brothers do not destroy the presumption of legality of their marriage.[14] Where the parties consistently, continuously and openly lived as husband and wife, cohabited together for a long period and had children and were regarded and recognised by friends and relatives as husband and wife, it furnishes a clear evidence of marriage raising the presumption unless it is shown that the connection started in mere concubinage. But before raising such a presumption, it is necessary that the requisite conditions of a valid marriage stood satisfied in the sense that such a marriage was not prohibited under the law.[15]

Continuous cohabitation of a man and a woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage. But the presumption which may be drawn from long cohabitation is rebuttable, and if there are circumstances which weaken or destroy that presumption, the court cannot ignore them.[16] It was held that the rebuttal cannot be evidence of mere probability.[17] Alongwith the presumption of validity of marriage on the basis of long cohabitation, the formality and customs for valid marriage would also be presumed to have been performed.[18]

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11. *Muhammad Mazaffar-al-Musavi* v. *Jabeda Khatun*, AIR 1930 PC 103.
12. *Singaraju Rama Rao* v. *Nellore Linga Reddy*, AIR 1957 AP 632; **reversed on** another point in *Kondayya* v. *Rama Rao*, AIR 1966 SC 681.
13. *Mohabbat Alikhan* v. *Mohd. Ibrahim Khan*, AIR 1929 PC 135; *Guru Dutt Singh* v. *Durga Devi*, AIR 1966 J&K 75; *Sheodhar Prasad* v. *Jagdhar Prasad*, AIR 1964 Pat 316; *Anandi Lal* v. *Onkar*, AIR 1960 Raj 251; *Gokul Chand* v. *Parvin Kumari*, AIR 1952 SC 231; *Badri Prasad* v. *Director of Consolidation*, AIR 1978 SC 1557; *Kumarasamy Gounder* v. *Kumarathal*, AIR 1999 Mad 462 (para 8); *Gurubasawwa* v. *Irawwa*, AIR 1997 Kant 87; *Munni Devi* v. *Angari Devi*, AIR 1999 MP 31 (para 37); *A. Bal Reddy* v. *Saraswathi*, 1994 Cr LJ 1125 (para 13) (AP); *Baghyavathi* v. *Lakshmikanthammal*, AIR 1993 Mad 346 (para 20); *M. Shanmugha Udayar* v. *Sivanandam*, AIR 1994 Mad 123; *Chowdegowda* v. *C. Nagaraju*, AIR 1996 SC 3485 (para 4), **reversing** RSA No. 204 of 1994, Dt. 17-3-1995 (Kant); even without the factum of marriage is proved and without such admission by adversary, *Ranganath Parmeshwar P. Mali* v. *E.G. Kulkarni*, AIR 1996 SC 1290 (para 6); *Nera Bai* v. *Pusia Bai*, 1996 AIHC 122 (paras 10 and 11) (MP), **relying on** *Mahila Mathurobai* v. *Ramwati*, 1990 MPLJ 475; omission to mention female as wife in family register, not a clinching evidence to deny status of wife, *Lalsa* v. *District IVth Upper District Judge, Basti*, AIR 1999 All 342 (para 13) : 2000 AIHC 317 (para 13); *Alamelu Ammal* v. *Nalamma Reddiar*, 1999 AIHC 3455 (para 21) (Mad). *Lakshmamma* v. *Kamalamma*, AIR 2001 Kant 120 (para 14).
14. *S.P.S. Balasubramanyam* v. *Suruttayan*, AIR 1994 SC 133 (para 4), **reversing** the decision of Madras High Court.
15. *Virendra Singh Pal* v. *Kashibai*, AIR 1998 MP 324 (paras 12 and 13).
16. *Gokal Chand* v. *Parvin Kumar*, AIR 1952 SC 231; *Badri Prasad* v. *Director of Consolidation*, AIR 1978 SC 1557; *Mohabbat Alikhan* v. *Mohd. Ibrahim Khan*, AIR 1929 PC 135; *Khages-war Naik* v. *Domuni Bewa*, AIR 1989 Ori 10; *Basanti (Mt.)* v. *Pholo*, AIR 1955 Him Pra 37; *Thunthi* v. *Dhani Ram*, AIR 1953 Him Pra 66; *Prauinbhai Uttamrao* v. *Nalini Kant Kishandas Bania*, AIR 1961 MP 93; *Gnanamuthu Udayar* v. *Authoni*, AIR 1960 Mad 430; *Vishnu Namboodiri* v. *Kuttiparu Amma*, AIR 1957 Trar Co. 85; *Guru Dutt Singh* v. *Durga Devi*, AIR 1966 J&K 75; *Rajagopal Pillai* v. *Pakkia Ammal*, ILR (1968) 2 Mad 138; *Raghuvir Kumar* v. *Shanmugha Vadivu*, AIR 1971 Mad 330; *Mal Singh* v. *Ram Kaur*, AIR 1973 Punj 124; *Bikash Kumar* v. *Nanda Rani*, 1979 Cal 358; *Mandakini Pundalik* v. *Chandra Sen Ratkar*, AIR 1986 Bom 172; *Ningu Vithu Bamane* v. *Sadashiv Ningu Bamane*, 1987 Bant 27; *Bina Agarwal* v. *Mahesh Chandra Agarwal*, 1983 All LJ 597; *Bira Jena* v. *Tauli Dei*, AIR 1972 Ori 143; *Balasubramanyam* v. *Suruttayan*, AIR 1992 SC 756; *Subhash Popatlal Shah* v. *Lata Subhash Shah*, AIR 1994 Bom 43 (para 8).
17. *Nirmala* v. *Rukminibai*, AIR 1994 Kant 247 (para 13).
18. *Nirmala* v. *Rukminibai*, AIR 1994 Kant 247 (para 17).

When a person is already married, no presumption of a second marriage arises by reason of long cohabitation[19] unless divorced.[20]

Mere continuance of cohabitation is not sufficient to raise a presumption of marriage. To raise such a presumption, the continued cohabitation must be under circumstances from which it could reasonably be inferred that the cohabitation was as man and wife without obstacle to the form of marriage being gone through between them.[21]

Where the connection starts in mere concubinage the presumption does not arise. In such a case the presumption would be that the illicit connection continued till marriage is proved.[22]

Cohabitation with public women cannot give rise to a presumption of valid marriage.[23] A *Kudipiravarthi* woman (*i.e. Devadasi*) can contract a legal marriage. A rebuttable presumption of marriage from long cohabitation can be drawn in her case just as in the case of any other Hindu woman.[24]

In the absence of any contention that a particular ceremony is necessary in the re-marriage of a widow with a second husband, the fact that the woman lived for a considerably long time with the person as his wife, will be sufficient to establish that she was the wife of that person. There would be a presumption of re-marriage in favour of the lady.[25]

Where there were documentary evidence like the birth certificate and the marriage invitation and tax receipt in the name of plaintiff after his alleged father's death, it would be sufficient to draw the presumption of marriage between his mother and the alleged father which would not be rebutted merely because the plaintiff had not signed a document alongwith his alleged father and his other children and also because the alleged father had denied the marriage in reply to a legal notice to him by the plaintiff.[26] Where a person signs in the school admission register as father of children, the presumption would be that there is valid marriage between the person and the mother of those children.[27] Where marriage and the ceremonies observed at the time of marriage have been proved, it may be presumed that all legal formalities have been complied with.[28] Where factum of marriage was otherwise proved from evidence of witnesses and long cohabitation but the marriage register could not be produced for which satisfactory explanation was given, the factum of marriage was held to be proved.[29] When celebration of some form of marriage is established there is justification of presumption of legal marriage.[30]

There is no presumption that the property owned or held by a woman necessarily belongs to her husband or that the money for the acquisition of such a property had been supplied to her by the husband or somebody else.[31]

An able-bodied husband is presumed to be capable of maintaining his wife and children.[32] Incapacity to consummate may be assumed from persistent refusal by the husband to consummate marriage.[33]

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19. *Pravinbhai Uttamrao Reshamwalla* v. *Nalinikant Kishandas Bania*, AIR 1961 MP 93; *Nagarajamma* v. *State Bank of India*, AIR 1961 AP 320.
20. *Lolo* v. *Durghatiya*, AIR 2001 MP 188 (para 17).
21. (1971) 84 Mad LW 676.
22. *Tileswar Ahom* v. *Khohuli Ahomani*, AIR 1951 Assam 148; **See contra** *Rajamma* v. *Sivayya*, (1969) 1 An WR 480; *Basanti* v. *Pholu*, AIR 1952 Bilaspur 13.
23. *Raafiuddin* v. *Zubedesi*, AIR 1968 Mys 155.
24. *Poonamma Kaliamma* v. *Kumar Pillai*, AIR 1972 Mad 200.
25. *Ashutosh Dey Sarkar* v. *Nagendra Chandra Singh*, AIR 1957 Tripura 27; 1969 All WR (HC) 579.
26. *Sarangapani* v. *Varadhan*, AIR 1995 Mad 188 (paras 6-8).
27. *S.A. Kaiser* v. *Noor Sahan*, 1980 Cr LJ 611 (Cal). **See also** *Radhakrishnan* v. *Balakrishna*, 2001 AIHC 3866 (para 11) (Mad)
28. *Linga Mallik* v. *Ajodhya Mallikani*, AIR 1974 Orissa 107.
29. *Rajan Baboo* v. *U.P. Public Service Commission*, (1998) 8 SCC 580.
30. *Binapani Debi* v. *Ajit Banerjee*, 1983 Cr LJ 1440 (Cal).
31. *Sunder Devi* v. *Jhaboolal*, AIR 1957 All 215.
32. *Chander Prakash Bodh Raj* v. *Shila Rani Chander Prakash*, 1968 Cr LJ 1153 : AIR 1968 Del 174.
33. *Ponnen* v. *Ponnen*, AIR 1968 Ker 129 (DB).

It is one of the strongest presumptions based on human experience that a woman must be unchaste when her children say so in the court, though the said presumption is rebuttable.[34]

In a petition for dissolution of marriage on the ground that the respondent is incurably of unsound mind, it is for the petitioner to establish such unsoundness of mind. There is no provision in law for compelling the respondent to undergo medical examination. However, an adverse inference can be drawn against the respondent for refusing to submit to medical examination[35] but if she did not go for medical examination for want of fund, no adverse inference could be drawn against her for it was the duty of the husband to pay the expenses for such examination.[36] In a divorce proceeding on the ground of allegations of adultery against the wife, onus was on the husband to prove his allegations in which he failed. The wife was given an opportunity to mend her ways and thereafter husband and wife lived together. Condonation of offence of adultery by the husband could be presumed.[37]

In a matrimonial suit brought by the husband, non-production of the compromise petition of an earlier occasion by the husband in evidence would raise a presumption about a state of affairs adverse to the petitioner.[38] Where a woman alleged to be married is not examined, inference is that, had she been examined, she would not have supported the plea of her marriage.[39]

(aa) Legitimacy

When a woman lives for a number of years in close association with a man and bears children, who are acknowledged by the man as born to him, and the relations and other persons of the village treat them as such, there is a presumption of legitimacy.[40] Where consummation of marriage and access of husband and wife were admitted and the medical opinion supported the wife, legitimacy of the child was presumed even after refusal of wife to submit to DNA Test.[41] If a child is in possession of affiliation acknowledged by the parents and has repute in the society, legitimacy should be presumed.[42] A youth of 15 years is not incapable of procreation. Hence from mere age alone, no conclusive inference that he could not possibly have been the father of a child can be made.[43]

(ab) Partner

Where a lease is renewed by a partner there is a presumption that the renewal is for the benefit of the other partners.[44]

(ac) Principal and Agent

An agent's authority to bind the principal may be presumed. Onus is on the principal to prove that the agent's authority is limited.[45]

There is no presumption that the husband acted as an agent of his wife, when he sold the properties of his wife under a contract, unless it is proved that he had either express or implied authority to sell the property. Implied authority within the meaning of Section 187 Contract Act arises from the conduct or situation of the parties or necessity of the family.[46]

Where a trade union takes action, the presumption is that it has taken such action with the support of its members and in a representative capacity.[47]

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34. *Dharam Sheela Bai* v. *Ram Dayal Bhatnagar*, (1961) 2 Cr LJ 236 (MP).
35. *Bipinchandra* v. *Madhuriben*, AIR 1963 Guj 250.
36. *Rekha* v. *Ravindra Kumar*, AIR 1994 NOC 330 (MP).
37. *Arun Kumar Bhardwaj* v. *Anita Bhardwaj*, AIR 1993 P&H 33 (paras 12 and 13).
38. *Tapan Kumar* v. *Jyotsna*, AIR 1997 Cal 134.
39. *Pravinbhai* v. *Nalini Kant*, AIR 1961 Madh Pra. 93.
40. *Shivalingaiah* v. *Chowdamma*, AIR 1956 Mys 17 (DB).
41. *Devesh Pratap Singh* v. *Sunita Singh*, AIR 1999 MP 174 (paras 12 and 14).
42. *Surendra Mohan Das Bhoumick* v. *State of West Bengal*, AIR 1979 Cal 3 (DB).
43. *Veragam* v. *Manoranjan Samania Kumar*, ILR (1963) Cut 415.
44. *C.G. Chetty* v. *C.S. Chetty*, AIR 1959 SC 190.
45. *Kasinath Das* v. *Nisakar Rout*, AIR 1962 Ori 164.
46. *Phuljari Devi* v. *Mithailal*, AIR 1971 All 494.
47. *The Management, Hindustan Times Ltd.* v. *Chief Commr., Delhi*, AIR 1957 Punj 102.

(ad) Money Transactions

In the absence of a receipt for the deposit of money no inference can be drawn that the money was deposited as it would throw very great doubt about the deposit.[48]

Payment by means of demand draft cannot be presumed to be a loan.[49]

The fact that a certain sum is paid towards principal on a certain date does not justify the conclusion that interest up to that date has been paid.[50]

Where in a case of default of payment in purchase of a T.V. on credit basis, the vendor pleaded that the purchaser had agreed to pay Rs. 100/- as penalty for each default in payment of instalements but he failed to produce the said agreement, an adverse inference could be drawn against him.[51] Where in a case for recovery of loan, the bank produced the certified copies of the banker's book to prove the loan and also examined its employees as witnesses, the debtor firm did not examine its partner who was conservant with the firm's dealings and also did not produce its account books, adverse inference could be drawn against the firm.[52]

(ae) Dishonour of Cheque

The presumption that the cheque was drawn for the discharge of liability of the drawer is a presumption of law, though rebuttable, and ought to be raised by the Court in every case.[53]

(af) Mortgage

Though there is no presumption of law that mere deposit of title deeds constitutes a mortgage, courts may presume under Section 114 of the Evidence of Act that under certain circumstances, a loan and a deposit of title deeds constitute a mortgage.[54]

Where possession of the mortgaged property repeatedly changed hands, no presumption can be drawn that the possession of such other person was without any right and he was in unlawful possession, as he may be an assignee of mortgage.[55]

No presumption as to the value of the property mortgaged can be raised from the amount of the loan advanced.[56]

(ag) Pledge

The National Saving Certificate, being the property of the post office, can be pledged only by it. It having been pledged by the Post Master in favour of a party, presumption that the pledging is proper arises.[57]

(ah) Mohammedan Law

As the great majority of Muslims in India follow the Hanafi School of Sunni law, the Courts presume that Muslims in India follow the Hanafi law unless the contrary is alleged and proved.[58]

The presumption of advancement applicable to deposits in the joint names of father and daughter cannot be extended to Mohammedans in India.[59]

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48. *Ajit K. Saha* v. *Nagendra N. Saha*, AIR 1960 Cal 484.
49. *Govind Rao* v. *Dattatraya Narayan*, ILR (1974) Kant 1260; *Satyanarayana* v. *Sree Ramulu*, AIR 1961 AP 461.
50. *Thirai Doloi* v. *Singheshwar*, AIR 1950 Assam 216.
51. *Ganga Maruthi* v. *Nagraj*, AIR 1998 Kant 407 (para 13).
52. *Shivam Construction Com.* v. *Vijaya Bank, Ahmedabad*, AIR 1997 Guj 24.
53. *Hiten P. Dalal* v. *Bratindranath Banerjee*, 2001 Cr LJ 4647 (paras 20, 21 and 23) (SC).
54. *K.J. Nathan* v. *S.V. Maruthi Rao*, AIR 1965 SC 430; *Keval Das Kilabhai* v. *Chhotabhai Bhailalbhai Patel*, AIR 1955 Bom 454.
55. *K.V. Thomas* v. *State of Kerala*, AIR 1960 Ker 293 (FB).
56. *Soshil Kumar* v. *Madan Gopal*, AIR 1953 Punj 292 (DB).
57. *Gorakhnath Upadhyaya* v. *State of U.P.*, AIR 1994 All 283 (para 21).
58. *Abdulla Beary* v. *Alikunhy Beary*, 1957 Ker LT 849.
59. *Mujtabai Begum* v. *Mehbub Rehman*, AIR 1959 MP 359.

Presumption of lawful marriage among Muslims can be drawn from continuous cohabitation.[60] Regarding a Muslim marriage it was held that, in the absence of evidence to the contrary, it must be presumed that the marriage was duly solemnized and that words of acceptance were uttered by the husband. The presumption is fortified by the fact that marriage has been consummated.[61]

(ai) Negligence

No presumption of negligence can be drawn in a civil case simply because the person was convicted in a criminal case for negligence.

The Maxim *res ipsa loquitur* (things speak for themselves) used in cases of tort in civil cases is not applicable in criminal cases. The Supreme Court observed: "The primary reasons for non-application of this abstract doctrine of *res ipsa loquitur* to criminal trial are: Firstly, in a criminal trial, the burden of proving everything essential to the establishment of the charge against the accused always rests on the prosecution, as every man is presumed to be innocent until the contrary is proved, and criminality is never to be presumed subject to statutory exception. No such statutory exception has been made by requiring the drawing of a mandatory presumption of negligence against the accused where the accident "tells its own story" of negligence of somebody. Secondly, there is a marked difference as to the effect of evidence, *viz* the proof in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the court, as a reasonable man beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgement."[62] As pointed out by Lord ATKIN in *Andrews* v. *Director of Public Prosecutions*[63] "simple lack of care such as will constitute civil liability, is not enough" for liability under the criminal law "a very high degree of negligence is required to be proved. Probably, of all the epithets that can be applied 'reckless' most nearly covers the case".[64]

It was held by the Supreme Court that the mere fact that a person was knocked down by a motorist and killed, there can not be any presumption of negligence on the part of the driver. There must be clear proof showing that there was a direct nexus between the death of person and the rash or negligent act of the accused.[65] Where plea of sudden failure of lights and foggy weather as cause of accident was not established, negligence on the part of the driver could be presumed.[66]

Where a fire explosive, in a display of fire works, fell in the midst of crowd and injured an on looker, it was held that a presumption of negligence on the part of person making and displaying the fire explosive, may be raised.[67]

Where a consignment of mangoes reached the destination two days later than the reasonable time, it was held that a delay of two days is not unreasonable and no presumption that damage was due to delay of two days could be drawn.[68]

"The law will conclusively presume that the carrier has been guilty of negligence unless he can show that the loss or damage was occasioned by what it technically called the "act of God," or by King's enemies. The same principle applies to goods under the custody of a stage-coachman, a cabman, or even a gratuitous bailee". (TAYLOR ON EVIDENCE (See 187)).

As a rule negligence is not to be presumed. But in the case of common carriers or bailment, and loss, law presumes negligence on the part of the bailee.[69]

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60. *Mohd. Amin* v. *Vakil Ahmad*, AIR 1952 SC 358.
61. *Kazi Siddique* v. *Satima Khatoon*, (1957) 61 Cal WN 187.
62. *Syed Akbar* v. *State of Karnataka*, AIR 1979 SC 1848.
63. (1937) 2 All ER 552 : 1937 AC 576.
64. *M.P.S.R.T. Corp.* v. *Sudhakar*, AIR 1968 MP 47; *State of Punjab* v. *H.L. Kochhar*, ILR 1980 H.P. 271.
65. *Suleman* v. *State*, AIR 1968 SC 829. **See also** *T.S. Gore* v. *State*, AIR 1971 Bombay 164; But **see** *Engineers International* v. *Hanumantha Raju*, (1974) 1 MLJ 37.
66. *Krishna Kapoor* v. *Himachal Road Transport Corporation*, AIR 1994 NOC 308 (HP).
67. *T.C. Balkrishan Menon* v. *T.R. Subramanian*, AIR 1968 Ker 151.
68. *Union of India* v. *Bhagaban Rout*, AIR 1969 Ori 100.
69. *Kushikanta* v. *Chandrakanta*, 28 CWN 1041.

In a suit against the railway for damages for loss of goods in transit, non-disclosure as to how the consignment was dealt with in transit by the railway administration leads to presumption of negligence on the part of the railway.[70] In a suit for loss, damage or non-delivery of goods, filed against the carriers, the presumption is in favour of the plaintiff and against the defendant that he is liable to make good the loss. He can rebutt the presumption by establishing that the loss was caused by the act of God or inevitable accident or something beyond his control.[71] Mere fact that rain water entered the wagon and caused damage would not fix liability on the railway.[72] In a suit for damages for short delivery alleging negligence against the railway, inference of negligence or misconduct can be inferred, if the railway fails to disclose to consignor how the consignment was dealt with in transit.[73] Where a consignment of goods was sent by railway and the goods were either lost or damaged because of the derailment, it was held that a rebuttable presumption of negligence on the part of the railway employees arises.[74] Where there is an arrangement between two railways by which one acted as agent of the other in entering into contract of carriage an act of one is binding on the other, the fact that goods were placed in charge of one railway and not returned by the other raises a presumption of negligence on the part of the railway and it is for them to rebut that presumption.[75] Consignments delivered to a railway, may have to travel on railways of two or three different administration, it is not safe to presume that a particular consignment was received intact by each railway from the previous railway.[76]

Where in a rental premises, the tenant stored combustible substances and fire took palce, negligence can be presumed unless rebutted.[77]

The possibility of stealth by a person other than the bailee is not sufficient to rebut the presumption of negligence against a bailee on the happening of loss.[78]

Where a newly born infant was injured at night in a Govt. owned hospital, presumption of fact regarding negligence of the hospital staff would arise.[79]

(aj) Notice

Where a notice is addressed to the Secretary, Railway Board instead of the General Manager, it cannot be presumed under Section 114 that a wrong addressee would immediately forward the communication to the person who was bound to receive it.[80]

Refusal to accept notice amounts to service in accordance with law.[81] Where the lessee alleged that he received the lease termination notice late thus not allowing him 15 clear days' time as required but failed to produce the envelop of notice to show the date of delivery to him besides taking no specific stand about the date of receipt of the notice in the written statement and showing no record of receipt of the said notice, adverse inference would be drawn against him.[82] Where the landowner whose land was acquired did not raise the issue of non-service of land acquisition notice, rather the objection was raised by the person acquiring title through him after a lapse of 20 years, it was presumed that the requisite notice was duly served.[83]

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70. *Sarada Mills Ltd.* v. *Union of India*, AIR 1966 Mad 381 (representing Central Railway).
71. *Karnataka Transport Corporation* v. *National Insurance Bank Ltd.*, AIR 1999 Kant 233 (paras 15, 19 and 20).
72. *Union of India* v. *Hukumchand*, AIR 1970 MP 55.
73. *Union of India* v. *Alumingum Works, Co-operative Factory Ltd.*, (1972) 1 An LT 189.
74. *Khedut Oil Cake Industries* v. *Union of India*, AIR 1988 Delhi 88.
75. *Tejbndra Lal Das* v. *Union of India*, ILR (1959) 1 Cal 450.
76. *Firm Radha Kishan Bhagwati Prasad* v. *Union of India*, AIR 1959 Assam 98.
77. *National Small Industries* v. *Bishambar Nath*, AIR 1979 All 35 (DB).
78. *P. Rangaraju* v. *Muthukrishna*, AIR 1962 Mad 244.
79. *Jasbir Kaur* v. *State of Punjab*, AIR 1995 P&H 278 (paras 6 and 8).
80. *Sandhya Trading Co.* v. *Governor General in Council*, AIR 1950 Cal 426.
81. *Thirumala Agencies* v. *Samala Mareppa & Sons*, 2001 Cr LJ 2692 (para 6) (Kant).
82. *Roger Enterprises Pvt. Ltd.* v. *Renu Vaish*, 1998 AIHC 1313 (para 6) (Del).
83. *R.M. Employees Co-operative House Building Society Ltd.* v. *Sushila Devi*, 1999 AIHC 1955 (paras 26 and 27) (Del).

(ak) Ownership and Possession

Title carries with it the presumption of possession.[84] If none can prove possession the court must hold that possession is with the rightful owner.[85] Where possession may be either lawful or unlawful, the court, in the absence of evidence, shall presume the former[86] but before coming to the conclusion that possession of the petitioners, claimed by virtue of registered sale-deeds in respect of land belonging to a tribal obtained after permission from the District Collector, was without the authority of law, the pleas of the petitioners must be considered.[87]

There is no presumption regarding the fact of adverse possession.[88] The report of the Commission and the plan of land, submitted in a different suit concerning a different issue, cannot be taken into consideration to presume the finding of adverse possession without examining the said Commissioner.[89] Where title to a waste land incapable of effective enjoyment, was found vested in the plaintiff, presumption arose that possession followed title.[90] Possession of one co-owner is presumed in law to be possession of all co-owners even when others do not participate in profits and the principle of adverse possession does not apply. There can not be adverse possession unless established by cogent evidence showing open assertion of hostile title or repudiation of others title or express ouster, to the knowledge of other co-owners.[91]

The person in whose name the properties stands in survey and settlement registers can be presumed to be the real owner thereof.[92]

The initial presumption is that a building constructed on land after a person acquired title to the land, is also owned by such person.[93] Presumption is that trees in holding belong to the person to whom the holding belongs.[94]

The person who is in possession is presumed to have *prima facie* title against all the world except the real owner but the presumption that possession follows title is rebuttable. In case of acquisition of land the original owner ceases to have the right, title or interest in it and cannot transfer any part thereof. In case he executes a sale-deed the transferee would be a tresspasser, if he comes into possession.[95]

Where the co-owner did not participate in taking rents and profits for a very long time, there is presumption of ouster.[96] Where there is a deposit in the joint names of A and B and there is no evidence to show that money deposited belonged to A, the reasonable conclusion that can be drawn from the joint nature of the deposit is that it belongs equally to both of them.[97] Where there is no indication or evidence as to the extent of share of each of the claimants to compensation, the presumption would be that they share equally.[98]

(al) User

User from times immemorial raises a presumption that the enjoyment had a lawful origin.[99]

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84. *Bitola Kuer* v. *Ramcharan*, AIR 1978 All 555.
85. *Nanda Kumar* v. *Emdad Ali*, AIR 1927 Cal 49.
86. *Hardit* v. *Gurmukh*, AIR 1918 PC 1.
87. *Atmaram* v. *State*, AIR 1995 MP 225.
88. *Bitola Kuer* v. *Ram Charan*, AIR 1978 All 555.
89. *Rayaroth Kathiani Amma* v. *Kolangarakandi Mallika*, 2000 AIHC 952 (para 3) (Ker).
90. *Pratap Singh Bhadur* v. *Thakur Manmohan Dey*, AIR 1966 SC 1931; *Thiruvanchan Sankaran* v. *Kunjipillai Amma Govri Amma*, AIR 1970 Ker 310; *Jamaluddin* v. *Mosque Mashakganj*, AIR 1973 All 328.
91. *P. Lakshmi Reddy* v. *L. Lakshmi Reddy*, AIR 1957 SC 314; *Kunjamma Cicily* v. *Kasim*, AIR 1969 Ker 293 (FB); *Corea* v. *Appuhqmi*, 1912 AC 230; *Muttu Nayagan* v. *Pritto*, 1918 AC 985; *Arab Ali* v. *Md. Ali*, AIR 1922 PC 84; *Chandbhai* v. *Hasanbhai*, ILR 46 Bom 213; *Hardit* v. *Gurumukh*, 20 Bom LR 1064 : AIR 1918 PC 1; *Muthukrishna* v. *Sankara*, 27 MLJ 600.
92. *Anantam Veeraju* v. *Valluri Venkayya*, ILR (1959) AP 951; *Neeraju* v. *Venkayya*, AIR 1960 AP 222.
93. *Droupadi Devi* v. *Pannu Sahu*, ILR (1969) All 767.
94. 1955 (21) Cut LT 575.
95. *John B. James* v. *Bangalore Development Authority*, 2001 AIHC 837 (Kant).
96. *N. Varada Pillai* v. *Jeevarathnammal*, AIR 1919 PC 44; *Velligothummal* v. *Nadukandy*, 1969 AP 222; *Ramalakhan Singh* v. *Bhaia Chantu*, AIR 1929 Pat 624.
97. *Mujtabai* v. *Mehbub Rehman*, AIR 1959 MP 359.
98. (1964) 77 Mad LW 644.
99. *Madhab Das Bairagi* v. *Jogesh Chander Sarkar*, ILR 30 Cal 281.

Mere user of a piece of waste land as passage does not give rise to a presumption that the user was a matter of right.[1]

Public user should be as of right and without interruption in order to raise a presumption of dedication.[2]

Where Muslim residents of a village were burying the dead in a plot of land and continued to do so even after the U.P. Zamindari Abolition Act, 1951 and the defendants recognised the user, it was held there was a presumption that the plot was dedicated for user as a grave yard.[3] When a vehicle is given to an employee in the course of his employment, the presumption arises that the employee was entitled to use both for official and non-official purposes unless there is evidence that the user was restricted.[4]

Where a water course is running on another's land, a right to user cannot be acquired on the basis of presumption under S. 114, illus. (*e*) of the Evidence Act.[5]

(am) Wills

Onus of proving a Will is on propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and signature of testator as required by law is sufficient to discharge the onus.[6] Where it was alleged that a certain will was executed under fraud and undue influence but no evidence was adduced to support the allegation, validity of the will was inferred.[7]

Where a Will was executed in favour of his newly wedded wife and the testator died after a few months, no presumption can be drawn that the woman was in a position to dominate his Will.[8]

Where a duly executed will was found missing at the time of the testator's death, presumption that the will was revoked should be applied with care.[9] A court may resort to presumption that where the Will is traced to the possession of the testator but is not forth-coming after his death, it must have been destroyed by the testator with the intention to revoke it.[10]

Where an ancient will is rational in character and was executed in the presence of witnesses, the presumption that the testator was of sound mind is justified.[11] In cases of Wills the presumption is that the attesting witnesses signed after the testator had signed. The presumption is based on the maxim *'Omnia praesumuntur rite esse acta.*[12]

(an) Miscellaneous

Where a person in Baroda entered into agreement with the Government of India at Delhi to supply goods and the payment for goods was to be made by cheque, it was held that according to the course of business usage in general, parties must have intended that cheque should be sent by post.[13]

There is no presumption in law that a person who possesses only a learner's licence or possesses no licence at all, does not know driving.[14]

Where *A*'s land adjoins *B* house and is to the north of *B*'s house, and *B* opens a door in the north wall of his house with the purpose of having access to north; *A* is entitled to relief for apprehended

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1. *Gajo Rai* v. *Gaura Devi*, AIR 1960 Pat 498; *Salina Jitendra Lal Sinha* v. *Ram Charan Gope*, AIR 1959 Pat 475
2. *Satyanarayan* v. *Murarilal*, AIR 1954 Hyd. 82; *Lambodar Panda* v. *Ramesh Chandra Panda*, AIR 1958 Orissa 248.
3. *Md. Naqi Khan* v. *State*, ILR (1965) 2 All 337.
4. *George Oakes Co.* v. *V.S. Govindarajan*, 1998 AIHC 4045 (para 2) (Kant).
5. *Moola Singh* v. *Surendra Singh*, AIR 1960 All 656.
6. *Shashi Kumar Benergi* v. *Subodh Kumar*, AIR 1964 SC 529; **reversing** *Subodh Kumar Banerjee* v. *Shashi Kumar*, AIR 1958 Cal 264.
7. *S. Kaliyammal* v. *K. Palaniammal*, AIR 1999 Mad 40 (para 15).
8. *Surendral Pal* v. *Saraswati Arora*, AIR 1974 SC 1999.
9. *Nishabar Singh* v. *Local Gurudwara Committee Manji Sahib*, AIR 1986 Punj & Har 402.
10. *Devi Charan* v. *Durga Prasad*, AIR 1967 Del 128.
11. *Venkata Rama Rao* v. *Bhaskara Rao*, AIR 1962 AP 29; *Rameshwar Prasad* v. *Krishna Mohanath Raina*, AIR 1969 MP 4.
12. *Satipada Chatterjee* v. *Annakali Debya*, AIR 1953 Cal 462.
13. *Shri Jagadish Mills* v. *I T Commr., Bombay*, AIR 1959 SC 1160.
14. *Suleman Rahiman Mulani* v. *State of Maharashtra*, 1968 Cr LJ 1013 (SC) : AIR 1968 SC 829.

trespass against *B* for his land. *A* has reasonable apprehension that the opening of the door is a first step towards subsequent act of trespass against his land.[15]

Where a date expired medicine is kept in a drug shop, the presumption is that the medicine is stocked for sale.[16] The statement about the date of expiry given by the manufacturer on the drug is at best a statement about a future occurrence and therefore it cannot be regarded as a fact within the meaning of Section 114 because it does not indicate any such common course of natural events, human conduct and public and private business as may be relevant to the question whether the drug would or would not be rendered unfit for analysis after the date of expiry. In the instant case, after the analysis of the sample a particular drug was found to be not confirming to the claim in respect of its contents.[17]

There can be no presumption that when person was discharged from general hospital there was no necessity for detaining him any further in hospital when it is common knowledge that for want of accommodation several persons are discharged before complete recovery.[18]

(ao) Statutory Presumption

There is a presumption of the constitutional validity of a statutory provision. The Supreme Court should lean in favour of the view as would sustain the validity of the provision and not disturb a construction which has been accepted for such a length of time.[19]

Rule 141(2) of Defence of India Rules 1962 is not *ultra vires* as laying down a rule of evidence contrary to Section 114.[20]

There is every presumption that a change of sovereignty would not affect private rights to property.[21]

From the mere conduct of an accused, neither the existence of the order nor its due publication nor its knowledge by the accused, can be inferred. Before any presumption of due publication can arise, it must be shown that the order in question u/r. 81(2) of Defence of India Rules (1939) was made in strict compliance with the provision of Rule 119.[22] Statutory presumption under Section 5 of the TADA Act, 1987 is rebuttable and the accused can prove that his purpose was wholly unrelated to any terrorist or disruptive activity.[23]

When a person enters India on a passport issued by the Government of Pakistan, a presumption that he has acquired the citizenship of that country arises. Such a presumption is rebuttable.[24] Issue of an Indian passport to a person though not conclusive on the point of Indian citizenship, raises a rebuttable presumption in his favour.[25]

In a criminal proceeding under the Hyderabad Gambling Act, the Court may presume that an officer issuing warrant has acted on credible information.[26] Where opium is recovered from a car during transport, all occupants of the car may be presumed to commit the offence under Sections 9 and 10 of the Opium Act (1878).[27] Presumption under S. 178-A Customs Act (1878), cannot be raised when article seized is not covered by S. 178A(2).[28] Where presumption under Section 123 of the Customs Act could not be availed of as the seizure of gold biscuits was not done in accordance with the Act, it was held that in certain special circumstances the prosecution can fall back upon the presumption under Section 114. Under Bengal (Bihar) Tenancy Act, there is a rebuttable presumption that the land is not the proprietor's

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15. *Rambabu* v. *Par Prasad*, 1963 AP 239.
16. *Kasim Bhai* v. *State*, 1956 Cr LJ 1380 : AIR 1956 All 703.
17. *Dueful Laboratory* v. *State of Rajasthan*, 1998 Cr LJ 4534 (para 36) (Raj).
18. *G. Gopalaswami* v. *G. Navalgaria*, AIR 1967 Mad 403.
19. *Dharam Das* v. *State of Punjab*, AIR 1975 SC 1069; *R.R. Steels* v. *Union of India*, 1972 All LJ 121.
20. *Mangilal* v. *State of Maharashtra*, AIR 1970 SC 1829.
21. *Damodhar* v. *C.P. & Berar*, AIR 1956 Nag 59, *Damodhar Bapu*; **relying on;** *Shahid Ganj* v. *S.G.P. Committee*, AIR 1940 PC 116.
22. *State* v. *Sheo Prasad*, 1956 Cr LJ 1149.
23. *Sanjay Dutt* v. *State*, 1995 Cr LJ 477 (SC).
24. *Bhaktiar Khan* v. *Union of India*, AIR 1961 Guj 109.
25. *Union of India* v. *Md. Ayub* AIR 1972 Gau 56.
26. *Narsappa* v. *State*, AIR 1953 Hyd 60.
27. *Abdul Rehman* v. *State*, AIR 1958 MP 285.
28. *Public Prosecutor* v. *M.L. Modi*, AIR 1961 Mad 368.

land.[29] Section 185 of Madras Estates Land Act (I of 1908) enacts a presumption that land in an *inam* village is not private land.[30]

When a dealer was found in possession of excess number of kerosene tins than shown in the register, in the absence of a reasonable explanation, a presumption arises that he intended to sell the excess tins in the black market.[31] Statutory presumption of correctness attaches to the entry in books regularly maintained by a limited company, it is for the person alleging the contrary to prove it.[32] A resolution of a company signed by its Chairman must be presumed to be correct.[33]

There can be no presumption that proceedings under R. 16, 24(ix) of the Punjab Police Rules were taken but, once it is admitted or proved that such proceedings were, in fact, taken then it must be presumed, unless otherwise alleged and proved, that they were taken in accordance with law.[34]

The declaration that a certain person is the owner, printer and publisher of a particular newspaper to be issued from a particular place, only raises a presumption of publication at that particular place and does not extend to the publication of any issue of newspaper at any other place.[35] Where a party alleges bias in the matter of decision of the Government acting under Section 10 of the Industrial Disputes Act, the Government should be presumed to act with complete propriety and without any bias unless evidence to the contrary is presented by the party alleging bias.[36]

In view of the definition of "goods vehicle" in the Motor Vehicle Act, a presumption that the driver of the goods vehicle picked up the passenger in the course of his employment cannot be drawn.[37]

The date of birth recorded in the matriculation certificate is not necessarily conclusive proof of such date.[38]

(ap) Interpretation of statute

Principle of presumption would be applicable equally in case of rule making authority. The provisions of a statute are to be interpreted harmoniously making the provisions clear and every part of the statute is to be given effect.[39]

(aq) Repeal of an Act

It is a well-settled principle of law that there is presumption against implied repeal of an Act.[40]

(ar) Landlord and Tenant

There is no presumption that a lease deed contained a term prohibiting the tenant from subletting.[41] Where a land was given on lease for building purpose and no period of tenancy was fixed, the presumption arises in favour of permanent tenancy. Giving a right to the lessee to surrender the lease at any time does not affect the nature of tenancy.[42]

Inaction on the part of a landlord for a long time in taking steps for eviction, does not lead to the presumption that he had consented to the sub-tenancy[43] but adverse inference could be drawn against him for his failure to appear in a case seeking eviction on the basis of *bona fide* need.[44]

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29. *Ramgobind Singh* v. *Ram Ranbijai Singh*, AIR 1958 Pat 279 (DB).
30. *Chidambaram Chettiar* v. *Santanaramaswami*, AIR 1968 SC 1005.
31. *Ram Lakhan Sao* v. *State*, AIR 1953 Pat 54.
32. *Fateh Chand Kad* v. *Hindsons (Patiala) Ltd.*, AIR 1956 Pepsu 89.
33. *Bharat Fire & General Insurance Ltd.* v. *Parameswari Prasad*, AIR 1968 Del 68.
34. *Union of India* v. *Pritam Singh*, AIR 1956 Punj 106.
35. *Bhaironlal* v. *Doongarsidas*, AIR 1959 Raj 251.
36. *Workers Govt. Soap Factory* v. *State of Mysore*, AIR 1971 Mys 22 (DB).
37. (1973) Mys 346.
38. *Nandalal Chhapalia* v. *Life Insurance Corpn. of India*, ILR (1973) Cut 675.
39. *Balkishan* v. *Shrilal*, AIR 1994 MP 14 (para 8).
40. *J.K. Kalra* v. *Regnl Inspectress of Girls' Schools, Meerut*, AIR 1997 All 44, **following** *Municipal Council, Palai* v. *T.U. Josef*, AIR 1963 SC 1561.
41. *Tirath Ram Gupta* v. *Gurubachan Singh*, AIR 1987 SC 770.
42. *Sivayogeswara Cotton Press* v. *Panchaksharappa*, AIR 1962 SC 413.
43. *Ram Dass* v. *Debiprasad*, AIR 1977 All 155.
44. *Sh. Manohar Lal* v. *Pushpawati Jain*, AIR 1994 NOC 220 (Del).

Where the notice for termination of tenancy was issued by the landlord to the tenant at his residential address in accordance with law, presumption arose that the same was duly served on him.[45] A presumption may be raised that the occupier of a room in a hotel is a lodger or inmate.[46]

Presumption as to forest lands in Kerala is that in absence of exceptional circumstances such as the land being entirely rocky or barren, all forest lands is agricultural land in the sense that it can be prudently and profitably exploited for agricultural purpose.[47]

Coconut, arecanut, jack, rubber, mango trees and pepper vine that were in existence in a particular year may be presumed to be in existence three years later.[48]

Where a person is recorded in the settlement record as *raiyat* of tank, presumption is that he is *raiyat*. However, the presumption is rebuttable.[49] Where a tenant was inducted by the ex-landlord from whom the present landlord purchased the premises and prior to the filing of eviction proceedings the ex-landlord and his *munim* died, no adverse inference could be drawn on the ground of failure of the present landlord to examine them.[50]

Where the premises in question was found to be in possession of a stranger and not a tenant, inference of sub-letting could be drawn[51] and it would also be presumed that the sub-letting must be for valid consideration.[52] Where in an eviction suit, the landlord plaintiffs, instead of examining themselves, examined the senior member of their family who was managing family affairs, no adverse inference could be drawn against them for not appearing as witnesses.[53] Where the tenant had sufficient means to acquire alternative accomodation, grant of permission for eviction on the ground of the tenant having sufficient means by drawing adverse inference against the tenant was held to be proper.[54] Where after the death of the husband his wife was recorded as a tenant in the revenue records and thereafter as a mortgagee, the change in revenue entries does not indicate cessation of tenancy. It only indicates that husband and thereafter the wife was tenant and the tenancy of the wife will revert to her after redemption of mortgage.[55]

Where the tenant had produced the certified copy of the admission of his tenancy by the landlord, adverse inference could not be drawn against the tenant on the ground that he did not summon the respondent/landlord[56] but where the tenant could produce no evidence of his plea that the other person was a business partner, adverse inference could be drawn against the tenant and he could be evicted.[57] The application by the landlord by post to the Rent Controller that the house was vacant and could be alloted to anyone could be presumed to be genuine only when the applicant is summoned and enquiry is made.[58]

Under the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982, Section 11(1)(c), the presumption, that the requirement of the plaintiff will not be substantially met if the defendant is directed to vacate a portion of one room suit premises, does not arise where the room is big enough to permit division to satisfy the needs of the landlord as well as the tenant.[59]

Presumption of service of notice is a finding of fact and cannot be interfered within writ jurisdiction.[60]

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45. *Vinod Khanna* v. *Bakshi Sachdev*, AIR 1996 Del 32 (para 20).
46. *Associated Hotel of India* v. *Ranjit Singh*, AIR 1968 SC 933.
47. *V. Venugopala* v. *Controller, Estate Duty, Kerala*, AIR 1969 Ker 304.
48. *K.C. Alexander* v. *Nair Service Society Ltd.*, AIR 1966 Ker 286.
49. (1969) 1 Cal 508.
50. *Jagmohan Singh Wadhera* v. *K.M. Bhatnagar*, 1996 AIHC 415 (para 12) (Del).
51. *Gur Dayal Khanna* v. *Malti Devi*, AIR 1993 All 90 (paras 12 and 13).
52. *Dudabhai* v. *Sulochanaben Gopaldas Kothari*, AIR 1995 Guj 68 (paras 13, 14 and 24).
53. *Chander Kanta Singhal* v. *Kapadia Exports*, 1998 AIHC 153 (para 20) (Del).
54. *Prem Sagar* v. *Vijay Kumar Rajput*, 1998 AIHC 161 (para 7) (Del).
55. *Ram Rakhi* v. *Atti*, AIR 1993 HP 137 (paras 10-12).
56. *Damu Gamu Bendale* v. *Arvinda Dhondu Talekar*, AIR 1994 SC 1303 (para 3).
57. *Banshilal* v. *Mohan Lal*, AIR 1995 Raj 167 (para 4).
58. *Sarvati Devi* v. *8th Additional District Judge, Agra*, 2001 AIHC 3978 (para 8) (All).
59. *Krishna Murari Prasad* v. *Mitar Singh*, AIR 1994 SC 489 (paras 3 and 4).
60. *R.A. Qureshi* v. *Xth Additional District Judge, Meerut*, AIR 1995 All 345 (paras 8 and 9).

(as) Religious Endowments

There is no presumption either way whether a temple is a public or private temple. It is a question of fact depending upon the circumstances such as course of conduct of the devotees, public visiting the temple, extent of the properties etc.[61]

Where an order of remand by a civil court does not mention the provision of law, the presumption is that it is passed under O. 41, R. 23, C.P.C.[62]

Where a foreign *ex parte* decree was passed against a domicile resident in India, and there was observation in the decree that summons was duly served on him, it cannot be presumed from such observation that the defendant was physically present in that country on the date of suit when the summons was served since a defendant may be served even outside that country.[63]

Whenever a Legislature repeals a particular provision, the natural presumption is that such a repeal must have been with a particular intention.[64]

The court presumes, unless contrary is shown, that the arbitrator has by his award determined only those matters that were referred to him.[65]

Where a judgement contains references only to some of the witnesses, it cannot be presumed that the court was unmindful of other evidence.[66]

(at) Education

Where a candidate appearing at the High School Examination in mathematics did not give the detailed calculation work in solving the sums, though the answers were correct, presumption about use of unfairmeans could not be drawn.[67] There can be no presumption on the ground of very good marks obtained in an examination that he/she will be entitled to get very good marks in the subsequent examination.[68]

(au) Cultivation underneath electric line

Having regard to common course of natural events, the Court can draw a presumption that agricultural operation in a reasonably profitable manner can be carried on in the affected land underneath electric lines except growing tall trees.[69]

(av) Inconsistency in evidence

In a motor accident case, it was held that no adverse inference could be drawn against the two injured minor girls due to some inconsistency in their testimony without following the procedure contemplated under Section 118 of the Evidence Act.[70]

(aw) Sufficiency of cause

No presumption can be drawn that there must be sufficient cause for delay for the condonation of which the party must place before the Court the acts constituting sufficient cause.[71]

(ax) Confirmation of minutes

Confirmation of the minutes of the meeting of the Corporators in the subsequent meeting is not obligatory under the Bombay Provincial Municipal Corporation Act, 1949. If the President signs over it, it can be given presumptive value which is rebuttable.[72]

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61. See MAYNE'S HINDU LAW, 13th Ed. (para 558), Page : 1155.
62. *Rama Rao* v. *P. Vimala Kumari*, AIR 1969 AP 216.
63. *Bharat Nidhi Ltd.* v. *Megh Raj*, AIR 1967 Del 22.
64. *Nasib Singh* v. *Bajo Ram*, AIR 1969 J&K 9 (FB).
65. *State of Mysore* v. *B. Basaviah*, (1968) 1 Mys LJ 404.
66. *Bhagwan Das Sharma* v. *Gayasah*, 1967 Cr LJ 1942 (Pat) : AIR 1967 Pat 254.
67. *Naresh Pal* v. *H.S. & Intermediate Education Board, Branch Office, Bareilly*, AIR 1995 All 81 (para 5).
68. *Srumoyu Ghosh* v. *State of W.B.*, AIR 1996 Cal 1 (para 5).
69. *Arya Antherjanam* v. *Kerala State Electricity Board (FB)*, AIR 1996 Ker 309 (paras 17, 20 and 22).
70. *Talasila Sandhya* v. *A.P. State Road Transport Corporation*, 1997 AIHC 1680 (para 6) (AP).
71. *Union of India* v. *Brij Lal Prabhu Dayal*, AIR 1999 Raj 216 (paras 18-20).
72. *Tarvindarsingh Mahendrasingh Dhillon* v. *State of Maharashtra*, AIR 2000 Bom 223 (paras 72-74).

(ay) Signature on blank paper

When the person says that he put the signature on a blank paper that does not mean that he had admittedly executed the document.[73]

Presumption as to absence of consent in certain prosecutions for rape

[74]**[S. 114-A. In a prosecution for rape under Cl. (*a*) or Cl. (*b*) or Cl. (*c*) or Cl. (*d*) or Cl. (*e*) or Cl. (*g*) of sub-section (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.]**

COMMENTS

In a case on the subject before the Madhya Pradesh High Court, the prosecutrix stated in her evidence that she did not consent to the sexual intercourse. The Court accordingly held that by virtue of this section, the burden of proving consent shifted to the accused. The section comes into play on proof by the prosecution that sexual intercourse had, in fact, taken place and on the victim girl saying before the court that there was no consent on her part.[75] The Court cited the decision of the Supreme Court in *Rafiq* v. *State of U.P.*,[76] to the effect that the absence of marks of injury on the accused is not fatal in each case, nor does the absence of such physical injuries on the prosecutrix warrant the presumption of consent on her part.

It has been held that the presumption under S. 114-A is attracted only to cases that fall under S. 376(2), I.P.C. and not to cases that fall under S. 376(1), I.P.C.[77] Where in a case of gang rape there was unexplained delay of nine days in lodging the complaint, the victim was desirous to marry one of the accused, the victim unwillingly made the report under the pressure of her parents and the unexhibited report of the chemical examiner contra-indicated story of sexual intercourse, it was held that presumption under S. 114-A was not attracted.[78] It has been held that the absence of injuries on the person of the accused or the prosecutrix, the victim of rape, is not *per se* sufficient to indicate her consent.[79]

The statement of the prosecutrix in a rape case does not require corroboration to be acted upon.[80]

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73. In re : *Kuttadan Valayudhan*, AIR 2001 Ker 123 (para 15).

74. Inserted by the Criminal Law (Amendment) Act, 1983 (Act 43 of 1983) w.e.f. 25-12-1983.

75. *Nawab Khan* v. *State*, 1990 Cr LJ 1179.

76. AIR 1981 SC 559 : 1980 Cr LJ 1344, which was, of course, not on the section and preceded its enactment.

77. *Ramcharan* v. *State of M.P.*, 1993 Cr LJ 1825 (para 7) (MP).

78. *Shatrughna* v. *State of M.P.*, 1993 Cr LJ 120 (MP).

79. *State of U.P.* v. *Padam Singh*, 1996 AIHC 169 (All).

80. *Zamir Ahmad* v. *State*, 1996 Cr LJ 2354 (paras 16 and 17) (Del), **relying on** *State of Maharashtra* v. *Chanderprakash Kewalchand Jain*, 1990 Cr LJ 889 : (1990) 1 SCC 550.

CHAPTER VIII

ESTOPPEL

Estoppel

S. 115. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

ILLUSTRATION

A intentionally and falsely leads *B* to believe that certain land belongs to *A*, and thereby induces *B* to buy and pay for it.

The land afterwards becomes the property of *A*, and *A* seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

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COMMENTS

1. PRINCIPLE AND SCOPE

Estoppel is based on the principle that it would be most inequitable and unjust that if one person, by a representation made, or by conduct amounting to a representation, had induced another to act as he would not otherwise have done, the person who made the representation should not be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it.[1]

The section says that when one person has by his (a) declaration, (b) act, or (c) omission intentionally caused or permitted a person :

(i) to believe a thing to be true, and (ii) to act upon such belief, then neither he nor his representative shall be allowed to deny the truth of that thing in any suit or proceeding between himself and such person or his representative. To invoke the doctrine of estoppel three conditions must be satisfied: (1) representation by a person to another, (2) the other shall have acted upon the said representation, and (3) such action shall have been detrimental to the interests of the person to whom the representation has been made. Even where the first two conditions are satisfied but the third is not, there is no scope to invoke the doctrine of estoppel.[2]

The doctrine embodied in this section is not a rule of equity, but is a rule of evidence formulated and applied in courts of law.[3] It precludes a person from denying the truth of some statement previously made by himself. No casue of action arises upon estoppel itself.[4]

This section is based on equity and good conscience the object being to prevent fraud and secure justice between the parties by promoting honesty and good faith.[5] This section is based on the decision in *Pickard* v. *Sears*[6] in which it was stated—"Where a person by his words or conduct *willfully* causes

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1. *Sarat Chunder Dey* v. *Gopal Chunder Laha*, (1892) 19 IA 203, 215, 216 : ILR 20 Cal 296; *Pickard* v. *Sears*, (1837) 6 A&E 469. For a parallel example see *Gulam Abbas* v. *Haji Kayyam Ali*, AIR 1973 SC 554, relinquishment of the future possible right of inheritance by a Muslim heir for a consideration may debar him from setting up his right when it actually comes into being.
2. *Gyarsi Bai* v. *Dhansukh Lal*, AIR 1965 SC 1055; *Dhiyan Singh* v. *Jugal Kishore*, AIR 1952 SC 145.
3. *Municipal Corporation of Bombay* v. *Secretary of State*, ILR (1904) 29 Bom 580 : 7 Bom LR 27.
4. *Banwari Lal* v. *Sukhdarshan*, AIR 1973 SC 814, estoppel does not create interest in property.
5. *Madanappa* v. *Chandramma*, AIR 1965 SC 1812.
6. (1832) Ad & El 469.

another to believe in the existence of a certain state of things and induces *him* to act on that belief so as to alter *his* own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time."[7]

The only difference is that in the above decision the expression "willfully" was used, whereas in this section the expression "intentionally" is used.

Practically there is no distinction between the law laid down in this section and the law in England.[8]

In HALSBURY (4th Ed, Vol. 16, para 1501, page 1008) it is observed : "Estoppel may be defined as a disability whereby a party is precluded from alleging or proving in legal proceedings, that a fact is otherwise than it has been made to appear by the matter giving rise to that disability."

The doctrine of estoppel has, however, been guarded with great strictness, not because the party enforcing it, is presumed to be desirous of excluding the truth... but because the estoppel may exclude the truth. Hence estoppels must be certain to every intent; for no one shall be prevented from setting up the truth, unless it be in plain contradiction to his former allegations and acts. These last words extend, not only to a man's own allegations and acts, but also to those of all persons through whom he claims; or, to express the same sentiment in the technical language of the law, estoppels are usually binding upon parties and privies. Lord coke has divided privies into three classes; *first*, privies in blood, as heirs; *secondly*, privies by estate, as feoffees, lessees, assignees, etc.; and *thirdly*, privies in law "as the Lord by escheat, the tenant by the courtesy, the tenant in dower, the incumbent of a benefice," husbands suing or defending in right of their wives, executors and administrators. In all these and the like cases, the law acting upon the wise principle *quit sentit commodum, sentire debet et onus* provides that the privy shall stand in no better position than the party through whom he derives his title; but that, if the latter is not at liberty to contradict what he has formerly said or done the former shall be subject to a like disability.[9]

To bring the case within the scope of estoppel as defined in Section 115: (1) there must be a representation by a person or his authorised agent to another in any form, a declaration, act or omission; (2) the representation must have been of the existence of a fact and not of promises *de futuro* or intention which might or might not be enforceable in contract; (3) the representation must have been meant to be relied upon; (4) there must have been belief on the part of the other party in its truth; (5) there must have been action on the faith of that declaration, act or omission, that is to say, the declaration, act or omission, must have actually caused another to act on the faith of it, and to alter his former position to his prejudice or detriment; (6) the misrepresentation or conduct or omission must have been the proximate cause of leading the other party to act to his prejudice; (7) the person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of affairs or had means of knowledge, there can be no estoppel; (8) only the person to whom representation was made or for whom it was designed can avail himself of it.[10]

Estoppel is a rule of civil action. It has no application to criminal proceedings, though in such proceedings it would be prejudicial to set up a different story.

A question of estoppel must be decided on ordinary common law principles of construction and of what is reasonable, without fine distinctions of technicalities. Estoppel is often described as a rule of evidence as indeed it may be so described. But, the whole concept is more carefully viewed as a rule of substantive law.[11]

The doctrine of estoppel by representation forms part of the English Law of evidence and such estoppel except as a bar to testimony, has no operation or efficacy whatsoever. Its sole object is either to place an obstacle in the way of a case which might otherwise succeed or to remove an impediment out of the way of the case which might otherwise fail.[12]

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7. **See also** *Hopgood* v. *Brown*, (1955) 1 All ER 550 at 559 (CA).
8. *Mitrasen* v. *Janaki Kuar*, AIR 1924 PC 213; *Dawson Bank Ltd.* v. *Nippon M.K. Kaish*, AIR 1935 PC 79.
9. TAYLOR, 12th Edn., ss. 89-90, pp. 86- 87.
10. *Chhaganlal* v. *Narandas*, AIR 1982 SC 121 : (1982) 1 SCC 223 : 1982 UJ (SC) 120 : (1982) 2 SCR 166.
11. *C. & D. Sugar Co.* v. *C.N. Steamship*, AIR 1947 PC 40.
12. *Ramniwas* v. *State*, AIR 1970 Punj 462 (FB); *Samarendra* v. *Calcutta University*, AIR 1953 Cal 172. It cannot operate to create rights.

Estoppel by representation does not create interest in property except as provided in Section 43, T.P. Act.[13] VISHWANATHA SASTRY J. observed: "An estoppel though a branch of the law of evidence is also capable of being viewed as a substantive rule of law insofar as it helps to create or defeat rights which would not exist and be taken away but for that doctrine."[14]

Principle of estoppel cannot operate against a person who was not in existence at the date when the transaction took place.[15] Where the order of extension of service of an employee was cancelled before it became operative, the question of estoppel did not arise.[16]

The rule of estoppel must prevail over a pure rule of procedure contained in Section 92 of the Evidence Act.[17]

At times even an innocent or mistaken representation may operate as an estoppel.[18]

In a partition between joint purchasers of property where exclusive ownership of passage was given to the plaintiff under an unregistered deed of partition, the plaintiff filed a suit for declaration of his ownership to the passage basing on the partition deed. It was held that onwership of passage can only be granted if legal and admissible evidence is adduced to establish the right to property and it cannot be created by estoppel.[19] Section 115 deals with questions of facts and not of rights. No one can be estopped from asserting his right, which he might have stated that he will not assert.[20]

2. APPLICABILITY

When the Court is objectively satisfied that equity demands that the promisor can be allowed to resile from his/its promise or representation and the promise can be adequately compensated, the Court can decline to extend the applicability of the doctrine of promissory estoppel, whereas on the other hand if the Court is objectively satisfied that it cannot be made possible to relegate the promise to its original position *ante*, then the promise so made should be declared final and irrevocable ignoring the plea of executive necessity.[21] The principle of promissory estoppel is applicable to administrative law and not between the private parties.[22] A plea of estoppel can be raised in writ petitions.[23] Election petition cannot be disposed of summarily on the question of estoppel.[24]

3. NOT EXHAUSTIVE

The sections relating to estoppel in the Evidence Act are not exhaustive. Cases of estoppel may arise which are not within the purview of these sections.[25] As to other instances of estoppel, see S. 234 of the Indian Contract Act, 1872; S. 18 of the Specific Relief Act, 1877; Ss. 41 and 43 of the Transfer of Property Act, 1882; Ss. 27 and 53 of the Indian Sale of Goods Act, 1930; and S. 28 of the Indian Partnership Act, 1932.

4. CONSTRUCTIVE ESTOPPEL

This is no such thing known to the law as constructive estoppel.[26]

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13. *Banwari Lal* v. *Sukhdarshan*, AIR 1973 SC 814.
14. *D. Veeraraghava Reddy* v. *D. Kamallamma*, 1951 Mad 403. **See also** *Dawson Bank Ltd.* v. *N.M.K.K.*, AIR 1935 PC 79; *Union of India* v. *Ramnath & Co.*, AIR 1974 All 296; *N.K. Raghavan* v. *Municipal Council, Jarsugada*, AIR 1973 Ors 86.
15. *Shri Ramji Mandir* v. *Co-op. Housing Society*, AIR 1979 Guj 134.
16. *State of U.P.* v. *Girish Bihari*, AIR 1997 SC 1354.
17. *State Bank of Indore* v. *Jasroop Baijnath*, AIR 1974 MP 193.
18. *Sarat* v. *Gopal*, ILR (1892) 20 Cal 296; *Vagliano* v. *Bank of England*, 1891 AC 197.
19. *Chandervati* v. *Lakhmi Chand*, AIR 1988 Del 13.
20. *Sida Nitinkumar Laxmankumar, Laxmanbhai* v. *Gujarat University*, AIR 1991 Guj 43.
21. *Kalu Chand* v. *State*, AIR 1998 Raj 33, at pp. 37-38. **Also see** *Food Corpn. of India, Bhopal* v. *Babulal Agarwal*, AIR 1998 MP 23, at p. 31.
22. *Hamir Ram* v. *Varisng Raimal*, AIR 1998 Gaj 165 (para 7).
23. *Baij Nath* v. *Bank of Maharashtra*, AIR 1987 Del 231.
24. *Ramgulam* v. *Collector, Guna*, AIR 1975 MP 145.
25. *Rup Chand Ghosh* v. *Sarbeswar Chandra Chandra*, (1906) 33 Cal 915. There are decisions which lay down that these sections are exhaustive: **see** *Asmatunnessa Khatun* v. *Harendra Lal Biswas*, (1908) 35 Cal 904.
26. *Parsotam Gir* v. *Narbada Gir*, (1899) 26 IA 175 : 1 Bom LR 700 : ILR 21 All 505.

5. ESTOPPEL AND PRESUMPTION

Estoppel differs from presumption. An estoppel is a personal disqualification laid upon a person peculiary circumstances from proving peculiar facts, whereas a presumption is a rule that particular inferences shall be drawn from particular facts, whoever proves them.[27]

6. ESTOPPEL AGAINST ESTOPPEL

The maxim is 'estoppel against an estoppel setteth the matter at large'. In a case of one estoppel against another, the parties are set free and the court has to see what their original rights really are.[28]

7. FEEDING THE ESTOPPEL

"Feeding the estoppel" is an expression which is part of English Law of Estoppel and by it is meant that where a grantor has purported to grant interest in land which he did not at the time posses, but subsequently acquires, the benefit of subsequent acquisition goes automatically to the earlier grantee.[29]

The equitable principle of feeding the estoppel has been recognised to some extent in S. 43 of the Transfer of Property Act, 1882, which says that where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. But the right of transferees in good faith for consideration without notice of the existence of the said option shall not be impaired. In such cases the subsequent interest enduring to the benefit of the transferor is said to feed the estoppel which is subsisting in the transferee so as to preclude the transferor from contending that the transferee has no right to his subsequently acquired property.[29] The option to be exercised in Section 43 of the T.P.A. by the transferee is not required to be exercised in express term or in a particular form and can be implied from the very fact that he has been claiming his right over the entire property and that he was proceeding against not only the transferor but also the so-called subsequent transferees.[30] This principle applies in the case of sale, mortgage, lease, or any such grant.[31]

Estoppel by representation does not create interest in property except as provided in Section 43 Transfer of Property Act.[32] Where a person transfers property in which he had no right to transfer without making any representation that he had authority to transfer, Section 43 T.P. Act would not apply. Similarly when both parties know the truth it would not apply.[33] To entitle a transferee, to the benefit of Section 43 there must be a fraudulent or erroneous representation by the transferor that he is authorised to transfer the property which he professes to transfer and the transfer must be for consideration. There is no further requirement that the transferee must have acted in ignorance of the facts and must have believed in the truth of the representation by the transfer. In view of this, Section 43 does not require that the transferee should have made an independent enquiry or taken reasonable care to ascertain whether the transferor had power to transfer the property before claiming the benefit of the section.[34]

8. SECTION 41, T.P. ACT

Section 41, T.P. Act is similar in principle to Section 115. When an owner transfers property with apparent ownership and right of disposition thereof, he would be estopped from claiming title against a

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27. STEPHEN, 175.
28. *Onkar* v. *Shamrao*, 1996 AIHC 1279 (para 10) (Bom).
29. *Krishna Chandra Ghosh* v. *Rasik Lal Khan*, (1916) 21 CWN 218.
30. *Onkar Hage* v. *Shamrao*, 1996 AIHC 1279 (paras 10, 11 and 15) (Bom). **following** *Girja Shankar* v. *Jagannath*, AIR 1952 All 301 and *Gomathy Ammal* v. *Rukmini Amma*, AIR 1967 Ker 58.
31. *Deoli Chand* v. *Nirban Singh*, ILR (1879) 5 Cal 253; *Vithabai* v. *Malhar*, (1937) 40 Bom LR 147; *Radhey* v. *Mahesh*, ILR 7 All 864; *Mokhoda* v. *Umesh*, 7 CLJ 381; *Jan Mohammad* v. *Karam*, AIR 1947 PC 99; *Tilakdhari* v. *Khedan*, AIR 1921 PC 112; *Gurnarain* v. *Sheolal*, AIR 1918 PC 140.
32. *Banwari Lal* v. *Sukhdarshan*, AIR 1973 SC 814.
33. *Jumma Masjid* v. *Kodimani*, AIR 1953 Mad 637 (FB); *Parmanand* v. *Champa Lal*, AIR 1956 All 225 (FB); *Deoman* v. *Atmaram*, AIR 1948 Nag 122.
34. *Veera Swami* v. *Subba Rao*, AIR 1957 AP 288; **See also**: *Sarat* v. *Gopal*, ILR 20 Cal 296; *Pandiri* v. *Karoomurthy*, ILR 34 Mad 159; *Chakrapani* v. *Gayamoni*, AIR 1918 Pat 534.

person to whom his original transferee disposed of the property and who took it in good faith and for consideration.[35] Principles of equity on which Section 41 of the T.P. Act, and Section 115 of the Evidence Act are based apply also to court sales.[36] Consent of the real owner need not be given to transfer. If it is proved by the transferee after taking requisite care to ascertain that the transferor had power to make transfer and he acted in good faith, he would be protected.[37]

Section 41, T.P. Act would not apply when the transferee had not taken care to ascertain the transferor's title and where the ostensible owner was not in possession with the consent of the real owner.[38] Section 41, T.P. Act would not apply to a transfer prohibited by any statute.[39]

Though the rule under Section 53-A, T.P. Act creates no right, it creates right of estoppel between the transferor and the transferee, which have no operation against third persons not claiming under those persons.[40] Reference may be made to commentory on Section 53-A of T.P. Act in Mulla's Transfer of Property Act and other standard treatises on that Act.

9. PERSON

The term 'person' applies only to a person of full age and competent to enter into contracts. If an infant represents fraudulently or otherwise that he is of age and thereby induces another to enter into a contract with him, the infant is not estopped from setting up infancy in an action founded on the contract.[41] But the court has discretion in equity to direct the minor to return the benefit he has received by false representation to the person he has deceived.[42] The Allahabad High Court has held that upon equitable grounds he may be made liable for any loss which the plaintiff has suffered.[43]

The Privy Council has not decided the point though the Calcutta High Court in its decision has expressly decided it.[44]

Under the English law a minor is not estopped from pleading his minority. An infant by fraudulently representing that he was of full age induced the plaintiffs to lend him a sum of money. In an action by the plaintiffs to recover the money it was held that the cause of action was in substance *ex contractu*, that the plea of infancy was a good answer to the action, and that the defendant was under no equitable liability to the plaintiffs.[45] When an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore him ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation, entered into while he was an infant, even by means of fraud.[46] This case has been approved by the Privy Council.[47]

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35. *Li Tse Shi* v. *Pang Tsoi*, AIR 1935 PC 208.
36. *Sheikh Hussain* v. *Phoolchand Harichand*, AIR 1952 Nag 64.
37. *Ramjanam* v. *Beyas Singh*, AIR 1958 Pat 537.
38. *Md. Shafi* v. *Md. Said*, ILR 52 All 248 : AIR 1930 All 847.
39. *Sannamma* v. *Radhabai*, ILR 41 Mad 418 (FB).
40. *S.N. Banerji* v. *K.L. & S. Co.*, AIR 1941 PC 128.
41. *Gadigeppa* v. *Balangowda*, (1931) 33 Bom LR 1313 : ILR 55 Bom 741 (FB); *Brahmo Dutt* v. *Dharmo Das Ghose*, ILR (1898) 26 Cal 381; *Manmatha Kumar Shaha* v. *Exchange Loan Company Ltd.*, ILR (1937) 1 Cal 283; *Mukul Chandra* v. *Sasadhar*, (1941) 45 CWN 907; *Vaikuntarama Pillai* v. *Authimoolam Chettiar*, ILR (1914) 38 Mad 1071; *Radhe Shiam* v. *Bhihari Lal*, ILR (1918) 40 All 558; *Radha Kishen* v. *Bhorey Lal*, ILR (1928) 50 All 862 : AIR 1928 All 626; *Kumar Ganganand Singh* v. *Maharaja Sir Rameshwar Singh Bahadur*, ILR (1927) 6 Pat 338. *Khan Gul* v. *Lakha Singh*, ILR (1928) 9 Lah 701 (FB); The former Judicial Commissioner's Court in Nagpur had held likewise; *Gulabchand* v. *Chunnilal*, (1929) 25 NLR 85.
42. *Khan Gul* v. *Lakha Singh*, ILR (1928) 9 Lah 701 (FB); *Vaikuntarama Pillai* v. *Authimoolam Chettiar*, ILR (1914) 38 Mad 1071; *Kumar Ganganand Singh* v. *Maharaja Sir Rameshwar Singh Bahadur*, ILR (1927) 6 Pat 388.
43. *Jagar Nath Singh* v. *Lalta Prasad*, ILR (1908) 31 All 21; *Radha Kishen* v. *Bhorey Lal*, ILR (1928) 50 All 862.
44. *Mohori Bibee* v. *Dharmadas Ghose*, (1903) 30 IA 114, 122 : ILR 30 Cal 539, 545 : 5 Bom LR 421, 424
45. *Leslie Limited* v. *Sheill*, (1914) 3 KB 607; *Sat Narain* v. *Union of India*, (1968) 2 SCWR 335; *State of Madras* v. *Madras Electric Tramways*, AIR 1957 Mad 169.
46. *Lesli Limited* v. *Sheill*, (1914) 3 KB 607.
47. *Mahomed Syedol* v. *Veohool Yark*, (1916) 43 IA 256 : 19 Bom LR 157; **followed** in *Muliabai* v. *Garud*, (1919) 15 NLR 149.

10. ESTOPPEL BY CONDUCT—DECLARATION, ACT OR OMISSION

All the three can be clubbed together under the expression "Conduct" and may be considered under the head "Representation by Conduct".

When a person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed, in any suit, or proceeding between himself and such person or his representative to deny the truth of that thing. This is estoppel by conduct.[48]

To raise an estoppel by conduct, a person must by word or conduct induce another to believe that a certain state of things exists, and to cause that other to act on that belief in a way he would not have done had he known the facts, so that, if, in an action between them, the person making a representation were allowed to prove the true facts —to tell the truth—the other person would have been prejudiced. If these two conditions are fulfilled, then the person making the representation will not be allowed to deny its truth in any action between him and the person to whom he made it or the persons who claim in the same right But in any other action he can deny its truth. The ways in which a person may make such a representation are infinite. He may speak or write, act or omit to act, or act negligently.

The following are the recognised propositions of an estoppel by conduct:

(1) If a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things, which the first knows to be false, and if the second believes in such state of things, and acts upon his belief, he who knowingly made the false statements is estopped from averring afterwards that such a state of things did not, in fact, exist.

(2) If a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intended to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such state of facts.

(3) If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he, with such belief, does act in that way to his damage, the first is estopped from denying that the facts were as represented.

(4) If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts, by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the pomixate cause of leading and has led the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist.[49]

Estoppel by conduct is distinguished from estoppel by record which constitutes the bar of *res judicata*. Even if the principle of *res judicata* is not applicable, the party can rely on estoppel by conduct.[50] Estoppel by conduct is of the very essence of the rules of estoppel embodied in Sections 115, 116 and 117 of the Evidence Act. The acts of the parties which come in for consideration in a litigation, must necessarily be acts performed prior to the commencement of the litigation.[51]

When a person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed, in any suit, or proceeding between himself and such person or his representative to deny the truth of that thing. This is estoppel by conduct.[52] Where the owner of the property clothes a third person with apparent ownership of property and right of disposition thereof and the third party disposes of that property, the real owner is estopped from asserting his title against the transferee in good faith and for

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48. *Venkata Swamy Naidu* v. *Sornammal*, ILR (1970) 1 Mad 336.
49. Per BRETT, J., in *Carr* v. *London and North Western Railway Co.*, (1875) LR 10 CP 307, 316, 317, 318. No estoppel arises from a mere participation in the selection of a lessee. *Pukh Raj* v. *State*, AIR 1980 Raj 83.
50. *Sunder bai* v. *Devaji Shankar*, AIR 1954 SC 82.
51. *Abdul Shakur* v. *Kotwaleshwar Prasad*, AIR 1958 All 54.
52. *Venkata Sami Naidu* v. *Soranammal*, ILR (1970) 1 Mad 336.

value.[53] Where a mother was appointed by the court as guardian of the minor daughters on the basis of a statement by the mother that she would not claim interest in the property adverse to the daughters, she is estopped from filing a suit for possession of property on the basis of her title in respect of the son's property.[54] Where the grant in favour of the highest bidder in an auction was cancelled, and a second auction was held, in which the previous highest bidder participated, he is estopped from questioning the validity of the cancellation of the earlier auction in his favour.[55]

Estoppel by conduct is on the same footing as estoppel by representation.[56] The party against whom estoppel is pleaded should have made some representation intended to induce a course of conduct by the party to whom it is made.[57] Where a non-transferable holding is sold by a tenant by a *Kobala*, he is estopped from setting up the invalidity of the sale by him.[58]

The form of representation may be oral or written.[59] Admissions in affidavits filed by the Government which are mere expression of opinion limited to the context and not specific assurance, are not binding on the Government to create any estoppel.[60] Decree holder *A* himself asked the executing court to secure permission of competent authority for sale of property since judgement debtor *B* belonged to Scheduled Tribe. It was held that *A* could not be permitted to dispute that *B* did not belong to Scheduled Tribe and therefore permission of competent authority was not needed.[61] Where the defendants had been receiving deficit grant from the Government on the representation that a certain amount had to be paid on account of house rent for the school building, it hardly lies in the mouth of the defendants to assert that there is no liability to pay rent for the school building.[62]

Where there was provision for automatic absorption of the employees to S-3 pay scale but an employee insisted for his absorption to the higher pay scale of S-4, hence he was kept out of the scheme of absorption to which he made no objection and enjoyed certain benefits out of his exclusion, an inference could be drawn that by his conduct he had "opted out" of the scheme and was estopped to insist for absorption subsequently.[63] In a case an industrial unit was seized and sold by a Corporation under the A.P. State Financial Corporation Act. The respondent industrial unit raised the plea of absence of notice and opportunity and non-communication of the Corporation's decision for the first time in the writ petition before the H.C. Whereas after the sale, a certificate was issued by a Bank on the request of the respondent regarding its loan amount outstanding to the Bank. The said certificate made it clear that it wanted that the balance amount remaining after adjusting the dues to the Corporation should go in the discharge of its dues to the Bank and the Corporation paid the amount covered by the certificate to the Bank out of the balance of sale proceeds. It was held that the respondent's conduct estopped it from questioning the sale.[64] In a case an employee, having been convicted under the I.P.C. was removed from service. After undergoing imprisonment he appealed to the appellate authority which reduced his punishment of removal from service to lower pay scale, denying back wages which he accepted and joined duty. He was estopped subsequently from filing a suit for declaration that his removal from service, reduction in rank and denial of back wages was illegal.[65] In a proceeding challenging the grant of stage-carriage permit, the party failed to raise the ground of improper constitution of State Transport Authority before the tribunal, she was debarred by her conduct to raise it in the writ petition.[66] Where in a case of *ex parte* order of eviction against the tenant, the tenant applied under Section 144, C.P.C. for restoration of possession which having been allowed, he applied for an order for payment of compensation under the same section for the period of dispossession, it was held that the tenant could

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53. *Li Tse Shi* v. *Pong Tsoi Ching*, AIR 1935 PC 208.
54. *Harchand Singh* v. *Moninder Kaur*, AIR 1987 P&H 138.
55. *Rahaman Bhan* v. *State of Orissa*, AIR 1989 Ori 233 (DB).
56. *Govindsa Marotisa* v. *Ismail*, AIR 1950 Nag 22.
57. *P.K.A.B. Co-op. Society* v. *Govt. of Palestine*, AIR 1948 PC 207.
58. *Bhagirath* v. *Haffizuddin*, 4 Cal WN 679; *Dayamoyi* v. *Ananda*, 18 CWN 971 (FB); *Chandra* v. *Shaik Alla*, 24 Cal WN (FB).
59. *Great Indian Peninsula Railway Co.* v. *Hanmandas Ramkison*, ILR (1889) 14 Bom 57.
60. *N.C. Singhal* v. *Union of India*, AIR 1980 SC 1255.
61. *Raghunath Pradhani* v. *Damodra Mahapatra*, AIR 1978 SC 1820.
62. *Management Committee, T.K. Ghosh's Academy* v. *T.C. Palit*, AIR 1974 SC 1495 : (1974) 3 SCR 872. **See also** *Tata Iron & Steel Co. Ltd.* v. *Union of India*, AIR 2000 SC 3706 (paras 22 and 23).
63. *Indian Council of Agricultural Research* v. *A.N. Lahiri*, AIR 1997 SC 2259.
64. *A.P. State Financial Corporation* v. *Vajra Chemicals*, AIR 1997 SC 3059.
65. *State of Punjab* v. *Krishan Niwas*, AIR 1997 SC 2349.
66. *Sushila Chand* v. *State Transport Authority, Orissa*, AIR 1999 Ori 1 (para 13).

have included the claim for compensation in the application for restitution itself, he could not apply afresh as he was estopped by his own conduct. He could not vex a man twice for the same cause of action.[67] Where the Govt. granted affiliation to a college for a certain period and the college accepted the benefit, it could not subsequently raise objection against the said grant.[68] Where a party willingly and voluntarily entered into a mining contract within time limit of six months and worked and derived benefits thereunder, it cannot turn round and say that the said contract enured for twenty years as per Rules.[69] Where in a sale of land by a muslim father, his son himself attested the sale-deed without any objection though it was against his interest, he was estopped from challenging the sale subsequently.[70]

Under the Assam Panchayat Act (XXIV of 1959), Section 3(1) and (2), a Gaon Sabha created by State Government recommended creation of another Gaon Sabha out of its area. The Gaon Sabha was held estopped from challenging the creation thereof by the State Government.[71]

High Court would be loathesome to exercise its discretionary power to interfere at the instance of a party whose conduct is not free from blemish or who has either acquiesced or been a privy to the mischief sought to be remedied.[72]

Under the ordinary law of master and servant, once an employer has condoned any misconduct attributed to an employee, which would have otherwise justified his dismissal or punishment, the employer cannot after such condonation go back upon his election to condone and assert a right to punish the servant. This principle however does not apply where an employee is governed by statutory rules, and under the law, the employer is required to consider the case of an employee for promotion against whom a preliminary enquiry is pending. The promotion so made would not amount to condonation of misconduct which is the subject-matter of inquiry.[73] Where the petitioner himself participated in the election of the Assembly Speaker and thereafter took part in the Assembly proceedings for about six months, he was estopped to challenge the said election.[74] Where the last date for filing nomination papers was altered to a later date and the petitioners filed their nomination papers after the original date and contested the election but were unsuccessful, they cannot, turn round and contend that those who filed their nomination papers after the original date had no right to contest the election.[75]

Statement at the time of mutation could not be regarded as a case of reliquishment of ones rights. Nor could the person be estopped by his conduct from putting forward any legal plea questioning the mutation.[76] When an appeal was filed against direction for payment of decretal amount in instalments in money suit without filing a copy of decree and was withdrawn immediately after filing a subsequent appeal against decree on merits, it was held to be not barred due to earlier appeal, as the appellant was not estopped by conduct from filing the subsequent appeal. See Civil P.C. (1908) S. 2(2)[77]

11. DECLARATION—RECITAL IN A DEED

A recital in a deed or other instrument is in some cases conclusive, and in all cases evidence as against the parties who make it, and it is of more or less weight or more or less conclusive against them according to circumstances. It is a statement deliberately made by those parties, which, like any other statement, is always evidence against the persons who make it. But it is no more evidence as against third

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67. *Shakuntala Bai Sangewar* v. *Gopi Chand Gupta*, 1999 AIHC 2860 (para 12) (MP).
68. *Managing Trustee, Rajkot* v. *State of Gujarat*, AIR 1998 Guj 161 (paras 16 and 17).
69. *Navayuga Exports Ltd.* v. *A.P. Mineral Development Corporation*, AIR 1998 AP 391 (para 8), **following** *State of Orissa* v. *Narain Prasad*, AIR 1997 SC 1493 : (1996) 5 SCC 740 and *Har Shankar* v. *Dy. Excise and Taxation Commissioner*, AIR 1975 SC 1121 : (1975) 1 SCC 737.
70. *Mahboob Sahab* v. *Syed Ismail*, AIR 1995 SC 1205 (para 7).
71. *Premnath Das* v. *State of Assam*, AIR 1969 Assam 61.
72. *G.C. Prabhuswamy* v. *Special Deputy Commissioner, Tumkur*, AIR 1997 Kant 253.
73. *State of M.P.* v. *R.N. Mishra*, AIR 1997 SC 3548, **distinguishing** *Lal Audhraj Singh* v. *State of M.P.*, AIR 1967 MP 284
74. *A. Elumalai* v. *Administrator-cum-Lt. Governor of Pondicherry*, AIR 2001 Mad 265 (para 36).
75. *Ravi Kiran Jain* v. *Bar Council U.P.*, AIR 1975 All 190.
76. *Niamat Singh* v. *Darbari*, AIR 1956 Punj 230; **See also** *Badrinarain* v. *Bageshwari Prasad*, AIR 1951 Pat 274
77. *M. Ramnarain (P) Ltd.* v. *State Trading Corpn. of India Ltd.*, AIR 1983 SC 786.

persons than any other statement would be.[78] A recital in a deed or other instrument is in some cases evidence against the party who makes it to attract estoppel but it is not evidence against other persons.[79] Where a deed describes that the land was of a particular category and the parties dealt with on that basis, it is not open to the parties to resile from that position.[80] Where the executant mentioned in the document that he was the sole owner of the property and that he was entitled to execute the document, it is not open to him to resile from the document and say that he was not entitled to execute the same.[81] Sale deed of *abadi* site contained an stipulation that the vendor was not responsible for obtaining consent of the landlord to the transfer and that vendee was responsible for the same. The stipulation did not in any way amount to an admission that the site was not liable to be sold without the consent of the landlord or that he had a right to recover possession of the site and that the vendee was not estopped from asserting his ownership to *abadi* site.[82] Under the Bengal Tenancy Act as well as the *Kobala* under which a stranger purchased the holding, it was described as an occupancy holding. The occupying tenant sought pre-emption of land. It was held that the purchaser was estopped from challenging the right to pre-emption of the occupancy tenant.[83]

Where the recital in a deed is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But where it is intended to be a statement of one party only the estoppel is confined to that party—when in a deed of sale, the vendors make unilateral statement that the vendors are *potinamdars* of the property transferred, the vendees are not bound by it and they are not estopped from denying that fact.[84] Where the vendor receives consideration and delivers possession of property without executing the sale deed, he is estopped from repudiating the fiduciary obligation arising out of contract after a long lapse of time.[85] Where a person settles a residential colony on his land and sells plots on the representation that a certain land marked as park in the plan would be used as such by them, he is estopped from claiming the land subsequently as his private land.[86]

Maps annexed to a sale deed ought not to be deemed part of deeds.[87]

12. FUTURE PROMISE

To create an estoppel there must be a representation by means of a declaration, act or omission that a thing is true, *i.e.*, that the representation is as to some state of facts alleged to be at the time actually in existence. If the representation relates to a promise *de futuro*, it can be binding not as an estoppel but as a contract.[88] A mere promise to do something in future will not create an estoppel.[89] There is a clear distinction between a representation of an existing fact and a representation that something will be done in future. The former may, if it amounts to a representation as to some fact alleged at the time to be actually in existence, raise an estoppel, if another person alters his position relying upon that representation. A representation that something will be done in the future may result in a contract if another person to whom it is addressed acts upon it.[90] Under Section 115 estoppel could be created not merely by an act or omission but also by declaration or representation which must necessarily be of existing fact, not of promise to do something in future which might or might not be enforceable in contract.[91]

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78. *Brajeshwara Peshakar* v. *Budhanuddi*, ILR (1880) 6 Cal 268; *Tehilram Girdharidas* v. *Kashibai*, (1908) 10 Bom LR 403 : ILR 33 Bom 53.
79. *Narayana* v. *Kanniammal*, 1953 Tra Co 417.
80. *Narayan* v. *Kamnammal*, AIR 1973 Mad 471.
81. *Lakshmi* v. *Kaladevi*, AIR 1977 All 509.
82. *Vithal Singh* v. *Binji Bai*, AIR 1951 Nag 454.
83. *Chaitanya Charan Nayak* v. *Manik Chandra Nandy*, AIR 1972 Cal 520.
84. *Dattatraya Prahlad* v. *Basawanappa Chanabasappa*, ILR 1960 Mys 1092.
85. *Ghulam Qadir* v. *Ghulam Hussain*, AIR 1973 J&K 11 (FB).
86. *Nrimal Kumar* v. *Champabala*, AIR 1971 Cal 407.
87. *Shamlal Batra* v. *B.N. Patel*, AIR 1973 SC 8162.
88. *Jethabhai* v. *Nathabhai*, (1904) 28 Bom 399, 407 : 6 Bom LR 428; *R. Carnac* v. *New Mofussil Company*, (1901) 26 Bom 54 : 3 Bom LR 846; *Parshottam* v. *Secretary of State*, (1937) 39 Bom LR 1257.
89. *Ma Pyu* v. *Maung Po Chet*, (1916) 2 UBR (1914-1916) 148.
90. *Century Spg & Mfg Co* v. *Ulhasnagar Municiple Council*, AIR 1971 SC 1021; *Seth Safuaram* v. *Union of India*, (1968) 2 SCWR 335; *State of Madras* v. *Madras Electric Tramway*, 1957 Mad 169.
91. *Balapur Co. Ltd.* v. *State of Maharashtra*, ILR 1971 Bom 89; *Jethabai* v. *Nathabai*, ILR 28 Bom 399; **See also** *Dawson's Bank Ltd* v. *Nippon M.K. Kaisha*, 39 Cal WN 657; *White-church* v. *Cavanagh*, 1902 AC 117; *Kelson* v.

Where an employee on termination of his service passes a receipt saying that he had no further claim against his employer and it is found that the receipt was executed without reference to bonus which was not, and could not even then have been, in the contemplation of both parties it does not constitute an estoppel against the employee's subsequent demand for the bonus declared afterwards in respect of the period during which he was in service.[92]

13. INTENTIONALLY CAUSES OR PERMITS

A person who, by his declaration, act or omission, had caused another to believe a thing to be true and to act upon that belief, must be held to have done so 'intentionally' if a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it.[93] At times even an innocent or mistaken representation may operate as an estoppel.[94]

It is not essential that the person making the representation which induces another to act must be influenced by a fraudulent intention. A fraudulent intention is not necessary to create an estoppel. The determining element is not the motive with which the representation has been made, nor the state of knowledge of the party making it, but the effect of the representation as having caused another to act on the faith of it.[95] The Allahabad High Court has held that the word intentionally does not mean that the conduct of the person making the representation should have been fraudulent or that it should not have been made under a mistake or misapprehension. The motive or state of knowledge of the representor is immaterial. The law only considers the position of the person to whom the representation was made.[96] The section "does not make it a condition of estoppel resulting that the person who by his declaration or act had induced the belief on which another has acted was either committing or seeking to commit a fraud, or that he was acting with a full knowledge of the circumstances, and under no mistake or misapprehension...What the law and the Indian statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss or injury of the person who acted on it." If the person who made the statement did so without full knowledge, or under error, it may, in the result, be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do.[97]

"An estoppel does not in itself give a cause of action; it prevents a person from denying a certain state of facts. One ground of estoppel is where a man makes a fraudulent misrepresentation and another man acts upon it to his detriment. Another may be where a man makes a false statement negligently, though without fraud, and another person acts upon it. And there may be circumstances under which, where a misrepresentation is made without fraud and without negligence, there may be an estoppel."[98] There may be statements made, which have induced another party to do that from which otherwise he would have abstained, which cannot properly be characterised as misrepresentation, but which amount to estoppel.[99]

Imperial Tobacco Co., (1957) 2 All ER 343; *Amulya* v. *Tarini*, ILR 42 Cal 254; **relying on** *Citizen's Bank* v. *Bank of N.O.*, (1874) LR 6 HL 352, 360.

92. *William Goodacre* v. *Mathan*, AIR 1957 Ker 16.
93. *Sarat Chunder Dey* v. *Gopal Chunder Laha*, (1892) 19 IA 203, 219 : ILR 20 Cal 296, 314, **quoted in** *Niharbala Debi* v. *Shasdhar Ray Chaudhuri*, ILR (1930) 58 Cal 358, 364.
94. *Sarat* v. *Gopal*, ILR 20 Cal 296; *Vagliano* v. *Bank of England*, 1891 AC 197.
95. *Cairncross* v. *Lorimer*, (1860) 3 Macq. HLC 827; *Jagon Bai* v. *Ram Khichaven*, 1986 MP 106; *Geetha Mishra* v. *Utkal University*, AIR 1971 Ori. 276.
96. *Harbans Lal* v. *Div. Supdt., Central Rly.*, AIR 1960 All 164; *Sheonarayan* v. *Jageshwar Kuer*, AIR 1950 Pat 9.
97. *Sarat Chunder Dey* v. *Gopal Chunder Laha*, (1892) 19 IA 203, 215 : ILR 20 Cal 296, 311, **overruling** *Ganga Sahai* v. *Hira Singh*, (1880) 2 All 809 (FB); *Vishnu* v. *Krishnan*, ILR (1883) 7 Mad 3 : (FB); *Assurabai* v. *Haribai*, ILR (1943) Kar 227.
98. Per LORD ESHER, M.R., in *Seton* v. *Lafone*, (1887) 19 QBD 68, 70.
99. *Sarat Chunder Dey* v. *Gopal Chunder Laha*, (1892) 19 IA 203 : ILR 20 Cal 296.

The word 'caused...person to believe a thing to be true' refer to the belief in a fact and not in proposition of law.[1] "Believe a thing to be true", *i.e.*, believe a fact to be true. The word 'thing' means fact.[2] It must be found that the defendant by his act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief. It is not sufficient to say that it may well be doubted whether the plaintiff would have acted in the way he did but for the way in which the defendant had acted. It must be found that the plaintiff would not have acted as he did.[3] If a man, either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct.[4] The petitioner represented that he wanted to hold ice shows for a limited duration. The first round of shows in the various cities of India was over. The Reserve Bank was not estopped from refusing further permission. There was no representation that they would be permitted till their foreign exchange was exhausted.[5]

14. NO ESTOPPEL WHEN THE OTHER PERSON KNOWS THE REAL FACTS

The section does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estopped where the truth of the matter is known to both parties.[6] Where the defendant knew that the buildings in dispute did not belong to him, but had been sold to the plaintiff, and, in spite of that fact, he chose of his own accord to incur expenditure by repairing these buildings, it was held that he could not raise any plea of estoppel.[7] A party relying upon this section has to establish not only that the opposite party had made a ertain declaration, but that the said declaration had been believed and had been acted upon and that it was not reasonably possible for the said party to know the true state of affairs by pursuing inquiries reasonably and with diligence. Where truth is accessible to a party, the plea of estoppel upon representation fails.[8] If a person is aware of the state of affairs or had means of knowledge there can be no estoppel.[9] Where a person makes a representation in a mistaken view of a fact and the person to whom such representation is made, knows the true state of facts, there is no estoppel. The person having knowledge of facts cannot take advantage of the principle of estoppel.[10]

If both sides have laboured under mistake, however *bona fide* or genuine it may be, the plea of estoppel is not available. Where, however, the mistake is within the knowledge of only one of the parties and the other on the basis representation acts and shifts his position to his prejudice, estoppel is certainly available.[11] No question of estoppel can ever arise where both the parties are labouring under a mistake

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1. *Rajnarain Bose* v. *Universal Life Assurance Co.*, ILR (1881) 7 Cal 594.
2. *Vishnu* v. *Krishnan*, ILR (1883) 7 Mad 3 (FB); *Sarat Chunder Dey* v. *Gopal Chunder Laha*, (1892) 19 IA 203 : ILR 20 Cal 296; *Tek Chand* v. *Mussammat Gopal Devi*, (1912) PR No. 46 of 1212 (Civil).
3. *Narsingdas* v. *Rahimanbai*, ILR (1904) 28 Bom 440 : 6 Bom LR 440; *Jhinguri Tewari* v. *Durga*, ILR (1885) 7 All 878. (FB); *Hem Nolini* v. *Isolyne Sarojbashini*, AIR 1962 SC 1471.
4. *Union of India* v. *K.P. Mandal*, AIR 1958 Cal 415.
5. *Arun Kumar* v. *R.B.I.* AIR 1981 Del 314.
6. *Hanapa* v. *Narsapa*, ILR (1898) 28 Bom 406; *Mohori Bibee* v. *Dharmodas Ghose*, (1903) 30 IA 114 : 5 Bom LR 421 : ILR 30 Cal 539; *Ranchodlal* v. *Secretary of State*, (1910) 13 Bom LR 92 : ILR 35 Bom 182; *Jacks & Co* v. *Joosab Mohomed*, ILR (1923) 48 Bom 38 : 25 Bom LR 1170.
7. *Nawab Zakia Begam* v. *Lucknow Improvement Trust*, ILR (1937) 13 Luck 192; *Rai Sunil Kumar* v. *Thakur Singh*, AIR 1984 Pat 80, where the truth of the matter was known to both parties.
8. *Muhammad Shafi* v. *Muhammad Said*, ILR (1929) 52 All 248 : AIR 1930 All 847; *Sarat Chunder Dey* v. *Gopal Chunder Laha*, (1892) 19 IA 203 : ILR 20 Cal 296.
9. *Jumnadas* v. *Radhathai*, (1969) 2 SCWR 271 : 1969 UJ 458. Both parties aware of legal impediments in adoption *Maddanappa* v. *Chandramma*, AIR 1965 SC 1812; *Parmanand* v. *Champalal*, AIR 1956 All 225, *Allah Rabbul* v. *Hasnain Ahmad*, 1952 All 1011; *Jamnadas* v. *Radhabu Arora*, 1963 HP 348, *Union of India* v. *J.J. Patel & Co.*, AIR 1960 Pat 30; *Katihar Jute Mills Ltd* v. *Calcutta Match Works (India) Ltd.*, AIR 1958 Pat 138; *Ishar Singh* v. *Gajadhar Prasad*, AIR 1957 Pat 174; *Shiva Dutt* v. *Kedarnath*, AIR 1972 HP 20; *Commr. of HRE* v. *Batsa Patsa*, AIR 1952 Ori 152.
10. *Jai Prakash* v. *B.S.E. Board*, AIR 1976 Pat 301.
11. *Naba Kishore* v. *Utkal University*, AIR 1978 Ori. 65.

of law.[12] When both parties were under a common error as per the erroneous advice of the lawyers in regard to the construction of a Will, and not by the representation of the beneficiary under the Will, the beneficiary was not estopped from claiming under the Will.[13]

15. AND TO ACT UPON SUCH BELIEF

A person cannot invoke the doctrine of estoppel unless he proves that he has been induced to change his position to his detriment by relying upon any declaration, act or omission of the person against whom the doctrine is invoked.[14] The person setting up an estoppel against another must show that his position was altered by reason of the representation or conduct of the latter, otherwise even the general principle of estoppel cannot be invoked by him.[15] Estoppel can arise only if a party to a proceeding has altered his position on the faith of a representation or promise made by another.[16]

Where on the basis of promise of grant of loan by certain financial institutions, an entrepreneur invested a huge amount from the sanctioned loan and the private resources in constructing an hotel complex but payment of the balance of the promised loan was stopped before the construction was completed, the principle of promissory estoppel was attracted as the entrepreneur had altered his position to his disadvantage.[17] Where on the basis of assurances and promises given by the State Govt. under its scheme, the entrepreneur set the cement factory and took other necessary steps, the Govt. cannot go back on their assurances and promises.[18] Where the Govt. under a scheme promised to grant subsidy to the industrial units in industrially backward areas on investment in goods-carriage and the petitioner in persuance of that scheme purchased goods-carriage for transport of its goods when the said scheme was in force, the Govt. was estopped subsequently to withdraw the subsidy with retrospective effect.[19] Where the Municipal Board communicated its offer for the allotment of a plot to the petitioner who deposited a large sum of money with the Board and spent money for obtaining water and electrical connections and construction was put up on the said plot as per plan sanctioned by the Board, the Board could not be allowed to resile from its promise and it was directed to execute a registered *patta* (lease) in favour of the petitioner.[20]

A person who has not suffered detriment by acting upon the representation of the other parties cannot invoke the doctrine of estoppel.[21] Where there is no evidence of any detriment to the appellants as a consequence of the silence of the respondents or altering of their position in any way and there was no conduct amounting to representation intended to induce a cause of conduct on the part of the appellants, there is no question of estoppel.[22]

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12. *Sales Tax Officer* v. *Kanhaya Lal*, AIR 1959 SC 135; *Kochunni* v. *Kuttanunni*, AIR 1948 PC 47; *People's Insurance Co.* v. *Sardul Singh*, AIR 1962 Punj 543; *Shakerlal* v. *Narendra*, AIR 1967 All 405; *Ranchodlal* v. *Secretary of State*, ILR 35 Bom 182; **following** *Honappa* v. *Narsappa*, ILR 23 Bom 406; *Swaminadha Aiyar* v. *Swanadha Aiyar*, AIR 1927 Mad 458; *Srinivasan* v. *Sundaramamurthi*, ILR (1972) 1 Mad 377; *Bansidhar* v. *Hazari Ram*, 1933 Pat 210; *Lachman Singh* v. *Collector*, AIR 1933 All 641; *Kanik* v. *Medni*, AIR 1942 Pat 317; *Firm Lorind Chand* v. *Punjab National Bank*, AIR 1940 Lah 254; *Mohori Bibee* v. *Dharmodas Ghosh*, ILR 30 Cal 539; *Bechelal* v. *Hem Singh*, AIR 1953 All 485; *Mutsadilal* v. *Union of India*, AIR 1955 Hyd 61.
13. *Vertannes* v. *Robinson*, AIR 1927 PC 151.
14. *Kazi Syed Karimuddin* v. *Meherunisa Begum*, ILR (1947) Nag 341 : AIR 1948 Nag 19; *Maddanappa* v. *Chandramma*, AIR 1965 SC 1812; *Mahindra & Mahindra* v. *Union of India*, AIR 1979 SC 798 : (1979) 2 SCR 1038; *Hem Nolini* v. *Isolyne Sarojbashini*, AIR 1962 SC 1471 : 1962 Supp (3) SCR 294.
15. *Maddanappa* v. *Chandramma*, AIR 1965 SC 1812.
16. *Mahindra & Mahindra Ltd.* v. *Union of India*, AIR 1979 SC 798.
17. *Kranti Hotels (Pvt) Ltd.* v. *State of J.&K.*, AIR 1997 J&K 91. **See also** *Nath Brothers Exim International Ltd.* v. *Union of India*, AIR 1995 Del 280 (paras 14, 17 and 18); *Sheelawanti* v. *D.D.A (FB)*, AIR 1995 Del 212 (paras 40 and 41).
18. *Vinay Cements Ltd* v. *State of Assam*, AIR 1997 Gau 34. Following cases were referred : *M.P. Sugar Mills* v. *State of U.P.*, AIR 1979 SC 621; *Union of India* v. *Godfrey Philips (India) Ltd.*, AIR 1986 SC 506; *Bakul Oil Industries* v. *State of Gujarat*, (1987) 1 SCC 31 : AIR 1987 142 and *Pine Chemicals Ltd.* v. *Assessing Authority*, (1992) 2 SCC 683 : 1992 AIR SCW 702.
19. *Arya Durga Industries* v. *G.M. Dist. Industries Centre, Kasargod*, AIR 1998 Ker 311 (para 9). **following** *Garments International Pvt. Ltd.* v. *Union of India*, AIR 1991 Kant 52 and *Old Village Industries Ltd.* v. *Union of India*, AIR 1993 Del 321.
20. *Kalu Chand* v. *State*, AIR 1998 Raj 33, at p. 38.
21. *George A. Leslie* v. *State*, AIR 1970 Ker 21 (FB); *Devassy* v. *Sankarnarayan*, AIR 1952 TC 191. **See also** *Chaitnya Charan Das* v. *State of West Bengal*, AIR 1995 Cal 336 (para 127).
22. *Imperial Bank of Canada* v. *Mary Victoria*, AIR 1936 PC 193.

Credit given in a pass-book binds the banker, if on the faith of such credit the customer has altered his position, as by drawing on the credit, etc., for by entering the sums to the customer's credit, they lead him to suppose that they have received them on his account. When, however, there has been no such alteration, the banker is allowed to show that the entries were made by mistake; for the pass-book is only *prima facie* evidence against him.[23]

In 1906 the Government of Bombay compulsorily acquired certain land belonging to the defendant, and as a result of proceedings under the Land Acquisition Act paid to the defendant in 1912 the amount of compensation awarded by the High Court. In 1924, Government, discovering that the land was of their ownership, sued to recover the money from the defendant, as money paid to him under a mistake. It was held that they were estopped in view of the position taken up by them in the land acquisition proceedings and the consequent alteration in the position of the defendant.[24]

16. REPRESENTATION MUST BE CLEAR AND UNAMBIGUOUS

The representation which is the basis for the rule must be clear and unambiguous and not indefinite, upon which the party relying on it, is said to have, in good faith and in belief of it, acted.[25] To create an estoppel against a party his declaration, act or omission must be of an unequivocal and unambiguous character[26]. An estoppel to have any judicial value, must be clear and non-ambiguous; it must also be free, voluntary and without any artifice.[27]

Where there is no representation, principle of estoppel would not apply.[28]

17. ESTOPPEL BY SILENCE OR ACQUIESCENCE

Whenever there is a duty owing by one person towards another to speak or act which he has failed to perform and the other party has been led by such silence to change his position, such silence would operate as estoppel against the former. But where there is no duty to speak, no estoppel can arise.[29]

When silence is of such a character and under such circumstances that it would be fraud upon the other party, for the party which has kept silence to deny what his silence has induced, it will operate as an estoppel.[30] A man is bound to speak out in certain cases, and his very silence becomes an expression as if he has openly consented to what is said or done and had become a party to the transaction. The ostensible owner sold certain land and his son, the real owner, remained silent. The acquiescence resulted in an estoppel.[31] A mortgagee who caused the mortgaged property to be sold in execution of a decree other than decree obtained upon his mortgage, without notifying to intending purchasers the existence of his mortgage line, was held to be estopped for ever from setting up that lien against the title of a *bona fide* purchaser[32] and so is estopped the party claiming possession on a land over which he, despite his knowledge, allowed the construction of a factory by the opposite party without making any objection.[33] A positive or active declaration as also an act or omission can constitute the basis for a plea of estoppel. An estoppel may arise from silence as well as words. However, to constitute an 'estoppel by silence' or 'acquiescence' it must appear that the party to be estopped must be bound in equity and good conscience

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23. *Mowji* v. *National Bank of India*, (1900) 2 Bom LR 1041 : ILR 25 Bom 499.
24. *Secretary of State* v. *Tatyasaheb Holkar*, (1931) Bom LR 791 : ILR 56 Bom 501; *Govind Vaman* v. *Sukharam Ramchandra*, ILR (1878) 3 Bom 42.
25. *B. Coleman & Co.* v. *P.P. Das Gupta*, AIR 1970 SC 426.
26. *Gajanan* v. *Nilo*, (1904) 6 Bom LR 864; *Gaura Dei Musammat* v. *Raja Mohammad Yasin Ali Khan*, ILR (1934) 10 Luck 361.
27. *Mowji* v. *National Bank of India*, (1900) 2 Bom LR 1041 : ILR 25 Bom 499; *Rani Mewa Kuwari* v. *Rani Hulas Kuwari*, (1874) 11A 157.
28. *Raghu Forwarding Agency* v. *Union of India*, AIR 2000 Gau 27 (para 10).
29. *Jones Brothers (Holloway) Ltd.* v. *Woodhouse*, (1923) 2 KB 117; *Delhi University* v. *Ashok Kumar*, AIR 1968 Del 131; *Union of India* v. *Wattkins Mayor & Co.*, AIR 1966 SC 275; *Kalloo Gaji* v. *Rishabh Kumar*, AIR 1951 Nag 347; *P.J. Joseph* v. *Assist Excise Commissioner*, AIR 1953 TC 146; *Central Banking Corp.* v. *Barnard*, ILR (1972) 1 Rer 576; *Parbati Devi* v. *Kasmirilal*, AIR 1959 Cal 69.
30. *Jokhumull* v. *Saroda Prosad Dey*, (1908) 7 CLJ 604; *Dhanpat Rai* v. *Gurandittа Mal*, ILR (1921) 2 Lah 258.
31. *Syed Abdul Khader* v. *Rami Reddy*, AIR 1979 SC 553; *Sailala* v. *Ngurtaiveli*, AIR 1980 Gau 70.
32. *Muhammad Hamid-ud-din* v. *Shib Sahai*, ILR (1899) 21 All 309; *Agarchand Gumanchand* v. *Rakhma Hanmant*, ILR (1888) 12 Bom 678; *R M A R L. Chettiar Firm* v. *Maung Po Kyaw*, ILR (1935) 13 Ran 346.
33. *New Bharat Chemical Industry* v. *Om Parkash*, 1998 AIHC 614 (para 48) (P&H).

to speak and that party claiming estoppel relied upon such silence or acquiescence and was misled thereby to change his position to his prejudice. Where a company allowed the other company, a sister concern, to manufacture the same products under the same registered trade mark for a long period, the doctrine of acquiescence and honest and concurrent user was attracted.[34] The students acted upon to their detriment when they continued their studies in the colleges in the belief that their admissions had been approved by the University and the University is estopped by keeping silence when it did not reject their admission at an early stage.[35] On the facts, the director of the company who was a party to the resolution allotting the shares in order to comply with the requirements of Section 277(1) of the Companies Act, dealt with the shares on the footing that allottees were the holders of the shares with a clear knowledge of the circumstances on which he might have founded his present objection. He cannot be heard to say, that he was interested in the allotment and could not vote. He would be estopped from contending the allotment is invalid.[36] Appellant questioned validity of certain rules. Appellant acquiesced to the rules by applying for the post of Village Accountant and took chance on being elected. Constitutionality of rules cannot be questioned by him.[37] A party who acquiesces to arbitration proceedings by participating in it for a long time, cannot be permitted to contend that the matter is legally incapable of being referred to arbitration.[38] Where the landlord has admitted the sub-tenancy for four years with his knowledge and the rent has been paid by the sub-tenant in the presence of the landlord and on several occasions passed on to him by the tenant, a presumption of acquiescence will be strengthened by the fact that the landlord offered no explanation why he had waited for four years before filing the suit for ejectment on the ground of illegal sub-letting.[39] The petitioner participated in the election of the managing committee of a school. The managing committee, after it was constituted, selected another as Headmaster. The petitioner is esttoped from challenging the appointment on the ground that the committee was not properly constituted as he had acquiesced in the election of the committee.[40] The candidate, participating in the selection without objection, is estopped from challenging the constitution of the Selection Committee and the procedure adopted by it.[41] Participation by the landholders in the proceedings of land acquisition at successive stages would bring in estoppel against them to challenge it subsequently on the ground available to them earlier but had been waived by them.[42]

Absence of a specific plea in wife's reply to the notice of second husband to the effect that she was a minor at the time of divorce from her first husband, she is not estopped from raising that plea.[43] Mere inaction against an incorrect settlement entry is not such an act or omission, as will, without more, be sufficient in law to induce or mislead another person to act upon the same and so to act to his prejudice.[44] When no objection to the constitution of the R.T.A., on the ground of bias of one of its members was taken by the petitioner when the R.T.A. considered his renewal application, or when it decided the matter, it was held, that he was not estopped from raising this objection in an application under Arts. 226 and 227 of the Constitution.[45] Where seats were reserved for members of the scheduled caste and there was questioning of election on the ground that the elected candidate was not a member of a scheduled caste as he had ceased to be a Hindu and had become a Buddhist. Where there was failure to object at time of scrutiny of nomination papers, there can be no estoppel to raise an objection in election

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34. *Power Control and Appliances Co.* v. *Sumeet Machines Pvt. Ltd.*, AIR 1993 Mad 120.
35. *Delhi University* v. *Ashok Kumar*, AIR 1968 Del 131.
36. *Narayandas Shereeram Somani* v. *Sangli Bank Ltd.*, (1965) 2 SCJ 379 at 380 : (1965) 3 SCR 777. **See also** *Ghaziabad Development Authority* v. *Sanchar Vihar Sahkari Avas Samiti Ltd.*, AIR 1996 SC 2021 (para 12).
37. *I.L. Honnegouda* v. *State of Karnataka*, AIR 1978 SC 28.
38. *Prasun Roy* v. *Calcutta Metropolitan Development Authority*, AIR 1988 SC 205; **reversing** (1987) 1 Ca LJ 207; *Prince & Co* v. *G.G. in Council*, AIR 1955 Punj 240. **See also** *Rukmini Amma* v. *Kallyani Sulochana*, AIR 1993 SC 1616 (para 22); *Ferro Alloys Corporation Ltd.* v. *A.P.S.E., Board*, AIR 1993 AP 183 (para 20); *Sarbati Devi* v. *Union of India*, AIR 1995 Del 102 (para 3).
39. *Mahabir Singh* v. *Anant Ram*, AIR 1966 All 214.
40. *Jadunandan* v. *Board of Secondary Education*, AIR 1976 Pat 58; *Raghuni Nayak* v. *District Magistrate*, AIR 1959 Pat 7; *Shanmahatma Swamy* v. *C. Gangaiah*, AIR 1994 Kant 303 (para 16); *Siben Kumar Mondal* v. *Hindustan Petroleum Corporation Ltd.*, AIR 1995 Cal 327 (para 48).
41. *Lokender Kumar* v. *District Judge, Bijnor*, 1996 AIHC 5493 (paras 5 and 6) (All). **See also** *Nand Prakash Vohra* v. *State of H.P.*, AIR 2000 HP 65 (para 8).
42. *Estate Officer, Huda* v. *Talari Gangamma*, 1996 AIHC 3629 (para 15) (AP). **See also** *State of Maharashtra* v. *Doburg Lager Breweries Pvt. Ltd.*, 1996 AIHC 4456 (paras 20 and 21) (Bom); *Bhalia Art Service* v. *State of Haryana*, 1996 AIHC 5500 (paras 11 and 13) (P&H).
43. *Sodha* v. *Mansha Ram*, AIR 1971 HP 27.
44. *Hemanta Kumar Mitra* v. *Dulal Chakrawarthi*, ILR (1960) 1 Cal 625.
45. *Sarju Prasad Singh* v. *S.B.R. Transport Authority, Patna*, 1957 Pat 732.

petition. But such failure would consideraly weaken the objection.[46] An excess of statutory power cannot be validated by acquiescence on or by the operation of an estoppel.[47] Illegal renewal of permit and acquiescing in its renewal over a long period of 29 years would not disentitle the authorities to object to its renewal subsequently.[48] The Development Authority does not acquiesce in illegal/unauthorised possession and is entitled to demolish the structure as soon as the interim injunction is vacated or modified.[49] Where the defendant gave evidence that when he came to know the user of his trademark by some other manufacturer, he could not ascertain his name, he did not acquiesce in the user of his trademark by the plaintiff.[50]

Where there was an omission to raise the plea of non-joinder of parties and it was not made subject-matter of an issue nor was it raised in grounds of appeal, it would operate as waiver.[51]

When on one party making a certain other claim, the dispute before the Arbitrator was unilaterally enlarged in spite of the objection by the opposite party who was left with no option but to participate in the proceedings, that did not amount to acquiescence.[52]

18. ACQUIESCENCE IN ILLEGAL OR IRREGULAR PROCEDURE

Question of mode of proof is a question of procedure and is capable of being waived and therefore evidence taken in a previous judicial proceeding can be made admissible in a subsequent proceedings by consent of parties. Relevant evidence can be brought on the record for consideration of the court or the Tribunal without following the regular mode, if parties agree.[53] Even after a person was exonerated by the Criminal Court, he was not given his substantive post, but another post temporarily and he had no other option but to work under the new conditions imposed on him as he could not afford to lose his Government service, the mere fact that he had to work in the new post for about seven days would not, in any way, create any estoppel against him.[54] The court can adopt a procedure to settle the disputes *"extra curus curaie"* provided the parties either consent or acquiesce in the said procedure. When once they consented they cannot turn round and question the proceeding adopted by the Court.[55]

Where a settlement is made outside conciliation proceeding between the employer and the majority union, acceptance of benefits following the settlement even by workmen who were not signatories to it, does not operate as estoppel against minority union raising same demands. Theory of implied agreement by a acquiescence is not attracted in such a case.[56] A breach of covenant in regard to the user of the premises in a continuing breach. If a landlord takes no exception to the changed user but acquisces in the breach, it would not constitute an irrevocable sanction to the changed user at a later period or for all time to come as there is no estoppel against the landlord.[57]

19. ACQUIESCENCE TO JURISDICTION

Consent cannot give jurisdiction.[58]

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46. *Ganpat* v. *Presiding Officer*, AIR 1975 SC 420.

47. *K.R. Shenoy* v. *Udipi Municipality*, AIR 1974 SC 2177 : (1974) 2 SCC 506 : (1974) 2 SCWR 275 : 1974 UJ (SC) 553.

48. *K.S.R.T. Corporation, Bangalore* v. *K.S.T. Appellate Tribunal*, AIR 1995 Kant 103 (para 2), **reversing** WP No. 19296 of 1983, Dt. 24-7-1989 (Kant).

49. *John B. James* v. *Bangalore Development Authority*, 2001 AIHC 837 (paras 79 and 79.1) (Kant).

50. *Uniply Industries Ltd., Chennai* v. *Unicorn Plywood Pvt. Ltd.*, AIR 2001 NOC 49 (Mad) : 2001 CLC 411.

51. *Hansraj* v. *Pyar Chand*, ILR (1957) 7 Raj 87.

52. *Union of India* v. *G.S. Atwal & Co. (Asansole)*, AIR 1996 SC 2965 (paras 9 and 11) **reversing** FMAT No. 1390 of 1991, Dt. 12-2-1992 (Cal).

53. *Kalyan People's Co-op. Bank Ltd.* v. *Dulhan Bibi*, AIR 1966 SC 1072.

54. *Sarasngthem* v. *State of Manipur*, AIR 1956 Mani 34.

55. *Rosily Mathew* v. *Joseph*, AIR 1987 Ker 42.

56. *Tata Chemicals* v. *Workmen, Tata Chemicals*, AIR 1978 SC 828; *Namburmadi Tea Co.* v. *Workmen*, AIR 1969 Assam 39.

57. *K.K. Sarma* v. *K. Venkata Raju*, AIR 1972 AP 335.

58. *Special Dy. Collector* v. *K. Kodanda Rama Charlu*, AIR 1965 AP 25; *Jiwaji Rao Sugar Co.* v. *J.M. Banerji*, AIR 1962 MP 310; *Jagadish Chandra* v. *Prakash Narain*, AIR 1953 VP 51; *Orient Paper Mills* v. *Union of India*, AIR 1979 Cal 114; *Nabir Bhat* v. *Mala Hamza*, AIR 1976 J&K 25.

Where a Small Causes Court decided the suit, although the allegations in the plaint clearly excluded it from its jurisdiction, by Art. 35(ii) of Sch. II of Provisional Small Cause Court Act, it was held that the plaintiff was not estopped from challenging the court's jurisdiction, when the decision goes against him, as acquiescence cannot confer jurisdiction[59] but where the defendant pleaded that only the Small Causes Court had the jurisdiction to decide the suit for possession and not a Civil Court, the plaint was returned to the Small Causes Court, the defendant was estopped from raising the plea that the transferee Court had no jurisdiction.[60] Where the power to decide is delegated by the Commissioner to the Commercial Tax Officer and the assessee does not question, the same earlier, later he cannot challenge the power of the officer on the ground that the Commissioner could not validly delegate the power to the Commercial Tax Officer.[61] Where appellants submit to the jurisdiction of the High Court, they cannot take exception to such jurisdiction.[62] Party acquiescing in proceedings before umpire is precluded from challenging the award for lack of jurisdiction.[63] Where the applicant had not challenged the jurisdiction of the additional Magistrate, he cannot challenge it subsequently in his petition for *certiorari*. If he acquiesced in the jurisdiction in the hope of getting a favourable decision, the doctrine of estoppel should be applied against him.[64] Every Court or quasi-judicial authority has got inherent power to restore the case dismissed by it in default. In any view, the petitioners participated in the proceeding before the Board of Revenue after the restoration of the revision and took chance of success. Now, they could not be allowed to raise any objection as to the jurisdiction.[65] Where a person acquiesces and submits to the jurisdiction of a committee of or an enquiry officer without raising any objection he cannot be allowed to challenge the jurisdiction of the enquiry officer, subsequently in his writ petition.[66] A person who submits to the jurisdiction of an authority is estopped from challenging the jurisdiction thereof.[67]

An estoppel against a party cannot give the court jurisdiction where it has none.[68] There can be no estoppel against a statute and that consent cannot confer jurisdiction.[69]

When premises does not fall vacant the Rent Controller has no jurisdiction to make allotment, under U.P. Temporary Rent Control and Eviction Act, 1947. Allotment can be challenged by a purchaser even though he also had applied for allotment and had submitted to the jurisdiction. Application made in ignorance of his right does not estop him.[70] Where the custodian, under the Administration of Evacuee Property Act (1950), made an order without jurisdiction, petitioner consented to the order and did not take objection to the jurisdiction before the custodian, he is not prevented from challenging his order in writ petition.[71]

Objection regarding territorial jurisdiction does not go to the root of jurisdiction. A judgement debtor is estopped from taking that objection in execution as to the validity of the decree.[72]

Service of notice is a condition precedent for proceedings under Section 21 of U.P. Sales Tax Act. Where notice was served on an unconcerned person but the assessee participated in the proceedings; it was held that as service of notice is a condition precedent for proceeding under Section 21 of the U.P.

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59. *Gopi Krishna* v. *Anil Bose*, AIR 1965 Cal 59.

60. *Narayana Shambhogue* v. *Venkataramana Upadhya*, 2000 AIHC 1300 (para 2) (Kant), **relying on** *Gurumurthappa* v. *Chickmunisamappa*, AIR 1953 Mys 62.

61. *Aswini Kumar* v. *Commercial Tax Officer*, AIR 1958 Cal 289.

62. *Tikaram & Sons* v. *Commissioner of Sales Tax, U.P.*, AIR 1968 SC 1286.

63. *N Chellapan* v. *Kera State 'E' Board*, AIR 1975 SC 230; *New India Assurance Co.* v. *Dalmia I. & S. Ltd.*, 1965 Cal 42; *N C M Singh* v. *Jee Jeebhoy*, AIR 1970 MP 63; *Union of India* v. *K.P Mandal*, AIR 1958 Cal 415; *Union of India* v. *B.M. Sen*, AIR 1963 Cal 456.

64. *Basant Singh*, v. *Janak Singh*, AIR 1954 All 447; *Padmanabhan* v. *Lakshmi Pillai*, AIR 1963 Ker 51.

65. *Chandrika Singh* v. *Addl Member, Board of Revenue, Patna*, AIR 1998 Pat 118 (para 16).

66. *National High School, Madras* v. *Education Tribunal*, AIR 1992 SC 717; *Syed Hassan* v. *State of Mysore*, AIR 1965 Mys 283; *Bengal Coal Co. Ltd.* v. *Chairman, Central Govt. Industrial Tribunal*, 1963 Pat 118; *S. Thamgeo* v. *President D.S.S. & A. Board*, AIR 1968 Mani 68; *Mukund Ram* v. *Registrar Trade Union*, AIR 1962 Pat 338.

67. *Nadia District Bus Owners Association* v. *District Magistrate*, AIR 1969 Cal 458. **See also** *State of U.P* v. *The 14th Additional District Judge, Agra*, 2001 AIHC 3396 (para 4) (All).

68. *Sayed Mohsin* v. *Sayed Amul Hussain*, (1946) 22 Luch. 283; *S.N. Koya* v. *Union Territory of L.M. & A. Island*, AIR 1967 Ker 259.

69. *Uda* v. *Jagdish Narayan*, (1963) Raj 652; *Rukmini Debi* v. *Mihar Bala Sarkar*, AIR 1977 Cal 161.

70. *Lachhman Das* v. *Rent Control & Eviction Officer*, AIR 1953 All 458.

71. *Raghunandanlal* v. *State of Rajasthan*, AIR 1952 Raj 184.

72. *Hiralal* v. *Kali Nath*, AIR 1962 SC 199.

Sales Tax Act, the assessee was not estopped from challenging validity of proceeding for non- service of notice.[73] Where an employee of Wakf Board applied for an appointment in pursuance of the Wakf Board Committee's notification is not estopped from challenging the Committee's decision.[74]

20. STANDINGBY

When A standsby while his right is being infringed by B, the rule of estoppel by acquiescence applies under the following conditions.

(1) B must be mistaken as to his legal rights;

(2) B must expend money or do some act on the faith of his mistaken belief;

(3) A must know his own rights;

(4) A must know of B's mistaken belief; and

(5) A must encourage B in his expenditure of money or other act directly or by abstaining from asserting his legal rights.[75]

To found a plea of estoppel on the doctrine of standingby, it must be affirmatively established that the parties against whom that estoppel is sought to be pleaded were aware of what was being done and consciously stoodby.[76] The limitation on the rule of standingby are that, first, the stranger building on the land must do so supposing it to be his own and secondly, the owner of the land, perceiving his mistake, abstains from setting him right and leaves him to persevere in his error.[77] In a suit for mandatory injunction directing demolition of construction put up by the defendant on suit land, it was held that the plaintiff could have known in time about the construction by the defendant on suit land, had he cared to find out. Principle of estoppel by acquiescence is applicable and the plaintiff was entitled only to a decree for compensation.[78] Where the tenant at will sold his rights together with house and tenure rights and the landlord perused the transfer deeds and recognised the transfer, and mutated the names of the transferees in his *sherists*, and when the transferee built a double storeyed *pucca* house on the land, the landlord did not object to the construction. The landlord is estopped from asserting any title to the land.[79]

Lord CRANWORTH observed: "If a stranger begins to build on my land supposing it to be his and I (the real owner) perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land, on which he has expended money on the supposition that the land was his own. It considers that when I saw the mistake in which he had fallen, it was my duty to be active and to state his adverse title; and that it would dishonest in me to remain willfully passive on such an occasion in order afterwards to profit by the mistake which I might have prevented."[80]

JANKINS. J. commented: "The doctrine involved (In *Ramden's* case) is often treated as one of estoppel, but I doubt whether this is correct, though it may be convenient name to apply. It differs essentially from the doctrine embodied in Section 115, which is not a rule of equity, but is a rule of evidence.....I do not think that it is any objection to that enquiry that the interest the municipality was to have in the land was not originally moulded in a form recognised by the law; that does not prevent us from now imposing such terms as will prevent that which a court of equity would regard as a fraud."[81]

Where there is no mistaken belief as to ownership of the land, still less was any mistaken belief, known to the other side, there is no basis for the application of the equitable doctrine of estoppel.[82] Where a person in possession of land, not in mistaken belief of his rights but in assertion of his right which he correctly believed to be his, builds structure on the land and the person who is entitled to

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73. *Laxmi Narain* v. *Sales Tax Commissioner*, AIR 1980 All 198.
74. *Dilawar Ali* v. *A.P. Muslim Wakf Board*, AIR 1967 AP 291.
75. *Sidde Gowda* v. *Nadakala Sidda*, AIR 1952 Mys. 117.
76. *Gurunadham* v. *Venkata Rao*, AIR 1959 AP 523.
77. *Kaloo Gaji* v. *Rishabkumar*, ILR (1951) Nag 909 : AIR 1951 Nag 347.
78. *Muthuswami Gounder* v. *A. Annamalai*, AIR 1981 Mad 220.
79. *Ambika Devi* v. *Sachita Nandan*, AIR 1960 Pat 289; **following** *Dhanu Pathak* v. *Sona Koeri*, AIR 1936 Pat 417 (S.B.); *Chandrakanta Nath* v. *Amjad Ali*, AIR 1921 Cal 451.
80. *Ramsden* v. *Dyson*, LR 1 App 129, 140 HL.
81. *Municipal Corp. of Bombay* v. *Secretary of State*, 29 Bom 580. **See also** *Bem* v. *Kundal* 21 All 496.
82. *Canadian Pacific Railway Co.* v. *King*, AIR 1932 PC 108.

possession knows of this, the latter is not estopped by acquiescence, from bringing a suit for possession.[83]

Where the leasee holding a lease for a term of ten years with renewal clause, built house on the land leased without consent, the lessor is not estopped from taking *Khas* Possession of lease hold.[84] Where under an oral agreement to grant permanent lease, the defendant took possession and erected structures and the plaintiff encouraged him to do so, it was held that the defendant cannot rely on the doctrine of equitable estoppel by representation.[85]

21. NEGLIGENCE AND ESTOPPEL

In support of a plea of estoppel on the ground of negligence it must be shown that the party against whom the plea is raised owned a duty to the party who raises the plea, or towards the general public of which he is one and that the negligence on which it is based should not be directly or remotely connected with the misleading effect assigned to it but must be proximate or real cause of that result *i.e.*, the negligence which can sustain a plea of estoppel must be in the transaction itself and it should be so connected with the result to which it led that that it is impossible to treat the two separately.[86] Estoppel depends on the existence of some duty; and that is peculiarly so in the case of an omission. In order to succeed on a plea of estoppel it must be shown that there was a neglect of some duty owing to the person led into a particular belief, or to the general public of whom that person is one, and not merely neglect of what would be prudent in respect of the party prejudiced, or even of some duty owing to third persons, with whom those seeking to set up estoppel are not privy. There is a breach of the duty if the party estopped has not used due precautions to aver the risk.[87] In order to create estoppel by negligence mere negligence on the part of the true owner is not enough. Negligence must be of so serious a character as to amount to a breach of duty by the owner to the party defrauded or to the general public of which the party defrauded is one.[88]

Where low amounts were collected as electric consumption charges, it was held that there is no estoppel as it was done by mistake in computation and it does not relieve the customer from his obligation to pay the true amount.[89] A banker is not estopped from claiming refund of excess credit given to the customers account.[90] In a suit for recovery of embezzled amount from bank on ground of plaintiff's forged signature and bank debited plaintiff's account on basis of cheques and advices, it was held that when a Bank was maintainging separate ledger for plaintiff's account and submitting regular statements of account coupled with confirmation slips which were returned duly signed by plaintiff, such confirmation amounted to acknowledgement and plaintiff would be estopped from challenging debits balance made due to his neglect.[91] A sold certain item of property (X) to B and later on executed a mortgage of his property which included that item (X) also. A then sold the mortgaged property to C. In a suit for redemption C raised plea of estoppel against B in allowing the item (X) to be included in the mortgage. C however, had admitted that he knew that B was in possession of the property but that he thought that B was in possession as a possessory mortgagee. He made no further enquiries and did not have a search made in office of the Sub-Registrar to ascertain if there was any other encumbrance regarding that item, or any other transaction evidenced by a registered document. It was held that C's omission in nor having made such enquiries must be held to be wilful, or as grossly negligent, and in that

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83. *Sarjug Devi* v. *Dulhin Kishori*, AIR 1960 Pat 474.
84. *Tarak Chandra* v. *Jagdish Chandra*, AIR 1954 Pat 41; *Ramachndra Dattatraya* v. *Pushpabai Manohar Sheth*, AIR 1990 Bom 182.
85. *Ariff* v. *Jadunath*, AIR 1931 PC 79; *Subodh* v. *Bhagwandas*, 50 Cal WN 851; **See also** *Sudhir Kumar* v. *Direndra Nath*, AIR 1957 Cal 625; (oral lease reserving yearly rent).
86. *New Marine Coal Co* v. *Union of India*, AIR 1964 SC 152; *Ritz Private Ltd* v. *A P S E B*, ILR 1974 AP 1056; *Purushottam Balvant Gole* v. *Secretary of State*, AIR 1938 Bom 93; *Canara Bank* v. *Canara Sales Corp*, *Mangalore*, ILR 1973 Kant 1030; *Parbati Debi* v. *Lachminarayan*, AIR 1957 Cal 551.
87. *Mercantile Bank of India Ltd* v. *Central Bank of India*, (1937) 40 Bom LR 713 : 65 IA 75 : ILR (1938) Mad 360 : AIR 1938 PC 52.
88. *Prabati Debi* v. *Lachminarayan*, AIR 1957 Cal 551; **relying on** *Jones Ltd.* v. *Waring & Gillow Ltd.*, 1926 AC 670; *Farguharson and Co.* v. *C. King & Co.*, 1902 AC 325; *Mercantile Bank of India Limited* v. *Central Bank of India Ltd.*, AIR 1938 PC 52.
89. *Maritime Electric Co* v. *General Diaries*, 1937 AC 619; *Corporation of Calcutta* v. *Sashi*, 50 Cal WN 263.
90. *Oakley Bowden & Co.* v. *Indian Bank*, AIR 1964 Mad 202.
91. *P. Roy Co.* v. *Punjab National Bank*, ILR (1980) 2 Del 1060.

view he could not claim any right to redeem that item and was estopped by his omission and negligence.[1]

In HALSBURY 4th Edn., Vol. 16, Para: 1620: Page 1091, it observed: Before anyone can be estopped by a representation inferred from negligent conduct. The expression "estoppel by negligence" has been criticised as an inaccurate expression, in that estoppel arises from a representation by words or conduct: see *Saunders*[2] there must be a duty to use due care towards the party misled, or towards the general public of which he is a member (This does not mean that the onus is on the person misled to prove that the party he seeks to sue is estopped and owed a duty to him in the same way as is necessary in establishing the tort of negligence: see *Saunders*[3] A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself, but inasmuch as he neglects no duty which the law casts upon him he is not in consequence estopped from denying the title of those who may have purchased those goods from the thief, unless it be in market overt.

Persons who issue documents with a certain mercantile meaning attached to them, for example, delivery orders, owe a duty to merchants and others likely to deal with those documents to use due care in their issue; and a railway undertaker or warehouseman issuing duplicate orders for the same goods may be estopped from denying that they had two parcels, to the prejudice of someone who has advanced money on the faith of the duplicate. Accordingly, if in the course of business a man volunteers a statement upon which another businessman may probably act, it is his duty to take reasonable care that the statement is correct.

If there is no duty cast upon the customer to scrutinise his bank passbook as soon as received and to inform the banker about any inaccuracies in the passbook it cannot result in estoppel.[4] Where forged cheques were paid by a Bank, the Bank is liable for wrong payment, plea of estoppel based on negligence of the customer is not available.[5] In a case specific instructions were issued by the customer to the bank guarantee in terms of the contract against mobilisation advance to be received from the beneficiaries; the bank negligently issued mobilisation advance-*cum*-performance guarantee. it was held that the beneficiary cannot invoke guarantee for recovery of loss or damage and the customer not being a party to the guarantee is not estopped from seeking court's protection.[6]

22. ESTOPPEL AGAINST REPRESENTATIVES

Estoppel applies not only in favour of the person induced to change his position but of a transferee from such person, and it binds not only the persons whose representations or actions have created it, but all persons claiming under or through them by gratuitous title.[7] A legal representative of a party to the record is as much bound by every estoppel as it is binding on his predecessor.[8] Admission by predecessor of defendant in a previous suit is binding on defendant in the present suit.[9]

23. PARTNER

Section 19 of Partnership Act (1932) does not give implied authority to partner to refer dispute to arbitration. When such a dispute is referred and other partners who know about it do not take any objection to the proceedings before the arbitrator till the passing of the award, it must be taken that they

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1. *Rangappa* v. *Marappa*, AIR 1958 Mad 515; *Paruathathammal* v. *Sivasankara*, AIR 1952 Mad 265.
2. *Executrix of the will of Rose Maud* v. *Anglia Building Society*, (1971) AC 1004 at 1038 : (1970) 3 All ER 961 at 982, HL, per Lord PEARSON; and **see** the case also sub nom. *Gallie* v. *Lee*, (1969) 2 Ch 17 at 48 : (1969) 1 All ER 1062 at 1081, CA, per SALMON LJ; and also on the ground that the expression is only one aspect of estoppel by conduct: **see** *Moorgate Mercantile Co. Ltd.* v. *Twitchings*, (1976) 2 All ER 641 : (1976) 3 WLR 66 at 295, CA, per LORD DENNING MR.
3. *Executrix of the will of Rose Maud* v. *Anglia Building Society*, (1971) AC 1004 at 1038 : (1970) 3 All ER 961 at 982 HL, per Lord PEARSON; **overruling** *Carlisle and Cumberland Banking Co.* v. *Bragg*, (1911) 1 KB 489, CA.
4. *Tarini Charan Nandi* v. *Ajit Kumar Kundu*, ILR (1955) 2 Cal 365.
5. *Canara Bank* v. *Canara Sales Corporation*, AIR 1987 SC 1603; *Babulal Agarwalla* v. *State Bank of Bikaner*, AIR 1989 Cal 92.
6. *G.S. Atwal & Co. Engineers Pvt. Ltd.* v. *Hindusthan Steel Works*, AIR 1989 Cal 184.
7. *Jagannath Prasad Singh* v. *Syed Abdullah*, (1918) 20 Bom LR 851 : 45 IA 97 : ILR 45 Cal 909; **See also** *Rani* v. *Malati Roy*, AIR 1992 Cal 302; *Jagjeevan Co-operative House Building Society Ltd* v. *Union of India*, 1998 AIHC 1047 (para 8) (Del).
8. *Petha Perumal* v. *Chidambaram*, AIR 1954 Mad 760.
9. *Shanti Sarup* v. *Radhaswami Satsang Sabha*, AIR 1960 All 248.

have ratified the act of the partner and are estopped from challenging the award on the ground of want of authority in the referring partner.[10]

Where the property mortgaged by a co-partner as security for advances made to him, (independent of partnership business), by his partner, is sold and the partner- creditor is not a consenting party to sale, receipt by the partner creditor of the amount due to him, from out of sale proceeds, does not estop him from relying upon the sale as an act of insolvency.[11]

24. TRUSTEE

A person who acted as a trustee of a public temple cannot later claim that as his private property.[12] The persons who are in possession of the property as trustees are estopped from denying the validity of the trust.[13]

Where a trustee had taken proceedings stating that a particular statute applies, the religious institution is not estopped from contending that it falls outside the purview of the statute.[14]

25. COMPANY

Where a director of a Banking Company dealt with the shares on the footing that the allottees were holders of the shares with a clear knowledge of the circumstance that he was interested in the particular transaction of the board meeting of the company, in a suit by the company against the allottees he was estopped from contending that the allotment was invalid; he could not be allowed to say that he was interested in the allotment and could not vote.[15] The share holders of a company requisitioned the Managing Director to convene a meeting for electing a new Managing Director. The meeting was not held at the registered office at the time fixed because the premises had been locked. Share-holders held the meeting at another place and passed a resolution removing the Managing Director and appointed another person as Managing Director. It was held that by reason of his conduct in not making the registered office available for the meeting, the Managing Director was precluded from complaining of the invalidity of the meeting actually held at a different place or the resolution passed there.[16] Directors of a company who participated at the Annual General Meeting and received with full knowledge of all facts, the dividents declared at that meeting, are estopped from challenging the validity of the said meeting and the proceeding thereof.[17] The plaintiff company allowed its Manager to use its seal for the purpose of endorsement of various cheques drawn in favour of the plaintiff company. The Manager encashed certain cheques but did not credit the amount in company's account. Plaintiff sued the Bank for damages on the ground that the Bank was guilty of negligence in giving away money to an unauthorised person. It was held, the plaintiff company by its conduct represented the Bank that the person encashing the cheque had authority to an act behalf of the plaintiff as its Manager and therefore, plaintiff company was estopped from challenging the authority of that person who used the company's seal as its manager.[18]

Where the purchaser of the assets of a wound up company submitted before the High Court that it would abide by the terms of settlement as imposed by the High Court which modified the terms of settlement, in appeal the Supreme Court can again modify the terms of settlement.[19]

26. FIRM

Where the plaintiff failed to prove that the alleged dishonoured cheque was issued by the concerned partner or that it was issued in the course of business, the firm was not estopped from denying liability.[20]

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10. *Dayanand* v. *Union of India*, 1952 Punj 373.
11. *Kuchelanarayanan* v. *S.P. Sheik & Co.*, AIR 1964 Mad 106.
12. *Venkata Ramana* v. *Rama Mandiram*, AIR 1966 AP 197; **See also** *Shri Ganesh* v. *Keshavrao*, ILR 15 Bom 625.
13. *Pichai Pillai* v. *Lingam Iyer*, AIR 1928 Mad 268.
14. *State of Madras* v. *K. Melamatham*, AIR 1965 SC 1570.
15. *Narayandas* v. *Sangli Bank Ltd.*, AIR 1966 SC 170.
16. *Ratna Veluswami* v. *Manickavelu*, AIR 1951 Mad 542.
17. *Surajmull Nagarmull* v. *Shew Bhagwan Jalan*, ILR (1973) 1 Cal 207.
18. *Bhutoria Trading Co. Ltd.* v. *Allahabad Bank*, AIR 1977 Cal 363.
19. *Industrial Finance Corporation* v. *Official Liquidator*, AIR 1993 SC 1524 (para 12).
20. *C.T. Joseph* v. *I.V. Philip*, AIR 2001 Ker 300 (para 15).

27. MINOR

It was held by the Privy Council that the infant will not be estopped from pleading his minority not withstanding his fraudulant representation.[21] But in an other case it was held that the infant will be estopped from taking advantage of his minority where there was misrepresentation and legal fraud played by the infant.[22]

The Privy Council held that any deed executed by a minor representing as a major is a nullity and the plea of estoppel will not operate.[23] Where the tenancy of a house occupied by a deceased tenant devolved jointly on his heirs two of whom were minor sons, it was held that the tenancy could not be terminated by the heirs accepting a new tenancy, as the question of acquiescence, waiver or estopel could not arise so far as the minors are concerned.[24]

In all the above cases the minor figured as defendant in the proceedings. In cases where the minor figures as plaintiff, the doctrine of estoppel would not apply. A minor can be a mortgagee or promisee or a vendee whereunder he advances money for the transactions entered into, in which cases it can be enforced by him or by any person on his behalf.[25]

A decree was passed against a minor who was not properly represented. The minor filed an appeal through his natural brother as guardian. Minor's guardian entered into a compromise on behalf of the minor and the appellate court modified the decree of the trial court in view of compromise. In the circumstances, it was held that the minor cannot question the validity of the appellate decree. Where a representation is made by a properly constituted guardian of the minor, the minor is bound by the representation.[26] An agreement made by the *Karta* of the Joint Hindu Family on behalf of the family is binding on the minor members also and they are estopped from challenging the same.[27] Where the defendant had recovered the properties in the suit from third parties after litigation prosecuted by him as the guardian of the plaintiff, he could not, be heard to plead that the decree in favour of his ward was illegal, and he was entitled to retain the property as reversioner.[28]

In a suit by a minor plaintiff through next friend for pre-emption, it was alleged that the plaintiff's mother, prior to sale in favour of the defendant, had represented that she had no intention to pre-empt sale. It was held that the plaintiff was entitled to pre-empt and that the previous consent of the plaintiff's mother would not operate as estoppel in view of the non-compliance with provisions of Section 173(3) Berar Land Revenue Code.[29]

28. JOINT FAMILY

Wife's succession is not affected by estoppel arising out of husband's action.[30]

Neither a reversioner nor person claiming through him can be estopped from challenging surrender by a widow, if it was void or voidable in law.[31]

Where the father takes benefit under a surrender by a widow and the son does not receive any benefit under it, the son is not estopped from challenging the surrender by the widow.[32]

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21. *Mohori Bibi* v. *Dharmodas Ghose*, ILR 30 Cal 539 (PC).
22. *Saral Chand Mitter* v. *Mohun Bibi*, ILR 25 Cal 371. **See also** *Fazul Bhoy* v. *Credit Bank of India*, 39 Bom 331: (Minor was allotted shares on his application and received dividends).
23. *Sadiq Alikhan* v. *Jai Kishori*, AIR 1928 PC 152. **See also** *Ranga Rao* v. *Vardichand & Co*., AIR 1934 Mad 560; *Kundan* v. *Magan*, AIR 1932 All 710; *Gadigeppa* v. *Balangowda*, 1921 Bom 561 (FB); *Ajudhia* v. *Chandan*, AIR 1937 All 610 (FB).
24. *Sunila Sundari Dasi* v. *Sailendra Nath Dey*, ILR (1966) 1 Cal 252.
25. *Raghava Chariar* v. *Srinivasa*, 40 Mad 308 (FB) (case of Sale) *Collector of Meerut* v. *Haridan*, AIR 1945 All 156; *Muniya* v. *Perumal*, ILR 37 Mad 390; *Naraindas* v. *Dhania*, ILR 38 All 154.
26. *Bagher Singh* v. *Teja Singh*, ILR (1976) 2 Punj 675; *Somanath Singh* v. *Ambika Prasad Dube*, AIR 1950 All 121.
27. *Gulab Chand* v. *Chhatar Singh*, ILR 1961 MP 867.
28. *Faitu Bhila* v. *Bhawaniram*, AIR 1961 MP 27.
29. *Bhiku Yogajee* v. *Sukh Deo Narayan*, AIR 1955 Nag 67.
30. *Gokul Ram* v. *Bhagvandas*, ILR 1962 MP 607.
31. *G.N. Sarwade* v. *State of Mysore*, 1967 Pat 47.
32. *Sarwade* v. *State of Mysore*, 1965 Pat 47.

29. MISCELLANEOUS

A person is not estopped from asserting his own title to a property which he did not claim in a previous suit wherein he, as a witness, had supported the defence.[33]

Where a union representing workers raised an industrial dispute challenging retrenchment of workers and the individual workmen accepted retrenchment benefits subsequently, the union is not estopped from challenging the retrenchment.[34]

Where a sale certificate is issued u/O 21, R. 94, C.P.C., stating that properties were sold subject to mortgage, purchaser is not precluded from contesting the binding nature of mortgage.[35]

30. ESTOPPEL AGAINST PERSON CLAIMING IN DIFFERENT CAPACITY

Acting in a representative character does not create estoppel on personal claims.[36] Where the suit is one on behalf of the community and the plaintiff does not claim any title or set up any personal right in him, no estoppel can be pleaded against him in his representative capacity by reason of any individual act, he might have committed.[37] A person transferred his import licence. The transferee imported the goods. The original licensee had committed irregularities in obtaining the licence, it was held that the transferee could not be made to suffer on that basis.[38]

31. ELECTION—APPROBATE AND REPROBATE

LORD ATKIN observed: "Where a person has the choice of two rights either of which he is at liberty to adopt, but not both, and if he adopts one, he cannot afterwards assert the other".[39]

LORD BLACKBURN quoting from COKE observed that when a man has an option to choose one or the other of two inconsistent things, when he has made his election, it cannot be retracted.[40]

In HALSBURY'S Laws of England 4th Edn., Vol. 16, para 1507, page. 1012, it is observed: "On the principle that a person may not approbate and reprobate[41], a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel *in pais*. The principle that a person may not approbate and reprobate expresses two propositions, that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile, and[42], that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct, which, he has pursued and with which his subsequent conduct is inconsistent.

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33. *Langa Manjhi* v. *Jaba Majhian*, AIR 1971 Pat 185.
34. *Hind Strip Mining Corp.* v. *Raj Kishore*, AIR 1967 Pat 12.
35. *Chekku* v. *Puliasseri Parvathi*, AIR 1956 Mad 634.
36. *Ram Harakh* v. *Hanwant Ram*, AIR 1930 PC 249 (1).
37. 1959 Ker LJ 932.
38. *Chemi Colour Agency* v. *Chief Controller, Imports & Exports*, AIR 1985 Cal 358. **See also** *Chhaganlal* v. *Narandas*, AIR 1982 SC 121. Where the claim of estoppel was not allowed to the assignee of the person to whom the representation was made.
39. *Lissenden* v. *C.A.V. Bosch Ltd.*, 1940 AC 412; *Union of India* v. *Bharat Fire & General Insurance Ltd*, AIR 1961 Punj 157.
40. *Searf* v. *Jardine*, (1882) 7 AC 345 (HL); **followed** by LORD ATKIN in *United Australia* v. *Barclay's Bank Ltd.*, (1941) AC 1 and *M.P. Rajan* v. *Kerala State Election Commission, Thiruvananthapuram*, AIR 1999 Ker 399 (para 8).
41. The origin of this maxim is discussed in *Lissenden* v. *C.A.V. Bosch Ltd*, (1940) AC 412 at 417, 418 : (1940) 1 All ER 425 at 429 HL, per Viscount Maugham, but in England the maxim appears not to express any formal legal concept; **see** that case at 429, per LORD ATKIN. **See also** *Harrison* v. *Wells*, (1967) 1 QB 263 at 277 : (1966) 3 All ER 524 at 530 CA, per SALMON LJ.
42. *Banque de Marchandas de Moscou (Koupetschesky)* v. *Kindersley*, (1951) Ch 112 at 119, 120 : (1950) 2 All ER 549 at 552 CA, per Sir Raymond Evershed MR (citing *Smith* v. *Baker*, (1873) LR 8 CP 350; Re *Morton, ex parte Robertson*, (1875) LR 20 Eq 733; *Evans* v. *Bartlam*, (1937) AC 473 at 479 : (1937) 2 All ER 646 at 649 HL, per Lord ATKIN, and at 483 and at 652 per Lord RUSSELL of Killowen.

The principle of approbate and reprobate is based on the maxim "*allegans contraria non est audiendus*" meaning thereby that a person who says things contradictory to each other, shall not be heard.[43]

The principle of estoppel by election applies to both civil and criminal proceedings.[44]

The maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election, and its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto.

The principle of election does not forbid a party from claining the same relief against different persons in different suits in respect of the same property though the grounds of relief are different and inconsistent[45] and where there is absolutely no election in between the two alternative and mutually exclusive remedies or the two alternative courses of action, the principle of estoppel by election has no application, as is the situation in the instant case.[46]

The Supreme Court observed: "(1) The doctrine of approbation and reprobation, which has a Scottish origin and is akin to the law of election and estoppel, applies to those cases where a person has elected to take benefit otherwise than on merits of the claim in the litigation under an order to which benefit he could not have been entitled except for the order. (2) That the person receiving a benefit under the order must have a choice between two rights and that after the exercise of the choice, restituion was impossible or inequitable."[47]

The principle forbidding simultaneous approbation and reprobation is an equitable principle. So are the principles relating to estoppel. It is not true view of law that if one party does something under the dictate of an order or a decree, as is the instant case, and another party receives something thereby, then in every case the order or decree becomes unchallengeable by the recipient party. The nature of the receipt, in the instant case a nominal amount, has to be examined in the facts and circumstances of each case and then only the rules of good conscience must be applied.[48]

In a case of acquisition of land with a view to prospect for coal, the appellant Central Government did not question the payment of additional compensation and interest before the Tribunal when the matter was heard on reference. Subsequently, the appellant could not be allowed to turn back and say that the same was not payable.[49] An owner of property is not estopped from claiming just compensation under Section 8 of Requistitioning and Acquisition of Immovable Property Act (1952), merely because they had given low figure of annual rent for purposes of taxation.[50] Where the petitioner is given option by the Tribunal either to amend the petition, or to supply particulars or strike off the particular para as being vague, and the petitioner choses to amend, he loses his right to adopt the alternative.[51] If the parties have taken up a particular position before the Court at one stage of the litigation it is not open to them to approbate and reprobate and to resile from that position.[52] In *Hemanta Kumari Devi* v. *Parasanna Kumar*[53] Justice MUKHERJEE observed: "It is well settled that a party litigant cannot be permitted to assume inconsistent positions in court, to play fast and loose, to blow hot and cold, to approbate and reprobate, to the deteriment of his opponent; and that this wholesome doctrine applies not only to the successive stages of the same suit, but also to another suit other than the one in which the

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43. *Lakshmidevamma* v. *Kesawarao*, AIR 1935 Mad 1066; *B.S. Lail* v. *Sardar Mal*, AIR 1964 MP 124.
44. *P.J. Kurien* v. *Renjitha*, 2000 Cr LJ 1731 (para 8) (Ker).
45. *Nagubai Ammal* v. *B. Shama Rao*, AIR 1956 SC 593; **See also** *Nirmal Chand* v. *Parameswari Devi*, AIR 1958 MP 333.
46. *P.J. Kurien* v. *Renjitha*, 2000 Cr LJ 1731 (para 8) (Ker).
47. *Bhabu Ram* v. *Baij Nath Singh*, AIR 1961 SC 1327 : (1962) 1 SCR 358. **See also** *Prafulla Chandra Sinha* v. *Chotanagpur Banking Association Ltd.*, AIR 1965 Pat 502.
48. *United Bank of India* v. *Abhijit Tea Co (Pvt.) Ltd.*, AIR 1999 Cal 81 (para 25).
49. *Union of India* v. *Kashinath Mahto*, AIR 1998 Pat 100 (para 9). **Following** *State of Tamil Nadu* v. *K. Sabanayagam*, AIR 1998 SC 344 (para 12).
50. *Satnarain* v. *Union of India*, AIR 1970 Del 232.
51. *Aminlal* v. *Hunna Mal*, AIR 1965 SC 1243.
52. *Uderaj Raj Singh* v. *Ram Bahal Singh*, ILR (1946) All 549 : AIR 1946 All 436; **See also** *State of Bihar* v. *B.L. Agarwalla*, AIR 1966 Pat 410; *I.T. Commr., Mysore* v. *Canara Bank*, AIR 1967 SC 417. For estoppel by pleadings **see** *Jai Kishan* v. *Mumtaz Beg.*, AIR 1984 SC 1890.
53. AIR 1930 Cal 32.

position was taken up, provided the second suit grows out of the judgment in the first."[54] A party who successfully took a plea and got a judgement in his favour cannot be allowed to take an inconsistent position in any action, arising out of the said judgement. This principle has been applied even to cases where a question of jurisdiction is involved.[55]

Where in an earlier proceeding the Tahsildar had passed order deleting the name of a person as the tenant of a certain land, the Tahsildar could not initiate a *suo motu* proceeding subsequently and declare him tenant.[56] Where a party succeeded on the plea that the Revenue Court or Rent Control Court had no jurisdiction to entertain the application of the petitioner, and the civil court alone had jurisdiction, later cannot turn round in the civil court and say that the civil court had no jurisdiction.[57]

A litigant cannot be permitted to assume inconsistent positions in court to the detriment of his opponent.[58] A person getting advantage of his plea in a prior suit is not entitled to take a plea inconsistent therewith in a subsequent suit.[59]

The two essential elements of an election are:—(1) That the person who is electing should have a choice between the two alternative courses, and, (2) he should derive an advantage, on such choice. A defendant adopting the valuation made by the plaintiff for the purpose of filing an appeal cannot be said to have a choice in the matter as he is generally bound to adopt the valuation made by the opposite party.

The rule that a party to a litigation cannot both approbate and reprobate is a rule essentially of logic rather than of law, based on the principle that where a party to a litigation has deliberately taken a particular position (without being induced so to take it by the opposite party), he must act consistently with it. The rule is different from estoppel. In the case of an estoppel, the representee should have altered his position to his detriment, for the rule of approbate and reprobate to apply, the representor must have obtained an advantage by the representation made or the stand taken by him.

The principle variously known as approbate and reprobate is an application of the doctrine of election.[60]

Where there was termination of service at the request of the Government servant, he cannot challenge the order as invalid on the ground that it was made under a non-existing rule, as he once elected his choice to have his service terminated.[61] Where a man is entitled to one of the two inconsistent rights and he has with full knowledge done an unequivocal act indicating his choice of the one he cannot afterwards persue the other.[62] A person who has acted as a trustee of a public temple as evinced by his own admission and conduct and who has obtained decrees of the courts in that capacity cannot subsequently turn round and claim the temple to be private temple, or the properties as his absolute

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54. *Ram Khelawan Singh* v. *Maharajah of Banaras*, AIR 1930 All 15; *Uttamchand* v. *Saligram*, AIR 1929 Nag 79; *Indermall Lohia* v. *Sub-Judge, Secunderabad*, AIR 1958 AP 779.
55. *Indermull Lohiya* v. *Sub. Judge, Secunderabad*, AIR 1958 AP 779; *Parandhamayya* v. *Samasekharaswamy Temple*, (1970) 1 And LT 154; *Controller of Insurance Simla* v. *Vanguard Insurance Co. Ltd.*, AIR 1966 Mad 437; **See also** *Ram Khelawam Singh* v. *Maharajah of Benaras*, AIR 1930 All 15; *Udrej Singh* v. *Ram Bahal Singh*, AIR 1946 All 430.
56. *Vijayabai* v. *Shriram Tukaram*, AIR 1999 SC 431. **Also see** *Tractors and Farm Equipment Ltd.* v. *Collector of Customs*, (1998) 9 SCC 665; *Promostyle Exports* v. *Collector of Customs*, (1998) 9 SCC 362; *Balu Laxman Khatik* v. *Biru Ramchandra Kotmire*, (1999) 1 SCC 308; *T. Ramaiah* v. *Sajjan Bai*, AIR 2001 NOC 89 (Kant) : ILR (2001) 1 Kant 1552.
57. *Kondala Rao* v. *Gopal Rao*, ILR 1964 AP 740; *Gurumarthappa* v. *Chickamunisamappa*, AIR 1953 Mys 62; *A N. Shah* v. *A. Annapurnamma*, AIR 1959 AP 9; *A. Phuluwa* v. *Laxmichand*, AIR 1960 MP 138; *Controller of Insurance Simla* v. *Vanguard Insurance Co.*, AIR 1966 Mad 437; *Champalal* v. *Sampat Raj*, ILR (1963) 13 Raj 468; *Inder* v. *Gurdit Singh*, ILR (1973) 2 Punj 43; *Chowdappa* v. *Chowdappa*, 2000 AIHC 1713 (paras 8, 9, 11 and 13) (Kant).
58. *State of Bihar* v. *B.L. Agarwalla*, AIR 1966 Pat 410. **See also** *Balakrishna Menon* v. *Padmavathy Amma*, AIR 1993 Ker 218 (para 11); *State* v. *Janamohan Das*, AIR 1993 Ori 180 (para 16); *Amrit Kaur* v. *Chaman Lal*, AIR 1994 HP 21 (para 18); *Mario Shaw* v. *Martin Fernandez*, AIR 1996 Bom 116 (para 5); *P.K. Vasudeva* v. *Zenobia Bhanot*, AIR 1999 SC 3323 (para 8).
59. *Umrao Singh* v. *Man Singh*, AIR 1972 Del 1.
60. *Kuppanna Gounder* v. *Peruma Gounder*, AIR 1961 Mad 511 (FB); **relying on** *Nagubai* v. *B. Shama Rao*, AIR 1956 SC 593.
61. *Md. Kutubbuddin* v. *State of A.P.*, (1969) 2 SCWR 856 : 1969 SIR 819; *State of Assam* v. *Harnath Barua*, AIR 1957 Assam 77; *General Manager, Telephones, Ahmedabad* v. *V.G. Desai*, AIR 1996 SC 2062 (para 15).
62. *R.S. Vijayam* v. *Srinivasa*, AIR 1956 Mad 301; *Union of India* v. *Bharat Fire and Gen Insurance Co.*, AIR 1961 Punj 157.

properties.[63] Where an order of requisition was served on the wife treating her as owner of the house and the wife challenged the requisition order, it is not open to the Government, to plead that the real owner was her husband on whom an earlier order of requisition had been served.[64] Where the stand taken by the respondent in the proceedings under Order XXI, R. 97, C.P.C., throughout was that he was not the judgement debtor and that therefore the executing court could not proceed against him under Rule 98, it was not open to him to contend later on that he was in fact a representative of the judgement debtor and as such the only remedy open to the appellant lay in execution.[65] The defendant in a case successfully contested the competency of execution proceedings started on the basis of a decree on the award, on the ground that the decree contemplated enforcement of the claim by means of a separate suit, he cannot be allowed to say, when the plaintiff filed such a suit that the suit was not an appropriate remedy and it was barred u/Section 47, Civil Procedure Code.[66]

In a previous writ petition u/Art. 32 before the Supreme Court, the case of the petitioner was that he had purchased at auction the whole village R for cultivation under a sale deed which clearly stated that small area of land had already been sold to another. The Supreme Court held that the village R fell within the inclusive part of the definition of 'an estate' u/Art. 31-A (2)(a)(iii) of the Constitution and therefore the validity of the Daman Regulation of 1962 was protected from challenging u/Arts. 14, 19 and 31 of the Constitution. In a subsequent writ petition before the High Court, between the same parties, the petitioner's contention was that he was not the holder of the whole village R and as such was not a proprietor as defined in Section 2(h) of the Regulation. It has held, that the doctrine of approbate and reprobate applied to the conduct of the petitioner and he should not be permitted to depart from the unequivocal stand taken by him in the Supreme Court. A person who purchased at a sale with full knowledge that the judgement debtor had no saleable interest in property, is precluded from subsequently contending that the sale was void and that he should get a refund of the purchase money. To such a person, the doctrine that a person cannot approbate and reprobate is applicable.[67] A party cannot be allowed to accept a document for some purpose and reject the same document to his advantage, the rule of approbate and reprobate applies.[68] A person having some advantage under a transaction as a valid one which otherwise he would not be entitled to, cannot say that it was invalid for purpose of securing some further advantage.[69] Where a deed reserving annual rent provided that on termination of lease, lessee should hand over possession of property along with buildings and trees, the lessee on termination of lease claimed compensation for tress planted. It was held that the lessee could not blow hot and cold, for if he relied upon lease deed, he was not entitled to get compensation and if the lease deed was inadmissible for want of registration, he would not be entitled to compensation in respect of improvements effected on property demised.[70]

A person who specifically avers that a document is a **Will** cannot be allowed to say that it is not a **Will** but a family arrangement.[71] If a person chooses to accept a legacy under a **Will**, he will be estopped from setting up a title contrary to its provisions.[72] A Hindu Coparcener who took the property under a **Will** of another coparcener and acted on the terms of the **Will**, and his transferees who bought the property with notice of his title, are estopped from questioning the **Will**.[73]

The rule of estoppel or waiver cannot be applied against retrenched workmen who have no freedom to refuse payment in view of their financial position caused by the retrenchment.[74] If a person by force of circumstances is compelled to adopt one of the two courses, it cannot be said that he had two courses open to him and that he adopted one and abandoned the other, there is no question of estoppel by

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63. *Mareppu Venkata Ramana* v. *Sri Rama Mandiaram*, AIR 1966 AP 197. **See also** *3 ACES, Hyderabad* v. *Municipal Corporation of Hyderabad (FB)*, AIR 1995 AP 17 (para 33).
64. *Haradevi* v. *State of A.P.*, AIR 1957 AP 229.
65. *Madan Mohan* v. *Hari Anandilal*, AIR 1959 Bom 269.
66. *B.S. Lail* v. *Sardar Mal*, AIR 1964 MP 124.
67. *Kumarasami Chetti* v. *Subramania Chetty*, AIR 1953 Mad 671.
68. *Pishori Lal* v. *Pooran Chand*, ILR (1964) 2 Punj 5.
69. *Ambu Nair* v. *Kelu Nair*, AIR 1933 PC 167; *Sobrahmanya* v. *Sobrahmanya*, AIR 1929 PC 156; *Subbarama Ayyar* v. *Chinnaswami Thanjirayar*, AIR 1935 Mad 295.
70. *Perisaswami Pillai* v. *Sri Arunjadeshwara Swami Temple*, AIR 1967 Mad 257.
71. *Kasturchand* v. *Kapur Chand*, AIR 1975 MP 136.
72. *Probodh Lal Kandu* v. *Hurrish Chandra Dey*, (1904) 9 CWN 309.
73. *Laxshmamma* v. *Sreeramulu*, AIR 1927 Mad 1066; *Suhashini Dasi* v. *Ahibhushan*, AIR 1963 Cal 520 (person taking benefit under the will).
74. *B.N. Elias & Co* v. *Fifth Industrial Tribunal*, AIR 1965 Cal 166.

election in such case.[75] The right to realise cess, like the right to realise rent, accrues periodically and, if the person entitled to cause for any particular period chooses, either deliberately or through misapprehension of his right, to accept in satisfaction of his dues less than he is entitled to, his act will not estop him from claiming his full dues for a subsequent period subject to the law of limitation.[76] If the reliefs in alternative are interlinked, plaintiffs cannot be put on election to choose between reliefs[77] but where the petitioner had already instituted a civil suit for the forgery of documents, writ petition was not maintainable for the same relief.[78] Execution of promissory note by purchaser for amount due to vendor, does not extinguish vendor's lien under Section 55 of the T.P. Act and such execution does not estop the vendor from an action on such lien.[79]

To preclude a party from 'blowing hot and cold' or 'playing fast and loose' or to use a more common expression, from 'approbating and reprobating' one must establish a case of estoppel, waiver or acquiescence to invoke the well-known principles, underlying *res judicata* or election.[80]

A party having claimed on the basis of the investment in commercial speculations, cannot claim on another basis when he finds that the first basis is prejudicial to him.[81] A party cannot both approbate and reprobate, and cannot induce another party to alter his position by a representation and then to go back on that representation.[82] Plaintiff's father had settled a dispute and received his share of sale-proceeds of trust property sold by trustee, plaintiff could not charge the trustee for committing breach of trust nor could follow the alleged trust properties on the principle of estoppel.[83]

Doctrine of approbate and reprobate can apply only to orders passed by a court of competent jurisdiction notwithstanding that it was passed with or without consent of parties.[84] The accused pleaded in a previous trial that the prosecution was invalid for want of proper sanction. His plea was accepted and he was acquitted. He was prosecuted again on fresh sanction. The accused is estopped from pleading double jeopardy on the ground that the previous trial was valid. He cannot approbate and reprobate.[85] A party obtaining relief or benefit by an order of a court or tribunal is estopped from challenging that order subsequently by a suit on the ground that it was made without jurisdiction or was not correct.[86] Decree holder creditors applying for *rateable* distribution of assets held by executing court in another decree passed by the High Court, can not challenge the decree under which the assets were held, as invalid, on the ground that the High Court had no jurisdiction under Cl. 12 of *Letters Patent* to pass decree for sale of properties outside the local limits of its ordinary original jurisdiction.[87] Where a person enjoyed full benefit of a trial after remand of a case he is estopped from challenging the legality of order of remand.[88]

In a case the petitioners were declared owners/*bhomidhars* of the land acquired by the government and received compensation in respect to that land. After a gap of about ten years they challenged the notifications of acquisition and the award of compensation stating that the Government was owner of the said land and hence it could not acquire its own land. It was held that they could not be allowed to approbate and reprobate as they had never accepted the Government as owner earlier.[89] Where the respondent State though aware of the interim stay order, ignored the same and proceeded with the acquisition proceedings, they could not be permitted to take any advantage of the said interim order.[90] Where the consignee obtained delivery of goods from the carrier after inspection and found no damage

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75. *Azra Abdulla* v. *Silton Hotel*, AIR 1975 Kant 225; *Bhupendra Kumar Bose* v. *State*, ILR 1959 Cut 189.
76. *Ramkumari Devi* v. *Haridas*, AIR 1952 Pat 239.
77. *Kailash Chandra* v. *Raj Kishore*, AIR 1965 Ori 108.
78. *Rajendra Prasad Gupta* v. *State of Bihar*, AIR 2000 Pat 331 (para 8).
79. *Sundara Raja Pillai* v. *Sakthi Talkies*, AIR 1967 Mad 127.
80. *Subodh Chandra Mazumdar* v. *Manorama Ghose*, ILR (1956) 1 Cal 150.
81. *Hariram Serowgee* v. *Madan Gopal Bagla*, AIR 1929 PC 77.
82. *B. Kulla* v. *Board of Revenue*, ILR (1965) 2 Mad 56.
83. *Joseph Carlox Xavier* v. *Stanislaus Costa*, ILR (1966) 2 Mad 385.
84. *K.R. Sankar* v. *Buvanambal Ammal*, AIR 1971 Mad 368.
85. *Mahabir* v. *State*, AIR 1959 All 783.
86. *S.N. Rajan* v. *Govindaraj*, AIR 1953 Mys 1; *Samarathmal* v. *Jugaldas*, AIR 1974 Raj 104; *Jitendrarai* v. *State*, AIR 1954 Saurashtra 90 (DB); *Rajaram Bahu* v. *Babu Shanker Kadam*, ILR 1978 Bom 933.
87. *Abdul Jabbar* v. *Venkata Sastri*, AIR 1969 SC 1147.
88. *Brijlal* v. *Muni Tandon*, AIR 1979 Punj 132.
89. *Badam Singh* v. *Union of India*, AIR 1998 Del 162 (para 6).
90. *Anil Kumar* v. *State of Rajasthan*, AIR 1998 Raj 202 (paras 18 and 20).

to goods, subsequent claim by the consignee for short delivery against the carrier was barred.[1] Where the Central Govt. allowed the change of location of a factory and the State Govt. communicated that the unit so transferred will not be allowed any concession due to new units and the company agreed to it, it later on could not claim certain exemptions granted to entrepreneurs for setting up of a new unit.[2]

When the scrutiny of nomination papers was adjourned at the instance of a party, it does not lie in his mouth to call in question the act of adjournment by the returning officer.[3] Where a party seeks amendment of an election petition and obtains an order in his favour from the tribunal, he cannot turn round and say that amendment must be ignored.[4] The candidate contesting the election and also succeeding cannot allege that the election process was unlawful.[5]

Where a party volunteered before the arbitrator for extending time, his conduct of questioning of extending time was hit by the principle of approbate and reprobate.[6]

When an assee company makes a representation under one section of the Finance Act and obtains a monetary benefit, it cannot change its front and deny the truth of the representation made earlier in order to avoid liability.[7]

A tenant in appeal against his eviction took the stand that S. 12(1)(h) of M.P. Act 41 of 1961 did not apply. In appeal by special leave, the tenant could not contend otherwise.[8] An order under Section 14(a) of West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), was passed accepting the contention that a person was a tenant, who submitted to it by making payment of rent month by month. The tenant later committed default in payment of rent. It was held that he could not turn round and avoid the result of his default by setting up plea that Section 14(4) does not apply to his case as he was not a tenant.[9]

Where a person has accepted the benefit of an auction sale by receiving a part of the surplus money, he cannot attack the auction sale.[10] Where the disputed land was sold in auction by the revenue court for arrears of rent after the plaintiff's objection against the sale was rejected and the plaintiff received the balance of the sale proceeds after adjusting the arrears of rent, it was held that she was estopped from challenging the propriety of the auction sale.[11]

Where the Industrial Tribunal rejected the plea of a protected workman under Section 33 of the Industrial Disputes Act at instance of the management, the management cannot be allowed to raise a plea in an appeal before the commissioner for workmen's compensation that since the employee claimed to be protected workman, the forum for relief is an application under Section 33 of the Industrial Disputes Act.[12]

Acceptance of the salaries and subsistence allowances by employees from the municipal corporation would debar them from turning round and claiming that all along they were employees of the Government, and that the corporations had no jurisdiction to take disciplinary action against them.[13] Where a person obtains a benefit from the other party by a transaction of exchange, he must be taken to have accepted the validity of the exchange. Having taken the benefit under the exchange deed, he can not later challenge its validity.[14] Having accepted the right of the mother to execute the sale deed on behalf of her minor son and got the properties under the same, the alience cannot turn round and repudiate the authority of the mother to effect the sale on behalf of the minor, or to repurchase the property of the

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1. *Scindia Steam Navigation Co. Ltd.* v. *Union of India*, AIR 1998 Ker 250 (para 8).
2. *State of M.P.* v. *Bindal Agro Chemical Ltd.*, AIR 1997 SC 367, **reversing** MP No. 1 of 1988 and 4348 of 1989 decided on 9.10.1990 (MP).
3. *Badrivishal Pillie* v. *J.V. Narsing Rao*, AIR 1959 AP 116.
4. *B.T. Bhosle* v. *M.S. Aney*, AIR 1961 Bom 29 (DB).
5. *G.S. Shivakumar* v. *The State of Karnataka*, 2001 AIHC 3212 (para 12) (Kant).
6. *Food Corporation of India* v. *Dilip Kumar Dutta*, AIR 1999 Cal 75 (paras 30 and 31).
7. *I.T. Commer., Bombay* v. *Army & Navy Stores*, AIR 1958 Bom 23.
8. *Jai Kishan* v. *Mumtaz Begum (Mst.)*, AIR 1984 SC 1890.
9. *D.R. Gellatly* v. *J.R.W. Cannon*, AIR 1953 Cal 409.
10. *Somnath Singh* v. *Ambika Prasad*, AIR 1950 All 121.
11. *Prafulla Chandra* v. *C.B. Association Ltd.*, AIR 1965 Pat 502 (DB).
12. *Remington Rand of India Ltd* v. *Thiru R. Jambulingam*, AIR 1974 SC 1915.
13. *Abdul Rahim* v. *Chief Executive Officer*, AIR 1964 AP 407.
14. *Veeraju* v. *Venkayya*, AIR 1960 AP 222.

minor upon refund of the consideration money.[15] Where detenu under conservation of Foreign Exchange and Prevention of Smuggling Activities Act requested to be represented by a 'friend' but he did not take his friend with him before the Advisory Board, he could not fall back on his right to be represented by a 'friend' and say that the Board did not, on its own, ask him if he had brought his 'friend' with him.[16] Having accepted the validity of a gift deed and a subsequent deed of assignment, it is not open to a person to say that either the one or the other of the documents is invalid.[17] Where the subject-matter of an appeal was the validity of a special general meeting held for election of the Board of Directors and the Chairman, and the parties compromised and agreed to hold a fresh meeting for election, and the petitioner participated actively in the second meeting, he is estopped from contesting the validity of the first meeting.[18]

32. ESTOPPEL BY ACCEPTING COSTS

Where an appeal was restored to file on condition of payment of cost and the opposite party withdrew the costs so deposited, he cannot challenge that order of restoration, having elected to treat the order as valid.[19]

Where proceedings were dismissed for default and restoration was ordered conditional on party's paying compensatory costs, the acceptance of amount of costs was held not to estop other party from raising challenge on a point of law as to the correctness of order on merits.[20] Where the costs were accepted under protest, there is no estoppel.[21] Where costs are granted on an unconditional order the respondent can have no opportunity to waive his right to question the validity or the correctness of the order and therefore acceptance of costs cannot be operated as estoppel, against him in the absence of proof of waiver.[22] Where there was a conditional order for restoration on payment of cost and only part of the cost deposited and withdrawn it was held that there was no estoppel to challenge the order for restoration.[23]

33. ESTOPPEL BY ACCEPTANCE OF CONDITIONS

Stage carriage permit was granted by imposing certain conditions. Applicant accepted the conditions and claimed to have fulfilled them by producing clearance certificate. The applicant challenged the validity of the conditions. It was held that he could not be allowed to challenge the validity of order of the conditions in revision.[24] Where the petitioners did not challenge the general terms and conditions of auction of lease sites and the letter of allotment, they were estopped from challenging the proceedings initiated to recover the amount of premium and the ground rent.[25] Where in a suit for the recovery of policy amount from an insurance company, there was an averment in the plaint that under the terms of the policy, the claim of interest was barred, hence no interest was being claimed, prayer for interest by way of cross-objection could not be allowed.[26] Where the petitioner had accepted to produce a certain

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15. *Raju Bala Dasi* v. *Nidhuram*, AIR 1960 Cal 65.
16. *Sebina* v. *State of Kerala*, 1994 Cr LJ 1291 (para 17) (Ker).
17. *K. Veerankutty* v. *Pathamma Kutty*, 1956 Mad 514.
18. *Yugal Kishore* v. *B.N. Rahtogi*, AIR 1958 Pat 154.
19. *Dhrubendra Deb Roy* v. *Kumarendra Deb Roy*, AIR 1959 Cal 19; *Maniram* v. *Beharidas*, AIR 1955 Raj 145; *Kabiram* v. *Anandiram*, AIR 1952 Assam 93; *Md. Siddique* v. *Nand Kishor*, AIR 1952 Bhopal 41; *Pappy* v. *Cheriyan*, ILR (1966) 1 Ker 434; *Sewak Parshad* v. *Gram Panchayat*, AIR 1972 Punj 272; *Metal Press Works, Calcutta* v. *G.M. Cotton Press*, AIR 1976 AP 205; *Kiranalal* v. *Krishna Das*, AIR 1954 MB 12; *Amar Singh* v. *Perhalad*, 1989 P&H 229 (DB); *Ram Naresh Kanoo* v. *Sardar Harjashbir Singh*, AIR 1990 Gau 12; *Sreeramulu* v. *Venkatanarasimhan*, AIR 1938 Mad 1004; *Ramaswami Chettiar* v. *Chidambaram Chettiar*, AIR 1927 Mad 1009 (2); *Venkatrayudu* v. *Ramakrishnaiah*, AIR 1930 Mad 268; *State* v. *Rampo (Smt.)*, AIR 1960 All 636; *Zahurul Islam* v. *Tanweer Jahan Begum*, AIR 2000 Ori 140 (para 4); *Radheshyam Palod* v. *Shantidevi*, AIR 1994 NOC 191 (MP).
20. *Amar Singh* v. *Perhlad*, AIR 1989 P&H 229 **not followed**; *K.R. Singh* v. *A.G. Thakare*, AIR 1991 Bom 296.
21. *Cudise Trinath Rao* v. *Sudhansu Prasad*, AIR 1992 Ori 168; **following** *Ananda Behera* v. *Nilkamal*, AIR 1975 Ori 173.
22. *Devaiah* v. *Nagappa*, AIR 1965 Mys 102. **See also** *Bijendra Nath Srivastava* v. *Mayank Srivastava*, AIR 1994 SC 2562 (paras 20 and 21).
23. *Hashmat Rai* v. *Lalchand*, AIR 1952 Bho 43.
24. *Bachcha Pandey* v. *Deo Sunder Devi*, AIR 1968 Pat 248.
25. *Sukhpal Singh Kang* v. *Chandigarh Administration*, AIR 1999 P&H 156 (para 53).
26. *Life Insurance Corporation of India* v. *Ambika Prasad Pandey*, AIR 1999 MP 13 (para 20).

serial on T.V. in 13 episodes, he was barred by estoppel to seek permission subsequently to produce that serial in 26 episodes.[27]

The plea that a convict, having secured his release upon imposed conditions, cannot turn around and question the validity of such conditions, is not tenable in view of S. 432, Cr.P.C. under which imposition of automatic conditions would be neither reasonable nor fair.[28]

34. ESTOPPEL BY ACCEPTING EARNEST MONEY

Where the defendant entered into an agreement to sell land to the plaintiff and accepted earnest money, he was estopped from contending that he was not the owner.[29]

35. ESTOPPEL IN EXECUTION PROCEEDINGS

Where a decree holder applied rateable distribution of assets by the executing court in respect of another decree, they are estopped from questioning that decree on the ground that the court had no territorial jurisdiction to pass that decree.[30]

Defaulting purchaser's liability for deficiency on resale under Order XXI, R. 71, C.P.C., arises only if the deficiency is attributable to his default. When the first auction sale did not disclose any encumbrance but the second sale discloses the encumbrance, the auction purchaser could not be estopped from contending that the disclosure of the encumbrance in the second sale was the operative cause for the fall of the price and he is not a defaulter u/O. XXI, R. 71, C.P.C. The auction purchaser is not estopped from impeaching the charge or incumbrance over the property though he purchased it subject to charge or incumbrance. As the auction purchaser buys the property with all risks and defects in the judgement debtor's title, if it was found that charge or incumbrance to be invalid, he is entitled to the benefit thereof.[31] Where a compromise in execution, provides merely, the mode of discharging decree, no new contract is created and the decree can be executed when the judgement debtor failed to comply with the compromise subject to limitation and no estoppel applies and a separate suit is not necessary.[32] Where a compromise petition in execution proceedings did not disclose that any statement amounting to a representation was made by A, and upon the footing of that representation anything was done by B, it was held that the compromise petition did not estop A from challenging the sale in execution of the decree.[33]

Where the judgement debtor had notice under O. XXI, R. 66, C.P.C. and had knowledge of the contents of the sale proclamation and did not object as to the valuation, misdescription of the property was not saleable or transferable, he would be estopped from raising objection later and question the sale as to legality of the sale or of the attachment.[34] In the previous proceedings, under O. XXI, R. 90, C.P.C., based on the ground that the attachment was invalid, the objector, by a compromise obtained time from the decree holder to pay his decretal dues and agreed that on failure to pay, the court-sale in favour of the decree-holder would stand good. The objector failed to pay and the court sale was confirmed. The objector would be estopped to turn round and contest the legality of the sale or of the attachment in subsequent proceedings.[35]

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27. *Gopi Chand Television* v. *Director, Doordarshan Kendra, Hyderabad*, AIR 1995 AP 199 (paras 11 and 12). **See also** *Delhi Development Authority* v. *S.N. Kapoor*, 2000 AIHC 2955 (paras 11 and 16) (Del).
28. *Hari Singh* v. *State*, 2000 Cr LJ 1964 (paras 15, 17 and 18) (Del).
29. *Ram Sewak* v. *Subhash Chandra Misra*, AIR 1996 All 257 (para 23).
30. *Abdul Jabbar* v. *Venkata Sastri*, AIR 1969 SC 1147.
31. *Izatunnissa Begum* v. *Pratap Singh*, ILR 31 All 583 (PC); *Narayan Sodoba* v. *Umbar Adam*, ILR 35 Bom 275; *Agloa Sutan Khan* v. *Mohabbat Khan*, 1921 All 79; *Man Kaur (Mst.)* v. *Ishar Das*, AIR 1930 Lah 40.
32. *Bharat Bank* v. *Sehgal Brothers*, AIR 1960 Punj 459; *Uttam Chandu Kirthy* v. *Khetra Nath Chattopadhya*, ILR 29 Cal 577.
33. *Satyanarain* v. *Baidyanath*, AIR 1953 Pat 383.
34. *Arunachalam* v. *R*, ILR (1908) 12 Mad 19; *Maharaj Bahadur Singh* v. *Sachindra*, AIR 1928 Cal 328; *Behari* v. *Mukat*, ILR 28 All 273; *Raja of Kalahasti* v. *Maharaja of Venkatagiri*, 38 Mad 387 · AIR 1915 Mad 989; *Ramanathan* v. *Ramanathan*, AIR 1929 Mad 275; *Kaluram* v. *Shambhoo Singh*, AIR 1964 Raj 84.
35. *Baidyanath* v. *Satyanarain*, AIR 1960 Pat 36; *Batakrishna* v. *Apurbo Krishna*, AIR 1938 Pat 199.

36. KINDS OF ESTOPPEL

There are different kinds of estoppels: (1) estoppels by matter of record; (2) estoppels by deed; and (3) estoppels *in pais*.

37. ESTOPPEL BY RECORD—ESTOPPEL AND *RES JUDICATA*

A matter of record is something part of the records of a Court. It is at once the narrative and the proof of its proceedings. Estoppel by records results from the judgment of a competent Court. The law allows a party ample opportunity, by way of appeal and otherwise, of upsetting a wrong decision. And if he takes the opportunity and fails, or does not choose to avail himself of it, he canot subsequently re-open or dispute that decision. And not only the parties themselves, but also the heir, executor, administrator and assignee of each of them are bound by the decision, for they are 'privy to the estoppel'.

Estoppel by matter of record is chiefly concerned with the effect of judgments and their admissibility in evidence, and this kind of estoppel is dealt with by Ss. 11 to 14, Civil Procedure Code, and Ss. 40-44 of the Evidence Act.

In HALSBURY 4th Ed., Vol. 16, Para. 1503, page. 1009 it is observed: "Estoppel of record or of quasi-record, also known as estoppel *per rem judicatam,* arises (1) where an issue of fact has been judicially determined in a final manner between the parties by a tribunal having jurisdiction, concurrent or exclusive, in the matter, and the same issue comes directly in question in subsequent proceedings between the same parties (this is sometimes known as cause of action estoppel); (2) where the first determination was by a court having exclusive jurisdiction, and the same issue comes incidentally in question in subsequent proceedings between the same parties (this is sometimes known as issue estoppel); (3) in some cases where an issue of fact affecting the status of a person or thing has been necessarily determined in a final manner as a substantive part of a judgment *in rem* of a tribunal having jurisdiction to determine that status, and the same issue comes directly in question in subsequent civil or criminal proceedings between any parties whatever.

Where the earlier decision is that of a court of record the resulting estoppel is said to be "of record"; where it is that of any other tribunal, whether constituted by agreement of the parties or otherwise, the estoppel is said to be "quasi of record".

The force and effect of a judgment depend first upon the nature of the proceedings in which it was rendered, *i.e.*, upon the question whether it was an action in *rem* or in *personam*; and secondly upon the forum in which it was pronounced, *i.e.* upon the question whether it was a judgment of a domestic or foreign court. The record of a judgment *in rem* is generally conclusive upon all persons. In other cases, so far as the record purports to declare rights and duties, its material recitals import absolute variety between the parties to it and those who claim under them. The estoppel arising from or fixed by the fact enrolled constitutes the estoppel of a judgment. And to the question whether the judgment necessarily creates an estoppel, the general answer is, yes, if it resuls in *res judicata;* no, if it does not.[36]

The distinction between the doctrine of *res judicata* and the doctrine of estoppel was explained by MAHMOOD J., in *Sitaram* v. *Amir Begum.*[37]

"That the effect of the plea of *res judicata* may, in the result, operate like an estoppel by preventing a party to a litigation from denying the accuracy of the former adjudication, cannot be doubted. Perhaps the shortest way to describe the difference between the plea of *res judicata* and estoppel is that the while the former prohibits the court from adjudicating a matter already adjudicated upon, the latter prohibits a party after the enquiry has already been entered upon from proving anything which would contradict his own previous declaration or acts to the prejudice of another party who relying upon those declarations of acts, has altered his position. In other words *res judicata* prohibits an enquiry *in limine*, whilst an estoppel is only a piece of evidence." *Res Judicata* results from a decision of a court while estoppel results from declarations, conduct and acts of parties.

Estoppel by record is what is provided for in Section 11, Civil Procedure Code. It is not within the province of a court to introduce another kind of estoppel by judgement not covered by Section 11 of Civil Procedure Code or the general principles of *res judicata.*[38]

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36. BIGELOW, *6th Edn., pp. 406, 410,* WOODROFFE AND AMEER ALI, *9th Edn.* p. 850.
37. ILR (1886) 8 All 324.
38. *Sarangapani* v. *Venkata Narasimhacharyulu,* AIR 1952 Mad 384: *Res judicata* is estopped by judgment *Jai Narain* v. *Bulaqi Das,* AIR 1969 All 504 (FB).

A compromise decree creates an estoppel by judgment. A judgment operates as estoppel as regards all the findings which are essential to sustain the judgement.[39]

Estoppel precludes evidence being led to prove a fact in issue in respect of which evidence had already been led and a specific finding recorded in an earlier criminal proceeding before a court of competent jurisdiction.[40]

The essence of estoppel by judgement is that a party cannot be allowed to say one thing at one time and another at a later time. A judgment can be an estoppel only as between the parties to it unless it is a judgment *in rem* which is binding against all the world.[41] Matter decided at an earlier stage of the same suit or proceeding would be binding between parties at a subsequent stage.[42] Where the plaintiff's title over the suit property was held to be established on the basis of a valid sale-deed, subsequent suit for declaration of title by the defendant was barred by *res judicata*.[43] Once a party makes a submission before the High Court it is estopped to say otherwise later on.[44] Principle of *res judicata* would apply where the order of the Court has become final.[45] In order that a plea for exclusion of evidence in second trial on ground of issue of estoppel be allowed, the issue must have been distinctly raised and decided in the previous trial.[46] Doctrine of binding nature of the decree either by way of *res judicata* or otherwise, will have no application as against transferee for valuable consideration and without notice, in the case of a mere declaratory decree. Where, however, the decree is executable and the property charged can be sold in execution of the decree, the transferee will be bound by the decree and in such a case it is wholly immaterial whether the decree itself created the charge or the charge was created by a compromise or an award which was embodied in the decree.[47]

In a suit by a municipal board for restraining enforcement of restitution order against it on the ground that ownership in property vested in it, it was held that the Board could not be estopped from maintaining the regular suit since the question of ownership was not decided in a previous suit against it.[48] Grounds decided in favour of detenu at a previous trial canot be made basis for his subsequent detention.[49] Where there were contemporaneous suits between the same parties in respect of the same subject-matter and they were disposed of by a common judgment but two decrees passed and against one decree an appeal was prepared, the fact that there was one unappealed decree does not create an estoppel in the proceeding under appeal.[50] In the absence of judgement and decree passed in the previous suit for maintenance, the admitted facts cannot take the place of estoppel by record and hence a subsequent suit for recovery of maintenance cannot be barred by *res judicata*.[51] The court which pronounces a judgment or order must have inherent jurisdiction to do so, otherwise, the judgement or order has no effect. Such a judgement or order cannot operate as an estoppel even against the person who sought the assistance of the court whose jurisdiction is impunged.[52] *Res judicata* based on principle of estoppel by record does not arise out of a decision which is a nullity.[53]

It is the final decision and not any and every expression of opinion in a judgment which gives rise to an estoppel by record, and the actual decision cannot be carried further than the circumstances warrant.[54]

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39. *Sailendra Narayan* v. *State of Orissa*, AIR 1956 SC 346; *Kesavan* v. *Padmanabhan*, AIR 1971 Ker 234.
40. *Pritam Singh* v. *State of Punjab*, AIR 1956 SC 415; *Union of India* v. *Amar Chand*, AIR 1965 HP 11.
41. *Ahmed Ali* v. *B. Veeralla*, AIR 1959 AP 280.
42. *Abdul Shakur* v. *Kotwaleswar Prasad*, AIR 1958 All 54.
43. *Syed Md. Abdus Samad* v. *Bibi Anwari Khatoon*, 1998 AIHC 598 (paras 17 and 18) (Pat). **See also** *K.C.P.K.C.I. & Co.* v. *N.V. Venkitakrishnan*, 1998 AIHC 767 (Ker).
44. *Shree Anupar Chemical (India) Pvt. Ltd.* v. *Dipak G. Mehta*, AIR 1999 Bom 349 (para 7).
45. *Ambalammal* v. *Radha Bai*, AIR 1994 NOC 326 (Mad).
46. *State* v. *Khetaram*, AIR 1965 Raj 221.
47. *Mahesh Prasad* v. *Mundar (Mt.)*, AIR 1951 All 141.
48. *Municipal Board, Meerut* v. *Bir Singh*, AIR 1965 All 527.
49. *Ram Newaj Beta* v. *State of U.P.*, ILR (1965) 2 All 261.
50. *Lachmi* v. *Bhulli*, 8 Lah 384 (FB); *Jai Narain* v. *Bulaqui Das*, AIR 1969 All 504 (FB).
51. *Bhuturi* v. *Milkira*, AIR 1950 Assam 162.
52. *Ahsan Dar* v. *Md. Dar* AIR 1963 J&K 15 (FB); *Kameshwar Pandey* v. *Deolal Barhi*, AIR 1964 Pat 247; *Raghuraj Prasad Singh* v. *Basudeo Singh*, AIR 1950 Pat 318.
53. *Gulabji Khodaji* v. *Moksamiya Imam*, ILR 1967 Guj 982.
54. *Ghasiram* v. *Kundanbai*, ILR (1941) Nag 513.

The general principle which runs through the doctrine of estoppel by record is that a decree is an order of the Court and the judgment-debtor must, when it has once been completed, obey it unless and until he can get it set aside in proceedings duly constituted for the purpose.[55]

A party accepting payment under an arbitrator's award cannot afterwards challenge it.[56]

Estoppel by record is not applicable to taxation matters.[57] Although the principle of estoppel or *res judicata* does not strictly apply to the Income-tax Authorities, it is not open to a Tribunal to come to a different conclusion to the one arrived at by that very Tribunal earlier without any limitation whatsoever. An earlier decision on the same question cannot be reopened if that decision is not arbitrary or perverse, if it has been arrived at after due inquiry, if no fresh facts are placed before the Tribunal giving the later decision, and if the Tribunal giving the earlier decision has taken into consideration all material evidence.[58]

G having adopted the plaintiff as a son to her deceased husband, disputes arose between her and the defendant, her mother-in-law, regarding the validity of the adoption. The arbitrator to whom the disputes were referred declared that the plaintiff's adoption was invalid, that the right of adoption was lost to G from the very beginning and that nevertheless with the object of obtaining peace and goodwill the defendant should pay Rs. 8,000 to the plaintiff. A decree in terms of the award was obtained, the plaintiff having admitted the terms thereof and the receipt of Rs. 8,000. Subsequently G again adopted the plaintiff. Held that though the plaintiff was litigating under the same title, the bar of *res judicata* would not apply as the previous decree was passed in terms of the compromise, but that the underlying principle of estoppel was applicable and the plaintiff was estopped from contending that G had the right to adopt him even if the matter had passed from the stage of mere representation into an agreement.[59] Decision in an appeal filed by an assessee who is an ex-partner of an unregistered firm and where each of the ex-partners was assessed separately, is not binding on others as *res judicata* or estoppel.[60] Where in accidental claim cases directions were issued to the owner of the vehicle for the payment of the compensation awarded appeal against which for enhancement was not filed either by the owner or the claimant in one of the cases and the claimants had also the right to contend that the award should be satisfied by the insurance company, non-filing of appeal in the said case cannot defeat such right and would not operate as *res judicata*.[61] Where an earlier petition filed by a private party for corruption against a Chief Minister on the basis of CAG report and limited documents then available was dismissed, the police was not estopped from filing another petition on the basis of additional material on the same subject matter. The principle of *res-judicata* would not apply.[62] Where the private complaint filed under Section 15(2) of the Contempt of Courts Act by an Advocate Commissioner who was restrained from executing a search warrant was dismissed for default, it does not operate as bar against contempt proceedings initiated by the High Court on the basis of the report of the Magistrate. The doctrine of estoppel or principle of *res judicata* was not attracted.[63]

Where in an earlier proceeding the High Court held that the jurisdiction of the Civil Court to decide the disputed question of title to a certain suit land was not barred, the Courts jurisdiction could not be challenged in a subsequent proceeding on the same grounds.[64]

38. ISSUE ESTOPPEL

The basic principle underlying the rule of issue estoppel is that the same issue of fact and law must have been determined in the previous litigation[65]. The court has inherent jurisdiction as a matter of

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55. *Ramrao* v. *Dattadayal*, (1947) Nag 889.
56. *Govindji Jevat & Co.* v. *Shree Saraswat Mills*, AIR 1982 Bom 76.
57. *Nowrangilal* v. *State of Orissa*, AIR 1965 Ori 44 (DB); *Machereappa* v. *Govt. of A.P.*, AIR 1958 A.P. 371; *H.A. Shah & Co.* v. *Commr. of I.T.*, AIR 1956 Bom 375.
58. *H.A. Shah & Co.* v. *Commissioner of Income-Tax, Bombay*, (1956) 58 Bom LR 45.
59. *Sunderabai* v. *Devaji*, AIR 1954 SC 82.
60. *I.T. Commissioner* v. *S.K. Bose*, AIR 1969 Cal 4; **See also** under "Promissory Estoppel".
61. *Jadi Behera* v. *Utpala Rout*, 1999 AIHC 972 (para 13) (Ori).
62. *K. Kaunakaran* v. *State of Kerala*, 1997 Cr LJ 3618 (Ker), **distinguishing** *Jagnarain Singh* v. *State*, AIR 1968 All 388 : 1968 Cr LJ 1457.
63. *Advocate General of A.P.* v. *Chennamsetty Chakrapani*, 1997 Cr LJ 3333 (AP).
64. *Hari Nath* v. *Raghu Nath*, AIR 1998 HP 28, at p. 31.
65. *G.P. Sinha* v. *State of Bihar*, AIR 1971 SC 458.

discretion in the interests of finality and not to allow a particular issue which has already been litigated to be reopened.[66] Where no issue was decided, the principle of *res judicata*, constructive or otherwise cannot be attracted.[67] Principle of issue estoppel is simply this that, where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or *res judicata* against the prosecution not as a bar to the trtial and conviction of the accused for a different and distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by law.[68] Not only the parties in the two trials must be the same but also fact in issue proved or not in the earlier trial must be indentical with what is sought to be regitated in the subsequent trial.[69] The principle of issue estoppel is different from double-jeopardly or *autre fois acquit*. For issue estoppel to arise there must have been distinctly raised and inevitably decided the same issue in earlier proceedings between the same parties. It does not prevent the subsequent trial but relates to the admissibility of evidence to upset the finding of fact. The rule is in accord with sound principle and Section 300, Cr. PC (Section 403 Cr PC old) does not prevent its application.[70]

The doctrine of issue estoppel applies as much in the case of criminal proceedings as in civil proceedings.[71]

Where a Magistrate acquitted the accused on a minor offence and it was set aside and later the accused was committed for a major offence, it was held that the principle of *res judicata* would not apply.[72] Where a person as prosecuted for defalcation committed by him in his capacity as cashier, and he was acquitted by the High Court in an earlier case of defalcation on finding that he was not in charge of cash, it was held that the finding of the High Court, in the earlier case did not operate as issue estoppel in the subsequent case since the subsequent defalcation related to an altogether different period.[73] When earlier order that it was exempt from sales tax was made on the basis of only one sample sent by assessee, and later the assessee sent 26 samples for determination as to taxability, there is no issue estoppel.[74] Proceedings in connection with Foreigners (Internment) Order Para 5 are not criminal proceedings. Hence where in a prosecution under Section 14 of Foreigners Act accused is acquitted on the ground that he is not a foreinger, that decision does not operate as issue estoppel to bar subsequent action against the same person under Para 5 of Foreigners (Internment) Order 1962 to deport him as a Foreigner.[75] Two identical cases were filed by the Government. Later a G.O. was passed regarding withdrawal of one case. It cannot be said that other cases should be dismissed on basis of the doctrine of issue estoppel.[76] Where the first suit for judicial separation was withdrawn on persuasion of friends, a second suit for divorce on the same grounds is not barred by estoppel.[77] There is a distinction between a case where the defendant consents to a judgment after pleading the defence, and a case where he consents to a judgment before setting up any pleading. The defendant in the latter case is not estopped as against the plaintiff from subsequently setting up matters which might have constituted the defence because there has never been an issue before the consent decree.[78]

Where the revision against rejection of accused's prayer under Section 337 (1), Cr. P.C. for summoning a witness, was rejected on the ground of limitation and the enquiry thereafter proceeded in

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66. *Rev. Secy. of State*, (1984) 1 All ER 956 at 964 and *Ali* v. *Secy. of State*, (1984) 1 All ER 1009. Noted all ER Annual Rev. 1984 at 160-161.
67. *Kamta Prasad* v. *IInd Addl. District Judge, Mainpuri*, AIR 1997 All 201.
68. *Masud Khan* v. *State of U.P.*, AIR 1974 SC 28; **following** *Pritam Singh* v. *State of Punjab*, AIR 1956 SC 415; *Manipur Administration* v. *Bira Singh*, AIR 1965 SC 87 : 1965 (1) Cr LJ 120; *Piara Singh* v. *State of Punjab* AIR 1969 SC 961 : 1969 Cr LJ 1435; *State* v. *L.R. Melwani*, ILR 1969 Bom 349; *Ravinder Singh* v. *State of Haryana*, AIR 1975 SC 856; *Ramesh Chandra Biswas* v. *State*, 1994 Cr LJ 1134 (paras 17 and 18) (Cal).
69. *Ravinder Singh* v. *State of Haryana*, AIR 1975 SC 856; *Mohar Rai* v. *State*, AIR 1968 SC 1281
70. *Manipur Administration* v. *Bira Singh*, AIR 1965 SC 87; Re *Piara Singh* v. *State of Punjab*, AIR 1969 SC 961; *State of A.P.* v. *Kokkiligada*, AIR 1970 SC 771; *Baidyanath Basak* v. *Union of India*, 1983 Cr LJ 1542 (Cal).
71. *Sambasivam* v. *Public Prosecutor, Federation of Malaya*, 1950 AC 458.
72. *Ramekbal* v. *Madan Mohan*, AIR 1967 SC 1156; **dissenting from** *Pritam Singh* v. *State of Punjab*, AIR 1956 SC 415. *Sambasivam* v. *P.P. Fed. of Malaya*, 1950 AC 458; *Masud Khan* v. *State of U.P.*, AIR 1974 SC 28.
73. *G.P. Sinha* v. *State of Bihar*, AIR 1971 SC 458.
74. *Filter Co.* v. *Commissioner of Sales Tax, M.P.*, (1986) 2 SCC 103 : AIR 1986 SC 626.
75. *Masud Khan* v. *State of U.P.*, AIR 1974 SC 28.
76. *D.R. Rao* v. *G. Somi Reddy*, 1987 Cr LJ 1629 (AP).
77. *Dina Dinshaw Merchant* v. *Ardeshir Merchant*, ILR 1969 Bom 1043.
78. *Parasuram* v. *Pandu*, AIR 1956 Hyd 178.

the trial court, the acused is estopped from raising the same issue again in an application under Section 337(1), Cr. P.C.[79]

Merely because in previous years the plaintiff claimed *mesne* profits at reduced rates, there is no question of estoppel for subsequent years. It is no doubt a circumstance to be taken into account for purpose of ascertainment of *mesne* profits but the admission in plaint is by no means conclusive, as the claim at low rate might well have been to avoid payment of court fee.[80]

39. ESTOPPEL BY DEED

Doctrine of estoppel by deed would apply as pointed out by *Dalton* v. *Fitzerald*[81], when the person sought to be estopped or his predecessor in interest has obtained possession of property or some advantage under the deed.[82]

If a document is fictitious, it is of no legal consequence and the parties to such a document are not bound by the contents thereof.[83]

A vendor seeking to enforce an option of repurchase contained in the original sale deed is not estopped from taking the conveyance from the vendee even if he knew at the time of original agreement that he was not the rightful owner.[84]

Where the recital in a deed is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But where it is intended to be a statement of one party only the estoppel is confined to that party when in a deed of sale, the vendors make unilateral statement that the vendors are *inamdars* of the property transferred, the vendees are not bound by it and they are not estopped from denying that fact.[85]

Where the plaintiff signed the partition deed partitioning the properties belonging to the family and the relinquishment deed relinquishing his rights in favour of other member of the family, subsequently he could not file a suit for declaration of title over the said properties by pleading that there being no concept of joint family or right by birth under the Muslim Law, the said documents were void. He will have to file a suit for cancellation of those documents first.[86]

40. ESTOPPEL *IN PAIS*

Estoppel *in pais* (*i.e.* "in the country", or "before the public"), or more fully "estoppel *in pais de hors* the instrument" (*i.e.* with regard to matters outside a record or deed) as known to the common law was of an entirely different character to the estoppel *in pais* of the present days. "Indeed the estoppel *in pais* of the present day has grown up entirely since the time of COKE, and embraces cases never contemplated in that character by him or by the lawyers of even much later times though old lines are often visible in the newer pathways."

Estoppel *in pais* arises (1) from agreement or contract; and (2) from act or conduct of mispresentation which has induced a change of position in accordance with the intention of the party against whom the estoppel is alleged.

Estoppel *in pais* is dealt with in Ss. 115 to 117. Sections 116 and 117 are instances of estoppel by contract, *viz.*, that of the tenant, the licensee, the bailee and the acceptor of a bill of exchange. But the distinction between estoppel by contract and estoppel by conduct is not preserved in the Evidence Act.

See Commentary under the head *"Conduct"*.

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79. *Santosh Saha* v. *State*, ILR (1973) 2 Cal 173.
80. *Jagannath Prasad* v. *Badiul Mulk Khan*, AIR 1954 Pat 447.
81. (1897) 2 Ch 86.
82. *Damaraju* v. *Narayana*, 1941 Mad 551.
83. *Shib Dai* v. *Ghauri Lal*, AIR 1965 J&K 11.
84. *Nathoolal* v. *Ganpat Prasad*, AIR 1958 M.P. 84.
85. *Dattatraya Prahlad* v. *Basawaneppa Chanbasappa*, ILR 1960 Mys 1092.
86. *Habeeba Begum* v. *Gulam Rasool*, 2000 AIHC 1981 (paras 10-12) (AP). **See also** *L.V. Sundaram* v. *L.V. Krishna Iyer*, 2001 AIHC 3333 (para 45) (Mad).

41. PROMISSORY ESTOPPEL

In HALSBURY 4th Ed., Vol. 16, Para: 1514, Page: 1017 it is observed: "When one party has, by his words or conduct, made to the other in clear and unequivocal[87] (per LORD CROSS of Chelsa) promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced. This doctrine, which is derived from a principle of enquiry enunciated in 1877, has been the subject of considerable recent development and is still expanding. It differs from estoppel *in pais* in that the representation relied upon need not be one of present fact.

The doctrine cannot create any new cause of action where none existed before, and it is subject to the qualification (1) that the other party has altered his position; (2) that the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position; (3) the promise only becomes final and irrevocable if the promisee can not resume his position. The doctrine is known variously as "equitable" or "promissory" or "quasi" estoppel. It is a doctrine evolved by equity in order to prevent injustice.[88]

Promissory estoppel proceeds on the footing that when on the representation of a promisor, a promisee alters his position then the former must keep his word and is not allowed to recede from his promise.[89] Merely by applying for job and receiving call letter, it cannot be said that the petitioner has 'changed or altered' his position after having been declared to have passed the university examination and the university was not debarred from cancelling his results subsequently.[90]

There need not be a pre-existing contractual relationship between the parties provided there is a pre-existing legal relationship which could in certain circumstances give rise to penalties and liabilities.[91] The principle also applies where the promise affects a legal relationship which will arise in the futures. Where the landlord, who assured his tenant that if the tenant gave up premise in respect of which the tenant had statutory security of tenure and moved into other premises owned by the same landlord, the tenant would enjoy the same security of tenure, and that so long as the tenant contained to practise his profession, the landlord would not ask him to leave the premises, was estopped from alleging that the tenant had no statutory security in the second premises so as to claim possession from the tenant before he had ceased to carry on his profession.[92]

In its inception the equitable principle was that if parties who had entered into definite legal relations afterwards entered "upon a course of negotiations which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable, having regad to the dealings which have thus taken place between the parties."[93]

"A promise intended to be binding, intended to be acted on and in fact acted on, is binding so far its terms properly apply." per Lord DENNING in.[94]

Lord DENNING stated "The principle does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties....."[95]

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87. *Woodhouse AC Israel Cocoa Ltd. SA* v. *Nigerian Produce Marketing Co. Ltd.*, (1972) AC 741 at 768 : (1972) 2 All ER 271 at 291 (HL).
88. *Intrans Systems Pvt. Ltd.* v. *State of Kerala*, AIR 1996 Ker 161 (para 2).
89. *Kimti Lal Rahi* v. *Union of India*, AIR 1993 Del 211 (Paras 18-20).
90. *Reeta* v. *Berhampur University (FB)*, AIR 1993 Ori 27 (paras 6 and 8); **overruling** *Rajkishore Senapati* v. *Utkal University*, AIR 1982 Ori 189. **See also** *Chandrika Chettri* v. *State*, AIR 1994 Sik 1 (paras 5 and 6).
91. *Durham Fancy Goods Ltd* v. *Michael Jackson, (Fancy Goods) Ltd.*, (1968) 2 QB 839 at 847 : (1968) 2 All ER 987 at 991, per DONALDSON J.
92. *Bank Negara Indonesia* v. *Phillip Hoalim*, (1973) 2 MLJ 3, PC.
93. *Hughes* v. *Metropolitan Rly Co.*, (1877) 2 App Cas 439 (HL).
94. *Central London Property Trust Ltd* v. *High Trees House Ltd.*, (1956) 1 All ER 256.
95. *Combe* v. *Combe*, (1951) 2 KB 215.

Promissory estoppel as laid down in the English cases has been applied in India.[1]

In order that doctrine of promissory estoppel may operate, the promise must be clear and unequivocal.[2] Mere inviting applications for allotment of houses, does not create a right; subsequent announcement to give priority to unsuccessful candidates in future, cannot be construed as promise by the Board and the Authority constituted superseding the Board and formulating a fresh scheme was not bound by earlier announcements made by the Board.[3]

The doctrine of promissory estoppel, has the effect of creating substantive rights against the representee and can be viewed as a rule of substantive law. A representation of fact or intention on which the doctrine is founded if intended to be acted upon and when acted upon becomes actionable. The claim for the relief depends upon that representation, which constitutes the cause of action. The representation, be it of promise, or intention or future conduct, on which this doctrine of promissory estoppel is founded is susceptible of generating enforceable promises and binding contractual obligations even where there is no consideration, such as at common law would have supported the promises and obligation.[4]

It is not necessary that the promisee should suffer detriment. It is enough if he acts on the representation and alters his position.[5] Where a party made heavy investments on the modernisation of his rice mill allegedly under the Govt. Incentive Scheme but no approval was obtained as required by the said Scheme, he could not be said to be induced by the said scheme to change his position by spending a huge sum.[6]

"If a promise is acted upon such action in law as in physics must necessary result in an alteration of position". LORD DENNING in *High Trees* case.[7]

Alteration of position by promise is the only requirement for application of promissory estoppel, damage, prejudice or detriment to the promise need not be proved.[8] The doctrine of promissory estoppel applies when, there is a clear and unequivocal promise relying on which the other side has acted to his prejudice[9] but it does not bind other persons or saddle liability on other persons because of the statement of a third person.[10]

Promissory estoppel is not maintainable when objection to it was not raised by the petitioner earlier, but raised for the first time in writ petition.[11]

Where a company undertook to discharge tax liability of a share holder in respect of undistributed dividend and acting upon the undertaking discharged the liability, it was estopped from claiming reimburse from the share holder.[12] Where flats were allotted by the H.P. Housing Board pursuant to

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1. *Seth Satnarain* v. *Union of India*, (1968) 2 SCWR 335; *Air Corporation Employees Union* v. *G.B. Bhirade*, AIR 1971 Bom 288.
2. *Chongtham Ongbi Sabita Devi* v. *State of Manipur*, 1985 Cr LJ 693 (Gau)(DB); *Ude Ram* v. *State of Haryana*, AIR 1994 P&H 175 (para 12).
3. *Kabul Singh* v. *Punjab Urban Planning and Development Authority*, 1997 AIHC 1719, at pp. 9-11 (P&H).
4. *B. Subrahmanayan & Co.* v. *State*, AIR 1975 AP 126.
5. *M.P. Sugar Mills* v. *State of U.P.*, AIR 1979 SC 621; **followed in** *Indo-American Hybrid Seeds* v. *Chandigarh I&T.D. Corporation*, AIR 1995 P&H 134 (paras 13 and 14) and *Union of India* v. *Property & Finance Private Ltd.*, AIR 1996 Kant 264 (para 14); no promise, no change of position, no estoppel. *Ram Niwas Agarwal & Sons* v. *State of Rajasthan*, 1996 AIHC 3820 (para 7) (Raj); nothing to show petitioner acting on representation, representation not by competent authority, no estoppel. *D.K. Saksaria* v. *Bank of Baroda*, 1996 AIHC 3763, at p. 3766 (Cal); *Busching Schmitz Pvt. Ltd.* v. *State of Haryana*, 1997 AIHC 1560 (paras 29 and 36) (P&H); *UNI-ADs Pvt. Ltd* v. *Commissioner of M.C.H., Hyderabad*, AIR 1999 AP 278 (paras 24, 27 and 28).
6. *Mahalaxmi Rice Mills* v. *State of W.B.*, AIR 1996 Cal 162 (para 10). **See also** *State of Haryana* v. *Bharat Steel Tubes Ltd.*, AIR 1996 Del 198 (para 17).
7. *Central London Property Trust* v. *High Treer House Ltd.*, (1956) 1 All ER 256; *Alan (W.J.) & Co. Ltd.* v. *El Nasr Export & Import Co.*, (1972) 2 All ELR 127 @ 140; *Tool Metal Manufacturing Co. Ltd.* v. *Tungesten Electric Co Ltd.*, (1955) 2 All ER 657; *Viscount Simonds Ajayi* v. *Brscoe Lord Hodson*, (1964) 3 All ER 556; *Kammin's Ballroom* v. *Zenith Investments*, (1970) 2 All ER 871; *Grundt* v. *Great Boulder Pty Gold Mines Ltd.*, (1938) 59 CLR 641; All these are referred to in *Meenakshi College for Women* v. *University of Madras*, (1990) 2 MLJ 231.
8. *Delhi Cloth & General Mills Ltd.* v. *Union of India*, AIR 1987 SC 2414.
9. *Anchar Ali* v. *State of Assam*, AIR 1989 Gau 12 (DB); *Adinarayan Naik* v. *State of Orissa*, AIR 1987 Ori 115.
10. *C. Doctor and Company Ltd.* v. *B.S. Mills Ltd.*, AIR 1995 All 19 (para 3).
11. *Pramod Bhai* v. *Officer on Special Duty No. 2 (L.A.), Ahmedabad*, AIR 1989 Guj 187 (DB).
12. *Turner Morrison* v. *Hungerford Investment Trust Ltd.*, AIR 1972 SC 1311.

sanction of lay-out plan with an area earmarked for community facilities in it, the Board could not subsequently take plea that no promise was held out by it to provide community facilities to the residents.[13] Where the vendee under a contract for the sale of immovable property stated to the vendor that his money was ready and that the title deed was being prepared where those two matters alone were wanting to complete the sale and where the vendor gave five days notice to the vendee-calling upon him to complete the sale, it was held that the vendee was estopped from denying the truth of statement.[14]

Where rebate was granted by the State Electricity Board in demand and energy charges from the date of going into regular production which was subsequently withdrawn, a company starting production after the date of withdrawal was not entitled to rebate.[15] Doctrine of estoppel could not be applied where rebate was considered before the agreement but was not contemplated in the agreement.[16] Where the Govt. granted exemption from entertainment tax at higher rates to those constructing cinema buildings which was subsequently modified, those applying after the modification order could not invoke the principle of promissory estoppel for the exemption granted prior to the modification order.[17] The doctrine of promissory estoppel or legitimate expectation is not attracted where the assurance was conditional and the conditions were not timely fulfilled.[18] Where a section of the Act empowered the Govt. to amend the provisions of the schedule giving tariff concession to the new industries for five years and the Govt. imposed a condition before the expiry of five years, the doctrine of promissory estoppel could not be invoked against the Govt.[19] However an application by an industrial unit for incentive scheme of Govt. submitted on the date of expiry of the scheme, could not be rejected on the ground that it was not processed before expiry of the scheme.[20] The doctrine of promissory estoppel has to yield when equity demands it. Where the industries found to be sick due to mismanagement, were unwilling to follow certain suggestions, the benefit of rehabilitation scheme was declined to them.[21] The doctrine of promissory estoppel, being an equitable doctrine, should not be reduced to rule of thumb and be kept elastic enough in the hands of the Courts to do complete justice between the parties.[22] Where the petitioner never intended to establish the industry on the basis of representation under the Incentive Scheme of the Govt. and did not apply for registration under the said scheme, it was not entitled to invoke the doctrine of promissory estoppel.[23] Where there was no proof of any promise held out by the Municipal Corporation, the doctrine of promissory estoppel could not be enforced against the Corporation.[24] The promise of the municipal corporation to accept the tender, if the tenderer is willing to

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13. *Bhagat Singh Negi* v. *H.P. Housing Board*, AIR 1994 HP 60 (para 18). Abrupt refusal by Corporation to give concession, *Bharat Explosives Ltd.* v. *Pradeshiya Corporation of U.P. Ltd.*, AIR 1994 All 123 (paras 22, 23 and 28); allottee paying amounts as per terms of allotment of plots, taking possession and some of them even constructing houses, Govt. could not cancel allotments. *Secretary to Govt., Housing & Urban Development Department* v. *Ammani*, AIR 1996 Mad 70 (para 5); *Pawan Alloys & Casting Pvt. Ltd., Meerut* v. *U.P. S.E.B.*, AIR 1997 SC 3910 : 1997 All LJ 202, **relied on** in *Kamla Palace* v. *State of U.P.*, 2001 AIHC 457 (paras 11-14) (All), **distinguishing** *Pankaj Jain Agencies* v. *Union of India*, 1994 AIR SCW 4552 : 1994 (5) JT 64.

14. *Motilal Itchhalal Gandhi* v. *Haji Moosa Haji Mohammad*, AIR 1925 PC 124.

15. *A.P. State Electricity Board* v. *Sarada Ferro Alloys Ltd.*, AIR 1993 SC 1521 (para 11), **relying in** *Mahalaxmi Rice Mills* v. *State of W.B.*, 1996 AIHC 3401 (paras 11 and 12) (Cal). **See also** *Tilak Chitra Mandir* v. *State*, AIR 1993 All 30 (paras 5 and 6); applicant not entitled to benefit on date of application, no estoppel. *S.B. International Ltd.* v. *Asstt. Director of General F.T.*, AIR 1996 SC 2921 (paras 9 and 10).

16. *Bhoruka Power Corporation Ltd.* v. *State of Karnataka*, AIR 1994 NOC 314 (Kant).

17. *Jai Prasad Singh* v. *State of U.P.*, 1996 AIHC 3639 (paras 4 and 5) (All).

18. *Chemech Engineers Pvt. Ltd.* v. *Director of Industries and Commerce*, AIR 1994 Mad 14 (paras 28-30 and 32). **See also** *Ganpati Salt Works* v. *State of Gujarat*, AIR 1995 Guj 61 (paras 13, 14 and 18); *Mahalaxmi Rice Mills* v. *State of W.B.*, AIR 1996 Cal 162 (para 10); *Ananda Swarup Agarwal* v. *State of W.B.*, AIR 2000 Cal 222 (para 17); *Riaz Construction Co.* v. *Union of India*, AIR 2001 J&K 7 (para 11).

19. *National Oxygen Ltd.* v. *Tamil Nadu Electricity Board*, AIR 1996 Mad 239 (para 15).

20. *Shri Bajrang Extraction Pvt. Ltd.* v. *Secretary, Govt. of A.P.*, AIR 1993 MP 202 (paras 14, 16 and 17).

21. *Sanjiv Textiles Pvt. Ltd.* v. *State Bank of India*, AIR 1993 Guj 132 (paras 20 and 21). **See also** *K.M.L. Narasimhan Larsen & Toubro Ltd.* v. *Union of India*, AIR 1994 Mad 82 (para 14).

22. *State of H.P.* v. *Ganesh Wood Products*, AIR 1996 SC 149 (para 55).

23. *Sree Ravalaseena Alkalies & Allied Chemicals Ltd.* v. *Govt. of A.P. (TB)*, AIR 1993 AP 278 (para 49).

24. *Mangalore Municipal Market Welfare Society* v. *Corporation of Mangalore*, AIR 1993 Kant 220 (para 39). **See also** *Ashok Kumar* v. *Union Territory, Chandigarh*, AIR 1995 SC 461 (paras 8 and 9), withdrawal of exemption for a specified period no estoppel. *Kasinka Trading* v. *Union of India*, AIR 1995 SC 874 (paras 19, 21, 22, 24 and 25) : 1995 AIR SCW 680 : (1995) 1 SCC 274, **relied on in** *Union of India* v. *Godhawani Brothers*, AIR 1999 SC 1604 (para 3); *Arvind Industries* v. *State of Gujarat*, AIR 1995 SC 2477 (para 6); *U.P.S.R.T. Corporation* v. *U.P. Parivahan N.S.B. Sangh*, AIR 1995 SC 1115 (paras 9 and 10); *Siben Kumar Mondal* v. *Hindustan Petroleum Corporation Ltd.*, AIR 1995 Cal 327 (para 18); *S.R. Bhupeshkar* v. *Secretary, Selection Committee, Sabarmati*

pay the entire bid amount within sixty days from the date of receipt of the final acceptance, is no ground for acceptance of the tender on the principle of promissory estoppel.[25] Enforcement of an assurance under the doctrine of promissory estoppel is not based on the terms of the contract, but the nature of the assurance held out which is acted upon by the assured persons who alter their position owing to such assurance.[26]

42. PRINCIPLES GOVERNING APPLICATION OF PROMISSORY ESTOPPEL

The application of "promissory estoppel" is governed by the following principles :

(1) The legislature can never be precluded from exercising its functions to legislate by invoking the principles of promissory estoppel.

(2) Principles of 'promissory estoppel' can be invoked against the Govt. or public authority subject to the following :

(i) It cannot be invoked to compel it to act contrary to the obligation or liability imposed by law.

(ii) The doctrine of 'promissory estoppel' being an equitable doctrine, if it is established on the facts and circumstances that it would be inequitable, in the larger public interest, to hold the Govt. or public authority to the promise or representation made by it, it will not be enforced.

(iii) The doctrine cannot be invoked when the representation made by the officer or authority is beyond their powers.

(iv) The doctrine being an equitable one cannot be invoked, if it is shown that the representation was obtained by playing fraud, having regard to the fact that fraud vitiates everything.[27]

43. GOVERNMENT AND PROMISSORY ESTOPPEL

Government and its agencies are no longer immune from the operation of the doctrine of promissory estoppel. Government agencies have to work within the framework of the legal system. Where the Working Group consisting of the representatives *inter alia* of the Central Govt. and Engineering Export Promotion Council was an instrumentality of the State, the Govt. was bound by the promise given by the Working Group to the concerned company.[28] The Govt. cannot resile from its promise simply on account of change of Govt.[29] The doctrine of promissory estoppel applies in the facts and circumstances of a given case, whether such a policy is considered as government action or as subordinate delegated legislation.[30] The Government is not exempt from the equity arising out of the acts done by citizens to their prejudice, relying upon the representations as to its future conduct made by the Government[31]. Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them, relying on which other persons have altered their position to their prejudice.[32] The Govt. cannot invoke the defence of executive necessity or freedom of future executive action.[33]

Hostel (FB), AIR 1995 Mad 383 (para 27); *Union of India* v. *Property & Finance Private Ltd*, AIR 1996 Kant 264 (paras 12-14), **reversing** ILR 1991 Kant 315; *Bharat Wools, Ludhiana* v. *State of Punjab*, AIR 1996 P&H 215 (para 30); *Nupur* v. *Punjab University, Chandigarh*, AIR 1996 P&H 132 (para 37).

25. *C. Jayasree* v. *Commissioner, M.C.H.*, AIR 1994 AP 312 (paras 5 and 13).
26. *Nagappa* v. *State*, AIR 1994 Kant 77 (para 32).
27. *Sree Ravalaseema Alkalies & Allied Chemicals Ltd* v. *Govt. of A.P. (FB)*, AIR 1993 AP 278 (para 37). **case Law discussed.**
28. *K.M.L. Narasimhan, Larsen & Toubro Ltd* v. *Union of India*, AIR 1994 Mad 82 (paras 34 and 35).
29. *B. Sanjeeva Reddy* v. *Govt. of A.P.*, 1996 AIHC 2426 (AP).
30. *Union of India* v. *Rizwan International*, AIR 1993 Mad 336 (para 15).
31. *Union of India* v. *Indo-Afghan Agencies Ltd.*, (1968) 2 SCR 366 : AIR 1968 SC 718. **See also** *Gujarat Ambuja Cements Ltd* v. *Union of India*, AIR 1994 Guj 104 (para 25); *Rizwan International* v. *Union of India*, AIR 1994 Mad 112 (paras 18 and 20).
32. *Century Spg. & Mfg. Co.* v. *Ulhasnagar Municipality*, AIR 1971 SC 1021.
33. *K.M.L. Narasimhan, Larsen & Toubro Ltd* v. *Union of India*, AIR 1994 Mad 82 (para 13); *Jeet Ram* v. *State of Haryana*, AIR 1980 SC 1285 : (1980) 3 SCR 689 **not followed in view of** *Motilal Padamapal Sugar Mills* v. *State of U.P.*, AIR 1979 SC 621 : 1979 All LJ 368 : 1979 2 SCR 641.

The Express News Paper Pvt. Ltd., having acted upon the grant of permission by the then Minister for Works and Housing and constructed the new Express building with a double basement in conformity with the permission granted by the lessor *i.e.* Union of India with the concurrence of Delhi Development Authority in view of the master plan, it was held that the lessor was precluded from contending that the order of the Minister was illegal, improper or invalid by application of the doctrine promissory estoppel.[34] Where the State Government held out certain specific promises as inducement for its employees to move into a newly created department, it was held that the employees having believed the representations by State Government and having acted thereon could not be denied rights and benefits promised to them.[35] Where as per notification of the Govt., all the successful candidates in the entrance examination were to be given six months teachers training, the Govt. could not subsequently restrict the admission to the extent of availability of seats.[36] Under an incentive scheme, enterpreneurs starting new industires were given sales tax concessions. Subsequently the order giving the concessions was withdrawn on the ground of misuse of the scheme and undue advantage taken by some enterpreneurs. However, relevant facts establishing such misuse was not placed before the court by the Government. It was held that the Govt., cannot resile from the promise and withdraw the concession.[37] But in a case involving payment of interest free sales tax loan, the state did not deny its liability but pleaded its inability due to paucity of funds, it was held that principle of promissory estoppel was not applicable.[38] Where the State Government had given an undertaking in an earlier petition before the Supreme Court, stating that erstwhile village officers possessing general qualification under the relevant Act would be absorbed irrespective of their age, it was held that the Government could not get round the undertaking by prescribing a maximum age limit for absorption of erstwhile village officers.[39] Where an industrial company started legal proceedings claiming that the lands held by it being for non-agricultural use were outside the purview of Maharashtra Agricultural Lands (Ceiling of Holdings) Act and on Government agreeing to exempt them under Section 47(1)(*k*), the company withdrew the legal proceedings, the Government was held estopped from denying that the lands were held for non-agricultural use. No question of estoppel against statute arises in such a case.[40] Where the Government issues notification reviving earlier acquisition proceedings and also commences fresh proceedings by issuing notification under Section 4 of the Acquisition Act and both notification are in force but represents to the claimant that fresh proceedings will be the basis for compensation and he omits to avail of remedies under the earlier proceedings relying on such representations, the Government is estopped from treating the proceedings as revived.[41] The Oil Corporation offered distributorship of L.P.G. Gas by a letter of intent and the petitioner made substantial financial investments under the letter of intent. Subsequently the letter of intent was cancelled on the recommendation of Oil Selection Board. It was held that the principle of promissory estoppel applied and the concellation of intent was not correct.[42] A site was granted by the Government to a Corporation for a market stating that no rent was to be charged. The Corporation was in possession for more than 70 years on a rent free basis. It was held that though the grant was invalid, it did not wipe out the representation that it would be rent free and Section 115 applied and the Corporation was entitled to be in possession in perpetuity without the liability to pay rent.[43] Where the State Government, promissed assignment of land for house sites for the employees of the Central Government Undertaking and later resiled from the promise after a long lapse of time on the ground that the State Government, employees should be given preference, it was held that the doctrine of

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34. *Express News Papers Pvt. Ltd.* v. *Union of India*, AIR 1986 SC 872: **followed** in *S. Shanmughanathan* v. *Executive Engineer, Tamil Nadu Housing Board*, (1991) 1 MLJ 339. **See also** *Tulsi* v. *State of Rajasthan*, 1996 AIHC 1824 (para 37) (Raj).
35. *Bhim Singh* v. *State of Haryana*, AIR 1980 SC 768.
36. *Cera Manjula* v. *Director of School Education*, 1997 AIHC 988, at pp. 992 and 993 (AP), **dissenting from** WP No. 11636/96, Dt. 15-7-96 (AP).
37. *Assistant Commissioner of Commercial Tax, Dharwar* v. *Dharmendra Trading Co.*, AIR 1988 SC 1247; *Sri Jagannath Roller Flour Mills* v. *State*, AIR 1986 Ori 163; *Pournami Oil Mills* v. *State of Kerala*, AIR 1987 SC 590.
38. *Shakti Tubes Ltd.* v. *State of Bihar (FB)*, AIR 1994 Pat 162 (para 12).
39. *R.K. Ramarao* v. *State of A.P.*, AIR 1987 SC 1467.
40. *Belapur Co. Ltd.* v. *State*, ILR 1971 Bom 89 : 71 Bom LR 856.
41. *R.C. Sood & Co.* v. *Union of India*, AIR 1971 Del 170. **Also see** *Bejgam Veeranna Venkata Narsimloo* v. *State of A.P.*, AIR 1998 SC 542; *State of A.P.* v. *Commissioner of Land Reforms & Urban Land Ceiling*, 1999 AIHC 3417 (paras 7 and 11) (AP).
42. *Vinod Kumar Mittal* v. *Union of India*, AIR 1991 All 1.
43. *Collector of Bombay* v. *Bombay Corpn.*, AIR 1951 SC 469.

promissory estoppel applies.[44] The doctrine of promissory estoppel also applied where a N R I sent some amount in foreign currency alongwith an application for allotment of a plot and on request by the Govt., holding out to him earmarking of the plot and issue of allotment letter, he paid the balance amount and the Govt. subsequently refused to allot him the plot on the ground of change of policy.[45]

The Central Government, announced export assistance scheme declaring cash assistance at a particular rate on export of certain materials. Later, it unilaterally withdrew cash assistance retrospectively. It was held that the withdrawal was invalid by virtue of promissory estoppel.[46] The detaining authority refused to supply the grounds of detention at first but passed order later promising to supply the same. The authority was held bound by promissory estoppel.[47] Under a truck, matador, bus hiring scheme sponsored by M.P. State Road Transport Corporation to provide employment to educated unemployed persons, the petitioners were granted to operate on certain routes as nominees of the Corporation. Subsequently the corporation invited fresh tenders from educated unemployed persons to operate transport service on various routes including those granted to the petitioners. It was held that the corporation was estopped from doing so.[48] Land was allotted on no loss no profit basis to the petitioners for setting up educational institutions. Subsequently, Delhi was divided into four zones. The Delhi Development Authority revised price of land depending upon the location of land. It was held that it was estopped from charging at a rate higher than fixed earlier.[49] In a case the order of State Govt. cancelling the allotment of land in exchange of land owned by the landholder after a period of thirteen years and without any notice to him was held to be illegal.[50] A contractor was promised renewal of a forest lease. He paid the requisites and incurred expenditure on improvement of the site. There was some delay in granting formal renewal. Ultimately the contractor was refused because of a shift in policy. The Madras High Court did not permit the Government to go back upon its promise.[51] The Government announced a scheme of exemption under the Industries Act. The applicant submitted his documents within the time delimited and commenced working. The Government took four years to dispose of his application telling him that the scheme was withdrawn. The High Court of Delhi ordered the Government to grant the intended benefits to the applicant.[52] The moral of these cases is that there can be no whimsical withdrawal from a declared programme which has already generated action.[53] Where an industrialist went to the extent of erecting a factory in response to declarations of vital exemptions, BHAGWATI J (now CJ retired) held the Government bound by the scheme in reference to the petitioner. It was immaterial that his factory was running at a profit. The doctrine of estoppel is not based upon loss or detriment but upon alteration of position in response to a representation.[54]

Estoppel can be invoked to hold the Government bound to its promises and agreements whether they be of executive or administrative character. A Town Development Authority was not permitted to raise prices arbitrarily[55]. Cigarette manufacturers did not collect excise on corrugated fibre board containers in which cigarettes were delivered at the factory gates on the basis of a Departmental letter. It was held that

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44. *Aeronautics Employees Co-operative Society Ltd.* v. *State of A.P.*, AIR 1990 AP 331.
45. *Anokh Singh* v. *State of Punjab*, AIR 1994 P&H 157 (paras 9 and 12). **See also** *Om Prakash* v. *State of Rajasthan*, 1998 AIHC 2715 (para 5) (Raj); *Dharmichand Chajod & Sons* v. *Agricultural Produce Marketing Committee*, 1998 AIHC 2638 (paras 11-13) (Kant).
46. *Garments International Pvt. Ltd.* v. *Union of India*, AIR 1991 Kant 52.
47. *Sukhdev Singh* v. *Union of India*, 1989 Cr LJ 1340 (DB).
48. *Krishan Gopal Dixit* v. *M.P. Road Transport Corp.*, AIR 1986 MP 103. **See also** *Davinder Singh* v. *State*, AIR 1995 J&K 77 (paras 15 and 16). **relying on** *International Airport Authority*, AIR 1979 SC 1628 (at pp. 1636 and 1637).
49. *Rose Educational, Scientific and Cultural Society (Regd.)* v. *Union of India*, AIR 1990 Del 75.
50. *Ganpat Lal* v. *State*, AIR 1999 Raj 225 (paras 11 and 14).
51. *A.K. Thangadurai* v. *D.F.O., Madurai*, AIR 1985 Mad 104. Similarly, the extension of lease of fishery was not allowed to be withdrawn after the gurantee had acted upon it. *Ikop Laidakol Fishing Corpn* v. *State of Manipur*, AIR 1982 Gau 14.
52. *Dhampur Sugar Mills Ltd.* v. *Union of India*, AIR 1985 Del 344.
53. **See** *Union of India* v. *Indo-Afghan Agencies*, AIR 1968 SC 718.
54. *Motilal Padamapat Sugar Mills* v. *U.P.*, (1979) 2 SCR 641 : AIR 1979 SC 621 : 1979 All LJ 368. The same result **followed** where there was incentive scheme for industry in backward areas. *Tapti Oil Industries* v. *State of Maharashtra*, AIR 1984 Bom 161 (FB); *Union of India* v. *J.K. Industries*, AIR 1991 Raj 45; *Modi Alkalies* v. *State of Rajasthan*, AIR 1992 Raj 51; *R.K. Kawatra* v. *D.S.I.D.C.*, AIR 1992 Delhi 28; *Union of India* v. *Anglo Afghan Agencies*, AIR 1968 SC 718; and *Century Spinning & Mfg. Co.* v. *Ulhasnagar Municipality*, AIR 1971 SC 1021 **followed.**
55. *Sadhna Agarwal* v. *Indore Devp. Auth.*, AIR 1986 MP 88.

promissory estoppel was attracted.[56] The State Government allotted rectified spirit to petitioner company which put up a plant and machinery at a huge cost. The commissioner of prohibition allotted denatured spirit instead. The Plant and machinery were designed only for use of rectified spirit and the design can not have denatured spirit. It was held Government was estopped.[57] In respect of the office of S. Sajadanashin to a Durga Saheb, the Durga Committee and the parties proceeded on the basis that the heriditary office was entitled to be appointed by the descendants of the Saint who established the shrine by the rule of primogeniture, it was held that the Durga Committee would be estopped by their conduct to contend that it was not bound by the decision of the courts below, that the office was entitled to be claimed by the descendants of the Saint.[58]

Courts have power in appropriate cases to compel performance of the obligations imposed upon departmental authorities by orders which are executive in character when they find that any person has acted to his detriment on solemn promises made by the State Government or its authorities concerned.[59] Building was constructed by the petitioner as per plan sanctioned by the city corporation, occupancy certificate was also issued by it. Flats were sold to different persons. Notices were issued by the corporation after 3 to 4 years for demolition of the building. It was held that the corporation is equitably estopped from issuing notices for demolition.[60]

Under Section 115 of the Evidence Act, it is open to a party who had acted on a representation made by the Govt., to claim that the Government shall be bound to carry out the promise made by it, even though the promise was not recorded in the form of a formal contract.[61] Where the authorities make express or implied representation of a fact, it is not open to them to retract from it.[62] Petitioners were incurring expenditure to their prejudice and detriment acting on the representation of Government that they had a valid concession for supplying electric energy. Government acted for years as if they recognised and acknowledged the concession granted by the Portuguese Government. It was held that the Government was estopped from saying that they have not recognised the concession.[63] Where a person was appointed by a Municipal Committee, whose conditions of service were subject to approval of Government, on its satisfaction that the appointee possessed requisite qualification, the Government Official in his inspection report also found him to be holding the required qualification and he was retained in service for a long time, he could not be dismissed on the Government's direction that he did not possess the requisite diploma especially when other persons like him were in Government employment.[64]

Amounts were being sanctioned by the Government from time to time to a voluntary organisation set up to uplift tribal people. Later the Government stopped sanctioning the amounts without giving an opportunity to the organisation to place its case for continuance of funds. It was held the action of the Government was hit by the principle of estoppel. It is submitted that the decision cannot be regarded as correct as there can be no promise to continue assistance.[65] The representation made by the Govt. must be definite and clear, and not tentative or uncertain, otherwise it would not attract the doctrine of promissory estoppel nor confer any rights and impose any duties on the parties.[66]

Where permission to sell property has been granted, the cancellation of permission subsequently is not permissible by reason of estoppel.[67] After a lapse of thirteen years of continuous acknowledgement of the petitioner as the Secretary of the Co-operative Bank and dealing with him as such during that long period, it is no longer open to the Registrar of Co-operative Societies or the Bank to question the validity

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56. *Union of India* v. *Godfrey Philips India Ltd.*, AIR 1986 SC 806.
57. *Varalakshmi Chemind Pvt. Ltd.* v. *Commissioner of Prohibition, Madras* (1933) 1 MLJ 205
58. *Syed Saulat Hussain* v. *Syed Illamuddin*, AIR 1987 SC 2213.
59. *S.K.G. Sugar Ltd.* v. *State of Bihar*, AIR 1975 Pat 123.
60. *H.H. Builders (P) Ltd.* v. *Corporation of the City of Bangalore*, AIR 1990 Kant 56.
61. *Union of India* v. *Anglo Afghan Agencies*, AIR 1968 SC 718. Even though case not falling within rule of estoppel, party acting on representation of Govt., Govt. bound, *Ashok Kumar Maheshwari (Dr.)* v. *State of U.P.*, AIR 1998 SC 966; *Dominion of India* v. *Ram Rakha Mall*, AIR 1957 Punj 141.
62. *Kumari Akhtar* v. *Principal, Os. M. College*, AIR 1959 AP 493.
63. *Chowgula & Co.* v. *Union of India*, AIR 1972 Goa 33.
64. *M.K. Raghavan* v. *Jharsuguda Municipality*, AIR 1973 Ori 186.
65. *Social Work & Research Centre, Banswara* v. *State of Rajasthan*, AIR 1987 Raj 26.
66. *Kimti Lal Rahi* v. *Union of India*, AIR 1993 Del 211 (paras 21 and 22).
67. *Ramadebi* v. *Union of India*, AIR 1988 Cal 38.

of his original appointment as Secretary.[68] In the circular pertaining to the appointment of Educational Panchayat Officers law degree was prescribed as qualification for the post. Petitioner, though not a law graduate, was still appointed and confirmed. It was held that estoppel operated against the Government and the petitioner could not be reverted as clerk.[69] Where the licensees, securing stocks and selling them as per direction of Government under Section 3 of the Essential Supplies (Temporary Powers) Act, 1946, and Madras Food Procurement Order (1946), became entitled to fixed Commission, they were estopped from contending that portion of the order asking them to make over the price was invalid.[70]

Where requisite fee has been paid on the basis of valuation made by the Government, it cannot afterwards challenge the valuation.[71]

Where on the basis of the representation made by the State Government that the lessee will be provided with alternate site and will enjoy the property for 90 years, the lessee surrendered the legal right created in his favour under the first lease deed and a valid lease-deed in respect of the alternate site was also executed and registered in his favour and thus the lessee changed his position to his prejudice relying on representation, the lessee is entitled on the basis of promissory estoppel to claim possession of the alternative site from the State Government.[72] The improvement Trust by passing resolution made a promise to a Co-operative Housing Society to release portion of land included in one of its schemes, for developing a housing colony for is members. The society in pursuance of that promise, went ahead with its plans and got a sale deed of land in dispute in its favour from the original holder of land. It was held that the Improvement Trust was estopped from going back on its promise and revoke its earlier sanction accorded by the resolution.[73] Where a company was induced to make part payment of consideration towards the sale price of land, on the basis of correspondence with different Govt. departments, to the effect that the said land was resolved to be industrial area and be handed over to the company, and receipt of part payment was duly acknowledged from time to time by the officers and the functionaries of the Improvement Trust, and in fact user of land was shown as industrial in the master plan also, the Govt. could not go back from its promise and consequently send notice for taking coercive action against the company alleging encroachment over the land in question.[74]

Where there was a scheme to give cash subsidy for setting up an industry and a co-operative society obtained a part of subsidy and expanded its industry by investing a huge amount, it was held that the principle of promissory estoppel applied and the authorities were directed to pay the balance.[75] The Govt. was held to be bound by its own earlier notice in respect of quantum of land to be acquired and could not challenge the same.[76]

Where the petitioner applicants were fully conscious of the fact that the costs of the flats allotted by the development authority was subject to change as per prevailing rates at the relevant time, the plea that costs indicated in the brochure were final and binding owing to principle of promissory estoppel, was not tenable.[77] Where at no point of time any promise was made to the petitioner that the timber would be supplied at the rate which was prevalent at the time of passing the sanction order, the principle of estoppel was not attracted and the respondents could supply the timber at the rate which is lawfully chargeable.[78] Where the Govt. reduced the assured price revision period of the supply of timber, it was

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68. *Narayan Rathi* v. *Registrar, Co-operative Societies*, ILR 1970 Cut 437.

69. *Badri Prashad Pandey* v. *State*, ILR 1973 HP 171.

70. *State of Madras* v. *J.R.M. Contractors Co.*, AIR 1959 AP 352.

71. *Abdul Wahid* v. *Union of India*, AIR 1982 Del 291.

72. *Hadibandhu* v. *Kaushalaya Devi*, AIR 1976 Orissa 120.

73. *Laghu Udyog Karmachary Co-op. Housing Society* v. *State of M.P.*, AIR 1975 MP 93. **See also** *Akhara Brahm Buta* v. *State of Punjab*, AIR 1993 SC 366 (para 3).

74. *National Engineering Industries Ltd., Jaipur* v. *State of Rajasthan*, AIR 1998 Raj 229 (paras 15 and 16).

75. *Sabarkantha J.R. Utpadakoni Co-op Spinning Mills Ltd* v. *General Manager*, AIR 1992 Guj 89; *M.P. Sugar Mills* v. *State of U.P.*, AIR 1979 SC 621 and *Gujarat State Financial Corpon* v. *Lotus Hotels Pvt. Ltd.*, AIR 1983 SC 848 **followed; See also** *Garments International Pvt. Ltd.* v. *Union of India*, AIR 1991 Kant 52 (Export assistance scheme-assistance can not be withdrawn). **See also** *Old Village Industries Ltd* v. *Union of India*, AIR 1993 Del 321; *Selvi Travels* v. *Union of India*, AIR 1993 Mad 216 (para 28); *Union of India* v. *Rizwan International*, AIR 1993 Mad 336 (para 16).

76. *Tandon Brothers* v. *State of W.B.*, AIR 2001 SC 1866 (para 35).

77. *DDA Self Finance Flats Owners Society* v. *U.O.I.*, AIR 2001 Del 39 (paras 14 and 15).

78. *Ghulam Mohammad Wani* v. *State of J.&K.*, AIR 1999 J&K 74 (para 10). No promise held out by Govt., no estoppel. *Becharbhai V. Patel* v. *State of Gujarat*, AIR 1998 Guj 1 and *Dayalbagh Educational Institute, Agra* v. *State of U.P.*, AIR 2001 All 290 (para 29). **Also see** *C.B.S.E.* v. *P. Sunil Kumar*, (1998) 5 SCC 377; *H.S. Industrial Development*

held that it would not amount to any material breach of promise attracting promissory estoppel.[79] Minister's statement on the floor of the House does not amount to a promise or representation by the Government.[80] Where under a Government policy to transfer a sugar mill to Corporate Sector, possession of the said mill was handed over to the petitioner who failed to make payment of the sale-price hence the sale consideration was converted into loan which too he defaulted to pay, recovery proceedings were not barred on the ground that the letter of intent and the land was not transferred in his favour.[81]

44. NO ESTOPPEL

It was observed by KAILASAM J.:

(1) "The plea of promissory estoppel is not available against the exercise of the legislative functions of the State.

(2) The doctrine cannot be invoked for preventing the Govt. from discharging its functions under the law.

(3) When the officer of the Govt. acts outside the scope of his authority, the plea of promissory estoppel is not available. The doctrine of *ultra vires* will come into operation and the Govt. cannot be held bound by the unauthorised acts of its officers.

(4) When the officer acts within the scope of its authority under a scheme and enters into an agreement and makes a representation and a person acting on that representation puts himself in a disadvantageous position, the court is entitled to require the officer to act according to the scheme and the agreement or representation. The officer canot arbitrarily act on his mere whim and ignore his promise on some undefined and undisclosed ground of necessity or change the conditions to the prejudice of the person who had acted upon such representation and put himself in a disadvantageous position.

(5) The officer would be justified in changing the terms of the agreement to the prejudice of the other on special consideration, such as difficult foreign exchange position or other matters which have a bearing on general interest of the State."[82]

Refering to *Jit Ram Shiv Kumar* v. *State of Haryana*[83] and *M.P. Sugar Mills* v. *State of U.P*[84] the Supreme Court observed: "Of course, we must make it clear that, and that is also laid down in *Motilal Sugar Mills'* case, that there can be no promissory estoppel against the Legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition. It is equally true that promissory estoppel cannot be used to compel the Government or a authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of Government, or the public authority to make. We may also point out that the doctrine of promissory estoppel being an equitable doctrine, it must yield when the equity so requires, if it can be shown by the Government or public authority that having regard to the facts as they transpired, it would be inequitable to hold the Government and public authority to the promise or representation made by it, the court would not raise an equity in favour of the

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Corporation Ltd. v. *Inderjeet Sawhney*, AIR 1996 SC 2244 (paras 12 and 15). Govt. granting concession in payment of royalty for five years to a company, subject to review after five years, extendable to ten years, withdrawal after five years, no promise, no estoppel, *Andhra Pradesh Rayons Ltd.* v. *Govt. of A.P.*, AIR 1997 AP 23.

79. *Vidarbha Veneer Industries Ltd.* v. *State of Maharashtra*, AIR 1994 Bom 155.

80. *Union of India* v. *Ganesh Rice Mills*, (1998) 9 SCC 630.

81. *Northland Sugar Complex Ltd.* v. *P.S.I.D. Corpn. Ltd.*, AIR 1998 P&H 240 (paras 35 and 36).

82. *Jit Ram Shiv Kumar* v. *State*, AIR 1980 SC 1285. **See also** *Bajrang Industries* v. *General Manager, D.I.C. Vizianagaram*, AIR 1994 AP 10 (paras 13-15); *P.V. Balakrishnan Nair* v. *State of Kerala*, AIR 1994 Ker 6 (paras 13 and 14), **holding** *Robertson* v. *Minister of Pensions*, (1949) 1 KB 227 : (1948) 2 All ER 767 : 64 TLR 526, **not a good law**; *Intrans Systems Pvt. Ltd.* v. *State of Kerala*, AIR 1996 Ker 161 (paras 3 and 5); State Govt. extending promise without authority as requirement of concurrence of Central Govt. not obtained, no estoppel, *Ram Nath Sahu* v. *Union of India*, AIR 1996 All 19 (para 7); *G. Sreenivasan* v. *Principal, Regional Engineering College, Rourkela*, AIR 2000 Ori 56 (paras 26 and 33); *John B. James* v. *Bangalore Development Authority*, 2001 AIHC 837 (paras 36 and 38) (Kant). **See also** *Gujarat State Financial Corp.* v. *Lotus Hotels Pvt. Ltd.*, AIR 1983 SC 848; *M.P. Sugar Mills* v. *State of U.P.*, AIR 1979 SC 621; *Surendra* v. *Oil and Natural Gas Commission*, 93 Cal WN 449.

83. AIR 1980 SC 1285.

84. AIR 1979 SC 621.

person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority. The doctrine of promissory estoppel would be displaced in such a case, because on the facts, equity would not require that the Government or public authority should be held bound by the promise or representation made by it".[85]

The Legislature can never be prevented from exercising its legislative functions by resorting to promissory estoppel.[86] There cannot be any estoppel against the Government in exercise of its sovereign legislative, executive functions, where the Government finds necessary to review its policy.[87] It does not apply to the Government while acting in sovereign capacity unless it is necessary to prevent fraud or manifest injustice.[88] The doctrine of promissory estoppel cannot be invoked for preventing Government, from acting in discharge of its duty under law. The order of the Government directing levy of control in pursuance of resolution of Municipality under the law could not be challenged.[89] It can also not be invoked to compel an authority to do something which is not allowed by law or is prohibited by it.[90] Government is not estopped from claiming exemption from holding inquiry and giving opportunity under Art. 311(2) of the Constitution, even after the inquiry.[91] Estoppel cannot be claimed on the basis of a contract which does not satisfy the requirements of Art. 299.[92]

The power of Government to make rules under Section 12 of the Kerala Education Act, is not affected by agreement. The agreement cannot give rise to plea of estoppel against the Government.[93] Eventhough, sales of country liquor were exempted from sales tax at the time of auction of liquor licences, the Government is not estopped from subjecting sales to Sales Tax later.[94] The Electricity Board after negotiations with party agreed to supply electricity at cecessional rate. Later the agreement was annulled by an amending Act and uniform tariff imposed. It was held the Electricity Board was not estopped.[95] Where the tenants of the Bombay Port Trust made representation, the Port Trust by its estate manager stated that on deposit of certain amount they would be allotted flats after reconstruction of the building. It was held that no promissory estoppel would arise though executive necessity was not established.[96]

Prior to the amendment of the Army Rules re-employment of the retired or released army officers was not permissible. After the amendment they could be recruited by re-employment to the Post of Assistant Commandant. It was held that the action of the authorities calling for the opition of such officers for absorption would not operate as estoppel or confer any right to claim absorption.[97]

The Government can, for example, change export policy and thereby upset many a contratual commitments.[98] The Madras Education Rules and the Text Book Committee Rules did not hold out any representation or even an assurance to the publishers that the books once prescribed will not be changed within the period for which they are stated to be current. There is no justification for the assumption that these rules envisage the participation of the publishers in the scheme and that the Government is estopped from resiling from the representation that the period will not be altered.[99] Promissory estopeed

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85. *Union* v. *Godfrey Philips India Ltd.*, AIR 1986 SC 806.
86. *State* v. *Gwalior Rayon Silk Manuf. Co. Ltd.*, AIR 1973 SC 2734.
87. *Excise Commr U.P* v. *Ram Kumar*, AIR 1976 SC 2237; *Bihar Eastern Gangetic Fishermen Co-op., Society Ltd.* v. *Sipahi Singh*, AIR 1977 SC 2149; *Sukh Dev Singh Gill* v. *State of Punjab*, AIR 1986 P&H 167; *Malhotra & Sons* v. *Union of India*, AIR 1976 J&K 41; *R.J.R Rao* v. *State of A.P.*, AIR 1973 A.P 236; *Uma Shankar* v. *H.S. & I.E. Board*, AIR 1974 All 290; *State of Punjab* v. *Amrit Banaspati Ltd*, AIR 1977 Punj 268; *Sankaranarayanan* v. *State of Kerala*, AIR 1971 SC 1997 (Power of Government to make rules under Kerala Education Act).
88. *N. Ramanatha Pillai* v. *State*, AIR 1973 SC 2641.
89. *Jit Ram Shiv Kumar* v. *State of Haryana*, AIR 1980 SC 1285; *Nowrangalal* v. *State of Orissa*, AIR 1965 Ori 44 (DB).
90. *Management of Bajrangpur Tea Estate* v. *State of Assam*, 1998 AIHC 176 (para 5) (Gau)
91. *Sunil Kumar* v. *State*, AIR 1970 Cal 384.
92. *Bihar EGF Co-op Soc V. Sipahi Singh*, AIR 1977 SC 2149. Similarly there can be no estoppel where the requirements of exemption are not satisfied. *D.R Kohli* v. *Atul Products Ltd*, AIR 1985 SC 537.
93. *C. Sankaranarayan* v. *State of Kerala*, AIR 1971 SC 1997.
94. *Excise Commissioner, U.P* v. *Ram Kumar*, AIR 1976 SC 2237; *Union of India* v. *Maruthai Pillai*, ILR (1979) 1 Mad 426.
95. *Indian Alluminium Co. Ltd.* v. *Karnataka Electricity Board*, AIR 1992 SC 2169.
96. *Vasanth Kumar Radhakrishan Vora* v. *Board of Trustees of the Port of Bombay*, AIR 1991 SC 14.
97. *Union of India* v. *R.C. D' Souza*, AIR 1987 SC 1172.
98. *Bansal Exports (P) Ltd.* v. *Union of India*, AIR 1983 Del 445 (FB); *A.D. Amin* v. *Union of India*, AIR 1990 Guj 167.
99. *State of T.N.* v. *S.K. Krishna Murthy*, AIR 1972 SC 1126.

is not an absolute doctrine which does not admit of any exception. One of the exceptions is change in policy by the Government in public interest.[1] However, mere *ipsi dixit* that there is a change in policy is not sufficient. The Government has to show that there is overriding public interest which compelled it to change its policy.[2] Indian Oil Company changed its policy regarding distributorship. This resulted in cessation of supply of lubricants to some dealers. The policy was implemented by the Oil Corporation uniformly without discrimination. It was held that the earlier transactions between the dealers and the Corporation did not confer on the dealers any contractual rights and the doctrine of promissory estoppel could not be invoked against the corporation.[3] A factory existed in the area prior to declaration of that area as pollution control area and the petitioner was later denied no objejction certificate question. It was held that the of promissory estoppel does not arise.[4] No promissory estoppel arose where the Government granted a cement permit and afterwards cancelled it on account of a change in policy.[5] Promissory estoppel is not available against abolition of a Government post.[6] Government had agreed that a vast tract of private forest purchased by the company would be immune from acquisition under the proposed legislation for acquisition of private forest for a period of sixty years. Plea of equitable estoppel cannot avail against the Government from acquiring those forests.[7] The State Government after considering the proposal of the Development Authority regarding a housing scheme, directed the authority to finalise the scheme. Subsequently the Government ordered revocation of the scheme since the scheme was not in public interest and was in violation of the master plan. It was held that the subsequent order of revocation of the scheme was not hit by the principle of estoppel.[8]

Even granting that there had been some representation on the part of the State Government, not to reduce the age of retirement, both the State Govt., and the officials concerned are bound by the impugned amendment reducing the age of retirement which is the result of the legislative action, as there is no estoppel against legislative action.[9] The power of the Central Government, to impose customs duty or grant, modify, withdraw exemption from duty is elgislative in nature. Orders made in that behalf take the place of delegated or subordinate legislation. No promissory estoppel can be raised against exercise of that power by the Government.[10]

The Government is also not bound by the acts of its Departments or officers which are beyond their powers or *ultra vires*.[11] Acceptance of rent by *Patel* and *Patwari* as agents of the Government under mistake of fact does not operate as estoppel against the Government in a suit for declaration of occupancy right.[12] Where certain officers of Govt. who were agents of the Govt. and were deputed to look after certain contract works and had no authority to give assurance for payment at enhanced rate proposed by contractor no etoppel against the Government could arise.[13] The State is not bound by doctrine of promissory estoppel for acts of its subordinate done in violation of its direction or administrative instructions.[14] An *ultra vires* act of an employee of a corporate body cannot bind the corporate body on the principle of equitable estoppel.[15] It is not bound by its illegal act when it subsequently changes its stand to be in conformity with law.[16] A release order as per Section 3 of the

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1. *R.K. Deka* v. *Union of India*, AIR 1992 Del 53. **See also** *Malu Khan* v. *State of Rajasthan*, AIR 1990 Raj 112: *Nandkishore* v. *Nagar Palika, Shajapur*, AIR 1991 MP 99.
2. *Union of India* v. *J.K. Industries*, AIR 1991 Raj 45: **See also** *American Dry Fruit Stores* v. *Union of India*, AIR 1990 Bom 376.
3. *Mahabir Auto Stores* v. *Indian Oil Corporation Ltd.*, AIR 1989 Del 315 (DB).
4. *Chhatisgarh Hydrade Lime Industries, Bilaspur* v. *Special Area Development Authority, Bilaspur*, AIR 1989 MP 82
5. *Jacob Philip* v. *Union of India*, AIR 1985 Ker 255: *R.B. Jodhamal* v. *State*, AIR 1984 J&K 10.
6. *Dasarathi* v. *State of A.P.*, AIR 1985 AP 136.
7. *G.R. Silk Mfg. Co.* v. *State of Kerala*, AIR 1973 Ker 36 (FB).
8. *Hindu Housing Co-op. Society* v. *State of M.P.*, AIR 1987 M.P. 193.
9. *Laxman* v. *State*, ILR 1974 Kant 852.
10. *Indian Rayon Corporation* v. *Collector of Customs*, AIR 1988 Cal 228.
11. *C.V. Enterprises* v. *Braithwaite & Co.*, AIR 1984 Cal 306, a Govt. Co. not bound by contracts entered into under mistake of its rights: *Chetlal Sao* v. *State of Bihar*, AIR 1986 Pat 267 (FB), acts done in violation of directions or administrative instructions. Govt. action taken contrary to law, no estoppel. *Harbansdal Mahendra Kumar* v. *State*, 1996 AIHC 3278 (para 13) (Raj).
12. ILR 1961 MP 454.
13. *State of Rajasthan* v. *Motiram*, AIR 1973 Raj 223.
14. *Chetlal Sao* v. *State of Bihar*, AIR 1986 Pat 267.
15. *Prasada Rao* v. *Union of India*, ILR 1973 AP 1122.
16. *M.I. Builders Pvt. Ltd.* v. *Radhey Shyam Sahu*, AIR 1999 SC 2468 (para 75).

Imports and Exports Control Act (1947) was made by Joint Controller under mistaken belief that conditions for its issue were satisfied. It has held that the doctrine of equitable estoppel does not apply.[17] The State is not bound by the *ultra vires* acts of its agents.[18] Where a Government servant accepts damages for use and occupation from an unauthorised occupant, the Government is not estopped from saying that the occupant is an unauthorised occupant.[19] It was held by the Supreme Court that the holders of additional licence for 1978-79 were entitled to import only those goods which were included in 1985-88 of Import Policy and a letter was also issued by the Government of India making that position clear. Earlier to that a Government Official issued a letter which was contrary to the subsequent letter, it was held the earlier letter would not affect the position or create any estoppel.[20]

Exemption from purchase and sales tax in respect of raw materials was granted. It was held that the exemption was in the form of concession and could be withdrawn without violating rule of promissory estoppel[21] but promissory estoppel cannot be invoked to compel the Government to refund tax realised by it.[22] A Govt. scheme permitting the small scale industrial units to realise "Tax for growth fund" at prescribed rates and pay the same, to be utilised towards their repayment of loans, was held to be an arrangement to refund the Sales Tax to the manufacturing units, hence no promissory estoppel could be invoked against the withdrawal of the said scheme by the Govt.[23]

A Government servant retained accommodation beyond the concessional period of two months. He was liable to pay damages equivalent to the market rent for the period of such unauthorised occupation. It is an absolute liability. There was no representation or conduct amounting to representation on the part of the Government. As such it was held there could be no question of promissory estoppel in a matter of this kind.[24] Encroachers cannot invoke the principle of promissory estoppel.[25] Parties are bound to use Government aid only for sanctioned objects. Money sanctioned for payment of rent of school building was not allowed to be diverted to other heads.[26] Where a portion of *darmashala* lands was sold to the Local Fund Committee with the consent of the Government when there was no dispute about the ownership, the Government was not estopped from claiming ownership for the remaining property when the dispute arose between the Local Fund Committee and the Government.[27] Where land register is corrected by the Registrar on representation of the owner of the land there is no estoppel against the Registrar or the Government from asserting title to land.[28] Where the defendants had been receiving grant from the Government on the representation that a certain amount had to be paid on account of house rent for a school building it hardly lies in the mouth of the defendants to assert that there is no liability to pay rent for the school building.[29]

It was contended that the Electricity Board could not enhance duty because its predecessor, the State Government had held out assurance to the petitioner of supply of hydel power at low and fixed rates over a long term of years. Acting on such representations and assurance, the petitioner agreed to locate its factory at Hirakud a place away from the raw materials and market for the produce. Rejecting the contention it was held that the agreement was the result of negotiations. The petitioner was as much desirous of being supplied electric power as the supplier was anxious and willing to supply the same; hence he could not raise the plea of promissory estoppel.[30] A Government emplyee joined military service prior to the issue of a Government memorandum whereby certain concessions were offered to those who joined military service. The employee claimed benefit of concessions so offered. It was held that the doctrine of promissory estoppel had no application against the Government, since the employee could not be said to have altered his position by joining military service pursuant to representation made

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17. *M.S. Industry* v. *Jt. Chief Controller, Imports & Exports*, AIR 1977 Mad 377.
18. *State* v. *Maharanu Adhirani Rajlakshmi*, ILR (1967) 46 Pat 767.
19. *Kanwar Bhan* v. *Somawati*, ILR 1969 Del 761.
20. *Star Diamond Co., India* v. *Union of India*, AIR 1987 SC 179.
21. *Shri Bakul Oil Industries* v. *State of Gujarat*, AIR 1987 SC 142.
22. *Intrans Systems Pvt. Ltd.* v. *State of Kerala*, AIR 1996 Ker 161 (paras 5 and 6).
23. *Intrans Systems Pvt. Ltd.* v. *State of Kerala*, AIR 1996 Ker 161 (paras 8, 11, 12 and 15).
24. *Union of India* v. *Wing Commander., R.R. Hingorani (Rtd.)*, AIR 1987 SC 808.
25. *A.N.D. Alasingarahar* v. *Collector of Dharmapuri*, AIR 2000 Mad 71 (para 8).
26. *T.K. Ghosh's Academy* v. *T.C. Palit*, AIR 1974 SC 1495.
27. *District Local Board Ahmedabad* v. *Secretary of State*, AIR 1938 P.C. 87.
28. *P.K.A.B. Co-op. Society* v. *Government of Palestine*, AIR 1948 PC 207.
29. *T.K. Ghosh's Academy* v. *T.C. Patik*, AIR 1974 SC 1495.
30. *Indian Aluminium Co. Ltd.* v. *Orissa State Electricity Board*, ILR 1974 Cut 503.

in the memorandum.[31] Where the condition of allotment of flats permitted the alloting authority to vary forms of allotment, authority can not be estopped from varying terms of allotments.[32] Interim payment of running bills under Road construction contract, is not conclusive as to the quality of work or material used by the contractor. Government is not estopped from withholding final bill and forferiting security deposit on the grounds of defective performance of the contract thereby.[33]

Where a city corporation leased land to petty shopkeepers and the lessees got evicted on termination of lease. The principle of promissory estoppel was held not attracted.[34] When a brochure was issued at the time of registration for allotment of houses indicating that the cost given in it was subject to variation, the increase in cost made subsequently by the Government, cannot be challenged on the ground of estoppel.[35] Where the Municipal Corporation took up the question of rehabilitation of squatters, there was no promise or representation to act in any manner nor any policy was formed to allot shops to such squatters. It was held that no direction can be given for allotment of alternative shops or no order prohibiting them from dispossessing such squatters can be made, and the principle of estoppel cannot be invoked.[36]

The supply of Electricity and other amenities by authorities for dwellers on lands, does not estop the Government from acquiring those lands.[37] Mere supply of electricity for building purpose and charging for the same would not estop the corporation from demolishing the structure on the ground of violating building regulations.[38]

The doctrine of promissory estoppel does not apply to criminal cases.[39]

45. CASUAL STATEMENT—NO ESTOPPEL

Admissions in affidavit of the Government in earlier similar proceedings and other admissions made in Parliament on behalf of the Government are mere expression of opinion limited to the context and also being rather vague promises but not specific assurances are not binding on the Government so as to create an estoppel.[40] The Government averred about employee's continuing in service as of right till his 58th year. In a subsequent writ petition the employee could not contend that the Government, was barred by plea of estoppel in terminating the service before she reached age of 58th year.[41] Representations made in advertisements issued by Public Service Commission for appointments in vacancies by selection, would not be binding on the Government. Estoppel could not be pleaded in the absence of fraud or manifest injustice.[42] The petitioner company offered to sell frozen meat to army authorities at competitive rates. Army authorities sent a reply stating that at the appropriate time, tender would be floated and the company could give its offer. Subsequently, the army authorities granted contract to another company without floating tender and at rates higher than those quoted by petitioner company. It was held that there is no estoppel as there was no representation about the rates in its letter.[43] Where a company undertook to export certain percentage of total production and the Government, promised subsequent assistance, but withdrew the promise, it was held that such withdrawal of promise does not give rise to estoppel against the Government.[44] Where there is absence of clear and unambiguous representation by the Government to grant exemption from tax, withdrawl of the exemption is not illegal. Promissory estoppel would not operate.[45] No estoppel is created by a Minister's statement in the House

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31. *State of Karanataka* v. *Chikkamaglur*, ILR (1980) 1 Kant 401 (DB).
32. *Ajai Pal Singh* v. *Bareilly Development Authority Bareilly*, AIR 1986 All 362 (DB).
33. *State* v. *Motilal*, ILR (1971) 21 Raj 457.
34. *Vidyaranyanagar Petty Shop Keeper's Association* v. *Corporation of the City of Bangalore*, AIR 1987 Kant 159.
35. *Shiv Pal Karan Kholi* v. *State of U.P.*, AIR 1988 All 268. **See also** *Rajiv Moudgil* v. *H.P. Housing Board*, AIR 2000 HP 77 (paras 16, 18 and 34).
36. *Moti Ram* v. *New Delhi Municipal Committee*, AIR 1988 Del 57.
37. *Lal Singh* v. *Lt. Governor, Delhi* ILR (1971) 2 Del 392.
38. *United Taxi Operate C.T. & C. Society* v. *Delhi Municipality*, AIR 1967 Punj 82.
39. *State of Maharashtra* v. *Jethmal Himatmal Jain*, 1994 Cr LJ 2613 (Bom).
40. *P.C. Sethi* v. *Union of India*, AIR 1975 SC 2164; *N.C. Singhal* v. *Union of India*, AIR 1980 SC 1255.
41. *Binapani Dei* v. *State of Orissa*, AIR 1971 Ori 170.
42. *Balakram* v. *State*, ILR 1975 HP 483.
43. *Chandigarh Food & Services Ltd.* v. *Union of India*, AIR 1990 P&H 206.
44. *Kesoram Industries* v. *Union of India*, AIR 1977 Cal 459.
45. *Bakul Cashew Co* v. *Sales Tax Officer, Quilon* AIR 1987 SC 2239. A statement in a budget speech cannot give rise to estoppel. *Venkatesh* v. *Asst. Collector Special Customs preventive Division*, AIR 1992 Ker 383.

and reported in newspapers that no import tax would be levied on rice brought into the State.[46] Draft University Ordinance, which has been approved by the Faculty and Academic Council but not yet accepted by the Executive Council, is not binding. Mere fact that the authorities acted in accordance with the draft ordinance would not make the draft ordinance valid and binding and would in no way operate as estoppel against the University, in the absence of any direct representation by the University.[47]

46. EDUCATION AND ESTOPPEL

Estoppel presupposes equity in the conduct of the claimant. A student who is a party to the issue of false marks-sheet cannot rely on it.[48] Where a marks-sheet showed failing marks but the remarks column showed "passed", the mistake being patent, the Board was not estopped from cancelling the result[49] A marks-sheet obtained by fraud can be rectified.[50] Where an ineligible candidate secured admission in teachers training school on payment of capitation fees and completed two years course, withholding of his result on the ground of ineligibility was held to be not improper and the plea of estoppel by the candidate was not tenable.[51] Where an ineligible candidate was admitted to a professional course by the College, the University was justified in disapproving his admission.[52] But where the entire strength of the examinees was only twelve, cancellation of their result on account of recourse to malpractice of mass copying without giving them hearing, was against the principles of natural justice and the petitioner, being one of them, was entitled to get the benefit of promissory estoppel[53] but the students allegedly found guilty of using unfair means in the examination were allowed to join the terms of the next year under the interim orders of the High Court, the university was not estopped from altering the results subsequently on the basis of the decision of the syndicate finding them guilty., The Syndicate had powers to alter results even beyond two months.[54]

The Andhra Pradesh High Court allowed an institution to cancel an admission obtained on the basis of a false certificate even though the falsity was discovered after four years of study[55] But the Patna High Court did not allow this to be done when the candidiate was in the fifth year.[56] An admission on the basis of a false certificate of caste can be cancelled[57]. But Rajasthan High Court did not permit it to be cancelled after three of four years.[58]

Where an institution makes an error in an admission it may cancel the same if the mistake is on a point of law. An admission was accordingly allowed to be cancelled when admission rules required the candidate to be Inter in Sanskrit whereas the admitted candidate was not.[59] However an admission which

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46. *Sah Mahadeo Lal* v. *State of Bihar*, AIR 1982 Pat 158. **See also** *Mohamed Ebrahim Sait* v. *State of T.N.*, 1999 AIHC 708 (para 9) (Mad).
47. *G.P. Singh* v. *Faculty of Law*, AIR 1953 All 6.
48. *Satish Kumar* v. *Gorakhpur University*, AIR 1981 All 377.
49. *Kedar Lal* v. *Secy. H.S. & I. Education*, AIR 1980 All 32; **See also** *Haripadadas* v. *Utkal University*, AIR 1978 Oris 68 Admission of ineligible candidate by college under some mistake, not binding on university, cancellation proper. *Charan Singh* v. *Punjab University, Chandigarh*, AIR 1997 P&H 278. On inquiry university found admission done by affiliated college invalid, no estoppel against withholding the result for rectifying the mistake. *Sitam Seshank* v. *Principal, College of Pharmaceutical Sciences*, AIR 1997 Ori 62. **following** *Rajendra Prasad Mathur* v. *Karnataka University* AIR 1986 SC 1448. Promotion wrongly shown in marksheet does not attract promissory estoppel. *Vice-Chancellor, University of Allahabad* v. *S.P. Ratnakar*, AIR 2001 All 319 (paras 7 and 8).
50. *Karupa Sindhu* v. *Orissa Board of Sec. Edu.*, AIR 1981 Ori 91.
51. *M.K. Sankaran* v. *Govt. of Tamil Nadu*, AIR 1998 Mad 332 (para 10).
52. *K. Shashidhar Rao* v. *Dr. Ambedkar Institute of Technology, Bangalore*, AIR 1998 Kant 294 (paras 11 and 12).
53. *Reeta* v. *Berhampur University (FB)*, AIR 1993 Ori 27 (paras 18 and 19).
54. *Desai Devang* v. *Registrar, South Gujarat University*, AIR 1996 Guj 96 (para 10).
55. *N.B. Rao* v. *Principal, Osmania Medical College, Hyderabad* AIR 1986 AP 196; *Venkat Rao* v. *Principal, Andhra Medical College*, 1989 AP 159. Admission obtained by student by producing fake marks card, no estoppel against university in cancelling his admission, *P.N. Bhadra* v. *Registrar, University of Agricultural Sciences, Bangalore*, AIR 1997 Kant 100; *Dinesh* v. *State*, AIR 1993 Raj 187 (paras 16 to 19, 21 and 23).
56. *Amresh Kumar* v. *Principal, Bhagalpur Medical College*, AIR 1982 Pat 122.
57. *Israr Ahmad Mansuri* v. *State of M.P.*, AIR 1982 MP 205. Caste certificate obtained by fraud creates no estoppel. *State of T.N.* v. *A. Gurusamy*, AIR 1997 SC 1199.
58. *Harphool Singh* v. *State of Rajasthan*, AIR 1981 Raj 8. **See also** *Mukund Prasad Khare* v. *State*, AIR 1996 MP 130 (paras 7-10).
59. *Dalip Singh* v. *Pracharya & Adhikshak*, AIR 1986 All 158. **See also** *Vinod Kumar Razdan* v. *State*, AIR 1995 J&K 68 (paras 10-12 and 14), **distinguishing** AIR 1976 SC 376; *Prabhjot Wahi* v. *Guru Nanak Dev University, Amritsar*, AIR 1995 P&H 269 (Paras 13, 14 and 16).

slipped through in spite of inadequate percentage of marks was not allowed to be cancelled right on the verge of examinations.[60] Admission to the course of Physical Training Instructor after allowing the candidate to undergo full training for about a year was not allowed to be cancelled on the ground that the sports certificate given by him was not properly authenticated.[61] The principle of estoppel was also applied where a candidate was given admission in a particular subject by mistake without any suppression of fact by her and she persued the course and altered her position.[62] Where the selection committee admitted a candidate in a Medical College on a seat reserved for the army personnel by mistake, cancellation of her admission four months after joining was held to be illegal. More so when rules of natural justice were not followed[63] but the doctrine of equitable estoppel was not applied where the admission of the petitioner was cancelled only three days after his admission was wrongly made and he had not lost any chance to join any other institution.[64]

Where the petitioner got admission on the basis of the marks sheet supplied and when the university sought to cancel the result on the ground of mistake, it was held that promissory estoppel applies.[65] A wrong marks sheet showing that the student had passed was supplied to him by the university. He had no other means of knowing the real state of affairs relating to his examination results. It was held that the University was estopped from taking the plea after a lapse of a number of years that the student had in fact failed.[66]

Where provision in the prospectus of post graduate medical course regarding giving first preference to the in service candidates in selection of colleges or courses of studies was introduced by G.O. dated 17-3-97 after the petitioners belonging to the general merit quota wrote examination in accordance with the prospectus and it is not made clear that that part of the prospectus was made known to the applicants till the date of interview, the petitioners were not barred from challenging the prospectus as unconstitutional and incorrect.[67] However, the students, who were admitted on the basis of a certain prospectus and also appeared in the written examination, were held to be incompetent to challenge the said prospectus.[68] The fact that a candidate was allowed to appear for a competitive test for admission to a Medical College, does not estop the selection committee from refusing admission on the ground that the said candidate failed to prove his domicile.[69] Where in the admission notice of a Homeopathic Medical College as well as in its brochure it was given that the Central Council had given approval for upgrading the Diploma into Degree from that session and the petitioner-students acted on it and passed the diploma but no document was found to be issued by the authorities to this effect prior to the advertisement, it was held that the authorities would not be bound by mere declaration by the colleges in the absence of any rule postulating such conversion of diploma into degree course.[70]

There are four occasions categaried below, on which refusal to permit a candidate to appear in an examination do not attract estoppel (i) A person who practices fraud or makes a mis-statement or suppresses material facts cannot claim estoppel. (ii) Where there is some technical defect in the filling of the form or where there was a deficiency in attendance, which defect or deficiency could not be condoned by the authorities in exercise of discretion mentioned under the statute. (iii) Where the candidate was patently ineligible on the particulars supplied by him, as there can be no estoppel against

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60. *Sangeeta Srivastva* v. *U.N. Singh*, AIR 1980 Del 27. For other admission cases **see** *Manoj Kumar* v. *Co-ordinator A.C.M.N.R. Engg. College*, AIR 1985 All 257; *Gladson Menino Vaz* v. *Goa Medical College*, AIR 1981 Goa 21; *Neelam Kumar* v. *State of Bihar*, AIR 1994 Pat 15.
61. *Randhir Singh* v. *State*, AIR 1995 Raj 44 (para 10).
62. *Smita Shukla* v. *University of Allahabad*, AIR 1994 NOC 107 (All).
63. *B. Jayalakshmi* v. *S.C., University of H.S., Vijayawada*, AIR 1994 AP 297 (paras 3-5).
64. *Brajendra Singh Chouhan* v. *State*, AIR 1995 MP 23 (para 10).
65. *Maxey Charan* v. *Rohil Khand University*, AIR 1992 All 122; **See contra** *Prabhat Kishor Sahu* v. *Sambalpur University*, AIR 1992 Ori 83; *N. Vanajakshi* v. *Principal, University College for Women, Hyderabad* AIR 1999 AP 323 (paras 10 and 12) and *Birendra Nath Mondal* v. *Vidyasagar University*, AIR 1999 Cal 283 (paras 24, 26 and 28). (on similar facts **See also** *M. Hussain* v. *Bharathiyar University, Coimbatore*, AIR 1991 Mad 45; *Rabisankar* v. *Orissa State Financial Corporation*, AIR 1992 Ori 93.
66. *Basanta Kumar Mohanty* v. *Utkal University*, AIR 1990 Ori 10.
67. *A.V. Gopalkrishnan* v. *Byju N.*, AIR 1999 Ker 10 (para 8).
68. *R. Murali* v. *R. Kamalakkanan (FB)*, AIR 2000 Mad 176 (paras 37, 46 and 55).
69. *N. Kanakadurga* v. *K. Medical College, Warangal*, AIR 1972 A.P. 83.
70. *Varinder Singh* v. *State of Punjab (FB)* AIR 1998 P&H 42 (para 44). **Also see** *Osmania University* v. *R. Madhvi* AIR 1998 AP 130 (para 4).

statute. (iv) Where the question of eligibility depends upon the intepretation of a provision of law. The principle of estoppel will depend upon the facts of each case.[71]

Where a candidate was admitted to law course by a Law College, the University permitted to appear for pre-law, intermediate law and even final examinations but refused to declare his results on the ground that the candidate was not eligible to be admitted to the Law Course, it was held that the University was barred by estoppel.[72] Where the basis of selection for admission to an Educational Institution is changed abruptly to the detriment of the candidate, principle of estoppel applies.[73] Where in an admission test, an additional condition of passing two examinations for rural areas was imposed without earlier publication of the same, the State or University was estopped from denying admission on that basis.[74] Where the date of completion of house job by candidates was fixed mistakenly by the State Government beyond the cut-off date fixed by the Supreme Court for admission to post-graduate medical course, any candidate misled by the mistake of the State was entitled to seek admission on that basis for that year.[75] Where the Government gave recognition to an educational institution and later withdrew the recognition, the Government was directed to recognise the certificate issued to students joining the course before derecognition under the doctrine of promissory estoppel.[76] Where inaction by the University results in admission to a non-eligible candidate, equitable estoppel applies against the University.[77] The petitioner was promised by the Indian Institute of Technology (Madras) that his application for admission to the M. Tech., course would be considered if seats were available. One seat became vacant and the petitioner was the only earnest claimant for that seat. It was held that the Institute, on its own promise was estopped from denying the seat to the petitioner and it was not for the Institute to advance the cause of other candidates who had not evinced any interest in claiming the seat.[78]

Where for entrance examination to B.Ed. course, minimum eligibility criteria was fixed as 45% from 40% marks at degree examination of a recognised university by the National Council for Teacher Education Act, 1993 as advertised earlier but in the advertisement for the entrance examination it was shown that 40% marks will be minimum qualification, it would not act as estoppel against the university for changing the criteria of marks which was done in consonance with law.[79] Where the petitioner acted upon the eligibility criteria stated in the notifications and applied for the test on the basis of marks obtained by her in the Post-Graduate examination and on being declared successful she got admission in the B. Ed. Course, the respondents would be estopped from cancelling the admission of the petitioner on the ground of securing less than 45% marks in graduation.[80] Candidates were admitted to B.Ed., course, they had paid fees, pursued studies for months and had even submitted notes of lessons, etc. In the middle of the session, their admission was cancelled for non-compliance with one of the conditions laid down for admission. It was held, that cancellation at such stage, that too for no fault of the candidate attracted the doctrine of promissory estoppel and the order of cancellation was liable to be quashed.[81]

The fact that exemption was granted to a candidate in respect of minimum age at S.S.C. Examination, does not ensure to her the benefit for admission to all future courses of study, when she is overaged. However, acceptance of application for entrance examination to medical course, attracted the doctrine of promissory estoppel and she could not be denied admission.[82] A student was admitted to a private engineering college after due selection. His admission was subsequently cancelled on the ground that he had not secured minimum marks in qualifying examination as mentioned in college prospectus.

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71. *Balkrishna Tiwari* v. *Registrar of Awadhesh Pratap Singh University, Rewa* 1978 MP 86.

72. *Sanatan Gauda* v. *Berhampur University*, AIR 1990 SC 1075. **See also** *Kanishka Aggarwal* v. *University of Delhi*, AIR 1992 Delhi 105.

73. *Abodha Kumar* v. *State of Orissa*, AIR 1969 Ori 80.

74. *Rajkumar Gadpayle* v. *State*, AIR 1997 MP 85, **distinguishing** *State of M.P.* v. *Ku. Nivedita Jain*, AIR 1981 SC 2045; *Maharashtra State Board of Secondary and Higher Secondary Education* v. *Paritosh Bhupesh Kumarsheth*, AIR 1984 SC 1543; *Jatinder Kumar* v. *State of Punjab*, AIR 1984 SC 1850 and *Indra Sawhney* v. *Union of India*, AIR 1993 SC 477, **relying on** M.P. No. 1323 of 1989 decided on 8-12-1989 (MP) and **following** *Soneram Dhakad* v. *State of M.P.*, (1995) WP No. 1295 of 1995 decided on 10-11-1995 (MP).

75. *Popat Ramachandra Jadhav* v. *State of Maharashtra*, AIR 1990 SC 749.

76. *Suresh Pal* v. *State of Haryana*, AIR 1987 SC 2027.

77. *Sangeeta* v. *U.N. Singh*, AIR 1980 Del 27; *Inder Parkash* v. *Dy. Commr., Delhi*, AIR 1979 Del 87.

78. *Manjunath* v. *Indian Institute of Technology, Madras*, AIR 1987 Mad 22.

79. *Anop Singh Ratnu* v. *Maharshi Dayananda Saraswati University Ajmer*, AIR 1998 Raj 54 (para 11).

80. *Abida* v. *M.D.S. University*, AIR 1998 Raj 328 (para 11).

81. *Shyamlal Shrungi* v. *State of M.P.*, AIR 1990 M.P. 15.

82. *Narmada* v. *Secretary, Medical & Health Dept., A.P.* AIR 1988 AP 2.

The University regulation did not prescribe any minimum marks for eligibility for admission to engineering colleges. The college was held estopped from cancelling the admission.[83]

Where the University Ordinance prescribed a rule for revaluation of answer books and a candidate, seeking revaluation of his answer booklet, found adverse change in his marks after revaluation, the outcome of revaluation is binding on him and there is no promissory estoppel.[84] On appearing in the improvement test a student was allowed by the university to appear at M. Sc. Pt. II Examination, her result could not be withheld on the basis of the resolution of the Examination Committee prohibiting the students from taking two examinations in a year. More so when the resolution was never communicated to her.[85]

Where the University represented to an examinee for M.Sc., (Part-I) examination that he had passed that examination by forwarding the mark list showing him to be successful and subsequently confirmed the said representation by informing him, in response to his application for scrutiny of certain answer books, that there was no change in the marks obtained by him, the University could not, after his having completed M.Sc. (Final) course as per requirement, prohibit him, on the eve of M.Sc. (Final) examination, from appearing at that examination on the plea that he in fact did not pass M.Sc. (previous) examination.[86]

A student was admitted to a medical college on transfer from another medical college. He was not informed that students admitted only through CPMT would be eligible to post-graduate course in a transferee college. It was held that denial of admission to the said student was not proper as the State Government had acquiesced in the transfer.[87] A Government resolution regarding admission to post-graduate courses in medicine were changed from time to time, even though the resolutions were amended prior to the date of admission to the post-graduate courses some of them were made, after the candidates passed the M.B.B.S. Examination. It was sought to be contended by the candidates that when they appeared for M.B.B.S. examination, they had in mind the Government resolutions which were in force for eligibility for admission to post-graduate course and they prepared and appeared for M.B.B.S. examination on that basis and their legitimate expectation regarding their eligibility for admission to post-graduate course on the basis of the results in the examination were shattered by a change in the rule regarding the admission in post-graduate course. It was held that the doctrine of legitimate expectations would not apply as a student appears for the M.B.B.S. examination would only look at the Government resolution operating at that time. In the circumstances it was held that the rule of promissory estoppel would not apply.[88]

An institution cannot change examination rules after the tests have already been conducted[89] and a candidate submitting to such rules cannot subsequently, assert rights contrary to them.[90]

Where the colleges were started on the basis of the permission granted subject to conditions mentioned in such permissions based on Govt. Order, and the managements started the colleges by investing huge amounts and putting lots of efforts on the basis of such permissions, the Govt. could not either make the 50% of the seats as Govt. seats in private unaided colleges or take away the right of admission of students to that extent by issuing executive order.[91] The University launched a programme of "autonomous colleges" on a year to year basis and issued application forms. A women's college filed application which was recommended by the Inspection Commission. There was no promise or assurance on the part of University. The College prescribed its own syllabus on autonomus pattern. Subsequently

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83. *Ambika Prasad Mohanty* v. *Orissa Engineering College*, AIR 1989 Ori 173 (DB).
84. *Lalit Taori* v. *Nagpur University, Nagpur*, AIR 1986 Bom 255 (DB).
85. *Ruchira Chauhan* v. *Rohilkhand University, Bareilly*, AIR 1996 All 12 (paras 3 and 4).
86. *Anil Kumar* v. *University of Allahabad*, AIR 1973 All 442; *Registrar, University of Madras* v. *Sundara Shetty*, AIR 1956 Mad 309 (DB).
87. *Lavelina Chawla* v. *State of U.P.*, AIR 1990 All 179.
88. *Ashwin Prafulla Pimpalwar* v. *State*, AIR 1992 Bom 233 (FB).
89. *Competitive test held without reservation, subsequent reservations not allowed*: *Anand Kumar* v. *State*, AIR 1981 Pat 164; *Deepak* v. *State*, AIR 1982 Pat 126. Merely by appearing in qualifying exams. and subjecting himself to selection process, candidate not debarred from challenging subsequent change in criteria. *Miss Anjum Ushan* v. *State of J&K*, AIR 1994 NOC 312 (J&K).
90. *Nisham Singh Supehia* v. *Regional Engineering College, Hamirpur*, AIR 2000 HP 99 (paras 12-14).
91. *Association of Management of Pvt. Colleges* v. *State of T.N.*, AIR 1998 Mad 34 (para 65).

there was denial of status to college on the basis of direction of the University Grants Commission. It was held principle of promissory estoppel was not attracted.[1]

When sufficient number of S.C./S.T. candidates were not available to fill the reserved quota of seats in Medical or Dental Colleges, the Government reduced the minimum qualifying marks from 35% to 25% in order to accommodate more such candidates. It was held that the Government, was competent to do so and its action was not hit by rules of estoppel.[2] Non-consideration of a candidate as a reserved category candidate due to non-filing of such certificate could not be challenged after taking pre-entrance examination as a general candidate.[3] Where a student sought admission to an educational course by obtaining and filing a false certificate of belonging to a certain tribe, she cannot claim to continue her studies on the ground of equity or promissory estoppel as she did not come with clean hands.[4]

Where the candidates applied for admission to a particular course in terms of the prospectus, they were not estopped from challenging a particular clause of that prospectus later.[5] The candidates after having taken part in the entrance examination for admission to a super speciality medical course and having no right to reservation quota could not challenge the selection on the basis of subsequent retrospective amendment of the prospectus by the Govt. providing for certain reserved seats.[6] Where a student, prosecuting All India Secondary School Certificate Course, on transfer of his father to a place where no such course was available, applied for admission into a college affiliated to Council conducting Higher Secondary School Certificate Course and got admission, subsequently withholding his result in view of a Regulation of the Council that he had not passed any equivalent examination making him eligible for admission, was held to be illegal and the Regulation was held to be unreasonable and discriminatory.[7]

Where a student was admitted to LL.B. course though he secured less than 49% marks at the qualifying examination, on a recommendation of a Minister and subsequently admission was cancelled by the University, it was held that the cancellation was not illegal and the principle of estoppel cannot be applied.[8]

Where about the hike in fee the students were informed at the first available opportunity alongwith issue of their roll numbers for the entrance test, then in detail at the time of counselling and again by issuing a public notice, promissory estoppel would not apply against authorities from claiming the hiked fee.[9]

47. EMPLOYMENT—ESTOPPEL

Estoppel was pushed into service in favour of a person who was appointed the Vice Chancellor of a University for one term on the assurance that his appointment would be extended for one more term and he had on that basis given up his political career and his seat in the Assembly.[10]

Where the appointee accepted the terms and condition in the appointment letter and accepted monthly compensation, he could not subsequently contend that the appointment letter was not signed by an authorised person and hence its terms could not be complied with.[11]

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1. *Meenakshi College for Women* v. *University of Madras*, AIR 1991 Mad 32.
2. *Aarti Gupta* v. *State of Punjab*, AIR 1988 SC 481; *Awadeesh Nema* v. *State of M.P.*, AIR 1989 MP 61.
3. *Naresh Singh* v. *State*, AIR 1994 J&K 42 (paras 22 and 24); **see also** *Arshad Iqbal* v. *State*, AIR 1997 J&K 100 (paras 14 and 20).
4. *Madhuri Patil* v. *Addl. Commissioner, Tribal Development*, AIR 1995 SC 94 (para 15). **See also** *B. Seenaiah* v. *Health University Vijayawada*, AIR 1995 AP 181 (para 31).
5. *V. Ramalakshmi* v. *Director of Medical Education, Chennai*, AIR 1998 Mad 55, at p. 57. **See also** *State of T.N.* v. *G. Sumathi*, AIR 1999 Mad 327 (para 13).
6. *S. Gomathy* v. *State*, AIR 1996 Ker 347 (para 14); no vested right for admission, no estoppel. *Nupur* v. *Punjab University, Chandigarh*, AIR 1996 P&H 132 (para 37); *Harpreet Singh Randhawa* v. *State of Punjab*, AIR 2001 P&H 107 (para 2).
7. *Amarjeet Jena* v. *Council of Higher Secondary Education, Orissa*, AIR 1999 Ori 129 (paras 11, 18 and 25).
8. *Rajesh* v. *Awadhesh Pratap Singh Vishwavidyalaya*, AIR 1988 MP 138. **See also** *Surendra Kumar* v. *Board of Secondary Education*, AIR 1995 Raj 115 (paras 5 and 6).
9. *Mithiless Kumar* v. *State of Punjab*, AIR 2001 P&H 300 (para 12).
10. *Hardwari Lal* v. *G.D. Tapase*, AIR 1982 P&H 439 (FB).
11. *Sociedade de Fomento Industrial Ltd.* v. *Ravindranath Subraya Kamat*, AIR 1999 Bom 158 (para 8).

Where the petitioner holding an unrecognised diploma in tailoring was appointed by the University as Tailoring Instructor after considering his qualification and was continued in service for four years and was kept under the impression that he would not be removed from service, it was held that the University was estopped from terminating his service as unqualified Instructor[12] but employment snatched by a workman on the basis of bogus and forged casual labourer service cards was liable to be recalled and voidable at the option of the employer. His continuing in employment for a number of years, would not attract estoppel.[13]

A candidate participating in the selection process is estopped from challenging the process. Omission in advertisement to state that it was a special recruitment was immaterial.[14] Where all the candidates were made aware of the procedure for promotion before they sat for the written test and before they appeared before the Departmental Promotion Committee, they could not turn around and challenge that procedure, when they found that they were not selected.[15] The conduct of appearing before a selection committee without any objection as to the constitution of the committee would create an estoppel preventing the candidate from challenging the Constitution of the committee even if the decision was against him.[16]

A person was allowed to appear for a competitive examination as being duly qualified. He was discharged from service after the expiry of the probationary period on the ground that he was not qualified to appear for the competitive examination, as the petitioner, was overage at the time of discharge and was not eligible for employment, it was held that plea of estoppel was available to him and the discharge was illegal.[17] Where there was negligence of the Government in re-appointing the petitioner and, on discovering its own negligence subsequently discharged the petitioner who had become overage at the time of discharge, it was held that the discharge was illegal and estoppel operated against the Government.[18]

It may generally not be useful or wise to take recourse to strict legalistic principles like estoppel in deciding questions in industrial adjudications.[19] Retrenched workmen in starving condition who accepted retrenchment benefits are not estopped from challenging the legality of the retrenchment as the technical plea of estoppel is not applicable in cases of industrial disputes.[20]

Though the claim of respondent to reappointment was overlooked while making appointments by the Manager of an Educational Agency and the Education Officer approved the action of the Manager, the respondent is not estopped from putting forward his right to reappointment in future proceedings in the absence of some positive action on his part which gives rise to the bar of estoppel[21] but employment snatched by a workman on the basis of bogus and forged casual labourer service cards was liable to be recalled and voidable at the option of the employer. His continuing in employment for a number of years, would not attract estoppel.[22]

The doctrine of promissory estoppel does not apply to a contract between the employer and the employees as to the range of quantum of Bonus. It cannot be said that, by the offer of bonus by the employer, the employees changed the position to their detriment as the offer is made in the context which the employees are presumed to know.[23]

An employee is entitled to seek change in his date of birth only in case of *bona fide* mistake in recording the date of birth at the time of employment, otherwise principle of estoppel will apply.[24]

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12. *Gadde Nagabhushanam* v. *Krishna Zilla Parishad*, ILR 1971 AP 633.
13. *Union of India* v. *M. Bhaskaran*, AIR 1996 SC 686 (para 6).
14. *University of Cochin* v. *N.S. Kanjoonjamma*, AIR 1997 SC 2083.
15. *Union of India* v. *N. Chandrasekhran*, AIR 1998 SC 795 (para 13).
16. *G. Sarana* v. *Lucknow University*, AIR 1976 SC 2429.
17. *K. Jagannadhan* v. *District Collector*, AIR 1966 AP 59.
18. *Pamandass* v. *Manikyam Pillai*, 1969 AP 59.
19. *Associated Cement Companies* v. *Their Workmen*, AIR 1959 SC 967.
20. *Hind Strip Mining Corpn.* v. *Raj Kishore*, AIR 1967 Pat 12.
21. *Janaki Amma* v. *State of Kerala*, ILR (1970) 2 Ker 24.
22. *Union of India* v. *M. Bhaskaran*, AIR 1996 SC 686 (para 6).
23. *C.N. Sharma* v. *L.I. Corporation*, ILR (1979) 1 Del 525.
24. *Union of India* v. *C. Rama Swamy*, AIR 1997 SC 2055.

48. EQUITABLE ESTOPPEL

A man may be estopped, not only from giving particular evidence, but from doing acts, or relying upon any particular argument or contention which the rules of equity and good conscience prevent his using as against his opponent.[25] The law of estoppel by representation is confined to the provisions of this section and apart from the provisions of this section there is nothing like what is called "equitable estoppel" evolved by the English Judges. The provisions of this section are in a sense a rule of evidence.[26]

The doctrine of equitable estoppel rests on the principle that where a party with full knowledge or with sufficient notice or means of knowledge of his rights and of all the material facts remains inactive or abstains from impeaching a transaction or freely does what amounts to a recognition thereof, or acts in a manner inconsistent with its repudiation so as to effect the situation of the parties so that the other party is induced to suppose that it is recognised. This amounts to acquiescence and the transaction although originally impeachable becomes unimpeachable. One cannot ordinarily be estopped to assert the direct violation of a statutory provision but equitable estoppel being a rule of justice should prevail over all other rules.[27] A representation made by one party for the purpose of influencing the conduct of the other party and acted upon by him, will, in general, be sufficient to entitle the latter to obtain the assistance of the court in equity for the purpose of realising the fruits of such representation.[28] A claim for compensation by a tenant against his landlord for improvement effected to the demised property may be rested on the doctrine of equitable estoppel though the law does not generally recognise any right in a lessee to improve the lease-hold estate and claim compensation from the lessor for the same after the expiration of the lease. But mere standing by and failure to object by the lessor when the tenant builds on the demised land is not sufficient to attract the doctrine. What is required is that there should be active encouragement by the landlord and an implied promise that in case the tenant was ejected he would be paid compensation. The doctrine of "equitable estoppel" familiarly known as a rule in *Ramsden* v. *Dyson*[29] is outside the provision of T.P. Act and its applicability is not excluded by Section 51 of the T.P. Act.[30]

When a person in *bona fide* belief that a certain property belongs to him, spends money upon it and the true owner stands by allowing him to spend money and make improvements upon the land, the true owner is estopped from asserting his title to the land as against the person making improvements in such *bona fide* belief.[31] Petitioner did not challenge merit list published for house jobs. Subsequently same merit list was published in respect of admission to M.D. Courses. The challenge by the petitioner to the subsequent list was held to be barred on equitable considerations.[32] A person tolerated an encroachment wall obstructing passage for nine years. He commenced proceedings but claimed removal only after four years of the proceedings. The Court would not allow him do so but ordered the defendant not to obstruct the passage further by dumping material.[33]

Surrender of Government of its legislative powers to be used for public good cannot operate as equitable estoppel against Government.[34]

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25. *Ganges Manufacturing Co.* v. *Sourujmull*, ILR (1880) 5 Cal 669, 678.
26. *Maddanappa* v. *Chandramma*, AIR 1965 SC 1812.
27. *Uma Shanker* v. *H.S. & I.E. Board*, AIR 1974 All 290; *Kisto Chandra* v. *Anila Bala Dasi*, AIR 1968 Pat 487; *State Bank of India* v. *Jasroop Baijnath*, AIR 1974 MP 193; *Abdul Kader* v. *Upendra*, 40 CWN 1370; *Hemangini Devi* v. *Bejoy Singh Dudharia*, AIR 1924 Cal 438; *Jamarun* v. *Jafar Beg*, ILR 48 All 353; *Masooma Bibi (Mst.)* v. *Mohammed Said Khan*, AIR 1942 All 77; *Ram Avadh* v. *Ghisa*, 1942 Ori 611; *Lalta Prasad* v. *Brahmanand*, AIR 1953 All 449 (DB).
28. *Kamalendu Prasad* v. *Sambalpure University*, AIR 1976 Ori 134 (DB).
29. (1866) LRI HL 129.
30. *Alagarswami* v. *T.J. Andhoni*, AIR 1961 Mad 293; **See also** *Hiralal* v. *B.C. Co. Ltd.*, 1957 Pat 331. For equitable estoppel under T.N. General Sales Tax Act, **see** *Mohan Breweries & Distilleries Ltd.* v. *Commercial Tax Officer, Madras*, AIR 1997 SC 3497, **affirming** *Mohan Breweries & Distilleries Ltd.* v. *CTO*, (1990) 78 STC 461 (Mad).
31. *Venkataswami Naidu* v. *Muniappa Mudaliar*, AIR 1950 Mad 53; *Hari Bhushan* v. *Sheikh Abdul*, AIR 1927 Cal 54; *Mahadeo Patel* v. *Narayan*, 1927 Nag 348; **See also** *Inwards* v. *Baker*, (1965) 2 QB 29; *Ward* v. *Kirkland*, 1967 Ch 194; *Ives (E.R.) Investment Ltd.* v. *High*, (1967) 2 Q.B. 379.
32. *Dr. Ku. Nilofar Insaf* v. *State of M.P.*, AIR 1991 SC 1872.
33. *K. Satyanarayan* v. *K. Ramaiah*, AIR 1983 SC 452.
34. *Gwalior Rayon Silk Mfg. Co. Ltd.* v. *State of Kerala*, 1972 KLT 628 (FB).

49. DOCTRINE OF LEGITIMATE/REASONABLE EXPECTATION

"The doctrine of legitimate expectation has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural justice. It was in this context that the doctrine of legitimate expectation was evolved which has today become a source of substantive as well as procedural rights....."

"The doctrine of legitimate expectation can be invoked if the decision which is challenged in the Court has some person aggrieved either (a) by altering rights or obligations of that person which are enforceable by or against him in private law; (or) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which, he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that it should be withdrawn. . . . . "

"The question whether the expectation and the claim is reasonable or legitimate, is a question of fact in each case. This question has to be determined not according to the claimant's perception but in larger public interest."[35]

The doctrine of legitimate expectation and the principle of promissory estoppel are invoked in the cases where one expects pecuniary or any other advantages of like nature. Where the petitioner was nominated as a member of syndicate of a university to render free services and the Vice-Chancellor suppressed the nomination, he could not invoke the doctrine of legitimate expectation or the principle of promissory estoppel.[36]

The concept of just expectation or promissory estoppel cannot be made applicable in strict sense to the academic courses particularly in the field of education wherein with the change and advancement, educational needs are fast changing.[37] Where no assurance was given by the corporation that allowance claimed by the respondents would be payable to them, the doctrine of legitimate expectation was not attracted.[38] Where both the parties had been acting upon the letter granting to telecast a certain fixed number of T.V. serial episodes, the letter served as an agreement between them and the applicant/party could not compel the authorities to grant extension on the basis of 'revised policy.' Neither the principle of legitimate expectation could be invoked nor that of the promissory estoppel.[39] Where in the admission notice of a Homeopathic Medical College as well as in its brochure it was given that the Central Council had given approval for upgrading the Diploma into Degree from that session and petitioner-students acted on it and passed the diploma but no document was found to be issued by the authorities to this effect prior to the advertisement, it was held that the authorities would not be bound by mere declaration by the colleges in the absence of any rule postulating such conversion of diploma into degree course. However, in view of the settled principles of "reasonable expectancy", the students were directed to be given promotion to 2nd year degree course after completion of 1750 hours of study and on passing the examination held thereafter.[40] Where the students admitted to an autonomous college persued the courses of study and passed the examination of Part I, II and III and the university conferred degrees on them, the university was estopped from pleading non-compliance with statutes by the college. It would

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35. *National Buildings Construction Corpn.* v. *S. Raghunathan*, AIR 1998 SC 2779.

36. *S.D. Kapoor* v. *Chancellor, Jai Narain Vyas University*, AIR 1997 Raj 217.

37. *Nupur* v. *Punjab University, Chandigarh*, AIR 1996 P&H 132 (para 32).

38. *National Buildings Construction Corpn.* v. *S. Raghunathan*, AIR 1998 SC 2779, **relying on** *Food Corporation of India* v. *Kamdhenu Cattle Feed Industries*, (1993) 1 SCC 71; *Union of India* v. *Hindustan Development Corpn.*, (1993) 3 SCC 499, *M.P. Oil Extraction* v. *State of M.P.*, (1997) 7 SCC 592 and *Navjyoti Coop. Group Housing Society* v. *Union of India*, (1992) 4 SCC 477 and **reversing** *S. Raghunathan* v. *National Buildings Construction Corpn. Ltd.*, (1996) 64 DLT 509 (Del).

39. *AAA Film Motion Picture Producers* v. *Union of India*, AIR 1999 Del 178 (paras 7 and 8).

40. *Varinder Singh* v. *State of Punjab (FB)*, AIR 1998 P&H 42 (paras 52 & 54) : 1998 AIHC 1109 (P&H). **Also see** *Osmania University* v. *R. Madhvi*, AIR 1998 AP 130 (para 4).

also defeat the legitimate expectation of the students. The university could not refuse admission.[41] The question whether public interest will override legitimate expectation can be decided by the Govt. itself and the Court's duty is only to see that it is not irrational nor perverse.[42] However, withdrawal of a facility extended by way of concession due to arising of chaotic situation does not attract the doctrine of legitimate expectation or the principle of promissory estoppel.[43]

50. WAIVER

For attracting the principle of waiver there are two essential elements which should be satisfied. **Firstly**, waiver should be **voluntary** and **intentional**, and **Secondly**, there should be **two parties** one waiving and the other getting benefit from such waiver.

In an eviction proceeding against the tenant on default of payment of rent, withdrawal of amount of the monthly rent of default by the landlord subsequently amounts to waiver of the benefit of getting the tenant's defence struck off and the tenant would be entitled to get the benefit of waiver.[44] Where the appellant had not taken any benefit of the impugned order, the plea that the appeal was not maintainable on the ground of waiver and acquiescence, was not tenable.[45]

Where in persuance of the directions of the High Court, Sharma Committee was appointed by the Central Govt. to consider the submission of parties to the H.C. proceedings, the committee after hearing them assessed their needs in respect to leasing of mining area against which no objection was filed by the appellant party and the Govt. acted upon the recommendations of the committee, the appellant was estopped from challenging the assessment as he had waived his right by acquiescence.[46] Where a certain non-agricultural land was included in the Town Planning Scheme and the inclusion was not objected by the Government, after the reconstitution of plots, plots were allotted to the owner *in lieu* of that land and necessary entries were made in relevant records and the owner sold one plot to the petitioner whereat the Collector issued show cause notice to the owner raising dispute about not allotting land *in lieu* of Government land included in the scheme, issuing of notice was held to be illegal and barred by estoppel and by not objecting to the inclusion of the said land, the Government would be deemed to have waived its right.[47] Where the Govt. instead of initiating appropriate proceedings against an assignee of land, assigned with the condition that he would surrender the same when required by the Govt. without claiming compensation, on his selling the land in violation of the condition of the grant, initiated acquisition proceedings, the Govt. thereby waived to avail the condition of non-payment of compensation under the assignment deed and could not deny to pay compensation.[48] Where the plaintiff filed a suit for recovery against the carrier without giving prior notice under the Carriers Act, objection in respect of which was raised very belatedly, it was held that right to objection would be deemed to have been waived by the defendant.[49] Where a party participated in the proceedings of a Court for more than four years without any objection to its jurisdiction and authority, his participation amounts to waiver of the right of objection.[50] Where at the time of accession of J&K in India, the valuables left by the former Maharaja or his son in the treasury of J&K was not claimed by them as their private property for over 30 years, it was held that that was relinquishment of right or waiver voluntarily.[51] Where the objections of both the parties against the arbitration award were time-barred and a review petition before the lower Court, the only remedial course available was not utilised, the appellant was estopped from raising the plea that objections were time-barred in appeal before the High Court.[52] Where objection to the

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41. *Shruti Chaturvedi* v. *Allahabad University, Allahabad*, AIR 1998 All 291 (paras 9 and 10), **relying on** *Mohan Bir Singh Chawla* v. *Punjab University, Chandigarh*, AIR 1997 SC 788 : (1996) 11 JT (SC) 226. **See also** *Jeeja P.K.* v. *Director, School of Distance Education University, Calicut*, AIR 2000 Ker 281 (paras 10 and 11).
42. *G. Sreenivasan* v. *Principal, Regional Engineering College, Rourkela*, AIR 2000 Ori 56 (paras 10, 21, 24 and 26).
43. *G. Sreenivasan* v. *Principal, Regional Engineering College, Rourkela*, AIR 2000 Ori 56 (paras 27 and 34).
44. ***Chetan Das* v. *Annusuiya***, 1996 AIHC 1706, at pp. 1708-1709 (Raj).
45. *Hindustan Copper Ltd.* v. *Rana Builders Ltd.*, AIR 1999 Cal 229 (para 35)
46. *Ferro Alloys Corpn. Ltd.* v. *Union of India*, AIR 1999 SC 1236, at pp. 1249 and 1250
47. *Chandulal H. Ghodasara* v. *State*, AIR 1998 Guj 84. **See also** *St. Anne's School Society* v. *Urban Improvement Trust, Jodhpur*, AIR 2000 Raj 70 (para 8).
48. *R. Abdul Jabbar* v. *State of T.N.*, 1997 AIHC 1033 (paras 14 and 15) (Mad).
49. *Auto Trade & Transport* v. *National Insurance Co.*, AIR 1998 MP 147 (paras 3 and 6).
50. *Mani* v. *Kishan Lal*, AIR 1997 Raj 19. **Also see** *Amena Bibi* v. *Sk. Abdul Haque*, AIR 1997 Cal 59.
51. *State* v. *Karan Singh*, AIR 1997 J&K 132. The Court referred to *Provash Chandra Dalui* v. *Bishwarnath Banerjee*, AIR 1989 SC 1834 at p. 1840.
52. *Shiv Lal* v. *Food Corporation of India*, AIR 1997 Raj 93.

maintainability of a suit is neither pleaded nor such an issue is raised, the objection must be deemed to have been waived.[53] The party present on all dates of hearing including the date on which the auction sale was confirmed without any objection having been raised on his behalf, the doctrine of waiver would be attracted in his seeking the setting aside of the said auction sale.[54]

Where a tenant alleged the waiver of right of prior purchase under the J. & K. Right of Prior Purchase Act, 1983 on the ground that offer of sale was made to the tenant, the same was rejected as it was found that nobody had made offer to any of the heirs of the original tenant with the proposed sale price which was an essential pre-requisite under the Act.[55] Where the High Court had upheld the order of the District Inspector of Schools recognising the election of the Managing Committee and also directed the parties to make representation to the D.I.O.S. regarding some other points which both the parties did, it was held that by filing representation, right to appeal could not be said to have been waived.[56] Where the employees of an institute, which was not a 'local authority' but an autonomous body were appointed to perform election duties and they challenged its validity, they could not be said to have waived their right to challenge the validity of such an order simply because they had once performed the election duties. The principle of estoppel was also not attracted.[57]

In sale in execution of a mortgage decree the mandatory requirement of the provisions of Section 72-A(2) of C.P.C., the reserve price to be fixed could not be waived by the judgment-debtor. The said provisions are not solely for the benefit of the judgment debtor, they are also intended to remove a social evil.[58]

51. ESTOPPEL AND WAIVER

Estoppel and waiver are different. Estoppel is not a cause of action. It may, if established, assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the eixstence of some fact essential to establish the cause of action; or, in other words by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action. Waiver, on the other hand, is contractual, and may constitute a cause of action. It is an agreement to release or not to assert a right. If an agent, with authority to make such an agreement on behalf of his principal, agrees to waive his principal's rights, then, subject to any other question such as consideration, the principal will be bound, but he will be bound by contract, not by estoppel. There is no such thing as estoppel by waiver.[59]

The generally accepted connotation of 'waiver' is that to constitute 'waiver' there must be an intentional relinquishment of a known right or the voluntary relinquishment or abondonment of a known existing legal right, or conduct such as warrants as inference of the relinquishment of a known right or privilege. Waiver differs from estoppel in the sense that it is contractual and is an agreement to release or not to assert a right; estoppel is a rule of evidence. Waiver may give rise to a cause of action whereas estoppel does not give rise to a cuase of action and it is only a rule of evidence.[60]

Waiver need not be founded on contract or agreement. Right of presumption can be waived.[61]

Abandonment is an aggravated form of waiver, acquiescence or laches and akin to estoppel. It cannot, be sustained as facts not sufficient to sustain waiver, *etc.*[62]

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53. *Raj Kumar Gupta* v. *Des Raj*, AIR 1995 HP 107 (para 8).

54. *B.M. Manjunatha* v. *M.G. Shivanagouda*, 1998 AIHC 102 (para 5) (Kant).

55. *Shiv Kumar Sharma* v. *Wazir Ajay Vir Chand*, AIR 1998 J&K 100 (para 8).

56. *Amar Nath Misra* v. *District Inspector of Schools, Ballia*, AIR 1997 All 358.

57. *Mohinder Kumar* v. *District Election Officer, Sangrur*, AIR 1997 P&H 272.

58. *Anto Nitto* v. *South Indian Bank Ltd.*, AIR 1998 Ker 219 (para 21).

59. *Dawsons Bank Ltd.* v. *Nippon Menkwa Kabushiki Kaish*, AIR 1935 PC 79 : (1935) 37 Bom LR 544 : 62 IA 100. *Metal Press Works* v. *G.M. Cotton Press Co.*, AIR 1976 AP 205; *Shiv Ditta* v. *Kidar Nath*, AIR 1972 HP 20 (DB); *Pannalal* v. *Union of India*, AIR 1957 Cal 156.

60. *Satyanarayana* v. *Yelloji Rao*, AIR 1965 SC 1405; *Bashesher Nath* v. *Commr. of I.T. Delhi*, AIR 1959 SC 149. *Dawsons Bank Ltd.* v. *Nippon Menkwa Kabushiki Kaish*, AIR 1935 PC 79; *Sentoo* v. *Mani Mala Sadhu*, AIR 1980 SC 155. *Nathmull Tolaram* v. *Killa & Co.*, AIR 1961 Cal 65. *Motilal Padampat Sugar Mills Co. Ltd* v. *State of U.P.*, AIR 1979 SC 621; *Shrikrishnadas Tikara* v. *State of M.P.*, AIR 1990 SC 1691. *LIC of India, Bombay* v. *Ramdas*, AIR 1979 Pat 124.

61. *Jagad Bandhu Chatterjee* v. *Nilima Rani*, (1970) 2 SCR 925 : (1969) 3 SCC 445; *Sukhnandan Singh* v. *Jamiat Singh* 1971 (3) SCR 784 : AIR 1971 SC 1158.

62. *Sha Mulchand & Co.* v. *Jawahar Mills Ltd.*, AIR 1953 SC 98 : 1953 SCR 351.

Where a candidate for selection knowing fully well the relevant facts about the members of the Selection Board voluntarily appeared for interview without raising any kind of objection against the Constitution of the Selection Board and took a chance of favourable recommendation in his favour, it was not open to him to turn around and question the Constitution of the Board when the decision was unfavourable to him.[63] Where the Electricity Board awarded a contract to a concern in which its consultant engineering company had financial interest, it was held that the petitioner who was one of the tenderers but who failed to object to the consideration of the tender made, the petitioner was estopped from questioning the award of the contract to the awardee.[64]

Where the Government constituted a Committee for selection of books for schools and colleges and the publisher submitted some books for selection and some books were selected it was held that the publisher was not precluded from raising an objection to the constitution of the Committee.[65] Mere request or expression of opinion cannot amount to waiver.[66] Where the services of a railway servant were terminated without any bar to his reinstatement, the servant could not be said to have waived his right to reinstatement by acquiescence, merely because he accepted in the same railway, after termination, a job inferior to the one he was holding prior to termination.[67] A decree holder who had obtained a charge for maintenance applied for execution but omitted to mention the charge in the execution petition. Subsequently she applied to enforce the charge in subsequent execution. Held, that the omission of the decree holder to disclose the charge in the first application could hardly be treated as waiver on her part for all time. At best, it was a waiver on her part in the first execution case.[68] Withdrawal of rent deposited by tenant under an order of court does not amount to waiver of the cause of action in a fresh suit for ejectment.[69] Mere waiver, acquiescence or laches not amounting to an abondonment of his right or to an estoppel against a person cannot disentitle that person from claiming relief in equity in respect of his executed, and not merely executory contract.[70] The plaintiff wrote to her bank manager that she had joined nunnery and, therefore, had no claim or interest in paternal property. This did not estop the plaintiff from claiming her share. The letter did not amount to surrender or waiver.[71]

A person cannot be held bound by any waiver, unless he is aware of what he is waiving and what rights he is abondoning.[72] Where there was allegation of bias against the member and objection was raised for first time before the High Court. It was held that waiver can be proved only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in questions and mere omission would not amount to waiver.[73]

52. MISTAKE

Where a person who has not been appointed an executor described himself as an executor under a mistake about his legal position, there is no estoppel.[74] No person can be estopped where the conduct constituting the estoppel is founded on a mistake of facts.[75] Any act done under misapprehension of legal

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63. *G. Sarana* v. *Lucknow University*, AIR 1976 SC 2428.
64. *Bakatawar Singh* v. *State of M.P.*, AIR 1992 MP 318.
65. *J. Mohapatra & Co.* v. *State of Orissa*, AIR 1984 SC 1572.
66. *Lokenath Bhattacharjee* v. *Union of India*, AIR 1957 Cal 576.
67. *Sachindra Nath Sengupta* v. *General Manager N.F. Railway*, ILR 1967-19 Assam 66.
68. *Jata Bhusan* v. *Krishna Bhamini Debi*, AIR 1957 Cal 204; **See also** *T.S. Mudaliar* v. *Meenakshi Ammal* 1963 Mad 144.
69. *Ganesh Lal* v. *Mohd. Ismail*, AIR 1976 Pat 223.
70. *Sha Mulchand & Co.* v. *Jawahar Mills Ltd., Salem*, AIR 1953 SC 98; *Shri Krishnadas Tikara* v. *State of M.P.*, AIR 1977 SC 1691; *Jorawarkhan* v. *Mukhram*, AIR 1952 Nag 40.
71. *G.K. Kempegowda* v. *Lucinda*, AIR 1985 Kant 231 (DB).
72. *Nathmull Tolaram* v. *Killa & Co.*, AIR 1961 Cal 65; *Shyam Sunder* v. *Kaluram*, AIR 1938 PC 230; *Rameshwar Prasad* v. *State*, AIR 1984 Pat 61; *Associated Hotels* v. *Ranjit Singh*, AIR 1968 SC 933; *Bansilal* v. *Hukumchand*, AIR 1963 Bom 230; *Rajagopal* v. *Muthu Lakshmi*, AIR 1969 Mad 5; *K.O. Verkey* v. *State*, AIR 1969 Ker 191 (Art. 30-Constitution); *Arifuddin* v. *Chittall*, ILR 1973 AP 276; *Eyyakku* v. *Unnalachan*, AIR 1974 Ker 139; (compromise without conscious forgoing of statutory rights); *Kota Reddy* v. *Chandra Sekhara*, AIR 1963 AP 42; *Abdul Khair (Dr.)* v. *James*, AIR 1957 Pat 308; (Both parties unware of their rights).
73. *Manaklal* v. *Dr. Prem Chand*, AIR 1957 SC 425.
74. *Atisukhlal* v. *Natvarlal*, AIR 1939 PC 238.
75. *Sukumar Chatterjee* v. *Kiran Chandra Mitter*, AIR 1964 Cal 439.

right does not create estoppel, nor does the knowledge of the parties about their correct position.[76] Where a decree holder mistakenly treated preliminary decree as final decree, he is not estopped from moving for passing of final decree.[77] Application of a Government servant for retirement on completion of his fifty fifth year under a misconception of law, would not estop him from claiming his right under the rules, to retire at the proper age of retirement.[78] Admissions made in ignorance of legal rights do not operate as estoppel.[79]

53. WAIVER AND CONSTITUTION

Fundamental rights have not been put in the Constitution merely for the individual benefit, though ultimately they come into operation in considering the individual right, but they have been put there as a matter of public policy; the doctrine of waiver and the rule of estoppel does not apply to fundamental rights.[80]

There can be no estoppel against the Constitution. Its provisions are conceived in public interest and are intended to serve a public purpose. There can also be no waiver of fundamental rights. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding whether under a mistake of law or otherwise, that any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. If the argument of estoppel is valid, an all powerful State could easily tempt an individual to forgo his precious personal freedoms on promise of transitory immediate benefits.

Merely because an undertaking was given before the High Court in writ proceedings on behalf of the pavement dwellers that they did not claim by fundamental right to put up huts on pavements or public roads and since they had given an undertaking to the High Court that they will not obstruct the demolition of the huts after certain date they could not be estopped from contending before the Supreme Court that the huts constructed by them on the pavements cannot be demolished because of their right to livelihood, which is comprehended within the fundamental right into life guaranteed by Article 21 of the Constitution.[81]

Article 14 protects us from both legislative and executive tyranny by way of discrimination. On the language of Article 14 it is a command issued by the Constitution to the State as a matter of public policy with a view to implement its object of ensuring equality of status and opportunity which every welfare State, such as India, is by her Constitution expected to do and no person can, by any act or conduct relieve the state of the solemn obligation imposed on it by the Constitution. Whatever breach of other fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by this Constitution mandate directed to the State. It is not for a citizen or any other person who benefits by reason of the provisions of Article 14 to waive any breach of the obligation on the part of the State.

S.K. DAS, J, however, observed that it is not quite correct to say that all the provisions of Part III of the Constitution grant fundamental rights. Where a right or privilege guaranteed by the Constitution rests in the individual and is primarily intended for his benefit and does not infringe on the right of others it can be waived provided such waiver is not forbidden by law and does not contravene public policy or public morals. In the instant case however there is no foundation on facts to sustain the plea of waiver.[82]

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76. *Shankerlal* v. *Narendra*, AIR 1967 All 405.

77. *Madhava Menon* v. *Esthapanose*, AIR 1952 TC 428.

78. *Vaikuntham* v. *Registrar Orissa High Court*, ILR 1972 Cut 44.

79. *Shantilal* v. *T.A. Tribunal*, AIR 1967 Raj 138.

80. *Behram Khurshid* v. *Bombay State*, AIR 1955 SC 123; *Sakhar Kherda Edn. Society* v. *State*, AIR 1968 Bom 91; *Bhaskar* v. *Arjun*, AIR 1962 Ori 167; C.V. *Transport Ltd* v. *State of H.P.*, AIR 1953 HP 8; *Ram Rachhpal* v. *Union of India*, AIR 1960 Punj 439; *Yousuf Ali Abdulla Fazalbhoy* v. *M.S. Kasbekar*, AIR 1982 Bom 135; *Omega Advertising Agency* v. *State Electricity Board*, AIR 1982 Gau 37; *Ekta Arvindkumar Shah* v. *H.S. Shah*, AIR 1993 Guj 90 (para 8); ***Ammini E.J.* v. *Union of India (SB)*, AIR 1995 Ker 252 (para 38).**

81. *Olga Tellis* v. *Bombay Municipal Corporation*, AIR 1986 SC 180 : (1985) 3 SCC 545 : 1986 Cri LR (SC) 23 : (1986) 1 Cur Civ LJ (SC) 230.

82. *Bashesher* v. *C.I.T., Delhi*, 1959 SCJ 1207. **See also** *Subhash Chand Aggarwal* v. *Murli Manohar Lal*, AIR 2000 Del 357 (para 15).

Constitutional right to equality extends also to a procedural matter.[83]

54. STATUTE OR LAW FOR THE BENEFIT OF THE INDIVIDUAL

There cannot be a waiver of limitation or estoppel against the plea of limitation.[84] Unless it was clear that the owners of the land (here tribals) knew about the provisions of the Land Acquisition Act or that the provisions were explained to them, waiver of right could not be presumed, more so when the compensation was accepted under oral protest.[85]

An *ex parte* decree was passed in wife's petition under Section 50 and 13 Hindu Marriage Act. That decree was set aside in appeal and the case was remanded. The husband contested the petition in the trial court on merits and also raised objection as to be territorial jurisdiction of the court. Such objection had not been raised in appeal against the *ex parte* decree. It was held that the husband had neither waived such objection nor submitted to the jurisdiction of the court.[86]

A party cannot confer jurisdiction on a court when it had none.[87] The Supreme Court by transferring the proceedings to itself under the Criminal Law Amendment Act could not acquire larger jurisdiction. The fact that the objection was not raised before the Supreme Court while giving directions cannot amount to any waiver.[88] Where one of the clauses in an agreement was that all disputes between them should be deemed to have arisen at a place D and only courts at D should have jurisdiction to determine the disputes. It was held that mere filing of certain suits at another place by a party will not operate as waiver so as to estop him from moving court at D.[89]

Under the Delhi Rent Control Act, the consent of the landlord for sub-letting the premises must be in writing and the same cannot be regarded as discretionary as it is in public interest, and the requirement cannot be waived.[90] Where a landlord who had taken land from the Improvement Trust on condition that it would be used for residential purposes only but he lets out the same for commercial purposes and both knew that the tenancy was not one permitted under the lease, the landlord is not estopped from claiming possession on account of himself being a party to the breach of the conditions.[91] It was held that the petitioner is not estopped from challenging the resolution of municipal council whereby the term of office was restricted, though he was a party to the resolution and from which he was benefitted.[92] Impossibility of compliance with the requirement as to notice under Section 80 of the C.P.C. cannot lead to inference of waiver of notice.[93]

A notice under Section 80 of C.P.C. is for the protection of the authority concerned, and if he does not require that notice in a particular case, he can waive his right to the notice.[94] Where during the tenancy (under the Rent Control Act) the Government who was the landlord in 1962 entered into an agreement by which tenant was to vacate premises for reconstruction and landlord to redeliver same after reconstruction. No question of policy, much less public policy, could arise. The landlord can waive the exemption benefit available for constructions made after 1-1-1951. The agreement is neither illegal nor unlawful nor defeating provisions of any law within the meaning of Section 23 of the Contract Act.[95]

Res judicata not expressly pleaded will be deemed to have been waived.[96]

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83. *Ram Gopal* v. *Asst. Housing Commr.*, AIR 1969 All 278 (FB).
84. *Ajab Enterprises* v. *Jayant Vegoiles & Chemicals Pvt. Ltd.*, AIR 1991 Bom 35.
85. *Basant Kumar Jena* v. *State*, AIR 1995 Ori 288 (paras 3-5 and 7).
86. *Janak Singh* v. *Raji*, AIR 1970 J&K 19.
87. *Mahabir* v. *Narain*, 1931A 490 (FB); *Ramlal R & Co* v. *B.C. Paul & Sons. (P) Ltd.*, AIR 1960 Cal 547.
88. *A.R. Antulay* v. *R.S. Nayak*, AIR 1988 SC 1531.
89. *Maltex Malsters (P.) Ltd.* v. *Allied Engineers*, AIR 1975 Del 123.
90. *Shalimar Tar Products Ltd.* v. *H.C. Sharma*, AIR 1988 SC 145.
91. *Faqir Chand* v. *Ram Rattan*, AIR 1973 SC 921.
92. *C.N. Ramaswamy* v. *Town Municipal Council, Chickmagalur*, AIR 1988 Kant 168
93. *State of Bihar* v. *Jiwandas*, AIR 1971 Pat 141.
94. *Vellayan Chettiar* v. *Govt. of the Province of Madras*, AIR 1947 PC 197; *Kathiyani* v. *Neelakanta*, 1979 Ker 280.
95. *Lachoo Mal* v. *Radhye Shyam*, AIR 1971 SC 2213.
96. *Sukhni* v. *Sukhbasi*, AIR 1967 All 423.

Non-raising of objection to secondary evidence produced amounts to waiver.[1] Where two arbitrators did not appoint in umpire though it was one of the terms of reference, but the plaintiff waived that non-compliance by appearing before the tribunal; he could not later on object to the award being invalid on the ground that of non-compliance with cl. 2 of the First Schedule to Arbitration Act.[2] Where an assessee does not raise any objection as to the competency of the assessing authority to assess, such failure amounts to waiver of objection and it cannot be raised in the civil court challenging the authority of the Income Tax Officer.[3] When parties to a suit themselves agree to a procedure to be adopted before a local commissioner and do not raise any objection, thereto before him, it is not open to them to challenge the validity of that procedure afterwards either in the court of first instance or in a court of appeal.[4] In an application for execution of decree where notice was served on the judgment-debtor and there was no objection to jurisdiction by the judgement-debtor, the petition was dismissed for non-prosecution. A second executon petition was filed, it was held that the judgement-debtor is estopped from raising objection to jurisdiction of court in the second application.[5] Where a restoration application under Order IX, R. 13, C.P.C. was presented by the pleader's clerk, and no objection that the presentation was not proper, was raised, the objection must be needed to have been waived.[6] Where a court has jurisdiction to pass an order of attachment, but such jurisdiction is exercised in an illegal or irregular manner, the defect can be waived.[7] If A, a teacher, who stands dischraged on termination of vacancy waives the right under Rule 51-A, of Kerala Edcuation Rules to be reappointed to a subsequent vacancy with the result that B was appointed thereto, then A cannot be allowed to claim preference over B for reappointment, to a vacancy raising after the waiver of his right.[8] Where the stipulation in a contract is for the exclusive benefit of contracting party and does not create any liability against him, he can waive it unilaterally.[9]

In a case under the Madras General Sales Tax Act, the department did not raise any objection when affidavits were taken in evidence by the High Court. The objection must be taken to have been waived.[10]

A particular private right is matter of fact though depending upon rules of law. Waiver of such right operates as an estoppel under Section 115.[11]

In view of the provisions of a complicated statute of the type of the Kerala Land Reforms Act, and the recent nature of the amendments affected, so closely prior to the disposal by the execution court, the mere omission to urge before the execution court to make a reference to the Land Tribunal would not amount to a waiver of the right.[12]

Reliquishment of a future right of inheritance by a Muslim heir, for consideration, may debar him from setting up his right when it actually arises.[13] Formalities required by Section 240(3) of the Government of India Act, 1935 could be waived.[14] Where a person is aware of the illegality in election proceedings, but still participates in the election, he is precluded from challenging the validity of the election.[15] Where the petitioner pleads the aid of any section in an Act or an order, it is not open to him to challenge the validity of that section.[16]

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1. *Tara Ram Chand* v. *State*, 1971 CrLJ 1201 (Punj).
2. *Modern Builders* v. *Hukmatrai*, AIR 1967 Bom 373.
3. *Kamakhya Narain Singh* v. *Union of India*, AIR 1966 Pat 305.
4. *Kanshi Ram* v. *Tarlok Singh*, ILR (1970) 2 Punj 640.
5. *Ram Dayal* v. *Smt. Kisturi*, AIR 1970 Raj 246.
6. *Md. Siddique* v. *Nand Kishor*, AIR 1952 Bhopal 41.
7. *Gaya Thakur* v. *Bhagwat Prasad*, AIR 1963 Pat 286.
8. *Sarojini* v. *Asst. Educational Officer*, ILR (1972) 1 Ker 266.
9. *Jiwan Lal* v. *Brij Mohan*, AIR 1973 SC 559; **following** *Dalsukh* v. *Guarantee Life & Employment Ins. Co.*, AIR 1947 PC 182.
10. *State of Madras* v. *Habibur Rehman and Sons*, AIR 1968 SC 339.
11. *Kunjammalu* v. *Sekhara Menon*, AIR 1951 Tra/Co. 127.
12. *George* v. *Thekkekkara*, AIR 1979 Ker 1.
13. *Gulam Abbas* v. *Haji Kayyum Ali*, AIR 1973 SC 554.
14. *State of Assam* v. *Harnath Barua*, AIR 1957 Assam 77.
15. *Deosaran Yadav* v. *State of Bihar*, AIR 1972 Pat 439; *Gurudeo Das* v. *Election Officer*, AIR 1972 Pat 283.
16. *Madhavan* v. *Asst. Excise Commr.*, ILR (1969) 2 Ker 71; *Gulabchandra* v. *State Govt. of M.P.*, 1963 MP 301; *Narasappa* v. *Shaik Hazrat*, AIR 1960 Mys 59; *Shridhar* v. *Collector of Nagpur*, AIR 1951 Nag 90; *Dhan Singh* v. *Madan Singh*, AIR 1951 HP 22.

Tra-Co. Buildings (Lease and Rent Control) Order, 1950, which was solely intended for the benefit of the class of persons claiming under it, does not contain any provision prohibiting such persons from contracting out of it.[17]

55. PLEADINGS AND PROOF

Whenever a waiver is pleaded, it should be shown by the party pleading the same that there was an agreement between them, that the person waving a particular right would not press that right in future in consideration of some compromise.[18]

Therefore, where a party to a litigation not only fails to invoke the doctrine of estoppel before the judge but joins issue with the opposite party upon the question and accordingly an issue is raised and evidence adduced on this question, such a party is precluded from relying on the doctrine of estoppel to prevent the other party from proving that question.[19] Where in a case involving land acquisition, the petitioner failed to take the plea of delay in taking possession vitiating the acquisition in the earlier petition which was unconditionally withdrawn when such a plea was available to him, he was estopped to take that plea in a subsequent petition.[20]

Where a plea of waiver is not taken in a written statement, the question of waiver need not be gone into by the trial court.[21] The plea of waiver could only be raised by a party who had accepted the representation of another and had acted to his detriment in relying upon it.[22] Plea of waiver cannot be raised for the first time in writ petition.[23] In order that, a legal remedy to which a party is entitled shall be deemed to have been waived or abondoned by it in express worded or by a deed there shall be clear indication by his conduct from which it can be inferred that there has been such a waiver or abondonment.[24] Waiver of a right cannot be lightly inferred and something more than inaction of the right holder in exercising the right is necessary.[25] Waiver may be express or implied. It may be intentional or due to inaction or gross-carelessness or absence of diligence on the part of the party having the right or advantage in his favour. The party having such right or previlege has a discretion to exercise the same.[26]

A person cannot be said to agree unless there is a free and voluntary consent. Mere promise in an attempt to avoid imminent threat to one's property does not amount to waiver.[27] The rule of estoppel or waiver cannot be applied against retrenched workmen who have no freedom to refuse payment in view of their financial position caused by the retrenchment.[28]

The defendant once having admitted the existence of certain fact in the written statement cannot be allowed to take the inconsistent plea which plea will irretrievably prejudice the plaintiff's case.[29]

Where in a suit for possession the appellant claimed title to the suit property under a will and set up the plea of adverse possessions it was held that both the pleas, being alternative, were permissible.[30]

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17. *T.K. Sivarajan* v. *Obbkal Receiver*, AIR 1953 Tra/Co. 205.
18. *R.C. Thakkar* v. *Gujarat Housing Board*, AIR 1973 Guj 34.
19. *Rajendra Ram* v. *Devendra Doss*, AIR 1973 SC 268.
20. *Raj Kumar* v. *Union of India*, 1998 AIHC 1419 (para 7) (Del). **See also** *Haji Yaseen* v. *Commissioner, Indore*, 2000 AIHC 1952 (para 3) (MP).
21. *Mangal Sen* v. *Kanchhid Mal*, AIR 1981 SC 1726.
22. *Waryam Singh* v. *Chanan Singh*, AIR 1960 Punj 308.
23. *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.*, AIR 1979 SC 621.
24. *Kanniah Gupta* v. *Subbarami Reddi*, 1952 Mad 687.
25. *Ram Raksh Pal* v. *Brij Nandan*, AIR 1967 All 325.
26. *Chotalal* v. *Ram Golam*, AIR 1975 Cal 436.
27. *Tej Ram Chand* v. *State*, ILR (1970) 2 Del 681; *Collector Customs & Central Excise* v. *Hindustan Motors*, AIR 1975 Cal 368; *Azra* v. *Silton Hotel*, AIR 1975 Kant 225.
28. *B.N. Elias & Co.* v. *Fifth Industrial Tribunal*, AIR 1965 Cal 166.
29. *Surendra Bhatia* v. *Punam Bhatia*, AIR 2001 Raj 338 (para 35); **See also** *Jawan* v. *Mewa Singh*, AIR 2001 P&H 344 (paras 21, 22, 23, 25, 33, 34 and 43).
30. *A. Krishnappa* v. *Thimmarayappa*, AIR 2001 Kant 470 (para 6). **holding** *Danappa Revappa Kolli* v. *Gurupadappa Mallappa Pattanashetti*, ILR 1990 Kant 610 **not a good law** in view of *Karnataka Wakf Board Bangalore* v. *State of Karnataka*, AIR 1996 Kant 55 : 1995 (4) Kant LJ 326.

56. COMPOSITE FEE

Where composite fee was levied from the operators of the tourist transport vehicles for promoting tourism and the operators were spending substantial money on expensive vehicles and undertaking work of transporting tourists, the authorities were estopped from levying anything beyond the composite fee.[31]

57. PAYMENT OF INSTALMENTS

A right created by contract, for example, in a consent decree may be waived. This waiver can be either express or implied. Where a party has two rights, the mere exercise of one right does not amount to waiver of the other but if there are alternative rights, the exercise of one right may imply that the party has waived to exercise of the other.[32] Life Insurance Corporation of India asserted that the policy lapsed since second instalment of premium was not paid. But it accepted 3rd, 4th and 5th instalments and also second with interest. It was held that by its conduct L.I.C., waived its right to claim the policy as lapsed; the nominee is entitled to the amount after the death of the assured.[33] Where an instalment decree was passed with a default clause, and there was a default by the judgement-debtor, the decree holder is not estopped from re-electing in favour of payment of instalment.[34]

58. WAIVER-NOTICE

Where a restoration application under Order IX, Rule 13, C.P.C. is presented by the pleader's clerk, and no objection that the presentation was not proper, was raised, the objection must be deemed to have been waived.[35]

Notice under Section 34, Income-tax Act, 1922 can be waived by an assessee.[36] Waiver of notice under Section 34, Income-tax Act (1922) by counsel does not bind the client.[37] Plea of want of notice under Section 106 can be waived.[38]

Where a tenant was given notice to quit and vacate on the last day of English calendar month (monthly tenancy) and an objection, that the notice was invalid on the ground that period of notice should have commenced from the day of month in which tenancy was created, was not taken by the tenant in his pleadings. It was held that the tenant was estopped from contending that notice did not coincide with the last day of calendar month of tenancy and notice was held to be valid.[39]

Notice under Section 49 of Punjab Municipal Act (1911) is mandatory. If the plea as to want of notice was not taken in the written statement, amendment can be allowed even at the stage of revisions.[40] Where the owner filed a complaint without issuing notice which was mandatory under Rule 15(2) framed under the Bombay Provincial Municipal Corporations Act, Section 457, the principle of waiver applied.[41] A notice terminating tenancy and demanding arrears of rent was issued under Bombay Rents, Hotel and Lodging House Rents Control Act (47 of 1947) (as applied to Gujarat). Subsequently a second notice fixing another date for termination of tenancy was given. Landlord, by giving second notice, waived the termination of contract brought about by the first notice.[42] Where the assessee filed returns and books of account and other evidence in support of the returns in response to notice issued under

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31. *Indo Canadian Transport Co.* v. *Union of India*, AIR 1999 P&H 130 (para 28).
32. *Humayun Properties* v. *Ferrazzinis Ltd.*, AIR 1963 Cal 473.
33. *L.I.C. of India* v. *Bhallah*, AIR 1989 Pat 269.
34. *Devi Dayal* v. *Ram Kumari Devi*, AIR 1961 All 107; **See also** *Rahmath Unnisa* v. *Shimaga Co-op Bank*, AIR 1951 Mys 59; *Kunjammal* v. *Sekhara Menon*, AIR 1951 Tra Co. 127.
35. *Md. Siddique* v. *Nand Kishor*, AIR 1952 Bhopal 41.
36. *Tansukhrai* v. *I.T. Officer*, AIR 1961 Assam 35; *Commr. of I.T.* v. *Kapasi*, ILR (1961) 2 Ker 32.
37. *B.K. Gooyee* v. *I.T. Commissioner*, AIR 1966 Cal 438.
38. *Batoomal* v. *Rameshwar Nath*, AIR 1971 Del 98; *Ram Pratap* v. *Birla Cotton Spl. & Wig. Mills*, AIR 1973 Del 124; *K.N. Ramakrishnan* v. *Keral Chand*, AIR 1971 Mad 150; *Boota Singh* v. *Roshanlal*, AIR 1971 Punj 269.
39. *Gurdit Singh* v. *Tata Iron & Steel Co.*, AIR 1965 Pat 311.
40. *New Delhi Municipal Committee* v. *Ramsaran Dass*, ILR (1972) 1 Del 708.
41. *Municipal Corporation Ahmedabad* v. *Oriental F&G Insurance Co. Ltd.*, AIR 1994 Guj 167 (paras 66 and 67).
42. *Thakkar Manganlal Popat Lal* v. *Thakkar Bhikhan Bhai Devji*, ILR 1972 Guj 24.

Sections 148 and 143(2) of Income-Tax Act 1961, he cannot challenge the notice as he is estopped by acquiescence.[43]

Acceptance of smaller sum without prejudice to balance of claim does not create estoppel.[44] Merely because a person had waived his remuneration for earlier periods, it does not follow from it that he waived his remuneration for period subsequent to such waiver.[45] Where the appellant's did not challenge the auction sale of their assets but claiming bigger amount though they accepted smaller amount given under the award, it was held that there is no estoppel against them on account of accepting lesser amount and there is no estoppel by auction.[46]

59. ESTOPPEL AGAINST STATUTE

The principle of estoppel cannot override the provisions of a statute.[47] The principle of estoppel cannot be invoked to defeat the plain provisions of a statute.[48] Doctrine of promissory estoppel cannot be invoked for the enforcement of a 'promise' made contrary to law.[49] Promissory estoppel cannot be invoked against a statute imposing ceiling on incentive retrospectively. [50] There is no estoppel against an Act of Legislature.[51]

Estoppel only applies to a contract *inter partes* and it is not competent to parties to a contract to estop themselves or any body else in the face of an Act.[52]

Where a statute imposes a duty by a positive action, estoppel cannot prevent it. Estoppel is only a rule of evidence which can be invoked under special circumstances but is not available to release a party

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43. *Shyamlal Ghashal* v. *Income Tax Officer*, ILR (1972) 1 Cal 455.
44. *Dipchand* v. *Abhechand & Co.*, AIR 1962 Cal 166; *Union of India* v. *Babulal Firm*, AIR 1968 Bom 294; *Rupeshwari Debi* v. *Lokenath Hosiery*, AIR 1962 Cal 608.
45. *Krishna Swami* v. *S.C. Construction Pvt. Ltd.*, AIR 1964 Mad 191; **See also** *Workers Textiles Mills* v. *Dhanalakshmi Mills*, AIR 1961 Mad 212; *Tata L. & E. Co.* v. *Kartar Singh*, AIR 1961 Pat 37.
46. *Budh Ram* v. *Om Prakash*, ILR (1969) 1 All 817.
47. *Ariff* v. *Jadunath Majumdar*, AIR 1931 PC 79; **followed** in *Kisto Chandra* v. *Anila Bala Dasi*, AIR 1968 Pat 487.
48. *Jagadbandhu Saha* v. *Radha Krishna Pal*, ILR (1909) 36 Cal 920; *Abdul Aziz* v. *Kanthu Mallik*, ILR (1910) 38 Cal 512, *Dhanu Pathak* v. *Sona Koeri*, ILR (1936) 15 Pt 589 (SB); *Ma Mo E* v. *Ma Kun Hlaing*, ILR (1941) Ran 309; *Workmen* v. *Hindustan Lever Ltd.*, AIR 1984 SC 516; *Steuart & Co., Ltd.* v. *Mackertich*, AIR 1963 Cal 198; *Baghat Transport Service Ltd.* v. *State of H.P.*, AIR 1951 HP 36; *Municipal Committee* v. *Shah Raiasi Hirji & Co.*, AIR 1960 MP 217; *State of Bihar* v. *Dukhulal Das*, AIR 1962 Pat 140; *Vanguara Fire & General Insurance Co.* v. *Sarladevi*, AIR 1959 Punj 297; *Virendra Kapur* v. *University of Jodhpur*, AIR 1964 Raj 161; *Qura Bali* v. *Govt. of Rajasthan*, AIR 1960 Raj 152; *Bhanwar Lal* v. *Mangi Bai*, AIR 1955 Raj 129; *J.J.S. Rodrigues* v. *Union of India*, AIR 1967 Goa 169; *Liberty Talkies* v. *State of Gujarat*, AIR 1968 Guj 280; *Commer. of H.R.E.* v. *Basta Patra*, AIR 1952 Ori 152; *Indra Bahadur Singh* v. *Bar Council of Allahabad, U.P.*, AIR 1986 All 56; *Hansraj* v. *Pyarchand*, ILR (1957) 7 Raj 87; *Ramesh Narang* v. *Rama Narang*, 1995 Cr LJ 1685 (para 13) (Bom); *K.M. Seth* v. *Competent Authority & Addl. Collector (Ceiling), Rajkot*, AIR 1994 Guj 130 (para 18); *Aliakutty Paul* v. *State*, AIR 1995 Ker 291 (para 24); *Vishnu Kumar Khatar* v. *State (FB)*, AIR 1995 Pat 168 (paras 15 and 16); *Jagdish Chandra Mitra* v. *District Municipal Election Officer*, 1996 AIHC 101 (para 7) (Cal); *N.S.V. Ramanuja Jeer Swamigal* v. *State of T.N.*, 1996 AIHC 204 (para 27) (Mad); *Estate Manager, Housing Deptt.* v. *Dilip Kumar De*, 1996 AIHC 4562, at p. 4569 (Cal); *Hukam Chand* v. *Om Chand*, 1998 AIHC 1509 (para 8) (P&H); validity of document required to be registered can be challenged, if unregistered, even if parties to it acting and benefiting by it. *Bankey Bihari* v. *Surya Narain*, AIR 1999 All 167 (paras 8 and 13); *Committee of Management, L.B.S.S. Degree College* v. *Gorakhpur University*, 1999 AIHC 3907 (paras 18 and 19) (All); *Punjab Travel Co., Ahmedabad* v. *Union of India*, AIR 2000 Raj 294 (para 21).
49. *Ashok Kumar Maheshwari* v. *State of U.P.*, AIR 1998 SC 966, p. 969; Direction of remanding case by appellate authority against statutory provisions, *ab initio* void, no estoppel. *National Textile Corpn.* v. *Bank of Madura Ltd.*, AIR 1998 Mad 113 (para 22); *Phoenix Impex* v. *State*, AIR 1998 Raj 100, p. 103; *Jalandhar Improvement Trust* v. *Sampuran Singh*, AIR 1999 SC 1347 (para 13); *Abu Zaid* v. *Principal, Madarsa-Tul-Islah, Saraimir, Azamgarh*, AIR 1999 All 64 (para 12); *Shiv Kr. Pandit* v. *State of Assam*, AIR 1999 Gau 68 (para 10); *State of Gujarat* v. *Vishnu Automobiles*, AIR 1999 Guj 92 (para 21).
50. *Sree Rayalaseema Alkalies & Allied Chemicals Ltd.* v. *Govt. of A.P. (FB)*, AIR 1993 AP 278 (paras 40, 41 and 42)
51. *Shridhar Balkrishna* v. *Babaji Mulla*, (1914) 16 Bom LR 586 : ILR 38 Bom 709; *Ahmed Bhauddin* v. *Babu*, (1929) 31 Bom LR 778 : ILR 53 Bom 676; *Mathra Parshad & Sons* v. *State of Punjab*, AIR 1962 SC 745; *B.N. Elias & Co.* v. *Fifth Industrial Tribunal*, AIR 1965 Cal 166; *Gopi Krishan* v. *Anil Bose*, AIR 1965 Cal 59; *Gadigeppa* v. *Balangowda*, AIR 1931 Bom 561.
52. *Barrow's case*, (1880) 14 ChD 432, 441, *Madras Hindu Mutual Benefit Permanent Fund* v. *Ragava Chetti*, ILR (1895) 19 Mad 200.

from the obligation to obey a statute.[53] Where the document of family arrangement was required to be registered to be admissible in evidence, parties could not be estopped from questioning its validity though they were acting upon it and benefiting by it. There is no estoppel against statute.[54] Nor it can be used to prevent legislative and executive organs of the State from performing their functions. Estoppel is not available for preventing a Municipal Committee from acting according to law. A Municipality granted exemption from *octroi* for developing a *Mandi*, but subsequently revoked it. It again granted exemption in keeping with the terms of the original sale of plots, but again levied the tax. Even so a claim of estoppel against its legislative power was not allowed.[55] Where a person had acted on the terms and conditions of a code for several years even he was not estopped from challenging its validity.[56] Where an exemption from tax is granted to save an industry, the doctrine of estoppel is not attracted.[57]

There can be no estoppel against a statute. If the law requires that a certain tax be collected, it cannot be given up, and any assurance by the Government that it would not be collected would not bind the State Government, whenever it chooses to collect it.[58] Even if it is assumed that the petitioner had the necessary knowledge of the proposals for the imposition of water tax this does not take away his constitutional right of challenging the validity of the new taxation measure.[59] The principle of estoppel cannot be made available in case of imposition of a tax not authorised by law simply because there was some discussion between the Govt. and the timber mill owners/the victims of impost.[60] There can be no estoppel in the matter of a statutory levy. The conduct of the Government in accepting the tax for September, 1950, and for the subsequent periods does not estop them from demanding tax in respect of August, 1950.[61] If a party, in order to clear the goods from customs, has given the classification under a particular item of tariff head in accordance with the wishes of the authorities or even under misapprehension, and if the law allows him a right to ask for refund on proper apprisement and the party cannot be estopped from asking for refund.[62] Where a classification of a product as a residuery item was approved by the department for purpose of levy of excise duty, it would not estop the department from revising that classification according to law.[63] When statute imposes positive duty upon public officers in the general interest of public, exemption from duty cannot be claimed by pleading estoppel.[64] Neither the Government nor any subordinate department has a right to modify the provisions of a statute and to recover less on the basis of such modification to the detriment of public treasury, under the Customs Act. The department is not estopped from demanding statutory amount of Customs Duty.[65]

Where the petitioner had not studied Sanskrit in Intermediate and the condition precedent for admission to B.A.M.S. course was that the candidate must have passed intermediate with Sanskrit, it was held the management could not be estopped from denying admission to him as the prescribed condition is a legal requirement.[66] Where the students in polytechnic failed to put in minimum prescribed percentage of attendance but the Principal permitted them to take the examination, their examination having been cancelled the students could not plead the principle of promissory estoppel as permission to

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53. *Harda Municipality* v. *H. Electric Supply Co.*, AIR 1964 MP 101; *Shankerrao* v. *Vinayak*, AIR 1951 Nag 307.
54. ***Bankey Bihari* v. *Surya Narain***, AIR 1999 All 167 (paras 8 and 13).
55. *Jit Ram Shiv Kumar* v. *State of Haryana*, AIR 1980 SC 1285. **Relying upon.** *Excise Commr. U.P.* v. *Ram Kumar*, AIR 1976 SC 2237 : 1976 Supp SCR 532; *N. Ramanatha Pillai* v. *State of Kerala*, (1974) 1 SCR 515; AIR 1973 SC 2641 and ***State of Kerala* v. *Gwalior Rayon***, (1974) 1 SCR 671 : AIR 1973 SC 2734.
56. *Monte de Guirim Educational Society* v. *Union of India*, AIR 1980 Goa 1. *Minority Institutions*: *Preethi Srinath* v. *Selection Committee, Govt. and Private Medical College*, AIR 1981 Kant 58, no reversation made for sportmen. *K.R. Shenoy* v. *Udipi Municipality*, AIR 1974 SC 2177, excise of statutory power. The right of a Road Transport Corpn. to allot routes to a fresh lot of unemployed graduates cannot be questioned because the earlier allottees had been allowed good time. ***Krishana Gopal* v. *M.P.S.R.T. Corpn.***, AIR 1986 MP 103.
57. ***Filterco.* v. *Commissioner of Sales Tax***, AIR 1986 SC 626.
58. *Mathra Parshad* v. *State of Punjab*, AIR 1962 SC 745; *Virendra Kumar Saklekha* v. *Jagjiwan*, (1972) 1 SCC 826; *Kashmir House* v. *Dy. Commr. of Commercial Taxes*, (1971) 28 STC 297 (AP); *Paradise Printers* v. *Union Territory of Chandigarh*, AIR 1988 SC 354.
59. ***R.R. Chari* v. *State***, AIR 1959 All 152.
60. *S. Veneer and Saw Mills, Dimapur* v. *State of Nagaland*, AIR 1995 Gau 37 (para 13). **reversing** Civil Rule No. 101 (k) of 1992, Dt. 6-8-1993 (Gau).
61. ***Sundareswaran* v. *State of T. Cochin***, AIR 1956 Tra/Co. 85.
62. ***Dunlop India Ltd.* v. *Union of India***, AIR 1977 SC 597.
63. *Plasmac Machine Manufacturing Co.* v. *Collector of Central Excise*, AIR 1991 SC 999.
64. *Dhone Gopal* v. *Secretary, Land and Land Revenue Dept. Govt. W.B.*, AIR 1966 Cal 348.
65. ***Hindustan Motors Ltd.* v. *Union of India***, AIR 1954 Cal 151.
66. ***Dilip Singh* v. *Pracharya & Adhikshak, Sri L.B.S.S.R.A. Mahavidyala***, 1986 All 158.

take examination was contrary to the provisions of the statute and even contrary to the provisions of equity.[67]

The Supreme Court held that the expression "wife" means legally wedded wife. In case of marriage of a woman with a man already having a living spouse, husband is not estopped from questioning it as a nullity and the second wife's right to maintenance as there is no estoppel in questioning the marriage.[68]

If the terms of a Government notification are clear, the interpretation put upon it by an officer of the rank of an Assistant Collector of customs would not be binding on the Government so as to estop them from claiming afterwards that interpretation was wrong.[69]

When the facts are fully set out and admitted, a party's opinion about the legal effect of those facts is of no consequence in construing the section. No estoppel arises by reason of the admission of the party as to such effect.[70] There can be no estoppel on a statement of law relating to the nomination of a person as a *chela* under the terms of a will.[71]

No person can be precluded from pleading that certain orders are illegal or invalid, because the question as to whether orders are illegal or invalid is a pure question of law and there can be no estoppel against law.[72] An undertaking was given before the High Cour in a writ proceeding on behalf of the hut and pavement dwellers that they would not claim any fundamental right to put up huts on pavements or public roads and that they would not obstruct the demolition of the huts after a certain date. They were not estopped from contending before the Supreme Court that their huts could not be demolished because of their right to livelihood comprehended in Article 21.[73] The provisions of Act 299 of the Constitution which are mandatory in character require that a contract made in exercise of the executive power of the State should satisfy three conditions laid down therein. Failure to comply with these conditions the contract would be void and unenforceable. There is no question of estoppel in a case where there is contravention of the provisions of Article 299(1) of the Constitution.[74] Though the plea of non-compliance with Article 299 of the Constitution is not raised earlier in the proceedings, a party is not estopped from raising it for the first time in revision under Section 115, C.P.C. There cannot be any estoppel against mandatory provisions of the Statute.[75]

The plaintiff and the defendant exchanged adjacent plots of land each worth more than a hundred rupees by means of an unregistered deed, both believing that they had effected a valid transfer. Possession was taken by each party and defendant began to erect a very costly building placing a wall thereof in the land he had acquired in exchange. While the building was in progress, the plaintiff demanded and obtained Rs. 525 from the defendant on the ground that the plot he parted with was found to be more in extent than the defendant's. After the completion of the building the plaintiff sued the defendant for recovery of his plot after removal of the defendant's building on it. The defendant pleaded that the plaintiff was estopped by his conduct from recovering the plot. It was held that the plaintiff was not estopped and that he was entitled to recover his plot owing to the absence of a registered deed of exchange as required by Sections 54 and 118 of the Transfer of Property Act.[76]

Even assuming that the executive by an order of Government had made a representation that an Act would not be brought into effect earlier than a certain date, that would not prevent the Legislature, when the legislation was actually introduced, from considering and making it a law and bringing it into effect from a date earlier than what was notified in the Government order.[77]

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67. *M R Javaseel* v. *Secretary, State Board of Technical Education & Training*, AIR 1998 AP 263 (para 10).
68. *Yamunabai Anantarao* v. *Anantarao Sivaram Adhav*, AIR 1988 SC 644.
69. *Collector of Customs* v. *Lala Gopikishen*, 1955 Mad 187; *Mathra Parshad* v. *State of Punjab*, AIR 1962 SC 745.
70. *Kalidas Dhajibhai* v. *State of Bombay*, AIR 1955 SC 62; *Shanti Prasad* v. *Kalinga Tubes Ltd.*, AIR 1962 Ori 202.
71. *Kartar Singh* v. *Dayal Das*, AIR 1939 PC 201.
72. *Dubai Petit* v. *Dominion of India*, AIR 1951 Bom 72 : (1950) 53 Bom LR 229; S B. *Noronah* v. *Prem Kumari*, AIR 1980 SC 193 where a tenant was not estopped from challenging the validity of a lease under Delhi Rent Control Act, 1958. *Indra Bahadur Singh* v. *Bar Council of U P*., AIR 1986 All 56. No esoppel against State. *Kakubhai & Co* v. *Nathmal*, AIR 1980 Bom 25, proceeding about validity of lease withdrawn, no estoppel against proceeding again.
73. *Olga Tellis* v. *Bom MC*, AIR 1986 SC 180.
74. *Bihar E.G.F. Co-op. Socy.* v. *Sipahi Singh*, AIR 1977 SC 2149.
75. *Harischandra Senena* v. *Union of India*, ILR (1972) 1 Del 110.
76. *Ramanathan* v. *Ranganathan*, ILR (1917) 40 Mad 1134.
77. *Madras Race Club* v. *State*, AIR 1976 Mad 238.

Any interpretation by the State Government of a legislative enactment, even though it has resulted in a citizen changing his position to his detriment cannot operate as an estoppel.[78] Where the Central or State Government Amendment of the Land Acquisition Act provides uniform rate of interest at 4% in Land Acquisition cases, the terms of the Acquisition Manual do not operate as estoppel against Government.[79] Rules 28(1-A) and 57(2) of the Mineral Concession Rules (1949) being statutory rules, requirement of these rules cannot be waived by the State Government.[80] There is no basis for application of rule of estoppel to a matter arising under Section 5-A of Bihar Private Irrigation Works Act as amended in 1939.[81] Where a suit for rent is filed by one co-sharer alone without impleading others, defendant is not estopped from raising statutory bar under Section 246(1), Tenancy Act.[82] An occupancy right, once accrued, can be extinguished only in the manner provided in the C.P. Tenancy Act and not by mere rule of estoppel based on subsequent conduct.[83] Pursuant to a money decree based on a compromise, the land of a *Santal* was sold in execution. As the right of restoration is given by statute, it was held that the judgement-debtor was not barred by estoppel from applying for restoration of possession.[84]

If a statute having prescribed certain thing, itself provides for exemption therefrom under certain circumstances or authorises some body to exercise the power of exemption then any thing done not in terms of those conditions or qualifications will not be *ultra vires* and will be said to be merely irregular and to such an act, the doctrine that there is no estoppel against statute will have no application.[85] Where fair rent is fixed by the consent of parties, a second application for the same relief is barred previous order operates as estoppel, by conduct. Plea that estoppel could not lie against a statute would not apply in this case.[86] A tenant sublet accommodation with the oral permission of the landlord. As sub-letting is unlawful under Clause 12-A of C.P. and Berar letting of Houses and Rent Control Order, 1949, oral permission by the landlord cannot operate as estoppel or waiver of benefit of the prohibition. The Landlord is not estoppel from pleading that subletting is unlawful.[87] Where a minority educational institution accepted the terms and conditions contained in the code for many years, they are not estopped from challenging the validity of the provisions of the code as no estoppel arises against statute.[88] A statute barred benefit of a regulation to improve prior performance in examination. A candidate who had failed earlier at M.A. examination was granted an admit card. It does not estop the university from denying the benefit, as the statute envisages a total bar.[89] Non-publication of the application for a permit under the Motor Vehicle Act by the authority is in violation of a mandatory provision. If a petitioner concedes the claim of the respondent *bona fide* believing publication of his application, the concession made by the petitioner is not binding as there is no estoppel against the statute.[90] Suit by an agent against the owner on the basis of Section 8 of the Carriers Act (1865) is not maintainable even though no objection to maintainability is raised in the statement.[91]

In a case under Madras Hereditary Village Offices Act, 1895, it was held that the right recognised in Section 6(1) of that Act was a legal right and was enforceable and the same accrued to P's family in 1948 when division of the village took place and the order dated 31-1-1950 appointing D to the post of *Karanam* gave rise to the cause of action for the suit; Section 6(1) of the Act was held void by the S.C. in 1961; that since D at no stage had put forward any hereditory right in himself to be appointed to the post of the *Karanam* he was not estopped from contending that Section 6(1) was opposed to the Constitution of India.[92] In an eviction suit under the Bihar Buildings (Lease, Rent and Eviction) Control Act (1947),

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78. *Virendra Kumar Saklecha* v. *Jagjiwan*, (1972) 1 SCC 826.
79. *Y. Yenkanna Chowdary* v. *Spl. Dy. Collector, LA (General)*, AIR 1981 AP 232 (DB).
80. *N. Setharamiah* v. *Kotiah*, AIR 1970 SC 1354.
81. *Collector of Monghyr* v. *Keshav Prasad*, AIR 1962 SC 1694.
82. *Bahul Begam* v. *Herm Chandar*, AIR 1960 All 519.
83. *Reghu Singh* v. *Govt. of Orissa*, AIR 1951 Ori 95.
84. *Ashiruddin* v. *Pitu Majhi*, ILR (1969) 2 Cal 127 (Cal).
85. *University of Delhi* v. *Ashok Kumar Chopra*, AIR 1968 Del 131.
86. *Autar Singh* v. *Sohanlal*, AIR 1970 J & K 26 (FB).
87. *Thakurain* v. *Shivnath*, AIR 1969 MP 130.
88. *Monte de Guirim Educational Society* v. *Union of India*, AIR 1980 Goa 1.
89. *Anant Kumar* v. *Vice-Chancellor, Magadh University*, AIR 1990 Pat 205 (DB).
90. *Anwar Ahmad Khan* v. *R.T.A. Lucknow*, AIR 1963 All 38.
91. *Narasa Reddy* v. *Venkata Subbayya*, AIR 1964 AP 71.
92. *Venkata Subbarao* v. *Rama Krishna Rao*, ILR 1963 Andh 337.

though objection under Section 11 of that Act was not raised, it can be raised in execution proceedings. There is no estoppel against statute.[1] If the position of the occupier and the payment of rent by him do not give him the status of a tenant, the Municipal Committee in accepting rent is not estopped under the Punjab Municipal Act.[2] Notice to quit was sent telegraphically by a landlord to his tenant. It was held that the tenant, was not estopped from contending that the notice was invalid, though he had replied, as there cannot be an estoppel against statute.[3] Where a tenant agrees, under consent decree, to surrender possession after one year and the landlord files execution after expiry of one year for recovery of possession, the tenant is not estopped from claiming benefit under clause 9(1) of Travancore-Cochin Buildings (Lease and Rent Control) Order 1950.[4]

Where a sale deed was followed by an agreement that the vendee or his heirs should not alienate the property, it was held that the bar of estoppel or waiver would not operate against the vendee as the agreement is in violation of Section 10 T.P. Act and Section 23 of the Contract Act.[5] A party is not estopped from challenging the sale contrary to the Partition Act after it had taken place for there cannot be any estoppel against a statute.[6]

Whether or not the appellant agreed or participated in the meeting which was held before introduction of the voting machines if such a process is not permissible or authorised by law he cannot be estopped from challenging the same.[7] Statement made under misapprehension of legal right does not create estoppel.[8]

A constructed a building as a residential one and let it out to the Government which located its office in it without any written permission from the Controller for converting the residential building into a non-residential one. Later the building was sold by A to B who filed a suit against the Government for eviction on the ground of *bona fide* requirement for his own residence. It was held that estoppel would not arise as the building continued to be a residential one by the absence of any written permission for conversion of the residential building into non-residential building by the controller as required by statute.[9] Where a public limited company doing forward contracts business, in a special meeting passed a resolutions depriving certain class of its shareholders of their right to vote and to declare and receive dividend etc., it was held that neither their absence at the meeting nor their failure to object at the subsequent elections held in accordance with the amended Articles of Association estopped them from raising the plea under Sections 397 and 298 Companies Act, the rights sought to be deprived being fundamental statutory rights conferred on them under the Companies Act which no shareholder could be permitted to barter away.[10]

Where the laws of money lending or monetary security are involved, the test is, whether the law that confronts estoppel can be seen to represent a social policy to which the court must give effect in the interest of the public generally or some section of it.[11]

An agreement regarding raising of objections to the validity of a will or otherwise, is no concession on a point of law and does not have the effect of estoppel against statute.[12]

60. TAX LAWS

Doctrine of estoppel does not apply to Income Tax Act, as equity is out of place in tax laws. Whether a particular income is to be taxed or not is a matter under the taxing statute. If it is not taxable

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1. *Bhagwati Prasad* v. *Radha Kishun*, AIR 1950 Pat 354.
2. *New Delhi Minicipal Committee* v. *H.S. Rikhy*, AIR 1956 Punj 181.
3. *Maduri Satyanarayna* v. *Veerabhadra Swamy*, AIR 1990 AP 169.
4. *Korah Pannen* v. *Parameshwara Kurup*, AIR 1956 Tra/Co. 1 (FB).
5. *Brahmanand* v. *Roshanidevi*, AIR 1989 HP 11.
6. *Sita Ram* v. *Joginder Kumar*, AIR 1963 Punj 531.
7. *A.C. Jose* v. *Sivan Pillai*, AIR 1984 SC 921 : (1984) 2 SCC 656 : 1984 UJ (SC) 558 : (1984) 3 SCR 74.
8. *A.C. Jose* v. *Sivan Pillai*, AIR 1984 SC 921; *Shanker Lal* v. *Narendra Bahadur Tandon*, AIR 1967 All 405; *Sukumar Chakraborty* v. *Ast. Assessor Collector*, AIR 1991 Cal 181.
9. *P. Varadarajan* v. *State of A.P.*, AIR 1976 AP 90.
10. *Mohanlal* v. *Punjab Co. Ltd.*, AIR 1961 Punj 485.
11. *Kok Hoong* v. *Leong Cheong Kweng Mines*, 1946 AC 993 (PC).
12. *Pritam Kaur* v. *Harpal Singh*, AIR 2001 P&H 306 (para 15).

under the statute, it cannot be taxed on the basis of estoppel or under any other equitable doctrine.[13] Income cannot be taxed on the basis of estoppel or any other equitable doctrine.[14] Income Tax Commissioner's power to object to settlement proceedings cannot be nullified by doctrine of estoppel.[15] There is no question of an assessee waiving any right accrued to him under the statute.[16] Written down value and depreciation determined under Section 35 of Income Tax Act, 1922 does not operate as estoppel or *res judicata*.[17]

Estoppel does not apply in case of successive assessments, as an assessment for each year is complete in itself[18] but in respect of assessment of land, land already assessed and certificate exempting it from future liability already issued, could not be reassessed for depositing one time tax.[19] Where a firm was dissolved and the individual partners were invited by the taxing authorities to pay their shares, and on payment of their shares they would not be required to pay anything further. The income tax officer was estopped from realizing the balance of tax from a partner who had paid his share.[20]

Where a party gave classification of goods in accordance with the wishes of the customs authorities or under some misapprehension, for clearance of his goods, he is not estopped from claiming for refund of tax paid on proper appraisal[21] and payment of tax voluntarily persuant to clause in terms and conditions of an auction, would not preclude the tax payer from claiming refund[22] but where the importer accepted the test reports indicating misdeclaration of the goods confiscated under Customs Act and agreed to adjudication by authorities after waiving the show cause notice against the confiscation of goods and imposition of penalty and the goods were released on that basis, they could not challenge the valuation on the basis of the test reports and the penalty and fine imposed.[23]

Issue of clarification or circulars by the Govt. regarding taxability of a certain item does not prevent the state from recovering the tax leviable according to law.[24] The principle of promissory estoppel does not apply in case of demand of additional tax.[25]

61. RENT CONTROL

When there is total lack of jurisdiction in the authorities under the Orissa House Rent Control Act, no amount of concession by party's counsel can confer any jurisdiction on them.[26] Fair rent fixed during compromise arrived at between parties before a Civil Court, would be outside the ambit of the Rent Control Act and it would not act as estoppel from getting the fair rent fixed under the Rent Control Act.[27]

62. ARBITRATION

Award of an arbitrator can be filed only in the court in which the suit would lie with regard to the subject-matter of reference. An agreement between parties to file in a different court is against the statute and cannot be given effect to.[28]

Appearance of a party in arbitration proceedings in terms of a contract which was void under some Act, could not later on be claimed by the opposite party as estoppel and prevent the party from

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13. *Commr. of I.T.* v. *Bharat General Re Insurance Co. Ltd.*, 1971 Tax LR 883 (Del); *Dwarkadas K. Morarka* v. *C.I.T., Bombay*, (1962) 44 ITR 529 (SC); *New Jehangir Vakil Mills Co.* v. *C.I.T. Bombay*, AIR 1964 SC 318; *Firm Bhagatram* v. *Commer., of Excess Profits Tax*, AIR 1956 SC 374.
14. *I.T. Commr.* v. *Firm Muar*, AIR 1965 SC 1216.
15. *I.T. Commer. Calcutta* v. *Bhattacharyjee*, AIR 1979 SC 1725.
16. *Basheshar Nath* v. *Commer. of I.T.*, AIR 1959 SC 149.
17. *Maharana Mills* v. *I.T. Officer*, AIR 1959 SC 881.
18. *Kantilal* v. *Commer. of I.T.*, AIR 1955 Bom 53.
19. *East India Hotels Ltd.* v. *State of Rajasthan*, AIR 2001 Raj 286 (paras 26-28).
20. *I.T. Officer* v. *Khanjan Lal*, (1973) 89 ITR 120 (All).
21. *Dunlop India Ltd.* v. *Union of India*, AIR 1977 SC 597.
22. *Divisional Forest Officer, Kalpetta* v. *C.C. Aravindan*, AIR 2000 Ker 121 (paras 13 and 14)
23. *Pine Chemical Suppliers* v. *Collector of Customs (Bombay)*, AIR 1993 SC 1185
24. *Bengal Iron Corporation* v. *Commercial Tax Officer*, AIR 1993 SC 2414 (para 18)
25. *Theatre, Sangamesh* v. *Entertainment Tax Dy. Commissioner, Kurnool (TB)*, AIR 1993 AP 137 (paras 16 to 19), **approving** *Sri Ram Theatre* v. *Dy. C.T.O., Kakinada*, 1982 (2) AP LJ (HC) 209 : (1982) 2 Andh LT 178.
26. *Dukhi Shyam Das* v. *Satyabadi Sahu*, ILR 1972 Cut 706.
27. *Kunjilal* v. *Madan Lal*, 1997 AIHC 1006 (paras 11-13) (J&K).
28. *Narasimhan* v. *Ramdayal*, AIR 1966 AP 134.

repudiating the award as void.[29] The fact whether a clause in the agreement can be construed and considered as an arbitration clause, has to be decided by reference to the intention of the parties by reading the language of the clause and not on the basis of a petition filed by a party admitting the existence of such a clause. Filing of the writ petition will not operate as an estoppel.[30]

Plaintiff agreed to an arbitration under as agreement, clause 9 of which provided for reference to a sole arbitrator who is to be apponted by the Managing Director even if he be an employee. It was held that the plaintiff was estopped from raising the plea against the appointment of an employee.[31]

Parties taking part in arbitration proceedings cannot later contest any want of formality in the appointment of the arbitrator and order of reference or the proceedings.[32] The party agreeing to refer the disputes to the arbitration cannot raise the plea that the disputes were beyond the scope of arbitration agreement only because the award is passed against it.[33] The party participating in the arbitration proceedings without any protest was estopped from challenging its proceedings after the award was passed.[34] However, it was held that mere participation in arbitration proceedings and raising objections would not operate as estoppel in challenging the jurisdiction of the arbitrators to give an award.[35] The Supreme Court observed that an arbitrator has to give an award within four months unless the time was extended by court. An award given beyond that time is without jurisdiction and invalid and the parties are not estopped from challenging the validity of such an award merely because they participated in the proceedings after the expiry of the prescribed period.[36] Where the agreement provided for the appointment of an arbitrator only by one of the parties but an arbitrator was appointed by the court at the instance of the other party; it was held that the award made by such arbitrator can be set aside and the appearance of the parties does not estopped the party from challenging the award.[37] Party participating in arbitration proceedings without protest cannot after awards challenge the whole proceedings as without jurisdicion on ground of known disability of the other party.[38] Where a contract with Government contained arbitration clause and reference to arbitration was made accordingly, and the Government took part in the arbitration proceedings is, it estopped from raising objection that the contract and the arbitration clause were void owing to non-compliance with Section 175(3) of the Government of India Act, 1935.[39] It was however held in the undermentioned case that where a party takes part willingly in the arbitration proceedings after expiry of the period for submitting the award and the award was made thereafter, the party is estopped from challenging the award on the ground that the award was made after expiry of the period.[40] When arbitrators failed to make an award within the time, the court directed, on consent of the parties, the umpire to act as sole arbitrator and make the award. When parties took part before the umpire, it was held they were estopped from questioning the award given by the umpire on the

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29. *Hiralal Pannalall* v. *Dal Housie Jute Co.*, AIR 1978 Cal 119; *Albion Jute Mills* v. *Jute and Gunny Brokers Ltd.*, 1953 Cal 458.
30. *Garg Builders & Engineers* v. *U.P. Rajkiya Nirman Nigam Ltd.*, AIR 1995 Del 111 (para 6).
31. *Vijay Singh* v. *Hindustan Zinc Ltd.*, AIR 1992 Raj 92. **See also** *Noble Engineering Works* v. *H.P. State Electricity Board*, AIR 1994 HP 153 (paras 50 and 51); *Kamala Solvent* v. *Manipal Finance Corporation Ltd.*, AIR 2001 Mad 440 (paras 9 and 10).
32. *Assaudullah Mokhdoomi* v. *Lassa Baba*, AIR 1966 J&K 1; *New India Assurance Co.* v. *Dalmia Iron & Steel Ltd.*, AIR 1965 Cal 42; *Tasapore & Co.* v. *Cochin Shipyard Ltd.*, AIR 1984 SC 1072; (Company agreeing to refer without prejudice cannot contend that award is not binding as reference was made without prejudice); *Dhar B.K.* v. *Union of India*, AIR 1965 Cal 424; *Union of India* v. *K.P. Mandal*, AIR 1958 Cal 415; *Union of India* v. *B.M. Sen*, AIR 1963 Cal 456; *Jupiter & Co.* v. *Corporation of Calcutta*, AIR 1956 Cal 470; *State of W.B.* v. *A.K. Ghosh & Brothers*, AIR 1975 Cal 227; *Neelkantan and Brothers* v. *Supt. Engineer National Highways Salem*, AIR 1988 SC 2045; *Union of India* v. *Sohan Singh & Co.*, AIR 1989 J&K 14; *R.C. Bhalla* v. *N.C. Bhalla*, AIR 1996 Del 24 (para 17).
33. *International S &I. Agency Ltd.* v. *Delhi Municipal Corporation*, AIR 2001 Del 283 (para 23).
34. *Vaish Brothers & Co.* v. *Union of India*, AIR 1999 Del 105 (para 3).
35. *Khardah Co. Ltd.* v. *Raymon & Co.*, AIR 1962 SC 1810; *Waverly Jute Mills Co.* v. *Raymon & Co.*, AIR 1963 SC 90; *Ajit* v. *Fateh*, AIR 1962 Punj 412; *Omprakash* v. *Union of India*, AIR 1963 All 242; *Jagannath* v. *Premier Credit Inst. Corp.*, AIR 1973 All 49; *Ramkinkar Rai* v. *Tufani Ahir*, AIR 1931 All 35.
36. *State of Punjab* v. *Hardyal*, AIR 1985 SC 920.
37. *Food Corp. of India* v. *A. Md. Yunus*, AIR 1987 Ker 231.
38. *Jupiter Insce Co.* v. *Calcutta Co-operation*, AIR 1956 Cal 470; *B.K. Dhar Pvt. Ltd.* v. *Union of India*, AIR 1965 Cal 424.
39. *Union of India* v. *Rallia Ram*, AIR 1960 Punj 567; *Union of India* v. *Khem Chand Raj Kumar*, ILR (1973) 1 Cal 529.
40. *Bokaro & Ramgur Ltd.* v. *Prasun Kumar*, AIR 1968 Pat 150 (FB); *State of Bihar* v. *S.K. Sahay*, AIR 1971 Pat 37; *N.M.T. Co-op. Society* v. *Dy. Registrar Co-op. Society*, AIR 1977 Raj 233; *Ganesh Chandra* v. *Artatrana*, AIR 1965 Ori 17.

ground of lack of jurisdiction.[41] The award passed by an Agricultural Tribunal after the prescribed period, is enforceable, particularly when the party challenging the award participates in the proceedings without protest.[42] Where an objection is raised to an award that it was delivered out of time, it is open to the other party to contend that the first party was barred by estoppel by his conduct from raising that plea.[43] Where the Government and the contractor sumitted to arbitration, it was held that the parties could not resile and the Government was not competent to direct the arbitrator not to act and to terminate the proceedings.[44]

Where the court set aside the award of the arbitrator and appointed a second arbitrator, and the State filed an appeal against the order of court appointing the second arbitrator but participated in the proceedings before the second arbitrator, it was held that the statutory right of appeal is not affected by the principle of estoppel.[45] Where the arbitrator was the Managing Director of the petitioner company, it was held that he can continue arbitration proceedings even after his retirement from the service of the company and the parties are estopped from questioning the reference.[46]

Res judicata not expressly pleaded will be deemed to have been waived.[47]

Admission by contractor of Government's claim for extra expenditure cannot estop contractor from challenging the claim and seeking arbitration regarding it under the arbitration clause.[48]

An agreement to be bound by arbitration at the instance of some partners, though not originally binding on other partners, might become binding later on by acquiscence or acceptance of benefit tendered and they would be estopped from challenging the award.[49] Where a company enters into contract with the Government in its pseudo or trade name, and deposits earnest money as well as securiy deposit and also tenders part of contracted stores for inspection, the company is estopped from challenging the contract and reference to arbitration.[50]

An invalid reference does not amount to waiver or estoppel.[51]

63. CIVIL PROCEDURE CODE

A decree holder's right to execute the decree is controlled by O. XXI, C.P.C. There can be no estoppel against right conferred by statute.[52] Executing court cannot sell property which is admittedly non-saleable. Failure to raise objection in time does not create any estoppel because there is no estoppel against statute. Doctrine of estoppel or waiver is not applicable to the protection under Section 60 of the Code of Civil Procedure Code (5 of 1908).[53] Second appeal under Section 100 of C.P.C. respecting finding of facts is not barred where the finding is based on non-appreciation of the conduct of the parties in proper perspective and misapplication of law.[54]

64. EXCISE ACT

A bidder at an auction of liquor shop held under the Punjab Excise Act is not estopped from challenging the legality of the conditions of sale announced at the time of the auction, if they are at variance with the conditions laid down by the statutory rules.[55]

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41. *Chellappan* v. *Kerala State Electricity Board*, AIR 1975 SC 230.
42. *Padmanabhan Nair* v. *Thankappan*, AIR 1980 Ker 156.
43. *Kamta Pd. Nigam* v. *Ram Dayal*, AIR 1951 All 711.
44. *State of Maharashtra* v. *Ranjeet Construction*, AIR 1986 Bom 76.
45. *State of Kerala* v. *Valliammal Bhaskaran*, AIR 1990 Ker 42.
46. *National Research Development Corpo. of India* v. *Britelite Carbons Ltd*., AIR 1987 Del 317
47. *Sukhni* v. *Sukhbasi*, AIR 1967 All 423.
48. *Union of India* v. *Rishi Raj & Co.*, AIR 1973 Del 15.
49. *Rai Dwarkanath* v. *Haj Mohammad*, AIR 1914 PC 33; **See also** 1971 Cur LJ 604.
50. *Modi Industries Ltd.* v. *Union of India*, ILR (1970) 1 Del 621.
51. *Union of India* v. *S.N. Das & Brothers*, AIR 1962 Cal 82.
52. *Narayana* v. *Godavarma*, AIR 1952 Tra/Co. 561.
53. *Gowranna* v. *Basavana Gowda*, AIR 1975 Kant 84; *Ram Naresh* v. *Ganesh Mistri*, AIR 1952 All 680.
54. *Bijan Kumar Barman* v. *Bhaskar Chandra Barman*, AIR 2001 Cal 98 (para 17).
55. *Union of India* v. *Narain Singh*, AIR 1953 Punj 274.

65. EVIDENCE ACT

Evidence of oral agreement contrary to written agreement is excluded by virtue of Section 92 of the Evidence Act. Section 115 does not override Section 92 as there is no estoppel against statute.[56]

66. MUNICIPAL ACT

There is no estoppel against the statutory provisions of a minicipal enactment and the municipality is entitled to remove illegal encroachments.[57]

67. BANK

Where a depositor nominated his two wives as his nominess while making the deposit and the bank accepted it, it was held that the bank is estopped from refusing to pay the nominees on the ground that the nomination of two nominess was irregular.[58] Where a money decree in respect of a bank loan was passed in favour of the bank but as a result of compromise proposal by the judgment-debtor, a deposit of part of money was made during the period of negotiation, it can not create estoppel against the bank to reject the proposal and to execute the decree.[59] The bank is not estopped from claiming any lien over the pledged goods even after the payment of the amount due if the debtor has not cleared his amount in connection with another loan.[60]

68. ESTOPPEL ON POINT OF LAW

There is no estoppel on a point of law[61] or a settled proposition of law.[62] Operation of law can not be prevented by estoppel.[63] Estoppel refers to a belief in a fact and not in a proposition of law. A person cannot be estopped for a misrepresentation on a point of law. An admission on point of law is not an admission of a "thing" so as to make the admission matter of estoppel.[64] Where certain claims have been allowed in a tax matter, there is no estoppel as against similar claims in future.[65] Any act done under misapprehension of legal right does not create estoppel, nor does a question of estoppel arise when the parties know the correct position.[66] Where persons merely represent their conclusions of law as to the validity of an assumed or admitted adoption, there is no representation of a fact to constitute an estoppel.[67]

No question of estoppel can ever arise where both the parties are labouring under a mistake of law and one party is not more to blame than the other. Estoppel arises only when the plaintiff by his act or conduct makes a representation to the defendant of a certain state of facts which is acted upon by the defendant to his detriment; it is only then that the plaintiff is estopped from setting up a different state of facts. Even if this position can be availed of where the representation is in regard to a position in law, no

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56. *Ranbaxy Laboratories Ltd.* v. *Doon Apartment (P) Ltd.*, ILR (1979) 1 Del 84.
57. *Ramjidas* v. *State of Assam*, AIR 1964 Assam 60.
58. *Chandramma* v. *General Manager, State Bank of Hyderabad*, AIR 1988 AP 289.
59. *Thakur Steel Tubes Ltd.* v. *State Bank of India, Chandigarh*, AIR 1997 P&H 215.
60. *State Bank of India, Kanpur* v. *Deepak Malviya*, AIR 1996 All 165 (paras 16, 18, 20 and 27).
61. *Raghava Rajagopala Chari* v. *State of Assam*, AIR 1965 Assam 109. Appointment in clear violation of Regulation, no estoppel, *Ravinder Sharma* v. *State of Punjab*, AIR 1995 SC 277 (para 12); *Union Territory, Chandigarh Administration* v. *Managing Society Goswami GDSDK*, AIR 1996 SC 1759 (paras 3 and 4), **reversing** Decision of P&H High Court, Dt. 22-10-1991; *M. Pyarali* v. *M. Sarifbhai*, 1996 AIHC 716 (para 14) (Guj); *B.S. Balaji* v. *T. Govindaraju*, 1996 AIHC 2184 (para 7) (Kant); undertaking to not to approach Court will not act as estoppel *Abu Zaid* v. *Principal, Madarsa-Tul-Islah, Saraimir, Azamgarh*, AIR 1999 All 64 (paras 11 and 12); *Kennedy Sigamani* v. *Kiruba Gnanaseeli Prema*, AIR 2000 Mad 337 (para 17); *Rijhan Nag* v. *State of Bihar*, 2000 AIHC 2455 (paras 5, 6 ad 8) (Pat); *Adhartal Shiksha Samiti* v. *State of M.P.*, AIR 2001 MP 3 (paras 13, 15 and 16).
62. *C. Doctor and Company Ltd.* v. *B.S. Mills Ltd.*, AIR 1995 All 19 (Para 3).
63. *C.I.T* v. *B.N. Bhattachargee*, ITR (1979) 118 461 : 1979 Tax LR 1180; *Jairam* v. *Laxmidevi*, ILR (1963) 2 All 976; *Prasun Kumar* v. *R.S. College*, AIR 1954 Pat 486; *Chinto* v. *Niranyan Singh*, 1957 Punj 217; *Dinbai* v. *Dominionof India*, AIR 1951 Bom 72; *Life Insurance Corporation of India* v. *Advani & Co.*, 2001 AIHC 421 (para 22) (All).
64. *Jagwant Singh* v. *Silam Singh*, ILR (1899) 21 All 285.
65. *Dunlop India Ltd.* v. *Union of India*, AIR 1977 SC 597.
66. *Shanker Lal* v. *Narendra*, AIR 1967 All 405.
67. *Dhanraj* v. *Soni Bai*, (1925) 27 Bom LR 837 : 52 IA 231 : ILR 52 Cal 482.

such occasion arises when the mistake of law is common to both the parties. The other circumstances would be such as would entitle a Court of Equity to refuse the relief claimed by the plaintiff because on the facts and circumstances of the case it would be inequitable for the Court to award the relief to the plaintiff. These are, however, equitable considerations and could scarcely be imported when there is a clear and unambiguous provision of law which entitles the plaintiff to the relief claimed by him. Observations of KAUSHALENDRA RAO, J. in AIR 1951 Nag 372, Not approved.[68]

In a suit for partition of properties purchased in the names of minor son, it was found that they were acquired by the father himself and on his death the properties devolved on his heirs. Any subsequent admission of wife and sons in the alleged partition deed or in some previous case, would not change the legal position and principle of estoppel would not be attracted.[69] No estoppel arises by reason of the admission by a party as to the legal effect of facts fully set out and admitted.[70] No amount of admission contrary to law can create as estoppel.[71]

Interpretation of a document is a question of law and there can be no estoppel in such matter.[72] Whether a suit is bad for partial partition or not, is a question of law. Hence the plea of estoppel is not available.[73]

When a person applies for a stay order under Section 34 of the Arbitration Act without representing that he is a party to the agreement and obtains an order but the contract containing the arbitration clause itself is found to be illeggal, he is not estopped from saying that he was not a party to the agreement.[74] Relinquishment of future inheritance does not operate as estoppel as such reliquishment is prohibited by Mohammedan Law as void.[75]

Where future right of inheritance is relinguished for consideration, estoppel applies. There is no conflict between Section 6(a) T.P. Act and Section 115 Evidence Act. *Jamma Masjid* v. *K. Deviah*[76], where it was held that Section 6(a) does not conflict with Section 43, as Section 43 also is a species of estoppel.[77]

The wrong acts of the court would not estop the party to support his claim.[78] Where the wife of a judgment-debtor claimed that the attached property belonged to her, the court referred her claim to a regular suit under Order XXI, R. 58, C.P.C. The opposite party was not estopped from contending that the suit was barred under Section 47, C.P.C.[79] Where on a writ petition the High Court directed the Government to pass an order under Fundamental R. 54 in favour of the petitioner and the Government accordingly passed an order, there is no estoppel against the petitioner from denying the applicability of the rule to his case and the order of the High Court in the writ petition will not operate as a bar to the High Court going into the validity of the order.[80] In an election petition, the tribunal set aside the election of the returned candidate, A writ petition was preferred against that order on the ground that the Tribunal failed in its duty to summarily dismiss the election petition for non-compliance with Rule 75 of Bihar Panchayat Election Rules. An objection was taken that the writ petitioner having contested the election petition had acquiesceed to the jurisdiction and was estopped from taking such plea. It was held that the principles of acquiescence and estoppel would not apply in such cases.[81] The dispute, relating to the number of votes secured by the candidates in an election and whether any valid vote of the opposite party was rejected while accepting invalid votes of the petitioner, cannot be adjudicated upon effectively without recounting of votes and the consent of the parties/candidates securing equal number of votes for

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68. *Sales Tax Officer, Banaras* v. *Kanhaiya Lal Makund Lal Saraf*, AIR 1959 SC 135.
69. *Girindranath Mukherjee* v. *Soumen Mukherjee*, AIR 1988 Cal 375.
70. *Kalidas* v. *State of Bombay*, AIR 1955 SC 62 : 1955 SCR 88.
71. *D.B. Dey & Co.* v. *Sib Thakur Jiu*, AIR 1969 Cal 565.
72. *Sudesh Kumar* v. *Mool Chand*, AIR 1969 Raj 22.
73. *Amarnath* v. *Ganesha Ram*, AIR 1971 Punj 241.
74. *V.K. Murthi* v. *C.V. Rama Iyyer*, ILR (1974) 2 Cal 1.
75. *Sulaiman Sahib* v. *Kader Ibrahim*, AIR 1953 Mad 161.
76. AIR 1962 SC 847.
77. *Damodaran* v. *Rajappan*, AIR 1992 Ker 397.
78. *Balgobind* v. *Sheo Kumar*, 22 All LJ 79.
79. *Machamma* v. *Kanakamma*, AIR 1935 Mad 923.
80. *Raghava Raja Gopala Chari* v. *State of Assam*, AIR 1965 Assam 109.
81. *R.P. Singh* v. *Baidhyanath Prasad*, 1973 Pat 289.

draw of lots cannot operate as estoppel.[82] But when the parties themselves requested the judge to decide the case contrary to the ordinary procedural law of the court and had taken part in the proceedings, they could not be allowed to complain against the procedure adopted by the judge.[83] Where the municipality has no legal power to effect closure of an existing market, it cannot do so even with the consent of the concerned party for such consent does not validate closure.[84]

Where the decree holder obtained decree on the basis of tenancy, he is estopped from pleading in the execution proceedings that the judgment debtor was not a tenant.[85] Where a party proceeded on the basis that certain rules are valid, cannot during argument challenge the validity of those rules.[86]

69. SUPREME COURT DIRECTIONS

There is no estoppel insofar as the duty of all concerned to enforce and comply with the directions of the Supreme Court is concerned.[87] However, where the owner of the land constructed building after completing the formalities after he received a letter of the Development Authority that the notification for acquisition had been quashed but subsequently the Supreme Court upheld the acquisition proceedings and the owner applied for release of that part of the land, the Supreme Court directed the Govt. to consider the same sympathetically.[88]

70. ESTOPPEL AGAINST PUBLIC POLICY AND PUBLIC INTEREST

Where a statute prohibits sub-leting the premises on the ground of public policy, even when the owner gives oral permission to the tenant allowing him to sub-let the premises, he is not estopped from pleading that subletting was unlawful.[89] The Rajasthan Land Reforms and Resumption of Jagirs Act 6 of 1952 confers no authority on the Government to grant exemption from resumption and an undertaking by the Government not to resume will be invalid, as there can be no estoppel against a statute.[90]

A person, who had earlier consented to an agreement, can plead that the agreement is a nullity being opposed to public policy: In *Union Carbide Corporation* v. *Union of India*, AIR 1992 SC 248 the Supreme Court observed the observation of ATKIN LJ "Illegalities are incurable" citing In re A Bankruptcy Notice (1924) 2 ChD 76 at 97: "It is well established that it is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the statement has, on grounds of general public policy, enacted shall be invalid". In *Maritime Electric Co. Ltd.* v. *General Dairies Ltd.*, AIR 1937 PC 114 at 116-117, it was observed ".... an estoppel is only a rule of evidence which under special circumstances can be invoked by a party to an action, it can not therefore avail in such a case to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law..... The court should first of all determine the nature of the obligation imposed by the statute and then consider whether the admission of an estoppel would nullify the statutory provision..... There is not a single case in which an estoppel has been allowed in such a case to defeat a statutory obligation of an unconditional character."[91]

The State Government announced a policy declaring incentive and concessions, one of them being refund of sales tax to selective industries. It was held that as the scheme of refund was opposed to public policy the doctrine of promissory estoppel is not applicable.[92]

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82. *Basanti Das* v. *Kamala Nayak*, AIR 1999 Ori 187 (para 4).
83. *Atro Ram Paul* v. *Balai Chandra Paul*, ILR (1973) 1 Cal 64.
84. *Ramanlal* v. *Piparia*, AIR 1963 MP 134.
85. *John* v. *Karthiayani*, AIR 1953 Tra-Co. 581.
86. *Adarsha Fishery Co-op. Society* v. *State of Assam*, AIR 1968 Assam 48.
87. *Managing Society, D.M. C. & Hospital* v. *State of Punjab*, AIR 1995 P&H 225 (para 21). **See also** *Lalitha E.P.* v. *State*, AIR 1996 Ker 133 (para 11).
88. *Delhi Administration* v. *Gurdip Singh Uban*, AIR 2000 SC 3737 (para 64).
89. *Waman Shriniwas* v. *R.B. & Co.*, AIR 1959 SC 689; *Thakuram* v. *Shivnath*, AIR 1969 MP 130.
90. *Amar Singhji* v. *State of Rajasthan*, AIR 1955 SC 504.
91. **Also referred** *State of Kerala* v. *Gwalior Rayon Silk Manufacturing Co.*, AIR 1973 SC 2734 at 2745; *Union Carbide Corpn.* v. *Union of India*, AIR 1992 SC 248.
92. *Amrit Banaspati Co. Ltd.* v. *State of Punjab*, AIR 1992 SC 1075.

Transfer of hereditory office being opposed to public policy, the transferor or his representative in interest is not estopped from contesting its validity.[1] Any prohibition made by law on the ground of public policy, cannot be defeated by raising the plea of estoppel.[2]

The declaration of a Minister in public function that the Govt. had decided to withdraw certain lands from acquisition, does not amount to policy decision. The newspaper report cannot also form the basis of claiming that the Govt. was estopped from proceeding further with acquisition.[3] Where the defendant claimed deduction on the ground that by virtue of an agreement entered into between the ancestors of the parties to deduct Rs. 96 *per annum* from the amount received by way of pension in order to enable him to maintain the dignity of his office, it was held that this agreement was an assignment of future interest in a portion of a pension and governed by Section 12, Pensions Act. Since the agreement of this kind was rendered void by Section 12, the plaintiff's right to claim her full share, was not affected.[4]

Government can change its policy in public interest and promissory estoppel would not apply[5] but where the Govt. action is arbitrary, say in violation of a stay order, the Court would interfere.[6] No estoppel is available against public interest.[7]

71. VOID TRANSACTIONS

Where a sale deed is void *ab inito*, there would be no question of estoppel as against the transferor.[8] When prior proceedings are held void, the decision therein cannot operate as estoppel.[9] Government is liable to compensate for goods, delivered in pursuance of a contract which is void and cannot be ratified by the Government.[10] Where the alternative plea was raised by the plaintiff at the outset alongwith the contention that the transaction in question was void and the defence itself was willing and ready to act in accordance with the plea, the alternative plea was maintainable.[11]

72. SOME INSTANCES OF ESTOPPEL

Where the owner of property clothes a third person with apparent ownership of property and right of disposition thereof and the third party disposes of that property, the real owner is estopped from asserting

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1. *Nallasami* v. *Sadasiva*, 67 MLJ 759.
2. *Adinarayana* v. *Chengiah*, AIR 1937 Mad 918; *Ramakrishnamma* v. *Venkatasubbbaiah*, ILR 58 Mad 389; *State of Gujarat* v. *Vishnu Automobiles*, AIR 1999 Guj 92 (para 21); *G.T.N. Textiles Ltd* v. *Asstt. Directors, R O T Commissioner*, AIR 1993 SC 1596 (paras 9-12); *Shakti Tubes Ltd.* v. *State of Bihar (FB)*, AIR 1994 Pat 162 (para 11); *Darshan Oils Pvt. Ltd.* v. *Union of India*, AIR 1995 SC 370 (paras 7 and 8); *Principal, Madhav Institute of Technology and Science* v. *R.S. Yadav*, AIR 2000 SC 2487 (paras 8, 9 and 11), **reversing** LPA No. 218 of 1997, Dt. 15-10-1997 (MP); *N.K. Metalia High School* v. *State of Gujarat*, AIR 2001 Guj 63 (para 11); *Ajantha Travels Trivandrum* v. *Govt. of India*, AIR 2001 Ker 112; *Laxmi Udyog Rock Cement Pvt. Ltd.* v. *State of Orissa*, AIR 2001 Ori 51 (para 12), **following** *Sales Tax Officer* v. *Shree Durga Oil Mills*, AIR 1998 SC 591 : 1998 AIR SCW 186.
3. *Mohmadbhai* v. *State of Maharashtra*, 2000 AIHC 1945 (para 18) (Bom).
4. *Parwati Bai* v. *Sakharam*, AIR 1953 Nag 221.
5. *Sales Tax Officer* v. *Shree Durga Oil Mills*, AIR 1998 SC 591. **See also** *Sanjaya Sales Corporation* v. *National Mineral Development Corporation*, AIR 1993 AP 62 (para 12); *A.J. Joy* v. *Govt. of Tamil Nadu*, AIR 1993 Mad 282 (paras 36 and 37); *Nagappa* v. *State*, AIR 1994 Kant 77 (paras 20 and 23); *Union of India* v. *Binani Consultants (P) Ltd.*, AIR 1995 Cal 234 (para 17); *P.T.R. Exports (Madras) P. Ltd.* v. *Union of India*, AIR 1996 SC 3461 (para 5).
6. *Md. Ehsan* v. *Union of India*, 1998 AIHC 2477 (paras 8 and 12) (Cal).
7. *Himalaya Rice Mill, Motinagar* v. *State*, AIR 1997 All 155. **Also see** *Y. Konda Reddy* v. *State of A.P.*, AIR 1997 AP 121, tenders cancelled even after informing of acceptance to lowest tenderer. Withdrawal of whole scheme of development of tourism and inter-related activities at certain places by the Govt. in public interest, after petitioner's proposals were accepted, no estoppel *Lotus Constructions* v. *Govt. of A.P.*, AIR 1997 AP 200. **Also see** *K.A.S. Senthilnathan* v. *Union of India*, AIR 1997 Mad 208. Government can change its industrial policy in public interest, no estoppel. *Sales Tax Officer* v. *Shree Durga Oil Mills*, AIR 1998 SC 591 (paras 14, 17 and 20) **reversing** OJC No. 2090 of 1980, decided on 15.9.1987 (Ori); *National Oxygen Ltd* v. *Tamil Nadu Electricity Board*, AIR 1996 Mad 229 (para 16); *Bharat Wools, Ludhiana* v. *State of Punjab*, AIR 1996 P&H 215 (para 30); *State of Rajasthan* v. *Mahaveer Oil Industries*, AIR 1999 SC 2302 (para 14); *Cosmopolitan Club* v. *Government of T.N.*, AIR 2000 Mad 120 (para 27.17).
8. *Biranchi Narayan* v. *Biranchi Narayan*, AIR 1953 Ori 333.
9. *Kameshwar* v. *Deolal*, AIR 1964 Pat 247.
10. **In re** : *Reghubansh Narain*, AIR 1962 Pat 330.
11. *Krishnabai C. Kadam* v. *Wellworth Developers*, AIR 2001 Bom 9 (paras 27 and 28).

his title against the transferee in good faith and for value.[12] Where a mother was appointed by the court as guardian of the minor daughter on the basis of a statement by the mother that she would not claim interest in the property adverse to the daughter, she is estopped from filing a suit for possession of property on the basis of her title in respect of the son's property.[13] Where the grant in favour of the highest bidder in an execution was cancelled, and a second auction was held, in which the previous highest bidder participated, he is estopped from questioning the validity of the cancellation of the earlier auction in his favour.[14]

73. TRUSTEE MORTGAGING TRUST PROPERTY AS HIS OWN CANNOT DISPUTE SALE BY MORTGAGEE

A trustee, alleging that the trust property, consisting of land was his own property, mortgaged it. The mortgagee took the mortgage in good faith, for valuable consideration, and without notice of the trust. The mortgagee obtained a decree against the trustee for the sale of the land, and the land was sold in execution of that decree. The trustee subsequently brought a suit to recover the land from the purchaser on the ground that it was trust property and that he had no power to transfer it. To this none of the beneficiaries under the trust were parties. It was held that the plaintiff was estopped by his conduct from recovering possession of the land.[15] A person, who acted as a trustee of a public temple and obtained a decree of Court in that capacity, cannot subsequently turn round and claim the temple to be a private temple and its properties as his absolute properties.[16]

74. JOINT FAMILY—ESTOPPEL IN CASES OF ALIENATION BY A WIDOW

There are three classes of estoppel that may arise for consideration in dealing with reversioner's challenge to a widow's alienation. They are (1) that which is embodied in Section 115 of the Evidence Act, (2) election in the strict sense of the term whereby the person electing takes a benefit under the transaction and (3) ratification *i.e.*, agreeing to abide by the transaction. A presumptive reversioner coming under any one of the aforesaid categories is precluded from questioning the transaction, when succession opens and when he becomes the actual reversioner. But if the presumptive reversioner is a minor at the time he has taken a benefit under the transaction, the principle of estoppel will be controlled by another rule goverining the law of minors. If after attaining majority he ratifies the transaction and accepts the benefit thereunder, there cannot be any difference in the application of the principle of election.[17]

Where a widow had taken a loan from the reversioners and alienated the property to pay off that debt, the reversioners are not estopped from challenging the alienation on ground of want of legal necessity.[18] A compromise by a presumptive reversioner under which he takes a benefit cannot debar his descendants who happen to be the actual reversioners from claiming to succeed to the reversion, when the succession open.[19]

Where a Hindu woman gave consent to her son to alienate her absolute property, she is estopped from claiming the property.[20] Where the son, who was the *Karta*, alienated property alleging, it was for legal necessity and his widowed mother consented, she is estopped from challenging the sale.[21]

Where a managing member of the joint family consented to the execution of a mortgage by a widow of the family and had an agreement from the mortgagee to have the option of having the mortgage transferred to him, he was estopped from challenging it.[22] A sale deed was executed by a widow and the

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12. *Li Tse Shi* v. *Pong Tosi Ching*, AIR 1935 PC 208.
13. *Harchand Singh* v. *Mohinder Kaur*, AIR 1987 P&H 138.
14. *Rahaman Bhai* v. *State of Orissa*, AIR 1989 Ori 233.
15. *Gulzar Ali* v. *Fida Ali*, ILR (1883) 6 All 24.
16. *Venkata Ramana* v. *Rama Mandiram*, AIR 1966 AP 197.
17. *S. Shanmugam Pillai* v. *K. Shanmugam Pillai*, AIR 1972 SC 2069; *Seetharamayya* v. *Sarva Chandrayya*, AIR 1955 Andhra 68; *D. Subba Reddy* v. *G. Govinda Reddy*, AIR 1961 AP 430; *Ramgowad Annagowda Patil* v. *Bhausaheb*, 1927 PC 227; *Pullayya* v. *Appanna*, AIR 1957 AP 846.
18. *Narainu* v. *Sant Ram*, AIR 1952 Bail 6.
19. *Bindu Kuer* v. *Lalita Prasad*, AIR 1936 PC 304.
20. *Jagari Bai* v. *Ramkhilawan*, AIR 1976 MP 106.
21. *K.C. Kapoor* v. *Radhika Devi*, AIR 1981 SC 2128.
22. *Bhagwan* v. *Ujagar*, AIR 1928 PC 20.

daughter of the last male holder of a property. The sale was challenged by the daughter's son on the ground, the sale was not for legal necessity. The widow died during the pendency of litigation and the daughter became the absolute owner of the property under Section 14 of the Hindu Succession Act. It was held her son's suit was not maintainable and the daughter who was a co-executant was estopped from challenging the alienation.[23] A Hindu widow alienated most of her husband's property by three deeds among which one was a sale-deed in favour of A, a reversioner. A survived the widow and did not challenge the alienation. In a suit for the recovery of the properties by the heirs of A, it was held that the three deeds were part and parcel of the one transaction, and the plaintiffs were precluded from questioning them.[24] Where in a dispute between a limited onwer and a claimant there was a compromise dividing the property between them which was acted upon for several years and later when succession opened to the claimant as s reversioner and he claimed the rest of the estate, it was held that he was estopped.[25] By making avertment in the plaint that the defendant filed tax returns showing suit properties as joint, he was estopped from claiming them as separate properties.[26] Where the father of a join Hindu family mortgages the family property and the mortgage deed is signed by the coparceners, the coparceners are estopped from questioning the validity of the mortgage.[27] Where in a suit by mortgagee against the widow mortgagor, the reversioners stated in their written statement that they had no objection to the sale of property, their successors in interest cannot subsequently challenge the sale. It was not open to them to take a contrary plea to the prejudice of the person who, on the faith of the concession, got the property auctioned and pruchased it.[28] A person taking a share of properties, by accepting an arbitration on the footing that they were self acquired, is estopped from setting up the plea of joint acquisition.[29]

75. ADOPTION

Even in the case of an invalid adoption which was made under the belief that it was valid, the principle of estoppel by conduct would apply.[30] Where an adoption was recognised by the family members for a very long time and it altered the position of the adopted boy, if questioned after a long lapse of time, estoppel by conduct would arise in such a case.[31] The doctrine of estoppel cannot confer on a person the status which an adoption alone can give him. But the doctrine can be invoked to prevent a challenge to the adoption by one who has induced the adopted boy to change his position so irrevocably as to render it impossible for him to revert to his original position in his natural family.[32] A Hindu widow's power to take a son in adoption to her deceased husband was extinguished due to the presence of her widowed-daughter-in-law. The senior widow adopted 'X' and induced the daughter-in-law, to change her status of being a legal heir on the date of the adoption, by marrying the adopted son X. It was held, that the widow was estopped by her conduct both before and after the adoption from changing her ground and challenging the adoption by her of X.[33] In a suit to set aside an adoption brought by the adoptive mother against her adopted son it was found that the plaintiff had represented that she had authority to adopt, and this representation was acted on by the defendant; that the ceremony of adoption was carried out on the faith of this representation; that the marriage of the defendant was likewise on the strength of it celebrated, and the defendant performed the *shradha* ceremony of his adoptive father. It was further found that the defendant had been obliged to defend a suit brough against him by an alleged reversioner to the estate of his adoptive father, and that for this purpose he had incurred heavy liabilities. It was held that the plaintiff was estopped from maintaining a suit for a declaration that the adoption was without authority and void.[34]

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23. *Gobardhan Manton* v. *Hariram Mahta*, AIR 1963 Pat 335.
24. *Ramgowda* v. *Bhausaheb*, AIR 1927 PC 227.
25. *Kanhailal* v. *Brijlal*, AIR 1918 PC 70.
26. *Lt. Col. Sawai Bhawani Singh* v. *Maharaj Jagat Singh*, 1996 AIHC 4165 (Del).
27. *Sohan Lal* v. *Chhagan Lal*, AIR 1957 Raj 355.
28. *Somnath Singh* v. *Ambika Prasad*, AIR 1950 All 121.
29. *Md. Wali Khan* v. *Mohiuddin Khan*, AIR 1919 PC 47.
30. *Sarat* v. *Gopal*, ILR (1892) 20 Cal 296 (PC): **disagreeing with** *Vishnu* v. *Krishna*, ILR (1883) 7 Mad 3 (FB); *Kannammal* v. *Virasami*, ILR (1892) 15 Mad 486; *Ravji Vinayakrav* v. *Lakshmibai*, ILR 11 Bom 381; *Chitko* v. *Janaki*, (1874) 11 BHCR 199.
31. *Rajendra* v. *Jogendra*, 14 MIA 67; *Rama Krishna* v. *Tirumaravana*, AIR 1932 Mad 198; *Umaram Gogoi* v. *Purak*, AIR 1925 Cal 993.
32. *Laxman* v. *Bayabai*, AIR 1955 Nag 241; *Fullamoni* v. *Netrahanda Sahu*, AIR 1967 Ori 103.
33. *Draupadi* v. *Sambari*, AIR 1958 Ori 242.
34. *Kumal Sheriff* v. *Mi Shwe Ywet*, (1875) SJLB 49.

There can be no estoppel against law. Therefore when an adoption is not legally valid, no conduct can estop an interested person from challenging the validity of the adoption. Moreover, mere participation in the ceremonies of adoption in the absence of evidence showing consent to such adoption, or acts subsequently to such adoption not leading to the adoption, cannot estop a person from challenging the validity of the adoption.[35] A childless Hindu widow agreed with the plaintiff's father to adopt the plaintiff, stating that her husband had given her authority to adopt. Subsequently she adopted the plaintiff and had his thread-ceremony performed in the adoptive family next day, and administered her husband's property as the minor's guardian for about eighteen months, when she repudiated the adoption and refused to maintain the plaintiff. It was held that the adoption being invalid on the ground that the widow had not as a fact, acted under authority from her husband, she was not estopped from denying the adoption by the fact of her having treated it as effective for the period of eighteen months. In order that an estoppel by conduct may raise the invalid adoption to the level of a valid adoption, there must have been a course of conduct long continued on the part of the adopting family, and the situation of the adoptee in his original family must have become so altered that it would be impossible to restore him to it.[36]

76. ILLATOM ADOPTION

Where neither any document was executed by the illatom son-in-law relinquishing his right in his natural family nor was there any evidence to show that since the year of his marriage he was excluded from enjoyment of the joint family properties and had ceased to be a member of the joint family, the illatom son-in-law was not estopped from claiming his share in the joint family property.[37]

77. MAINTENANCE

Where a compromise was reached between the parties upon an application for enhancement of maintenance under Section 127, Cr.P.C., subsequent application under Section 127, Cr.P.C. in the changed circumstances will not operate as estoppel or waiver.[38] Cohabitation after a compromise decree for maintenance obtained by the wife against the husband, would have no effect on the decree.[39] Where the order of maintenance under Section 125, Cr.P.C. was passed after the commencement of the Muslim Women (Protection of Rights on Divorce) Act, 1986 without obtaining the necessary consent of the husband in writing prefering to be governed by the provisions of S. 125, Cr.P.C., the order will not be binding on the husband and even if he had paid some amount in the first execution petition, he is not estopped from contending that the order was not binding upon him.[40] Where the wife had accepted maintenance under the *ex parte* foreign judgment in petition filed by the husband which was held to be a nullity, she was not estopped from filing a subsequent petition for divorce.[41]

78. FAMILY ARRANGEMENT

A widow claiming through her husband cannot impeach a settlement made by her husband with other members of the family whereby he released, by necessary implication, the interest which he had in the property.[42] Where an arrangement was entered by the father and his sons to settle a family dispute and even the normal succession was altered, any party to a family arrangement cannot subsequently question the legality thereof.[43] Where under compromise the presumption reversioners purported to give

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35. *Babu Ram* v. *Kishan Dei*, AIR 1963 All 509 **relied on in** *Satya Gupta* v. *Om Prakash*, 2001 AIHC 1276 (para 45) (All); *Tirkangauda* v. *Shivappa*, ILR (1943) 19 Bom 706 : AIR 1944 Bom 40; *Ramchandra* v. *Murlidhar*, AIR 1938 Bom 20; *Permanand* v. *Laxminarayan*, AIR 1955 Mad 129.
36. *Parvatibayamma* v. *Ramakrishna*, ILR (1894) 18 Mad 145.
37. *Papanna* v. *Madappa*, AIR 1993 Kant 24 (paras 14-17).
38. *Joydel Kumar Biswas* v. *Maduri Biswas*, 1994 Cr LJ 3342 (para 11) (Cal).
39. *K.L. Veera Venkataratnam* v. *Kudupudi Sri Krishna Vara Prasad*, AIR 1999 AP 226 (paras 6, 7 and 8); **holding** *B. Anusuya* v. *B. Rajaiah*, AIR 1971 AP 296 **not a good law in view of** *Mahua Biswas* v. *Swagata Biswas*, 1998 (4) JT (SC) 252 **and dissenting from** *P. Ammal* v. *Amavasikan*, AIR 1957 Mad 113.
40. *Nazimunnisa Begum* v. *Abdul Mujeeth*, 1995 Cr LJ 3156 (para 7) (Mad).
41. *Veena Kalia* v. *Jatinder Nath Kalia*, AIR 1996 Del 54 (para 4)
42. *Dadabhoy Framji* v. *Cowasji Dorabji*, AIR 1925 PC 306.
43. *Chinnathayi* v. *Kulasekara*, AIR 1952 SC 29; *Shriniwas* v. *Chandra Bhaga Bai*, AIR 1958 Bom 420; *Partha Talukdar* v. *Mina Hardinge*, AIR 1993 Cal 118 (para 27, **relying on** AIR 1966 SC 323. **See also** *Radhey Shyam Nigam* v. *Jyoti Shrivastava*, 2001 AIHC 3706 (para 19) (MP) : AIR 2001 NOC 116 (MP).

a portion of the suit properties absolutely to the widow in consideration of her giving up her claim in respect of the other properties, they would be estopped from contending that they are entitled to succeed to the properties given to the widow.[44] Parties taking advantage under a family settlement cannot resile on the ground that the settlement was not registered[45] and the party, who has himself gone against the provisions of the family arrangement, cannot take the plea of estoppel to enforce the said provisions strictly against the other party or parties.[46] Where a Hindu widow the next reversioner and the remote reversioners were all parties to a family settlement entered into in order to bring harmony in the family and to avoid disputes and litigation, and the remote reversioners were greatly benefited by the compromise, after the death of the next reversioner, the remote reversioners, who were the heirs when the succession opened, could not be permitted to say that at the time of the settlement, they had no title and could not enter into a compromise with the next reversioner. The principle of estoppel was clearly applicable under the circumstances.[47] In a family settlement by the award of an arbitrator one reversioner gave up his half share in the property in the possession of widow after her death, it was held that it is not a transfer of spes successionis or an agreement to transfer the same and was not hit by Section 6 of the T.P. Act. The reversioner, having taken advantage of the settlement is estopped from claiming the entire property.[48] Where there was a representation in an agreement that the vendor was the owner of the property and there was no evidence to reveal that the property belonged to the joint family of which the vendor was the *Karta*, it was held that he was estopped from raising a plea of want of title in a suit for specific performance on the ground that the property belonged to the family.[49]

A plea of estoppel can be invoked only in support of or to maintain a family arrangement where the Court finds that the parties should not be allowed to resile from a particular arrangement under which they had taken benefit but where continued enforcement of the family arrangement was wholly impracticable, unnecessary and unjust in the changed circumstances of the case, there was no question of applying the equitable principle of estoppel, especially where the arrangement was only for a limited time or purpose.[50]

The Supreme Court granted relief on the ground of promissory estoppel and fair play to a daughter-in-law who was married persuant to some arrangement between her father and her father-in-law settling some property in her favour.[51]

79. ESTOPPEL BY CONSENT OR COMPROMISE DECREE

Decree passed by a court on compromise. Judgment by consent or compromise operates as an effective estoppel, between the parties as a judgment in a contested case may create an estoppel by conduct.[52] Where an order is passed by the court by the consent of a party on some assumption, the party cannot turn round and say that the very foundation of order was erroneous. The earlier compromise decree operates as an estoppel by judgment.[53] In a suit filed against the order of the Road Transports

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44. *Krishna Beharilal* v. *Gulabchand*, AIR 1971 SC 1041; *Sakerlal* v. *Chunilal*, AIR 1953 Sau 146.

45. *Kale* v. *Dy. Director of Consolidation*, AIR 1976 SC 807; *Thayyullathil Kunhikannan* v. *Thyyullathil Kalliani*, AIR 1990 Ker 226.

46. *P.G. Hariharan* v. *Padaril*, AIR 1994 Ker 36 (para 32).

47. *Ram Charan* v. *Girijanandani Devi*, AIR 1959 All 473. **See also** *Bakshi Ram* v. *Brij Lal*, AIR 1995 SC 395 (para 4).

48. *Mukandilal* v. *State*, AIR 1952 All 212.

49. *Chand Rani Mehra* v. *Om Shankar Mehra*, AIR 1987 Del 194.

50. *P.G. Hariharan* v. *Padaril*, AIR 1994 Ker 36 (para 31).

51. *N.A. Mohammed Kasim* v. *Sulochana*, AIR 1995 SC 1624 (para 6).

52. *Subba Rao* v. *Jagannadha Rao*, AIR 1967 SC 591; *Garaj Narain* v. *Babulal*, AIR 1975 Pat 58; *Sundarabai* v. *Devaji*, AIR 1954 SC 82; *Autar Singh* v. *Sohanlal*, AIR 1970 J&K 26 (FB); *Baldevdas* v. *Filmistan Distributors*, AIR 1970 SC 406; *Indirabai* v. *B.A. Patel*, AIR 1974 AP 303; *Chandi Charan* v. *Nabagopal*, AIR 1957 Pat 365; *C.H. Kinch* v. *E.K. Welcott*, AIR 1929 PC 289; *Sailendra Narayan* v. *State of Orissa*, AIR 1956 SC 346; *Narasimham* v. *Atchayya*, AIR 1954 Mad 739; *Krishna Subala* v. *Dhanpati Dutta*, AIR 1957 Cal 59; *Karunakar* v. *State of Mysore*, AIR 1963 Mys 153; *Kailash Chandra* v. *Kulamani Chakra*, AIR 1956 Ori 210; *Hindu Rao* v. *Shorilal*, ILR (1962) 2 Punj 108; *Chander* v. *Indraj*, ILR (1959) Raj 1264; *Bunga Sarkar* v. *Raghbir Singh*, AIR 1951 Punj 257; *Kesavan* v. *Padmanabhan*, AIR 1971 Ker 234; *Bhanwarlal* v. *Raja Babu*, AIR 1970 Raj 104; *Ibrahim* v. *Dy. Director Consolidation*, AIR 1973 All 379; *Shivadas Subarao* v. *Divekar*, AIR 1969 Mys 73; *Rikhi Ram* v. *Dhanpat Rai*, AIR 1928 PC 190.

53. *Sailendra Narayan* v. *State of Orissa*, AIR 1956 SC 346; *Kesavan* v. *Padmanabhan*, AIR 1971 Ker 234; *Radha Kishan* v. *Election Tribunal-cum-Sub-Judge, Hissar (FB)*, AIR 2000 P&H 1 (paras 28 and 29) : 2000 AIHC 34; *Veena Mehra* v. *International Amusements Ltd.*, 2000 AIHC 1283 (para 8) (Del); *Wester Press Pvt. Ltd., Mumbai* v. *Custodian*, AIR 2001 SC 450 (paras 8, 11 and 12); *Radha Kishan* v. *Election Tribunal-cum-Sub-Judge, Hissar (FB)*,

Authority parties came to a compromise and the authority issued orders in terms of the compromise. It was held that the parties had taken benefits under the orders of authority and a writ of *certiorari* would not be granted.[54] *S* died leaving a daughter *M* and subsequently there was dispute between *M* and *B* who was *S*'s father's brother's son. *B* claimed *S*'s entire estate by survivorship which dispute was referred to arbitration and subsequently award was delivered. *M* was given suit properties as absolute owner. Rest of estate was given to *B*. Later *M* died in 1929 survived by two grandsons *D* and *J*. *B* died in 1890 survived by his sons *L* and *P*. *L* died in 1940 leaving two sons *K* and *N*. There was suit by *K* and *N* against *D* and *J* claiming property given to *M* as next reversioners. *M*'s son having precedeased her, even if the award was invalid, plaintiff's claim was held to be completely answered by plea of estoppel.[55]

Where the plaintiff, who was entitled to a sum of money under a compromise entered into by his mother on his behalf, during his minority, withdrew that money under an order of the court at a time when a suit on his behalf challenging the very compromise was pending, the plaintiff clearly elected to abide the compromise. He thereby precluded himself on the broad principles of estoppel from challenging the compromise subsequently on the ground that it was brought about wrongly and against his interests. Where the judgment-debtor and decree holder had made a pre-decretal agreement against execution of the decree and the judgement-debtor, acting on the agreement, refrained from pressing his contention the decree holder was held to be precluded from challenging the agreement.[56] In a compromise, the parties acknowledged their respective title and rights for the purpose of the compromise, with a view to avoid determination of their true nature. Even if one or both the parties may have been under a mistake in respect of the title as was subsequently discovered, that circumstances will not detract from the finality and binding character of the compromise. When a matter is compromised, it binds the parties and mistake has no place therein.[57] If the parties to a suit agree that they shall not proceed with the suit and consequently the suit was dismissed due to non-appearance of the plaintiff, it cannot be said as a dismissal for default as contemplated under O. IX, R. 8, C.P.C. and the principle of estoppel with bar the defendant from contending so.[58]

Persons taking active part in the matter of framing scheme, are estopped by conduct from questioning the validity of the scheme.[59] Where the petitioner-bidder along with others had handed over the possession of the ferry to the Zila Parishad, he was subsequently estopped from challenging the right of the Zila Parishad to settle the ferry.[60]

Where a person by a consent decree got his suit against vendee for setting aside sale of certain land dismissed on conditions that the vendee gave up his claim for the costs of the suit, he was estopped by his conduct from claiming any right in that land in subsequently proceedings.[61] But, a compromise entered into in a proceeding under Section 145, Cr.P.C., as to possession, would not create any title as to estop either of the parties in a subsequent civil suit in regard to title.[62] In an insolvency petition filed under the Presidency Towns Insolvancy Act by a creditor against a firm and its partners A, B and C, acts of insolvency were proved. By consent of parties, payment of debt in monthly instalments was ordered. In case of default, order of adjudication was deemed to have been passed. Only B and C appealed. It was held that the order cannot be impeached as it was a consent order, and the plea that the court did not find as a fact that insolvency was committed, is not open to B and C who participated in the proceedings.[63] Where a reversioner enjoyed the benefit for a long time under a compromise by the Hindu widow, he is estopped from challenging the compromise.[64] Where a society, already knowing that a party was a

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AIR 2001 P&H 68 (para 29) : 2001 AIHC 1355: *A P. Sarpanchs Association* v. *Govt of A P (FB)*, AIR 2001 AP 474 (para 13).

54. *M.S.R.T. Copn.* v. *B.R.M. Service*, AIR 1969 SC 329.
55. *Dhyan Singh* v. *Jugal Kishore*, AIR 1952 SC 145; *Kanhailal* v. *Brijlal*, AIR 1918 PC 70 : 45 IA 118 **followed**.
56. *Usman* v. *Mammooty*, AIR 1961 Ker 179.
57. *Subramoniaru* v. *State*, AIR 1954 Tra Co 128.
58. *Ramalingam* v. *Venugopal*, 2000 AIHC 2450 (paras 17, 19 and 20) (Mad) . AIR 2000 NOC 56 (Mad).
59. *Janaradana* v. *Cochin Dewaswom Board*, AIR 1957 Tra Co. 307.
60. *Samsuddin* v. *State of W.B.*, 1996 AIHC 930 (Cal).
61. *Ibrahim* v. *Dy. Director, Consolidation*, AIR 1973 All 378.
62. *Gopidas* v. *Madho*, ILR 45 All 162.
63. *Sita Ram Sawhney* v. *Kundanlal Sahni*, ILR (1968) 1 Cal 257.
64. *Ekkari Ghosh* v. *Chittarekha*, AIR 1958 Cal 447.

member of another society allowed that party dual membership, the society could not thereafter turn around and deny the benefit of membership to that party.[65]

An estoppel by consent decree can arise only when the question raised in the subsequent suit was present to the minds of the parties and was actually dealt with by the consent decree. In order to effect an estoppel it is also necessary that it should appear on record that the question had been put in issue.[66]

Any judgement or order passed even on consent of parties by a court having no jurisdiction, cannot operate as an estoppel.[67] Consent decree containing terms contrary to law or public policy, unless set aside in proper proceedings, will operate as *res judicata* or estoppel.[68] Where a compromise was arrived at between the self-styled leaders of Hindu and Muslim Communities of a village in respect of taking out procession on public roads before mosques accompanied with music and it was filed in proceedings under Section 107, Cr.P.C., it is not binding on the Hindu Community, when the compromise was not arrived at in a suit filed in a representative capacity. The law of estoppel does not debar the parties from asserting their right in a civil court.[69] Where in an earlier writ petition the licensee of a corporation filed a compromise which the corporation did not admit and filed its objection resisting the same as a result he abandoned the same and withdrew his writ petition, it was held to be no compromise and he was not bound by the statement in the compromise.[70]

80. CONTRACT AND AGREEMENT

Where the first contract of sale between the parties was held to be not a concluded contract and opportunity was given to the plaintiff by the High Court to amend the plaint and plead that there was a concluded contract at the second meeting between the parties which he refused to do, no relief could be given on the basis of such second agreement.[71] Where a contractor-petitioner realised fees and tolls on vehicles entering a Zila Parishad Territory but he did not remit the part of the amount to the Zila Parishad, it was held that the petitioner was under an obligation to pay it back to Zila Parishad, even if the contract was void. However, the Zila Parishad could not recover the amount due as arrears of land revenue.[72] The bidder, taking part as per procedure adopted, could not challenge the said procedure as being illegal and contrary to the principles of natural justice and fair play.[73] Where all the tenders for contract having been found defective, the tenderers were given opportunity to remove the defects after extending the last date and the petitioner also availed this opportunity, he could not challenge the said act of giving the opportunity.[74] Rate of payment accepted in the contract cannot be subsequently revised after the completion of the job.[75] The Government entered into an agreement to sell land to the respondents who constructed houses on the said land and resided there for a period of almost twenty four years, in the circumstances of case, the Govt. was estopped from serving them with notice that the transactions were in breach of the provisions of the Act, though there was no time bar.[76] Where the seller failed to raise the plea that the agreement to sell was only as a security for the repayment of a loan advanced by the purchaser in an earlier suit filed by the purchaser for permanent injunction restraining her from alienating the suit property, she would be estopped from raising that plea in a suit for specific performance of the agreement of sale.[77] Once a person gives a certificate of final settlement of his contractual claims, it will be rather unfair on his part to go back on his words so as to ask for settlement of some new claims allegedly remaining to settle under the same contract on the plea of being misled in giving such certificate or that he gave such certificate under duress or under some compulsion.[78] A

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65. *S.K. Tandon* v. *Registrar of Co-operative Societies*, 1997 AIHC 378, at pp. 386 and 387 (Del).
66. *Gokul Prasad* v. *Hari Saran Das Mahant*, ILR (1947) 22 Luck 270.
67. *Ahsan Dar* v. *Md. Dar*, AIR 1963 J&K 15; *Bhurey* v. *Pri Bux*, ILR (1973) 1 All 486.
68. *Bhima Rama* v. *Abdul Rahib*, AIR 1968 Mys 184.
69. *Shaikh Piru Box* v. *Kalandipati*, AIR 1970 SC 1885; **reversing** *Shaik Piru* v. *Kalandipati*, AIR 1964 Ori 18.
70. *M.S. Baliga* v. *Mangalore City Corpn.*, AIR 1998 Kant 76 (para 24).
71. *Ganesh Shet* v. *C.S.G.K. Setty*, AIR 1998 SC 2216 (para 10).
72. *Surendra Kumar Rai* v. *Zila Parishad, Jhansi*, AIR 1997 All 387.
73. *H.S. Sethi* v. *Union of India*, 1996 AIHC 3369 (para 11) (Del).
74. *N.U. Calcutta Construction Co.* v. *National Aluminium Co. Ltd.* AIR 2000 Ori 186 (para 13).
75. *Badan Lahkar* v. *State of Assam*, 1996 AIHC 4632 (paras 5 and 6) (Gau).
76. *Abdul Hameed K.* v. *State of Karnataka*, 1999 AIHC 693 (paras 5, 7 and 8) (Kant).
77. *C.C. Karthiayani Amma* v. *T.V.G. Namboodiri*, 1996 AIHC 5291 (para 5) (Ker).
78. *Union of India* v. *Raj Brothers*, AIR 2000 Gau 132 (paras 8 and 13).

person signing an agreement and taking benefit from it, cannot wriggle out of it and demand benefit[79] and where the respondent, alongwith other draftsmen agreed to pay enhanced licence fee and others started to pay also, he was estopped from challenging the rise in licence fee.[80] Also the party cannot invoke the principle of promissory estoppel in case he subsequently dishonours the terms and conditions of the agreement.[81]

Where the contract was not entered in the prescribed manner and form, it was not binding and could not be enforced.[82] In a contract entered into by the Electricity Board, the Board was not bound by the acts of its officer done on certain basis, not mentioned in the terms of the contract.[83]

The principle of promissory estoppel has no application in a case of concluded commercial contract.[84]

81. LANDLORD AND TENANT

Where a notice was sent by a tenant that he would vacate the premises and it was accepted by the landlord, the tenant was estopped from claiming that the notice was defective.[85] The tenant appeared before the tenancy authorities and made a voluntary statement that he was not interested in purchasing the suit property and handed over physical possession of it to the landlady and also alongwith his brother acted as a witness during the execution and registration of the sale-deed in favour of the third party, he could not subsequently challenge the validity of the proceedings.[86] Where the landlord states that he does not require the premises for a limited period and the tenant accepts it, the landlord is estopped from claiming possession within that period.[87] When the tenant did not raise the objection that no decree for eviction could be passed for want of permission of the rent controller for eviction, but raised that objection in execution proceedings, it was held that the tenant would be estopped from raising such objection when he failed to do so when the decree was passed.[88] Estoppel will prevent the landlord from raising objection to the competency of the legal representative of deceased tenant to appeal from the Tribunal's order, whom she herself impleaded as respondent in the pleadings before the Tribunal.[89] Where a landlord took proceedings under the Rent Control Act on the ground that respondent was a tenant it was held that he was estopped in a subsequent civil suit to assert that the respondent was a licensee.[90] The Madras Act 26 of 1948 authorising the Government to take over Estates does not authorise the Government to repudiate a lease created by them, and does not free them from estoppel to which they are subject as lessors.[91] Even if no formal tenancy is created estoppel would arise, if the position accepted is virtually that of a tenant.[92]

Where a lessor, being either ignorant of his rights or uncertain of their extent, by his own act or representation created or induced in the mind of his tenant a mistaken belief that he had a permanent interest in the land and might build thereon, and the tenant, relying upon the act or representation so made, treated his interest as permanent and incurred expense in building which he would not otherwise

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79. *Shitla Prasad Dubey* v. *State of U.P.*, AIR 1999 All 260 (para 28) : 1999 AIHC 4168 (All). **see also** *Bhopal Singh* v. *Chatter Singh*, AIR 2000 P&H 34 (para 10).
80. *Municipal Council, Pali* v. *State*, AIR 2000 Raj 157 (para 6). **See also** *Kundan Mal* v. *District Collector, Pali*, AIR 2000 Raj 152 (para 8); *N.P. Ponnappa* v. *State of Karnataka*, AIR 2000 Kant 384 (para 11); *Haryana Co-op Transport S.W. Assocn.* v. *State of Haryana*, AIR 2000 P&H 231 (para 13).
81. *Meera Devi* v. *Varanasi Development Authority*, 1999 AIHC 1401 (para 8) (All). **See also** *Meera* v. *State*, 2001 AIHC 2115 (paras 9 and 10) (Raj).
82. *B.C. Raju* v. *Karnataka Housing Board*, AIR 1995 Kant 356 (para 12).
83. *T.N. Electricity Board* v. *N. Raju Reddiar*, AIR 1996 SC 2025 (para 9). **reversing** OSA No. 112 of 1987, Dt. 6-9-1995 (Mad).
84. *Trident Tubes Ltd.* v. *Govt. of Bihar*, AIR 1995 Pat 50 (para 22).
85. *Dipak Kumar Ghosh* v. *Mirasen*, AIR 1987 SC 759.
86. *Radhabai Balkrishna Deshpande* v. *Babu Dhondu Shewale*, 2000 AIHC 4219 (Bom).
87. *Inder Mohan Lal* v. *Ramesh Khanna*, AIR 1987 SC 1986.
88. *Kamlabai* v. *Mangilal*, AIR 1988 SC 375.
89. *Banaridas* v. *Smt. Mewa Devi*, ILR 1980-2 Del 925.
90. *Ramachandra Sahu* v. *Pramila Sahu*, AIR 1992 Ori 183.
91. *Govinda Reddy* v. *Pattabhi Rama*, AIR 1954 Mad 161.
92. *India Electric Works & Co.* v. *B.S. Mantosh*, AIR 1956 Cal 148; **following** *Krishna Prosad Lal Singh Deo* v. *Baraboni Coal Concern Ltd.*, AIR 1937 PC 251.

have done, it was held that the lessor was estopped from denying the truth of that which it represented.[1] In 1894 the appellant agreed in writing to give the respondent a lease of a plot of land "for the purpose of erecting buildings..... from year to year at an annual rental of Rs. 180", and the respondent took possession. In 1903 the respondent wished to build a *pucca* house upon the land, and in answer to inquiries the appellant wrote a letter stating that the lease was a permanent lease though the rent was liable to enhancement. Acting upon that letter the respondent built a house; the appellant knew of the building and received a bonus in respect of it. In 1916, the appellant sued to eject the respondent from the land. It was held that, whether or not the letting was a permanent one upon the construction of the agreement, the statement in the letter that it was so was a representation of fact, not an expression of opinion and that the appellant was estopped from denying that the letting was of that character though subject to enhancement of rent.[2] Where the tenant admitted before the Court that there was a lease for a specified period on a monthly rental of the specified sum and the lease was admitted to be a valid lease in his written statement, he could not resile from that position.[3] Where a landlord accepts rent from the successors of the lessee he is estopped from contending that the successor-in-interest of lessee has no interest in land.[4]

Withdrawal by the landlord of rent deposited by the tenant under the Rent Control Act, does not constitute waiver of notice to quit.[5] It is only when the landlord accepts rent with the intention to treat lease as subsisting, the acceptance of rent can be regarded as waiver.[6] Withdrawal by landlord of rent deposited by the tenant beyond due date, has no effect on the question of default by tenant in an eviction petition.[7] The acceptance of rent without objection or grievance by the landlord after the forfeiture of a lease or in the event of failure to perform a statutory obligation by a tenant would amount to waiver.[8]

However where rent is a accepted under protest there is no estoppel.[9]

The tenant is estopped from denying the title of person to whom he is paying rent[10] and once he has taken the plea that he was entitled to possession of the suit land in his own rights, he cannot subsequently take the plea that he was a tenant.[11] Where the tenant had accepted one of the two co-owners initiating proceeding for eviction against him, he was estopped from contending that since the other two co-owners had not joined the proceedings of eviction on the basis of *bona fide* requirement, it was not maintainable.[12]

Where a tenant surrendered his tenancy right in favour of a registered society without the consent of the landlord and handed over the possession of the premises, mere acceptance of rent tendered by the tenant in the name of the registered society could not constitute legal and valid sub-tenancy in favour of the registered society and the landlord was not estopped from seeking eviction on the ground of unauthorised sub-letting.[13] A tenant would be estopped from claiming anything contrary to what he had agreed to in writing.[14]

The principle of estoppel cannot come in aid of the sub-tenant who was an unauthorised occupant to defeat the claim of the landlord.[15] The mere fact that the landlord was aware of sub-tenancy, is no

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1. *Forbes* v. *Ralli*, (1925) 27 Bom LR 860 : 52 IA 178 : ILR 4 Pat 707; *Bansi Singh* v. *Chankradhar Prashad*, ILR (1938) 17 Pat 358.
2. *Forbes* v. *Ralli*, *ibid*; *Bahir Das Chakravarti* v. *Nobin Chunder Pal*, ILR (1901) 29 Cal 306. For an example of estoppel by acceptance of rent **see** *Narendra Bahadur Tandon* v. *Shanker Lal*, AIR 1980 SC 575 at 579.
3. ***Rajendra Pratap Singh*** **v. *Rameshwar Prasad*,** (1998) 7 SCC 602.
4. *Narendra Bahadur Tandon* v. *Shanker Lal*, AIR 1980 SC 575; *Devassia* v. *Micheal Joseph*, AIR 1990 Ker 261 (acceptance of rent after notice-no waiver.)
5. ***Bhagat Ram*** **v. *Keshab Deo*,** AIR 1965 Assam 55.
6. *Kamaksha Prasad* v. *Paruatibai*, AIR 1960 MP 192; *Abdul Karim Bhai* v. *Abdul Rehman*, AIR 1960 MP 16.
7. ***Kali Kumar*** **v. *Makhan Lal*,** AIR 1969 Assam 66.
8. ***Sen & Co.*** **v. *Mani Mala Sadhu*,** AIR 1980 Cal 155.
9. ***Basant Lal*** **v. *State of U.P.*,** AIR 1981 SC 170.
10. *Rajendra Kumar* v. *District Judge, Jaunpur*, AIR 1996 All 178 (para 11). **See also** ***Harivansh Lal Rabra*** **v. *Madan Lal Jolly*,** 1997 AIHC 2068 (para 17) (Del).
11. *Voocha Pitchayya* v. *Gade Venkateswara Rao*, 1997 AIHC 1261 (para 9) (AP).
12. *Yashwant Prabhakar Kamble* v. *Prasad Narhari Karanjikar*, 1998 AIHC 1388 (para 9) (Bom).
13. ***Ram Saran*** **v. *Pyare Lal*,** AIR 1996 SC 2361.
14. *Gujarat State Road Transport Corporation* v. *Yusuf Ali Ahmad Ali*, 1997 AIHC 2611 (para 12) (Guj).
15. *Savitri Devi* v. *IInd Addl. Dist & Sessions Judge, Deoria*, 1998 AIHC 1371 (para 49) (All).

ground to estop the landlord from saying that the sub-tenancy is illegal.[16] Where the tenant had indicated in Form 'C' at the time of allotment that his brother and his wife would be occupying the premises and the Form 'C' was accepted by the Development Board, his tenancy could not be terminated subsequently on the ground of sub-letting and be regularised in favour of the brother of the tenant.[17]

82. ESTOPPEL AND PRE-EMPTION

Where a pre-emptor assured the purchaser that he would not pre-empt, it does not amount to making any representation of any fact, except showing his intention at that time as a fact which cannot be revoked. There is no estoppel unless the relationship between the parties is such that the truth of the representation is a necessary step in the constitution of the action.[18]

Where the vendor informs the pre-emptor about his intention to sell, orally or otherwise, and the pre-emptor refuses to purchase the property, he is disqualified from subsequently maintaining a suit for pre-emption as he is estopped from seeking to enforce his right by virtue of the provisions of Section 115.[19]

There would be no waiver of the right of a person to pre-empt if his consent is not obtained prior to the sales.[20]

83. DECREE HOLDER AND JUDGEMENT-DEBTOR

Where conduct of plaintiff unequivocally showed that he was not willing to accept trial court's decree, the mere fact that he sought the execution of the decree cannot disentitle him to the relief he sought in the suit.[21]

Creditors under a decree who applied for reteable distribution of assets held in an executing court of another decree, cannot challenge that decree on the ground that the court had no territorial jurisdiction to pass that decree.[22] A judgment-debtor is estopped, after sale in which he took part, from contending that sale is liable to be set aside on the ground that the sale was not advertised[23], so also on the ground of non-mention of encumbrance on the property in question in the sale proclamation.[24] A decree holder who induces the judgment-debtor to pay the decretal amount, is estopped from questioning the decree.[25] The decree holder who objected to the sale of the property of judgment-debtor, allowed the sale to proceed and also shared the sale proceeds, is estopped later to contend that the sale was void.[26] Where a judgment-debtor mortgagor agreed, after the preliminary decree, to pay higher rate of interest for extending the time to pay the mortgage debt, he would be estopped from objecting to the agreement in execution.[27] Where the judgment-debtor did not raise the plea that all the claims in separate suits filed regarding the same property should have been consolidated in one suit on service of the sale notice, he was prevented to raise such a contention in appeal. He was estopped also because he had consented to the decrees being passed separately.[28] Where the legal representatives of a judgment-debtor, who expired during the pendency of an appeal, prosecuted the appeal without getting impleaded, they could not raise the point that the judgment in appeal passed after the death of the judgment-debtor was unenforceable in law.[29]

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16. *Babubhai Jugalkishore N. Bhatt* v. *Jaichand Jayantilal*, 1998 AIHC 4271 (paras 15 and 16) (Guj).
17. *Dattaram S. Vichare* v. *Thukaram S. Vichare*, AIR 2000 SC 103 (para 9), **reversing** WP No. 123 of 1989 Dt. 3-12-1990 (Bom).
18. *C & D Sugar Co.* v. *Canadian National Steamships*, AIR 1947 PC 40; *Govindsa Marotisa* v. *Ismail*, AIR 1950 Nag 22, 29.
19. *Gopi Nath* v. *Nand Kishore*, AIR 1952 Ajmer 26; *Narayan Das* v. *Jagan Nath*, AIR 1950 MB 85; *Bagga Singh* v. *Chuni Lal*, AIR 1952 Punj 255; *Abdul Kaseem* v. *Babulal*, 1953 Bhopal 26.
20. *Fakira* v. *Ganpat*, AIR 1954 Nag 92.
21. *Ramesh Chandra* v. *Chunilal*, AIR 1971 SC 1238.
22. *Abdul Jabbar* v. *Venkata Sastry*, AIR 1969 SC 1147.
23. *Karnataka Bank* v. *K. Shamanna*, AIR 1972 Mys 321.
24. *Tippamma* v. *Annarao*, 1999 AIHC 847 (Kant).
25. *Bhrigunath* v. *Annapurna*, AIR 1934 1943 Pat 644.
26. *Bonagiri* v. *Karumuri Venkatanarasimham*, AIR 1938 Mad 1004.
27. *Subramania* v. *Corera*, 48 MLJ 121 : AIR 1925 Mad 457.
28. *Annapurna Industries* v. *Syndicate Bank*, AIR 1993 Kant 279 (para 9).
29. *Mina Devi Kedia* v. *Sita Devi Kedia*, 1996 AIHC 5313 (para 4) (Cal).

84. ESTOPPEL AS TO VALUATION OF SUIT OR APPEAL

In respect of a suit which is not required to be valued according to the real or market value, the parties are not precluded from showing, for the purposes of an appeal to the Supreme Court, under Art. 133(1)(*a*) of the Constitution of India; that the value of the subject-matter in a court of first instance was Rs. 20,000 or over, where the question of valuation had not been decided at an earlier stage and where the lower valuation put upon the plaint had not involved rescourse to a different forum.[30]

If the plaintiff does not correct the valuation of suit in trial court at the proper stage, he is precluded from pleading undervaluation for changing the forum of appeal.[31]

In the absence of any evidence that defence was prejudiced by undervaluation of the suit property by the plaintiff in the plaint, the plaintiff is not estopped from claiming compensation of suit property at market rate on the date of filing suit even if the market rate exceeded valuation given in plaint.[32]

85. ATTESTATION

Attestation proves no more than that the signature of an executing party has been attached to a document in the presence of a witness. It does not involve the witness in any knowledge of the contents of the deed. It can at the best, be used for the purpose of cross-examination, but by itself, it will neither create estoppel nor imply consent.[33] The Privy Council has held that attestation of a deed does not by itself estop the person attesting from denying that he knew of its contents or that he consented to the transaction which it effects and that knowledge of the contents of a deed is not to be inferred from the mere fact of attestation.[34] But an attesting witness can be shown by independent evidence to have fully understood the particular transaction so that his attestation may support the inference that he was a consenting party and might, therefore, be estopped from questioning the effectiveness of the transaction attested by him. It is, however, a question of fact and should be determined with reference to circumstances of the case.[35] If A, with the knowledge that the recital in a sale-deed that the land, thereby conveyed, belongs to B, and is in his (B's) enjoyment as owner, attests the sale-deed executed by B in favour of the plaintiff he is estopped from setting up thereafter his title to the land, even though he (A) might be the certified purchaser of the same in a previous court auction.[36] A person, who to his knowledge is entitled to one-half share in a shop and who allows his co-sharer to mortgage the whole shop, signing the mortgage deed as a witness and identifying the mortgagor and mortgagee at the time of registration, is estopped from bringing a subsequent suit against the mortgagee claimig a declaration of his right to one-half share in the mortgaged property.[37]

Where one brother attested the sale deed executed by another brother in respect of a joint property, without telling the purchaser that the vendor had no full saleable interest, he must be held to have consented to the transaction and is estopped from challenging the transaction.[38] Where the plaintiff attested a document with full knowledge of its contents, he is estopped from challenging the validity of

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30. *Annapoorna Cotton Mills* v. *S. Bhaduri*, AIR 1958 Cal 187; *Zaraton Nessa* v. *Faizur Rahman*, AIR 1955 Assam 126; *Kuppanna* v. *Peruma*, AIR 1961 Mad 511; *Venkatasubba Iythal* v. *T. Venkatarama Upadhyaya*, ILR 1960 Mys 931; **see contra**:—*Budhi Panigrahi* v. *Bhagirathi*, AIR 1962 Ori 159.
31. *Koshalya Wanti* v. *Jeet Singh*, AIR 1963 Punj 400.
32. *Srinivas* v. *Narayan*, AIR 1971 Mys 174.
33. *Nandalal* v. *Jagat*, ILR 44 Cal 186 (PC); *Lakhpati* v. *Rambodh Singh*, AIR 1915 All 255; *Harikishen* v. *Kashi*, AIR 1914 PC 90; *Annadurai* v. *Mayazaghu*, 2001 AIHC 1677 (para 14) (Mad) : AIR 2001 NOC 44 (Mad).
34. *Pandurang Krishnaji* v. *Markandeya Tukaram*, ILR (1921) 49 Cal 334 : 24 Bom LR 557 : 49 IA 16 : AIR 1922 PC 20.
35. *Pandurang* v. *Markendeya*, AIR 1922 PC 20; *Rajammal* v. *Saba Pathi*, AIR 1945 PC 82; *Sarkar Barnard & Co* v. *Alak Manjary*, AIR 1925 PC 89; *Imam Ali* v. *Baijnath*, ILR 33 Cal 613; *Rup Narain* v. *Gopal*, ILR 36 Cal 780; *Mahadeva* v. *Neelamoney*, ILR (1896) 20 Mad 269; *Lakhpati* v. *Rambodhu Singh*, ILR 37 All 250 : AIR 1915 All 255; *Bhagwat Rai* v. *Gorakh*, AIR 1934 Pat 93; *K. Govindan* v. *C. Chellamma*, AIR 1959 Ker 237; *Raibhan* v. *Namdeo*, AIR 1952 Nag 96; *M.C. Singh* v. *C.V.M. Devi*, AIR 1957 Mani 32; *Ramgopal* v. *L. Mohanlal*, AIR 1960 Punj 226; *Naveli* v. *Kailan*, 1933 Lah 733; *Gangadhara Rao* v. *G. Ganga Rao*, AIR 1968 AP 291; *Jegannatham* v. *Kunjitha Patham*, AIR 1972 Mad 390; *Damodaran* v. *D. Leelavathi*, AIR 1975 Mad 278.
36. *Kandasami Pillai* v. *Nagalinga Pillai*, ILR (1912) 36 Mad 564.
37. *Shori Lal* v. *Damodar Das*, (1937) 18 Lah 783.
38. *Dhannalal* v. *Bhaiyalal*, AIR 1956 MB 16.

the gift made under the document and he cannot dispute the nature of possession of the defendant.[39] Where the mortgage of a house by the wife as its owner is attested by the husband, he is estopped from claiming a share in the house.[40] Where the deed of alienation by a Hindu widow is attested by the next reversioner with full knowledge of contents it is not open to the reversioner to challenge the alienation subsequently.[41]

Mere attestation will not create an estoppel. Unless it is proved that the contents were known to the attestor as well as the circumstances and he did not protest against the recitals.[42]

Where the father attests the sale-deed of the co-parcenary property, his son cannot be estopped from claiming the property as he gets it in his own right by birth and not by succession.[43] A executed a sale deed in favour of C and D; and C and D attested a subsequent sale deed made by A in favour of Y. It was held that mere attestation by C and D did not estop them from claiming title under the former sale deed.[44]

Attestation by reversioner is not proof of necessity where there is no recital about necessity.[45]

86. ADMISSION

Admission made by a party in a previous suit is binding on his successor in interest in the subsequent suit.[46] Where the President of a Municipal Council admitted to have resigned in a subsequent meeting of the Council and demanded a fresh election for the post, such conduct of his disentitled him to claim that he had not resigned as his letter of resignation was not properly addressed.[47] Admission in a writ petition before the Supreme Court that certain lands in possession of the petitioner were used for grazing his cattle, estops the petitioner in subsequent writ petition before the High Court from turning round and saying that admission was not correct.[48]

An avertment not amounting to 'admission' would not attract the principle of estoppel.[49]

87. CONCESSION BY COUNSEL

Where persuant to the instructions of the State Govt., the Advocate General made a statement that a Govt. order stood superseded by subsequent Rules, it was not a concession on pure question of law and it was binding on the Govt. The State Govt. could not contend that the order was still alive. More so when the order dismissing the proceedings on the basis of that concession had become final[50] but where the question to be decided was that of law to be decided in view of the statutory provisions and the earlier decision was made on the basis of the concession made by the counsel, the petitioners would not be estopped from re-agitating the same.[51]

88. CONCESSION BY PARTY

Where the plea of the promotees was conceded by the direct recruits and the matter was decided accordingly but the same was held to be not binding on the Govt. which was the affected party in the matter, more so when the plea was opposed to record.[52]

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39. *Ganghadhara Rao* v. *G. Ganga Rao*, AIR 1968 AP 291.
40. *Damodaran* v. *D. Leelavathi*, AIR 1975 Mad 278.
41. *Jagannath Singh* v. *Rupnarain*, AIR 1960 Pat 564.
42. *Rajhu Naicker* v. *Anantha Krishna Naicker*, (1992) 1 MLJ 163; Entire case law discussed *Ramaswamy Gounder* v. *Anantapadmanabha Iyer*, (1971) 1 MLJ 392 **distinguished**).
43. *Santhappan* v. *Guruswami Gounder*, ILR 1965 Mad 287.
44. *Gayadhar Mohanty* v. *Bidy Adhar Behera*, ILR 1964 Cut 719.
45. *Satyanarayana* v. *Venkanna*, AIR 1933 Mad 637.
46. *Modgi Krishna* v. *Modgi Krishna Bai*, AIR 1994 AP 16 (para 11).
47. *Prabharani Vishwakarma* v. *State of M.P.*, AIR 1999 MP 223 (paras 12 and 13).
48. *Gulabbhai* v. *Collector, Daman*, AIR 1970 Goa 59; *L.N. Arjundas* v. *State Bank of India*, AIR 1969 Pat 385.
49. *Malik Ghulam Ahmed* v. *J.&K. State Forest Corporation*, 1996 AIHC 4426 (para 10) (J&K).
50. *Amali English Medium H. School* v. *Govt. of A.P. (FB)*, AIR 1993 AP 338 (paras 24-27).
51. *Jagannatha Swamy Varu* v. *Vana Venugopalanaidu*, 1996 AIHC 1397 (para 9) (AP), **relying on** *Veeramma* v. *Appayya*, AIR 1957 AP 965. **See also** *The Daily Partap* v. *R.P.F. Commissioner, Chandigarh*, AIR 1999 SC 2015 (paras 8 and 9).
52. *Union of India* v. *G.K. Vaidyanathan*, AIR 1996 SC 688 (para 12).

89. ELECTRIC SUPPLY

The policy decision of the government giving incentive/concession viz. exemption from payment of minimum consumption charges for a period of five years for new industries, is not binding on the Electricity Board and the Board was not estopped from imposing minimum consumption charges.[53]

90. ACCOUNTS

Accounts of firms, maintained in the ordinary course of business, can be accepted as correct and binding on the concerned parties who will be estopped from contending otherwise.[54]

91. CARRIER

Where the consignee obtained delivery after inspection and found no damage to goods, subsequent claim by him for short delivery against the carrier was barred.[55]

92. INSURANCE

Where the insurance company returned the premium for the renewal of policy by pay order with covering letter by certificate of posting sent two days prior to the accident without giving any reasons of its non-encashment and refused to pay compensation for want of cover of insurance policy, its act was held to be deliberate and company was held to be liable.[56] The mere delay of a couple of months in settlement of claims under policies will not authorise the National Commission to grant relief of interest under the Consumer Protection Act, particularly when the insurer had not complained of such a delay at the time of acceptance of the insurance amount under the policy.[57]

93. NATIONAL SAVINGS SCHEME

The Post Office made no objection in opening NSS Account by the father on behalf of his son under a General Power of Attorney and the same remained operative for a period of ten years after which the closure of account without interest was held to be arbitrary.[58]

94. INTERPRETATION OF DOCUMENT

There is no estoppel against the interpretation of a document.[59]

95. FRAUD OR MISREPRESENTATION

Where the petitioner had obtained a favourable order from the S.D.M. by fraud or misrepresentation of apparent facts, he could not invoke promissory estoppel. One who seeks equity must do equity.[60]

96. CONFIRMATION OF MINUTES

After the minutes of a meeting of the Corporators has been signed by its President under the Bombay Provincial Municipal Corporation Act, 1949 giving it rebuttable presumptive value, the

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53. *Hindustan Ferro Alloys Ltd.* v. *Executive Engineer, U.P.S.E. Board*, AIR 1995 All 209 (para 5).
54. *Vaiyapuri Mudaliar & Sons* v. *Sri Arunodhaya Textiles, Erode*, AIR 1996 Mad 19 (para 30).
55. *Scindia Steam Navigation Co. Ltd.* v. *Union of India*, AIR 1998 Ker 250 (para 8).
56. ***T. Dinkar* v. *P.J. Jagdish*, 1998 AIHC 625 (Kant).**
57. *United India Insurance* v. *Ajmer Singh Cotton & General Mills*, AIR 1999 SC 3027 (para 7).
58. ***Prashant K. Patel* v. *Union of India*, AIR 2001 Guj 58 (paras 3 and 4).**
59. ***Hukan Chand* v. *Om Chand*, 1998 AIHC 1509 (para 8) (P&H).**
60. *Raj Kumar Soni* v. *State of U.P.*, AIR 2000 All 1 (para 29) : 2000 AIHC 856. **See also** *Pravesh Kumar* v. *Vice-Chancellor, Banaras Hindu University, Varanasi*, AIR 2000 All 369 (pp. 375 and 376); *K.S. Vijayalakshmi* v. ***Tahsildar, Palakkad*, AIR 2000 Ker 262 (para 18).**

Corporators are not estopped from disputing the correctness of the minutes by adducing reliable evidence.[61]

97. PROOF, PRACTICE AND PROCEDURE

Where even though a clear plea of estoppel arises from the recital in an agreement, a party does not rely on this plea and enters into an issue on the facts so that the whole matter becomes open for the decision of the Court, that party cannot rely on the doctrine of estoppel to prevent the opponent from proving that fact.[62]

Plea of waiver cannot be raised for the first time in writ petition.[63]

Estoppel is a mixed question of law and fact. New plea thereon can be permitted in second appeal.[64] A question of estoppel is a mixed question of fact and law, and without definite allegations in the pleadings a party should not be permitted to resort to the plea of estoppel.[65] Estoppel is not a question of fact but an inference of law from proved facts. Hence, it is open to examination by High Court in second appeal.[66]

A person who puts forward the plea of estoppel must prove every legal requirement necessary to be established before he could avail of such a plea.[67] Where all the necessary facts have been pleaded, it is for the court to draw inference of estoppel and not for the party to plead it. The party cannot be penalised for not suggesting through its pleadings a rule of law to the court.[68]

To sustain in argument based on estoppel in second appeal which is a complex legal notion involving representation acting on it and change of position as a consequence, there should from the very nature of things, have been a proper trial on the distinct and specific pleading on the point. In order to support the plea of estoppel the representation must be of an existing fact.[69]

To found a plea of estoppel by conduct, there should be precise pleadings setting up the facts constituting the estoppel.[70]

If the plea of estoppel by acquiescence is not raised in the lower court, it cannot be raised in appeal.[71]

Where the plea of waiver was not raised before the trial court nor the issue to that effect was not framed by court it was held that the appellate court was wrong in entertaining the question of waiver for the first time in appeal before it.[72] In the absence of specific pleading and specific issue, plea of waiver cannot be allowed to be raised in appeal.[73]

Estoppel of tenant and of licensee of person in possession.

S. 116. No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by

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61. *Tarvindarsingh Mahendrasingh Dhillon* v. *State of Maharashtra*, AIR 2000 Bom 223 (paras 72-74).
62. *Rajendra Ram Doss* v. *Devendra Doss*, AIR 1973 SC 268.
63. *Motilal Padampat Sugar Mills* v. *State of U.P.*, AIR 1979 SC 621.
64. *State of Gujarat* v. *Lodha Harpal Ghasiram*, ILR 1970 Guj 784; **See also** *Ujagar Singh* v. *Sham Singh*, AIR 1979 Punj 12.
65. *Associated Publishers* v. *K. Bashyam*, AIR 1961 Mad 114.
66. *Ujagar Singh* v. *Sham Singh*, AIR 1979 Punj 12.
67. *N.R. Revanna* v. *T.V. Malappa*, AIR 1965 Mys 258.
68. *Somanath Singh* v. *Ambika Prasad*, AIR 1950 all 121.
69. *Ram Gopal* v. *L. Mohan Lal*, AIR 1960 Punj 226; *Anant Lal Goel* v. *Dr. P.S. Agarwal*, AIR 1973 All 89; *Bansilal Singh* v. *Kanshi Ram*, AIR 1975 HP 15; *Inderjit Singh* v. *Randhir Singh*, AIR 1978 Punj 260; *By Ford Pvt. Ltd.* v. *Union of India*, AIR 1972 Del 59.
70. *G.G.. Nambooripad* v. *I. Kochupilla*, AIR 1953 Tra/ Co. 447.
71. *M.J.V. Mudaliar* v. *S.V. Finance Corp.*, AIR 1971 AP 63.
72. *Munshi Lal* v. *Nazir*, ILR (1967) 2 All 49 : 1967 ALJ 371.
73. *S. Md. Naim* v. *Rouraffic & Far Eastern Ltd.*, AIR 1960 Cal 146.

the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given.

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COMMENTS

1. PRINCIPLE AND SCOPE

The section deals with estoppel of (1) a tenant, and (2) a licensee of the person in possession.It postulates that there is a tenancy still continuing[74] and that it had its beginning at a given date from a given landlord, and provides that neither a tenant nor any one claiming through a tenant shall be heard to deny that the particular landlord had at that date a title to the property.

The estoppel of a tenant is founded upon contract between the tenant and his landlord. It is one of the most noticeable instances of estoppel by contract.

In HALSBURY'S LAWS OF ENGLAND 4th Ed., Vol. 16, Para 1625, page 1095 it is stated: "the lessor is estopped from repudiating a lease under which possession has been given or a tenancy which he acknowledged and the assignee of the lessor's interest is estopped from denying anything which the lessor is estopped from denying."

The Supreme Court held that during the continuance of tenancy, a tenant will not be allowed to deny the title of the landlord at the beginning of the tenancy; so the tenant cannot acquire by prescription a permanent right of occupancy in derogation of the landlord's title by mere assertion of such a right to the knowledge of the landlord.[75]

A tenant who has been let into possession cannot deny his landlord's title however defective it may be so long as he continues to be a tenant and has not surrendered possession to the landlord.[76] A person

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74. *Sheikh Rashid* v. *Hussain Baksh*, AIR 1943 Nag 265; *Dangam Venkat Rajam* v. *Peddi Gundla Rajia*, AIR 1953 Hyd 288.

75. *Veerraju* v. *Venkanna*, AIR 1966 SC 629. **See also** *Ram Pasricha* v. *Jagannath*, AIR 1976 SC 2335; *Md. Israil* v. *Union of India*, AIR 1976 Cal 189; *Ganga Bishnu* v. *Calcutta Pinjraple Society*, AIR 1968 SC 615; *K.R. Venkataramana Rao* v. *B.S.K. Chari*, 2000 AIHC 1288 (para 6) (Kant), **relying on** *Ludha Swamy* v. *Smt. R. Shanthamma*, (1993) 1 Kant LJ 331; **distinguishing** *Adyanath Ghatak* v. *Krishna Prasad Singh*, AIR 1949 PC 124.

76. *Bilas Kunwar* v. *Desraj Ranjit Singh*, AIR 1915 PC 96; *Chandrika* v. *B.B. & C.I.R. Co.*, AIR 1935 PC 59; *John Agabog Vertannes* v. *James Golder Robinson*, AIR 1927 PC 151; *Adhar Mallit* v. *Kanhoo*, AIR 1972 Ori 134; *Currimbhoi & Co. Ltd.* v. *L.A. Creet*, AIR 1933 PC 29; *Hirabhai (Mst)* v. *Jiwanlal Palode*, AIR 1955 Nag 234; *Bhaiganti Bewa* v. *Himmat*, AIR 1917 Cal 498; *Muddada Chavanna* v. *Shri Kodanda Rama Swamyvaru*, (1969) 1 SC WR 844; *Rampearyalal* v. *Surajmal*, AIR 1959 Pat 500 (adverse possession); *Jaikaran Singh* v. *Sitaram Agarwalla*, AIR 1974 Pat 364; *Surajmal* v. *Rampearaylal*, AIR 1966 Pat 8; *Md. Azim* v. *Raja Saiyid Saadat Ali*, AIR 1931 Oudh 177; *Harbans Singh* v. *Tekamani Devi*, AIR 1990 Pat 26; *Bilas Kunwar* v. *Des Raj Ranjit Singh*, ILR 37 All 557 : AIR 1915 PC 96; *Munnalal* v. *Balchand*, ILR 1961 MP 262; *Charubala Basu* v. *German Gomez*, AIR 1934 Cal 499; *Gajadhar Lodha* v. *Khas Mahatadih Colliery Co.*, AIR 1959 Pat 562; *Mujibar Rahaman* v. *Isub Surati*, AIR 1928 Cal 546; *Nazroo* v. *Lalman*, AIR 1955 HP 44; *Rambilas Mohanlal* v. *Krishna Bai Motilal*, AIR 1973 Bom 168; *Rameshwar Lal Sharma* v. *Sardar Amrik Singh*, AIR 1974 Pat 195, (even after notice under Section 106 T.P Act); *Balasubramania* v. *Saraboji Gounder*, AIR 1973 Mad 305; *Abdul Ghafoor* v. *Lala Kunj Behari Lal*, AIR 1957 All 340; *Vidyanath* v. *Somanath*, ILR 1963 Cut 550; (defendant paying rent and accepting a person or landlord) *Gangaram* v. *Municipal Council Nagar Palika*, AIR 1992 MP 303; *Joginder Singh* v. *Jogindero*, AIR 1996 SC 1654

in an unauthorised possession of a property, converting his possession into that of a tenant by executing a rent note execution of which he subsequently admitted, would be estopped from challenging the title of the landlord and his right to recover rent or arrears of rent.[77] The tenant admitting the title of the landlady and paying her rent throughout cannot subsequently deny her title.[78] But mere payment of rent to a particular person does not create the relationship of landlord and tenant. In the instant case, the tenant was paying rent to a person as an agent of the landlord whose title he denied, principle of estoppel would not be attracted.[79] A lease deed creates landlord-tenant relationship between the parties estopping the tenant to deny the landlord's title.[80]

A tenant is estopped from taking the plea that a landlady's father who executed the lease in his favour was not a duly appointed attoreny of the landlady.[81]

The tenant is liable to be evicted on the ground of denial of the title of the landlord[82] even without consideration of other grounds of eviction.[83]

2. WHETHER TENANT SHOULD BE IN POSSESSION OF PROPERTY TO ESTOP HIM FROM DENYING HIS LANDLORD'S TITLE

The Privy Council has laid down that a tenant is estopped from denying his land lord's title whether he was or was not already in possession of the property at the time when he took his lease[84]. The Bombay[85], the Madras[86] High Courts have held similarly. The decisions of the Calcutta High Court are not unanimous on the point.[87] A tenant who wishes to dispute his landlord's title must not only see that the tenancy has come to an end, but that the possession which was in him as a tenant has been surrendered. A tenant who holds over and remains in possession cannot be allowed to use that possession as a lever to support a case in which he denies the landlord's title.[88] Where a tenant had deliberately and with ulterior motive raised the dispute of title of the landlord during the subsistence of tenancy, he was liable to be evicted.[89]

(para 6). **following** *Veerraju* v. *Venkanna*, (1966) 1 SCR 831 (839) : AIR 1966 SC 629, at p. 633; *Charan Singh* v. *Municipal Committee, Rania*, AIR 1996 P&H 207 (para 8); *Jamila Khatoon* v. *Ajodhya Pathak*, 1996 AIHC 2928 (para 10) (Gau); *Ram Krishna Jaiswal* v. *District Judge, Allahabad*, AIR 1999 All 198 (para 7) : 1999 AIHC 3530 (All); *M.D. Lakhanpal National Ltd.* v. *K.M. Kondappa*, 2001 AIHC 2558 (para 11) (Kant); *Kelvinator of India Ltd.* v. *A.F. Bagai*, AIR 1994 NOC 297 (Del).

77. *Ziauddin* v. *Bansi Lal*, 1996 AIHC 1425 (paras 4 and 5) (Del).
78. *Virendra Sharma* v. *Ramkatoridevi Singhal*, 1998 AIHC 3742 (paras 21 and 22) (MP). **See also** *S. Thangappan* v. *P. Padmavathy*, AIR 1999 SC 3584 (paras 12 and 16) : (1999) 7 SCC 474 : 1999 (6) JT 464, **relied in** *S.M. Sultan Rowthar* v. *Kothandarama Naidu*, 2000 AIHC 3063 (paras 25 and 31) (Mad); *Narendra Kumar Vaish* v. *Shyma Agrawal*, AIR 2000 MP 253 (para 11); *A.H. Sheikh Allauddin* v. *Hameed Julaika Nachiar*, 2000 AIHC 2927 (para 26) (Mad).
79. *Rajendra Kumar Mahawar* v. *Shakuntala Kesarwani*, 1999 AIHC 4700 (para 15) (MP).
80. *N.A.S. Ansari* v. *M. Sarangan*, 1996 AIHC 1534 (Mad). **See also** *Kartar Singh* v. *Collector, Patiala*, 1996 AIHC 1538 (para 6) (P&H); *Sona Devi* v. *Puran Chand Packaging Industries Pvt. Ltd.*, 2000 AIHC 3913 (para 10) (Del); *Mama Deen* v. *State of Haryana*, 2001 AIHC 602 (paras 9 and 10) (P&H).
81. *Rajesh Wadhawa* v. *Sushma Govil (Dr.)*, AIR 1989 Del 144.
82. *Gillan F Irani* v. *Parijat Hotels Pvt. Ltd.*, 2000 AIHC 3415 (paras 13, 14 and 19) (Bom). **See also** *A.H. Sheikh Allauddin* v. *Hameed Julaika Nachiar*, 2000 AIHC 2927 (para 26) (Mad).
83. *S.M. Sultan Rowthar* v. *Kothandavama Naidu*, 2000 AIHC 3063 (paras 25 and 31) (Mad).
84. *Krishna Prosad Lal Singha Deo* v. *Baraboni Coal Concern Ltd.*, (1937) 64 IA 311 : 39 Bom LR 1034 : ILR (1938) 1 Cal 1; *Bilas Kunwar* v. *Desraj Ranjit Singh*, (1915) 17 Bom LR 1006 : 42 IA 202 : ILR 37 All 557; *Vertannes* v. *Robinson*, (1927) 29 Bom LR 1017 : 54 IA 276, 5 Ran 427; *Pashupathinath* v. *Sankari Prasad Singh Deo*, AIR 1957 Cal 128.
85. *Vasudev Daji* v. *Babaji Ranu*, (1871) 8 BHCR (ACJ) 175; *Shankar* v. *Jagannath*, (1928) 30 Bom LR 741.
86. *Venkata Chetty* v. *Aiyanna Goundan*, (1916) 40 Mad 561 (FB); *Ganpat Rai* v. *Multan*, ILR (1916) 38 All 226, 228 : AIR 1916 All 121.
87. *Lal Mohomed* v. *Kallanus*, ILR (1885) 11 Cal 519 **dissented from** in *Nagindas Sankalchand* v. *Bapulal Purshottam*, ILR (1930) 54 Bom 487 : 32 Bom LR 692 : AIR 1930 Bom 395; *Ketu Dass* v. *Surendra Nath Sinha*, (1903) 7 CWN 596.
88. *Ekoba* v. *Dayaram*, (1919) 22 Bom LR 82; *Patel Kilabhai Lallubhai* v. *Hargovan Mansukh*, ILR (1894) 19 Bom 133; *Nadri Begum* v. *Nasrat Bibi*, AIR 1980 All 210, the defendant continued in possession after expiry of licence in the right of his father, estopped from denying the plaintiffs title.
89. *Janta Travels Pvt. Ltd.* v. *Raj Kumar Seth*, AIR 1997 Raj 1. **See also** *M. Narayanaswami* v. *Roya Poulle Amala*, 1996 AIHC 2591 (para 14) (Mad).

In the above case[90] it was further held that Section 116 applies against the lessee, assignee of the term, sub-lessee, or licensee; the principle only applies to the title of the landlord who let the tenant in to possession, as distinct from a person claiming to be a reversioner; that Section 116 applies not only when it was shown that the landlord put the tenant into possession but also where a person already in possession as a tenant under some other person becomes a tenant to another; that a "tenant who has occupied but not entered" is a difficult notion to thrust into Section 116 and quite impossible to find therein. So, an equittable principle of estoppel is incorporated in Section 116.[91]

SIR GEORGE RANKIN in the above case (AIR 1937 PC 251) observed: "The section postulates that, there is a tenancy still continuing, that it had its begining at a given date from a given landlord. It provides that neither a tenant nor any one claiming through a tenant shall be heard to deny that a particular landlord had at that date, a title to the property. In the ordinary case of a lease intended as a present demise (which is the case before the Board, in this appeal) the section applies against the lessee, any assignee of the terms and any sub-lessee or licensee. What all such persons are precluded from denying is that the lessor had a title at the date of the lease and there is no exception even for the case where the lease itself discloses the defect of title. The principle does not apply to disentitle a tenant from disputing the derivative title of one who claims to have since become entitled to the reversion....."The tenancy", under the section, does not begin a fresh every time that the interest of the tenanat or of the landlord devolves upon a new individual by succession or assignment."

The expressions "during the continuance of tenancy" makes it clear that estoppel operates only during the continuance of the tenancy. Section 116 does not prevent a tenant from setting up an adverse title at some subsequent date.[92]

Denial (of title) in the suit will not work a forfeiture of which advantage can be taken in that suit, because the forfeiture must have accrued before the suit was instituted.[93]

The denial of title or disclaimer must be clear and not vague to have the effect of forfeiture of one's right as tenant. Where the tenant merely denies the title of the landlord bonafide with the object of seeking information of such title or with the object of having such title established before the court so as to protect himself, it would not attract the charge of disclaimer of title.[94]

3. LANDLORD

The person who is duly authorised to receive rent is landlord and can maintain a suit for eviction.[95]

4. DENIAL OF TITLE

Where the tenant demanded certain documents from the transferee to prove his title to the property, it was held to be not a denial of the title of the landlord/trans-feree.[96] Mere assertion of the tenant that the landlord was co-owner because of lack of knowledge of release deed in his favour, does not amount to denial of his title.[97] Where the pending litigation regarding the title of the lessor on the leased property was decided declaring the title of the lessor on it which became final, the lessee, denying the title of the lessor was estopped from doing so thereafter.[98] Denial of title of the donee is not a *bona fide* denial.[99]

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90. *Krishna Prasad* v. *Balaboni Coal Concern Ltd.*, AIR 1937 PC 251 : 64 IA 311
91. **See also** *Bhagawati Devi* v. *Surendra Jit Singh*, AIR 1969 Pat 257.
92. *Banna* v. *Jetha* AIR 1950 Ajmeer 53.
93. *Maharaja of Jeypore* v. *Rukmani Pattamahdevi*, AIR 1919 PC **followed** in *Lena Pereira* v. *Mary Boracho*, AIR 1992 Bom 93.
94. *Nirvikar Gupta* v. *Ram Kumar*, AIR 1992 MP 115.
95. *Prafulla Kumar Saha* v. *Ranjit Kumar Saha*, 1998 AIHC 349 (para 8) (Cal).
96. *Gandabhai Ranchhodji Gandhi* v. *Noshir Ka Vasji Sabowala*, AIR 1994 Guj 18.
97. *C. Chandramohan* v. *Sengottaiyan*, AIR 2000 SC 568 (paras 18 and 19). **See also** *Fulaben* v. *Ganeshbhai Punabhai Channawala*, 2001 AIHC 307 (paras 9 and 10) (Guj).
98. *D.S. Krishna* v. *Digvijay Industries, Azamabad*, 1997 AIHC 3558 (paras 15 and 16) (AP).
99. *Jalal & Sons* v. *Sita Bai*, 2001 AIHC 1860 (paras 17, 23 and 31) (AP) : AIR 2001 NOC 41 (AP).

5. ALLOTEE UNDER W.B. CO-OPERATIVE SOCIETIES ACT

The Calcutta High Court has held that the order of allotment of flat in co-operative society building under West Bengal Co-operative Societies Act, 1983, was sufficient to prove that the allottee in possession had acquired title or interest in relation to the flat.[1]

6. TENANT

Where the defendant contended that along with the lease document there was a sale transaction of contemporaneous date, and so he was not in the position of a tenant, it was held that Section 116 applies only to a person, if he is a tenant, otherwise Section 116 cannot come into play.[2] Where the suit for eviction was brought by the lessor and to whom the rent was being paid, the tenant was estopped from challenging the title of the landlord.[3]

In the ordinary case of a lease intended as a present demise the section applies against the lessee, any assignee of the term and a sub-lessee or licensee.[4]

An agent or a representative of the tenant cannot deny the title of the landlord[5] and also that of the co-owner-landlord.[6]

7. CO-SHARES OF LANDLORD

A tenant can purchase the share of a co-sharer of his landlord, and claim the title to a part of the property. It does not constitute a denial of the title of the landlord on the date of the tenancy.[7]

Where a lessee of a joint family property purchased the shares of two brothers of that family, it was held that the principle of estoppel does not apply.[8]

8. LEASE—FRAUD OR MISTAKE

The tenant may show that no valid tenancy has been created between the landlord and himself, because the lease was executed under a mistake or in consequence of a fraud, mis-representation or coercion practised on him by the landlord.[9]

The defendants entered into possession of plaintiff's property by executing a registered agreement, but no lease was executed. In a suit by the plaintiff to recover rent, the defendants pleaded that without a lease there was no contract of tenancy and that the plaintiff was not entitled to recover the rent. It was held that in view of the fact that the defendants entered into and continued in occupation of the land with the plaintiff's consent, they could not be heard to say that they were not liable for rent for use and occupation.[10]

A tenant is not estopped from proving that the relationship of landlord and tenant never subsisted between him and the plaintiff.[11]

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1. *Dunlop India Ltd.* v. *T.K. Mukhopadhyay*, AIR 1998 Cal 59, at pp. 61-64.
2. *Rashid* v. *Hussain*, AIR 1943 Nag 265; *Chhuttu* v. *Kayam Khan*, 1953 Bhopal 18; **relying on** *Lalchand* v. *Ram Singh*, 1942 Nag LJ 136.
3. *P.S. Bedi* v. *Project & Equipment Corporation of India Ltd.*, AIR 1994 Del 255 (para 21).
4. *Krishna Prosad Lal Singha Deo* v. *Baraboni Coal Concern Ltd.*, (1937) 64 IA 311 : 39 Bom LR 1034 : ILR (1938) 1 Cal 1; *Ata Muhammad* v. *Shankar Das*, ILR (1925) 6 Lah 319; *Yusuf* v. *Jyotishchandra Banerji*, (1932) 59 Cal 739; *M Manphul Bai* v. *Ladhuram*, (1952) Raj 58; *U.G. Sakhare* v. *C.G. Gawande*, AIR 1960 Bom 238 : 60 Bom LR 1150.
5. *P.G. Venkataswamy* v. *M.Z. Hussain*, AIR 1973 Mys. 145. **See also** *Santosh Kumar Jain* v. *Shambhulal Krishna Kumar Suhane*, AIR 1993 MP 46 (paras 3 and 5).
6. *Kishan Gopal Agarwalla* v. *Ramdulari Sah*, AIR 1996 Gau 39 (paras 1 and 2).
7. *Raman Chandra Dey* v. *Gour*, AIR 1962 Assam 137.
8. *Ramaswamy Iyer* v. *Mangal*, ILR (1981) 1 Mad 219.
9. *Dangom Vanket Rajam* v. *Peddi Gundla Rajiah*, AIR 1953 Hyd 241; **relying on** *Krishnarao Raghunath* v. *Ghamon Ghama*, AIR 1935 Bom 144; *Ramjani* v. *Bansidhar*, AIR 1935 Oudh 385.
10. *Sheo Karan Singh* v. *Maharaja Parbhu Narain Singh*, ILR (1909) 31 All 276 (FB).
11. *Bhaboot Mal* v. *Sens Mal*, 1973 Raj 56; **following** *Immani Appa Rao* v. *G. Ramalinga Murthi*, AIR 1962 SC 370.

9. 'IMMOVABLE PROPERTY'

A fishery is considered immoveable property for the purposes of this section.[12]

10. PERSON CLAIMING THROUGH A TENANT

It was held that a tenant including a tenant holding over is estopped from denying the landlord's title.[13]

The Supreme Court held that after the determination of tenancy by a notice under Section 106, T.P. Act, the defendant ceased to be a tenant and as such, the infirmity, even if any as contemplated under Section 116 of the Evidence Act, ceases to have any application.[14]

The principle of estoppel under Section 116, is applicable between a tenant and his sub-tenant. Where there is no legal tenancy or sub-tenancy this section has no application, *e.g.*, where the agreement leading to the execution of a sub- lease is void and unenforceable being a contract against the law, it cannot make the sub-tenant a tenant of the tenant. Thus where there is no legal sub-tenancy, there can be no question of continuance of sub-tenancy, and the so called sub-tenant cannot be deemed to be estopped from challenging the status of the so called tenant, so long as the sub-tenant is in possession of the premises in question.[15]

Where a tenant filed a suit for ejectment against his sub-tenant on the ground of expiration of the sub-tenancy, the sub-tenant cannot be allowed to plead that he had obtained a fresh lease directly from the landlord a sub-tenant is estopped from denying the title of the tenant even after the term of the original lease has run out.[16]

The sub-lessee has to establish as a fact that his relationship with his immediate lessor stood disrupted not only *de jure* but also *de facto*.[17]

Where a plaitiff challenged the eviction decree against original tenant to which he was a party on the ground of illegality of original tenancy without making any averment that he was a sub-tenant or that he claimed it by adverse possession which he ought to have raised in the prior eviction suit, it was held the plaintiff cannot be permitted to deny title of the owner to the suit property and he was bound by the eviction decree. [18]

11. DURING THE CONTINUANCE OF TENANCY

A tenant is only precluded, during the continuance of the tenancy, from denying that the landlord had 'at the beginning of the tenancy' a title to the property, the subject of the tenancy.

If the term of lease has expired when a suit is brought, the tenant can dispute the title of the landlord. Though the tenancy may be continuing, it is quite open to the tenant to plead and show that his liability to pay the rent has wholly or partially or for a time ceased: such a plea is really one of confession and avoidance (not denial), and has been held available to the tenant.[19]

The principle applies even after the expiration or termination of tenancy and even though the defendant was sued as a trespasser. It is only when possession is surrendered to the landlord who puts him in possession, this principle would not apply.[20]

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12. *Lakshman* v. *Ramji*, (1920) 23 Bom LR 339.
13. *Md. Ali Akhtar* v. *Md. Abbas*, AIR 1975 Pat 177; **relying on** *Krishna Prosad* v. *Baraboni Coal Concern Ltd.*, AIR 1937 PC 251.
14. *Chaterjee* v. *Sri Kishna Thandon*, AIR 1972 SC 2526.
15. *Shamsher Bahadur* v. *State of U.P.*, AIR 1964 All 395.
16. *Vithalbhai Pvt. Ltd.* v. *Union Bank*, AIR 1992 Cal 283 at 285; **following** AIR 1932 Mad 298 and AIR 1917 Cal 498.
17. In re : *Ganesh Trading Co. Pvt. Ltd.*, AIR 1985 Cal 37.
18. ILR (1974) 2 Del 27 **relying on** *Currimbhoy* v. *Creet*, AIR 1933 PC 29; *I&M Ltd* v. *Pheroze Framroze*, AIR 1953 SC 73; *Guru Siddaswami* v. *D.M.D. Jain Sabha*, AIR 1953 SC 514.
19. *Jogendra Lal Sarkar* v. *Mohesh Chandra Sadhu*, ILR (1928) 55 Cal 1013; *Shantabai* v. *Narayana Rao*, ILR (1948) Nag 290 : AIR 1949 Nag 81.
20. *Gajadhar* v. *K.M. Colliery & Co.*, AIR 1959 Pat 562; *Charubala Basu* v. *German Gomez*, AIR 1934 Cal 499; *National Jewellery Works* v. *Diana Printing Works*, (1959) 63 Cal WN 192; *Rajaram* v. *Jadunandan*, AIR 1925 All

If a tenant attorns to the purchaser of the property thereby recognising him as his landlord the doctrine of estoppel applies, and not otherwise.[21] In the absence of attornment by the tenant, the purchaser of landlord's interest will not have the benefit of Section 116.[22]

A tenant holding over is also a tenant under Section 108(*g*) of the Transfer of Property Act and is estopped from denying the title of the landlord when the tenancy is subsisting.[23]

The expression "duirng the continuance of tenancy" in Section 116 means "during the continuance of the possession" that was received by or under the tenancy in question. Where the tenancy had long ago ceased to exist and the tenant does not continue in possession on the strength of or in pursuance of the tenancy, he is not debarred from raising the question of competence and validity of the title of the lessor. The rule of estoppel contained in Section 116 will not apply in such a case.[24]

During the tenancy the tenant who was inducted by the landlord, cannot challenge the maintainability of a suit by the landlord by setting up a claim of ownership to demised property.[25]

A leased out the property to B who sublet it to C. A obtained an order of eviction of both B and C on 9-5-69. C was not dispossessed from the property. B sued C for arrears of rent from 1-1-64 to 1-2-71, it was held that the order of eviction obtained by A against B and C amounted to dispossession of the tenants. C was not liable to pay rent after 9-5-69 and he was not estopped from denying the title of his lessor B.[26] A tenant attorned the tenancy in favour of the purchaser G, and paid rent to G. G in his turn sold the property to C. Both C and G issued notices to the tenant to attorn the tenancy in favour of C, but the tenant declined to do so and attacked not only the derivative title of C to the property but also the validity of the sale in favour of G. It was held that the contention of the tenant amounted to a denial of title which he was precluded from doing so.[27]

The bar of estoppel would come into play during the continuance of a tenancy and not when the tenancy is determined.[28] In a case before the Privy Council there was a lease by A to C on a monthly rent. The true owner B obtained a decree for possession against A and obtained symbolic possession in execution of the decree, but C remained in possession with B's permission, but continued to pay rent to A. C later obtained a lease of same property from B. In a subsequent suit by A for possesion, it was held that C is not estopped from disputing A's title as tenancy between A and C had already determined and C was a licensee from B.[29] During the continuance of tenancy, the defendants (tenants) were assessed under the Madras Land Encroachment Act and they paid the rent and accepted a *patta* from the Government. When the lessor sued for ejectment, the defendants pleaded title in the Government. It was held that the payment of rent to the Government and acceptance of patta amounted to eviction and the original tenancy was determined and so Section 116 did not apply.[30]

A licensee can resist the claim of his licensor on the ground that subsequent to the license he was ousted from possession by a person having a paramount right and that his prior possession no longer subsists and his present possession was derived from the person who outsted him.[31]

Where a tenant did not deny his previous landlord's title, he cannot question the title of the purchaser of the same premises from the previous landlord.[32]

758; (case of a mortgagee in a redemption suit); *Badri Dass* v. *Mahabir Prashad*, ILR (1976) 2 Del 716; *Kartar Singh* v. *Bachan Singh*, AIR 1972 Punj 408; *Sreeramulu* v. *K. Venkateshwar Rao*, AIR 1959 AP 92.

21. *Madanlal* v. *Manakchand*, AIR 1971 Raj 55; *Gajadhar* v. *K.M. Colliery & Co.*, AIR 1959 Pat 562; *Kailash Kumar* v. *Banarasi Das*, AIR 1961 J&K 34; *Dah Chand* v. *Dadamchand*, AIR 1963 Raj 209; *Rameshwar Lal Sharma* v. *Sardar Armik Singh*, AIR 1974 Pat 195; *Tej Bhan Madan* v. *Second Addil., District Judge*, AIR 1980 All 320; **affirmed in** AIR 1988 SC 1413; *Jitendra Nath Roy* v. *Narendra Kumar*, AIR 1988 Cal 392; *Parameshwarlal* v. *Dalu Ram*, AIR 1957 Ass. 188; *Bhagwan Pancha* v. *Nayan Kunvarba*, AIR 1953 Sau 53.
22. *Kailash Kumar* v. *Banarsi Das*, AIR 1961 J&K 34.
23. *Suraj Mal Marwari* v. *Rampearaylal Khandelwal*, AIR 1966 Pat 8; *Hariharpal* v. *Sudhir Kumar*, AIR 1988 Cal 68.
24. *Uday Prathap Singh Deo* v. *Krushna Padhano*, AIR 1952 Ori 95; *Suraj Bali Ram* v. *Dhaniram*, AIR 1979 Ori 101.
25. *Md. Indris Mian* v. *Doman Sah*, AIR 1978 Pat 82.
26. *Dorairajan* v. *Swaminathan*, (1978) 2 MLJ 185.
27. *Tejbhan Madan* v. *Second Addil, District Judge*, AIR 1988 SC 1413, **affirming** AIR 1980 All 320.
28. *Nanavati Jayantilal* v. *Shah Ashabhai*, (1974) 15 Guj LR 675.
29. *Adyanath Ghatak* v. *Krishna Prasad Singh*, AIR 1949 PC 124; **reversing** *Krishna Prasad* v. *Adyanath Ghatak*, AIR 1944 Pat 77.
30. *Alaga Pillai* v. *Ramaswami Thevan*, AIR 1926 Mad 187.
31. *Bodhan* v. *Bhundal Singh*, AIR 1965 All 309.

HALSBURY'S LAWS OF ENGLAND (4th Ed., Vol. 16, Para 1626, Page 1097) observed: "A tenant is not estopped either before or after the expiration of the term from showing that his lessor's title has determined. If, however, the tenant came into possession under the lessor, the better opinion would seem to be that he must surrender possession before he disputes the lessor's title or has been evicted by a person having title paramount, but it has been held that unless he claims to be entitled to the premises in his own right, it is not necessary that he should actually go out of possession."

12. PLEA OF EVICTION BY PARAMOUNT TITLE

The rule that a tenant is not permitted to deny the title of the landlord does not extend after the discontinuance of tenancy either by reason of notice to quit served on him or forefeiture of tenancy by denying the title of the landlord or by act of law, or where a tenant is dispossessed by a person having or claiming to have a title paramount. It was held by the Supreme Court that the rule namely, that the tenant would not be permitted to deny the title of the landlord, does not apply when the tenant is under threat of eviction by a person claiming paramount title.[33]

In a suit for eviction by a person having or claiming to have paramount title, it is not necessary for the tenant to give open surrender to the intermediate landlord.[34]

A *Dharmakarta* leased some temple property to a tenant and during the tenancy another person was declared as a rightful *Dharmakarta* in a separate suit. When a suit was filed by the original lessor *Dharmakarta* for rent it was held that the tenancy had not terminated and the tenant was estopped from denying his immediate lessor's title.[35] The tenant must establish that the person who wanted to evict him had a better title than his lessor. If there is nothing to show that the evictor had any better title, nor is there anything to show that the tenant gave as required by Section 108(*n*), T.P. Act, any notice to the lessor about the claim put forward by the evictor so as to enable him to protect his own interest or that the tenant made any enquiry as to the title of the two rival calimants the applicability of the doctrine of estoppel cannot be challenged by the tenant on the ground of eviction by title paramount.[36] Where a tenant of land in an 'Estate' committed default in payment of rent and the 'Estate' was subsequently abolished and the property vested in the Government, it was held that in view of Section 64 of Madras Estates Abolition Act 26 of 1948, the landlord's ownership by fiction continued for certain limited purposes and hence tenants were estopped from questioning the title of the landlord.[37] When the question of title between the landlord and the municipality in whom the tenant asserted the title, was not decided the tenant is estopped from denying his landlord's title.[38]

It is well-settled that when the true owner evicts the tenant who was let in to possession by another, the tenant could attorn the lease to the true owner and set up title in the true owner in answer to a suit filed for possession by his immediate landlord.[39]

Where a man having no title obtains possession of land under a demise by a man in possession, who assures to give him a title as tenant, he cannot deny his landlord's title; as, for instance, if he takes for twenty one years and he finds the landlord has only five years' title, he cannot after the five years set up

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32. *Hiremath* v. *Krishnappa*, AIR 1978 Kant. 13.
33. *Satyanarayana* v. *P. Jagadish*, AIR 1987 SC 2192; *Jogendra Lal* v. *Mahesh*, ILR 55 Cal 1013; *Dinabandhu* v. *Makim Sardar*, AIR 63 Cal 763; *Krishna Prasad Singh* v. *Adyanath Ghatan*, ILR 22 Pat 513 : AIR 1944 Pat 77; *Gajadhar* v. *K.M. Colliery*, ILR (1959) Pat 806 : AIR 1959 Pat 562; *Guruswami Nadar* v. *Ranganathan*, AIR 1954 Mad 403; *Gowresu* v. *K. Subadramma*, AIR 1957 AP 961; *Chokkalingam Pillai* v. *Ganesa Shanmuga Sundaram Pillai*, AIR 1951 Mad 284; *Omkarmal* v. *Manak Chand*, AIR 1957 Raj 357; *Valia Md.* v. *Savakutti*, AIR 1934 Mad 197; *Ramrakha Mal* v. *Munna Lal*, AIR 1931 Lah 243; *Jagannatha Iyengar* v. *Mariappan Chettiar*, AIR 1958 Mad 518; *Lekhraj Diddi* v. *Sawan Singh*, AIR 1971 MP 172.
34. *Alaga Pillai* v. *Ramaswami Thewan*, 91 IC 1024; **confirming** *Ramaswamy* v. *Alaga*, 79 IC 881; *Subbarova* v. *Krishnappa*, ILR (1888) 12 Mad 422; *Bala Kushaba* v. *Abai*, 11 Bom LR 1093; *Jogendra Lal* v. *Mahesh*, ILR 55 Cal 1013 : AIR 1929 Cal 22; *Ganpat Rai* v. *Multan*, ILR 38 All 226 : AIR 1916 All 121; *Khalil Sufi* v. *Aziz. Bhat*, 1960 J&K 132.
35. *Devalraju* v. *Md. Jaffer Saheb*, ILR (1913) Mad 53.
36. *Gajadhar Lodha* v. *Khas Mahatadih Colliery*, AIR 1959 Pat 562; **relying on** *Indu Bhushan* v. *Moajam Ali*, AIR 1929 Cal 272; and **dissenting from**: *Nourjani Sardar* v. *Bimla Sundari*, AIR 1914 Cal 730.
37. *Gauara Panasayya* v. *Patnaikuni Sitarama Lakshmamma*, ILR 1966 An P. 1305.
38. *Chinniah Gounder* v. *Ponnuswami*, AIR 1977 Mad 138.
39. *Krishna Murthy* v. *Thambaram Panchaya*, (1970) 1 Mad. LJ 444; *Guruswami Nadar* v. *Ranganathan*, AIR 1954 Mad 402.

against landlord the *jus tertii*, though, of course, the real owner can always recover against him. That is a perfectly intelligible doctrine. He took possession under a contract to pay the rent as long as he held possession under the landlord, and to give it up at the end of the term to the landlord, and having taken it in that way he is not allowed to say that the man whose title he admits, and under whose title he took possession, has not a title[40]. This is estoppel by contract. The estoppel arises, not by reason of some fact agreed or assumed to be true, but as the legal effect of carrying the contract into execution, of the tenant taking possession of the property from the hand of the lessor.[41]

The expression "a person in possession" within the meaning of the section need not be a full owner; he may be a mortgagee, lessee, or any other person having right to or is in actual possession; however defective the title of such a person or even the landlord may be at the time of the creation of the tenancy, the person inducted under the terms of the contract cannot be permitted to rely on that defect, to his advantage or to perpetuate his possession or to act in a way detrimental to the landlord's right. Even assuming that a third party has title to any extent in the suit property, where the contract is one entered into between the plaintiff and the defendant and actual possession was given by the plaintiff to the defendant in his own right, the plaintiff and not the third party must be regarded as the landlord of the defenant for the purpose of Section 116. The protection given to the landlord under this section does not come to an end by reason of his giving a registered notice to quit. The bar of estoppel under this section continues until the tenant actually goes out of occupation by handing over possession to his landlord.[42]

In a case the mortgagee leased the property to a third person. When the lessee was in possession the lease was attorned to a *Zamindar*; after redemption the mortgagor claimed the property, it was held that the lessee was estopped from denying the mortgagor's title even after the attornment because there was no change in the nature of his possession.[43]

The doctrine has no application to the same parties, even while the tenancy exists, when the question of title arises between them not in the relationship of landlord and tenant, but of vendor and purchaser.[44]

13. LANDLORD INCLUDES REPRESENTATIVES

It is not permissible for a tenant to plead defective title of his landlord from whom the plaintiff derived title. He is also estopped from pleading defective title of the plaintiff.[45]

A widow conveyed some land to R who leased it to V. one of the four sons of the widow. R filed a suit against the widow and all the four sons of the widow for ejectment. The Privy Council held that the widow could only convey her 1/3 interest in the property; that so far as V is concerned, he being tenant of R, is estopped from questioning the title of R; accordingly a decree for ejectment was passed against the widow and V.[46]

On the terms of Section 116 as well as on general principles of estoppel, the party is estopped from challenging the title of the transferee to whom he attorned by paying rent after he took the transfer from his lessor, unless there is fraud or mis- representation by the plaintiff as regards his own title so as to induce the party to attorn to him.[47]

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40. Per JESSEL, *M.R.*, In re : *Stringer's Estate, Shaw* v. *Jones-Ford*, (1877) 6 Ch D 1, 9; *Vertannes* v. *Robinson*, (1927) 29 Bom LR 1017 : 54 IA 276 : ILR 5 Ran 427; *Bilas Kunwar* v. *Desraj Ranjit Singh*, (1915) 17 Bom LR 1006 : 42 IA 202 : ILR 37 All 557.
41. *Bamandas Bhattacharjee* v. *Nilmadhab Sahu*, (1916) 44 Cal 771, 777.
42. *Bokka Sreeramulu* v. *K. Venkateshwar Rao*, AIR 1959 AP 92; **relying on** *Venkatanarasimha Charvulu* v. *Gangaraju*, AIR 1941 Mad 607; *District Board Tippera* v. *Sarafat Ali*, AIR 1941 Cal 408; and **distinguishing** *Muthuswamy Aiyer* v. *Solai Kanan*, AIR 1915 Mad 48.
43. *Gurunaidu* v. *Venkat Raju*, AIR 1968 Mad 85; *Motilal Bhatia* v. *Yusuf Ali*, 1972 MPLJ 187; *Duryodhan Nayak* v. *Keonjhar Municipality*, ILR 1973 Cut 772.
44. *Md. Hussain Sahib* v. *Abdul Gafoor*, AIR 1945 Mad 321 : ILR (1946) Mad 44; *Nesbitt* v. *Mable Thorpe UDC*, AIR (1917) 2 KB 568; *Guruswami* v. *Ranganathan*, AIR 1954 Mad 402.
45. *Subash Chandra* v. *Md. Sharif*, AIR 1990 SC 636.
46. *Vertannes* v. *Robinson*, AIR 1930 PC 224.
47. *Gajadhar Lodha* v. *Khas Mahatadih Colliery Company*, AIR 1959 Pat 562; **relying on** *John Nadjarain* v. *E.F. Trist*, AIR 1945 Bom 399; and *Krishna Prosad Lal* v. *Baraboni Coal Concern Ltd.*, AIR 1937 PC 251; *Manphul Bai* v. *Ladhuram*, AIR 1952 Raj 115; *Sudhir Chandra Guha* v. *Jogesh Chandra Das*, AIR 1970 Assam 102; *Syed Anwar Ahmad* v. *Asst. Custodian General Evacuee Property U.P.*, ILR (1972) 2 All 641; (title devolved by virtue of a decree).

The defendant is estopped from challenging the title of the purchaser from his landlord.[48]

However, where the tenant paid rent to a person claiming to be landlord on the strength of the title derived from the original landlord, it was held that it is open to the tenant to show that such payment was made in ignorance of the correct position in law and in fact the person claiming title has not derived any title.[49]

By mere purchase of landlord's interest the purchaser does not *ipso facto* become a landlord entitled to the benefit under Section 116. The relationship of landlord and tenant will have to be established between the purchaser and the tenant before calling in aid Section 116. If the tenant attorns to the purchaser, then Section 116 would come into play.[50]

14. *BENAMIDAR*

The Madras High Court has held that where a lease is executed by a tenant in favour of a *benamidar*, the real owner and not the *benamidar* is regarded as the landlord whose title the tenant is estopped from denying under this section. In a suit by such *benamidar* for rent, the tenant can deny his right to sue on the ground that he is not the person entitled. A *benamidar* has no right to sue unless he can show a legal right to sue under the general law.[51]

The Madras High Court has held that there is a distinction between a case where the contract was entered into by the real owner but the lease was taken in the name of his *benamidar* and the case where a *benamidar* who was in possession grants a lease without disclosing his *benami* character. In the former case the tenant's estoppel may operate in favour of the real lessor and not the *benamidar*, but in the latter case it would operate against the *benamidar* and not the real owner; the *benamidar* must be regarded as landlord for the purpose of Section 116.[52] Where the lease was in favour of the *benamidar* but the rent was paid to the real owner. It was held that as it was found that the agreement entered into was at the instance of or on behalf of the real owner the tenant was discharged from liability to pay the rent to the *benamidar*.[53] The Calcutta High Court is of the opinion that a tenant is estopped from raising the question that his lessor is a *benamidar* of some one to whom he has paid rent.[54]

15. MORTGAGOR AND MORTGAGEE

As between a mortgagor and his mortgagee neither can deny the title of the other for the purposes of the mortgage. A mortgagor canot derogate from his grant so as to defeat his mortgagee's title, nor can the mortgagee deny the title of his mortgagor to mortgage the property.[55] The rule of estoppel between the mortgagor and the mortgagee cannot be invoked in a case where the suit is not based on the mortgage, but is one in repudiation of the mortgage[56]. Where the object of a mortgage is to defraud a third person and the mortgagee is cognisant of and indeed a party to that intended fraud, the mortgagor is not estopped from pleading and proving against his mortgagee seeking to enforce the mortgage that it was a sham transaction, a device to defeat a possible attachment of the property by a creditor[57]. A mortgagor of immoveable property is not estopped from pleading, or taking advantage of, the invalidity

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48. *Upendra Nath* v. *Sathya Charan*, AIR 1961 Cal 151; **relying on** *Md. Emartulla Sircar* v. *Md. Didar Bux*, AIR 1920 Cal 48; *N.B. Gurung* v. *Anil Krishna*, AIR 1957 Mani 25.
49. *Gobinda Bhusan Roy* v. *Jnan Chandra Mukherjee*, ILR (1959) 1 Cal 533; *Mirkhan* v. *Kutub Ali*, 1979 MP LJ 155 (DB); *Pritam Singh* v. *Parmeshwari Devi*, 1974 Raj LR 257.
50. *Kailash Kumar* v. *Banarasi Das*, AIR 1961 J&K 34.
51. *Kuppu Konan* v. *Thirugnana Sammandam Pillai*, ILR (1908) 31 Mad 461; *Bogar* v. *Karam Singh*, (1906) PR No. 141 of 1906 (Civil).
52. *Venkata Narasimha Charyulu* v. *Gangaraju*, AIR 1941 Mad 607; **distinguishing** *Kuppu Koman* v. *Thirugnan*, ILR (1908) 31 Mad 461.
53. *Muttuswamy Aiyar* v. *Solai Kanan*, AIR 1915 Mad 48.
54. *Dina Bandhu Gan* v. *Hakim Sardar*, ILR (1935) 63 Cal 763; **See also** *Prabhat Chandra* v. *Bijoychand*, ILR 50 Cal 572; *Haripada Bhowmick* v. *Kishna Chandra*, (1960) 64 Cal WN 199; **See also** *Hirabai* v. *Jiwanlal*, AIR 1955 Nag 234; *Raj Krishna* v. *Barabani Coal Concern*, AIR 1935 Cal 368.
55. *Hillava Sobhava* v. *Narayanappa Timmayya*, (1911) 13 Bom LR 1200 : ILR 36 Bom 185; *Appu Gounder* v. *Munusami Kone*, AIR 1962 Mad 395; *Shriram* v. *Thakur Dhan Bahadur Singh*, AIR 1965 All 223; *Setty C.K.* v. *Abdul Khadar*, AIR 1956 Mys 14.
56. *Rajana (Mst)* v. *Musahib Ali*, ILR (1937) 13 Luck 178.
57. *Arunachalam* v. *Rangaswami*, ILR (1935) 59 Mad 289.

of his mortgage deed on the ground that, by the inclusion of a fictitious property in the document and getting it registered in an office where otherwise it could not have been registered, a fraud on the registration law was committed in which he participated.[58]

Principles of estoppel do not prevent a mortgagee from proving that subsequent to the mortgage the mortgagor lost his title to the property. But a mortgagee cannot, by repudiation of the mortgage, convert his possession under the mortgage into one adverse to the mortgagor. During the period available to the mortgagor for redemption, the possession of the mortgagee will always be attributed to the mortgage despite any assertion by him of a claim hostile to the mortgagor.[59]

Where the plaintiffs/co-mortgagees induced mortgagor to make payment to them without obtaining the consent of other co-mortgagees, the plaintiffs are not estopped from pleading that redemption was invalid.[60] If the title of the mortgagee in possession has determined (for instance, where there is an eviction by a title paramount), the rule of estoppel does not apply and the mortgagee can show that the title under which he entered into possession has determined in fact and in law.[61]

When a suit for redemption was pending, the land vested in the State under the M.P. Abolition of Proprietary Rights Act 1 of 1951. It was held that the mortgagee cannot be allowed to plead *jus tertii* and plead that the plaintiff had lost his proprietary rights in the suit land, and the right of the plaintiff to possession was not barred under that act. [62]

16. AT THE BEGINNING OF THE TENANCY

This section only provides that a tenant cannot be permitted to deny that the landlord at the beginning of the tenancy had a title to the property. The section does not disentitle a tenant to dispute the derivative title of one who claims, since the beginning of the tenancy, to have become entitled to the reversion. In that sense the principle only applies to the title of the landlord who "let the tenant in" as distinct from any other person claiming to be reversioner[63]. The tenancy under this section does not begin afresh every time the interest of the tenant or of the landlord devolves upon a new individual by succession or assignment.[64]

The section is no bar to a tenant showing that his landlord had not title at a date previous to the commencement of the tenancy. The words of the section leave it open to the tenant to show that his landlord's title has subsequently expired.[65]

The rule of estoppel contempalted by Section 116 is confined to the time when the tenancy commenced. This rule is subject to an important qualification, namely; a tenant is not estopped either before or after the expiration of the lease from contending that the landlord's title came to an end by reason of a transfer or was lost or defeated by title paramount or by operation of law.[66]

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58. *Ramnandan Prasad Narayan Singh* v. *Chandradip Narain Singh*, ILR (1940) 19 Pat 578.
59. *Bodhan* v. *Bhundal Singh*, AIR 1965 All 309.
60. *Ambe Lal* v. *Phina*, AIR 1974 HP 11.
61. *Nakchedi Bhagat* v. *Nakchedi Misr*, ILR 18 All 329.
62. *Bhudilal Deviprasad* v. *Jagannath Das*, AIR 1963 MP 344; **relying on** *Chhote Khan* v. *Md. Obedulla*, AIR 1953 Nag 361; *Gangayya* v. *V. Satyanarayana*, AIR 1925 Mad 1021.
63. *Krishna Prosad Lal Singha Deo* v. *Baraboni Coal Concern*, (1937) 64 IA 311 : 39 Bom LR 1034 : (1938) 1 Cal 1; *Pushpa Sharma* v. *Gopal Lal*, 1986 Raj 187, the tenant led evidence and proved the title of a third person. **See also** *Aras Khan* v. *Ali Mian*, AIR 1985 Pat 126, where in a suit for ejectment the plaintiff was not able to establish relationship of landlord and tenant, but did establish his ownership. There was no reason to deny him the equitable relief of recovery of possession.
64. *Krishna Prosad Lal Singha Deo* v. *Baraboni Coal Concern*, (1937) 64 IA 311 : 39 Bom LR 1034 : (1938) 1 Cal 1.
65. *Bala* v. *Abai*, (1909) 11 Bom LR 1093; *Devidas* v. *Shamal*, (1919) 22 Bom LR 149; *Ata Muhammad* v. *Shankar Das*, ILR (1925) 6 Lah 319; *Dina Bandhu Gan* v. *Hakim Sardar*, ILR (1935) 63 Cal 763; *Krishna Prosad Lal Singha Deo* v. *Baraboni Coal Concern*, (1937) 64 IA 311 : 39 Bom LR 1034 : ILR (1938) 1 Cal 1; *Khalil Sufi* v *Aziz Bhat*, 1960 J&K 132; *Munnalal* v. *Balchand*, ILR 1961 MP 262; *Guruswami Nadar* v. *Ranganathan*, AIR 1954 Mad 402; *Ibotam Singh* v. *Khumbongmyum Krishna Singh*, AIR 1964 Manipur 33; *Hanumanthaiya* v. *Thavakalsan*, AIR 1950 Mys 9; *Kartar Singh* v. *Prem Singh Jaggi*, (1963) 65 Punj LR 595; *Velayudhan Pillai* v. *Ouseph*, AIR 1953 Tra/Co 574.
66. *India Electric Works Ltd* v. *B S. Mantosh*, AIR 1956 Cal 148; *Jaikaran* v. *Sitharam Agarwalla*, AIR 1974 Pat 364; *Raghvendra* v. *Maruhu*, AIR 1971 MP 142 (Vested in Government by an act); *Sugga Bai* v. *(Smt.) Hiralal*, AIR 1969 MP 32; *Mahendra Nath* v. *M*, AIR 1948 Cal 141; *Ganpat Rai* v. *Multan*, ILR 38 All 226 : AIR 1916 All 121; *Subbaraya* v. *Krishnappa*, ILR (1888) 12 Mad 422; *Annamalai Chettiyar* v. *Molaiyan*, AIR 1970 Mad 396; *Hamid*

Where a *panchayat* leased out land belonging to the Government under the specific authority given to it by the Government for a specified period, the *panchayat* have no right over the land or claim arrears of rent from the tenants after the expiry of the authority given to it by the Government. The Government as a true owner can evict the tenants. So in the suits filed by the *panchayat* for collection of arrears of rent, it was held that the tenants will not be estopped from contending that the title was with the Government.[67]

In asuit for eviction by the landlord who put the tenant in possession, though the tenant cannot plead that the landlord had no title to the property when he granted lease, and that he had acquired the property by purchasing a share from the other co-sharers of the landlord or to show that his interest is adverse to the landlord. He can show that the title of the landlord had ceased to exist subsequent to the demise.[68]

Principle of estoppel does not operate where there is an extinction of the title of the landlord subsequent to the creation of tenancy by him in favour of the tenant.[69]

17. LICENSEE

The principle applies to a case of a person coming into possession with permission as licensee.[70]

Where it is proved that the occupation by a person of immoveable property is by permission of another, the occupier is estopped from denying that other's title[71] "There is no distinction between the case of a tenant and that of a common lincensee. The licensee, by asking permission, admits that there is a title in the licensor. The law would imply a tenancy under such circumstances.[72] Where defendant No. 1 came into possession of certain coal mining lands as a licensee of the plaintiff, and subsequently defendant No. 2, as the assignee of, and claiming through, defendant No. 1, entered into possession thereof, it was held that the possession of the lands by both the defendants must be attributed to the possession given to defendant No. 1 by the plaintiff and they were both barred by this section from questioning the plaintiff's title to those lands until they had surrendered possession thereof again to him.[73]

A licensee can resist licensor's claim to possession on the plea of eviction by paramount title holder.[74]

In the case of evacuee property, a lessee allowed a licensee in the property. Later another person created a lease in favour of the licensee, after that person was restored to possession of the property. It was held that by the extension of the principle of estoppel to the licensee the former lessor is entitled to obtain possession from his licensee as the licensee cannot deny title of his immediate lessor.[75]

Ahed v. *Gubamani Behera*, ILR 1970 Cut 49; *Dahchand* v. *Dadamchand*, AIR 1963 Raj 209; *Luckman Chaplain* v. *Peareylal*, AIR 1939 All 670; *Krishna Prosad* v. *Baraboni Coal Concern Ltd.*, AIR 1937 PC 251; *Mohindra Nath* v. *Mohindra Nath*, AIR 1943 Cal 305; *Guruswami* v. *Ranganathan*, AIR 1954 Mad 402; *Abdulla* v. *Moidin Kutty*, AIR 1937 Mad 865 was **dissented** in *Madanlal* v. *Mnakchand*, AIR 1971 Raj 55; *Rajeswar Prasad* v. *Sith Ram Marwari*, AIR 1977 Pat 247; *Uday Pratap Singh Deo* v. *Krushna Padhano*, AIR 1952 Ori 95; *Pritam Singh* v. *Parmeshwari Devi*, AIR 1974 Rajdhani LR 257; *Municipal Board, Etawah* v. *Ramsri*, AIR 1931 All 670; *Krupasinghu Routra* v. *Purna Chandra Misra*, AIR 1973 Ori 44.

67. *Krishna Murthy* v. *Thambaram Municipality*, (1970) 1 MLJ (Mad) 444.

68. *Hirabal* v. *Jivanlal*, AIR 1955 Nag 234; *Krishnaswamy* v. *Jayalakshmi*, AIR 1931 Mad 300; *Krishna Prasad Singh* v. *Adyanath Ghatak*, AIR 1944 Pat 77; *Mujibar Rahaman* v. *Ius Suruti*, AIR 1928 Cal 546; *Ganpat Rai* v. *Multan*, ILR 38 All 226 : AIR 1916 All 121. Note:—1944 Pat 77 was **reversed in** *Adayanath Ghatak Krishnaprasad Singh*, AIR 1949 PC 124.

69. *Banarsidas* v. *Sitaram Bagaria*, ILR 1976 Cut 159.

70. *U G. Sakhara* v. *C G. Gawande*, AIR 1960 Bom 238; *B K. Ghosh* v. *R.K. Joysurendra Singh*, AIR 1959 Manipur 27; *Balram Chunnilal* v. *Durgalal Shiv Narayan*, AIR 1968 MP 81; *Dwijendra Mohan Lahiri* v. *Rajendranath*, AIR 1971 Assam 143; *Ram Prasad Pandey* v. *Jagmohan Lal Shukla*, AIR 1977 All 458; *Zila Parishad* v. *Ram Bharosey*, 1977 All LJ 412; *Nadri Begum* v. *Nasrat Bibi*, 1980 All 210 (Licensee's son).

71. **See** *Mah Hli* v. *Maung San Dun*, (1892) PJLB 4.

72. Per COLERIDGE J., in *Doe Dem Johnson* v. *Baytup*, (1835) 3 Ad & El 188, 192.

73. *Currimbhoy & Co. Ltd* v. *L.A. Creet*, (1932) 35 Bom LR 223 : 60 IA 297 : ILR 60 Cal 980 : AIR 1933 PC 29.

74. *Bodhan* v. *Bhundal Singh*, AIR 1965 All 309.

75. *Nihal Chand* v. *Natha Singh*, (1962) 64 Punj LR 680; *Sajed Mohd Raza Khan* v. *Naubat*, 1952 All LJ (Rev) 329. *Punnamma* v. *Venkata Subba Rao*, AIR 1953 Mad 456; *Dwijendra Mohan Lahiri (Dr.)* v. *Rajendra Nath*, AIR 1971

18. SECTION 116 NOT EXHAUSTIVE

Even before the Act came into force, the Bombay High Court recognised an estoppel of this kind[76] After the Privy Council in *Kumar Raj Krishna Prosad Lal Singha Deo* v. *Baraboni Coal Concern Ltd*[77] declared that the section does not deal with all kinds of estoppel which might arise between the landlord and tenant. The estoppel under this section is wide enough to cover the case of a guarantee who occupies and enjoys under a grant disputing the guarantor's title. Even a mere attornment creates an estoppel against the tenant but that estoppel is not the same as is given statutory effect by this section. There are other kinds of estoppel between tenant and landlord which fall outside the scope of the section. Such an estoppel does not prevent the tenant from showing that he attorned in ignorance of the fact that the landlord has no title. There may be a situation where a lessee or a licensee is estopped from questioning the title of the lessor or licensor such as where a purchaser of a tenanted premises was attorned as landlord by the tenant and rent was paid without any demur whatsoever. The tenant cannot deny the relationship with such landlord.[78]

Estoppel of acceptor of bill of exchange, bailee or licensee.

S. 117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or licence commenced, authority to make such bailment or grant such licence.

***Explanation (1).*—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.**

***Explanation (2).*—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.**

SYNOPSIS

1. *Principle and Scope* ... 1145
2. *Bill of Exchange* ... 1146
3. *Forged Endorsement* ... 1146
4. *Bailee or Licensee* ... 1146

COMMENTS

1. PRINCIPLE AND SCOPE

This section deals with further instances of estoppel by agreement. Sections 116 and 117 are however not exhaustive of the doctrine of estoppel by agreement[79]. Agents for instance are not ordinarily permitted to set up adverse title of a third person to defeat the rights of their principals.

This section deals with the estoppel of an acceptor of bill of exchange, bailee or licensee and states that they are not permitted to deny—that the drawer of the bill had no authority to draw or endorse it. Similarly the bailee is not permitted to deny the authority of a bailor or licensor. But this principle is subject to the two qualifications which are mentioned in explanation 1 and 2.

STEPHEN in his Digest (Art. 105) regarding the qualifications of the general rule states "provided that any such bailee, agent or licensee may show that he was compelled to deliver up any such goods to some person who had a right to them, as against his bailor, principal or licensor, or that his bailor, principal or licensor wrongfully and without notice to the bailee, agent or licensee obtained the goods from a third person who has claimed them from such bailee, agent or licensee."

Assam 143; *Ramprasad Pandey* v. *Jagmohanlal Shukla*, AIR 1977 All 458; *Zila Parishad* v. *Ram Bharosey*, 1977 All LJ 412; *U.G. Sakhare* v. *C.G. Gawandi*, AIR 1960 Bom 238.

76. *Vasudev Daji* v. *Babaji Ranu*, (1871) 8 Bom HCAC 175.
77. (1937) 64 IA 33 : AIR 1937 PC 251.
78. *Kuldeep Harbans Singh* v. *Gojer Brothers (P.) Ltd.*, 1998 AIHC 144 (paras 50 and 51) (Cal).
79. *Rup Chand Ghosh* v. *Sarveswar Chandra*, ILR (1906) 33 Cal 1915.

This section has to be read along with Sections 41, 42 and 120, 121 of the Negotiable Instruments Act 26 of 1881 and also Chapter 9 (Section 148 to 181) of the Indian Contract Act 9 of 1872 and Section 26 of the Paper Currency Act.

2. BILL OF EXCHANGE

Under this section an acceptor of a bill of exchange cannot deny that the drawer had authority to draw such bill or to endorse it. But he may deny that the bill was really drawn by the person by whom it purports to have been drawn (expln. 1).

Section 41 of the Negotiable Instruments Act says that an acceptor is bound by a forged endorsement, even if he knew or had reason to believe the endorsement as forged. Section 42, N.I. Act says that an acceptor is liable though the bill is drawn in a fictitious name. Section 120 of that Act says that maker of a promissory note, a drawer of a bill of exchange, or cheque and acceptor of a bill of exchange for the honour of the drawer are, in a suit by a holder in due course, estopped from denying the validity of the instrument as originally made or drawn.

Under Section 121 of that Act a maker of a promissory note and an acceptor of a bill of exchange payable to, or to the order of, a specified person are, in a suit thereon by the holder in due course are estopped from denying the payee's capacity at the date of the note or bill to endorse the same. Section 122 of the Act says that an endorsee of a negotiable instrument is, in a suit thereon by a subsequent holder, estopped from denying the signature or capacity to contract of any prior party to the instrument. Section 120 of the Act is subject to the general rule contained in Section 26 of Paper Currency Act which states that a *hundi* made payable to bearer on demand is invalid and an endorser of such a *hundi* is not estopped as against the endorsee from setting up its invalidity. This provision in Section 26 of the Paper Currency Act is based on the principle that there is no estoppel against a statute.

See in *Alagappa Chetty* v. *Alagappa Chetty*[80] where it was held that the observation of SHESHAGIRI IYER J., in *Arunachalam* v. *Narayana*, 42 Madras 470, that an endorser of a Negotiable Instrument is estopped as against the endorsee from setting up its invalidity, is **obiter.** 44 Mad 187 **following** *Chidambaram* v. *Avaswami*, 40 Madras 585.

The Privy Council held that it is an established rule that in an action on a bill of exchange or a promissory note against a person whose name properly appears as a party to the instrument, it is not open either by way of claim or defence to say that the signatory was in reality acting for an undisclosed principal; that there is nothing in secs. 24, 25, 26 of the Negotiable Instruments Act to support the contention to the contrary.[81]

Before applying the provision of Section 120, Negotiable Instrument Act, there must be a properly stamped bill of exchange.[82]

It was held that in a suit by the endorsee of a pronote, the maker or the defendant debtor is not barred by Section 120 N.I. Act from raising a defence under Madras Agriculturists Debt Relief Act for the purpose of reducing the rate of interest as per the Act.[83]

3. FORGED ENDORSEMENT

No person can claim a title to a negotiable instrument through a forged endorsement. Such endorsement is a nullity and must be taken as if no such endorsement was on the instrument.[84]

4. BAILEE OR LICENSEE

The bailee and the licensee are placed in the same position as a tenant in the preceding section. The bailee is protected by the bailor's title so long as any better title is not advanced. A bailee entrusted with the care of goods is estopped from claiming that the bailor had no title at the time of bailment. He cannot

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80. ILR 44 Mad 187 : AIR 1921 Mad 382.

81. *Sadasukh Janakidas* v. *Sir Kishan Pershad*, ILR 46 Cal 663 : AIR 1918 PC 146.

82. *Chotey Lal* v. *Girray*, AIR 1926 All 359.

83. *Karuppa* v. *Narayana Swamy and Company*, (1941) 2 MLJ 808; *Anandam* v. *Muthukumaraswami*, (1939) 2 MLJ 658.

84. *Banku Behari Sikdar* v. *Secretary of State for India*, ILR (1908) 36 Cal 239.

set up the title of a third person. But the bailee has no better title than the bailor and consequently if a person entitled as against the bailor claims the goods the bailee has no defence against him.

A bailee or licensee cannot deny that his bailor or licensor had, at the commencement of the bailment or license, authority to make the bailment or grant the license, But a bailee, if he delivers the goods bailed to a third person may prove that such person had a right to them as against the bailor (Expln. 2).

Section 167 of the Indian Contract Act states that if a person, other than the bailor, claims goods bailed, he may apply to the court to stop the delivery of the goods to the bailor and to decide the title to the goods.

Where an automobile garage received a car for reparis, the garage owner is estopped from challenging the title of the person from whom the car is received.[85] When the defendant executed a hire purchase agreement of a motor truck in favour of the plaintiff calling him as owner, the defendant becomes a bailee and cannot deny plaintiff's ownership.[86] A *pujary* of a temple is in the position of either a licensee or bailee and is estopped from questioning the title of the person from whom he got possession of certain articles.[87]

A licensee cannot be permitted to deny that his licensor had at the time when the license commenced authority to grant such license. The licensee of a trademark cannot put an end to the relation of licensor and licensee by repudiating the contract, inasmuch as the concurrence of the other party is essential. In a suit for royalty, brought by the licensors certain jute trade marks against the licensees. The defence taken was that the plaintiffs had no title to the marks in question, and that the license was void. It was held that by virtue of this section the licensees were estopped from questioning their licensor's title or the validity of the license.[88]

The fact that a licensee repudiates the contract would not put an end to the relationship between the parties as the concurrenee of the licensor is necessary to rescind the contract, and his own repudiation of contract would not give him the right to question the title of the licensor.[89]

See also commentary on Section 116 under 'Licensee'.

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85. *Calcutta Credit Corporation Ltd.* v. *Prince Peter of Greece,* AIR 1964 Cal 374.
86. *Gurdial Singh Bedi* v. *Sunda Hire Purchase Corporation,* AIR 1970 Pat 7.
87. *Balram Chunnilal* v. *Durgalal Shivanarain,* AIR 1968 MP 81 : 1967 MPLJ 384.
88. *Hannah* v. *Jagannath,* ILR (1914) 42 Cal 262 : AIR 1915 Cal 520.
89. *Jagarnath & Co.* v. *Cresswell,* ILR (1915) 40 Cal 814; **relying on** *Johnstone* v. *Milling,* (1886) 16 QBD 460.

CHAPTER IX

OF WITNESSES

Who may testify.

S. 118. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

***Explanation.*—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.**

SYNOPSIS

1. *Principle and Scope* ... 1149
2. *Competent and incompetent witnesses* ... 1150
3. *Competent to testify* ... 1152
4. *Competence* ... 1152
5. *Competence—Omission to take oath* ... 1152
6. *Accused as a witness* ... 1153
7. *Evidence of Accomplice* ... 1154
8. *Approver's Evidence* ... 1154
9. *Witness for defence* ... 1155
10. *Child witness—Competence* ... 1155
11. *Child witness—preliminary inquiry* ... 1156
12. *Inquiry—English law* ... 1157
13. *Child witness—Corroboration* ... 1159
14. *Child witness—credibility* ... 1161
15. *Leper* ... 1164
16. *Rustic witness* ... 1164
17. *Power of Attorney Holder* ... 1164
18. *Scribe* ... 1164
19. *Person of Easy Virtue* ... 1165
20. *Advocate* ... 1165
21. *Police Officer—witness* ... 1165
22. *Medical Officer* ... 1165
23. *Interested person* ... 1165
24. *Adversary as Witness* ... 1166
25. *Eye-witness* ... 1166
26. *Falsus in Uno, falsus in omnibus* ... 1166
27. *Explanation—Lunatic* ... 1166
28. *Incompetency from defective intellect* ... 1167
29. *Testimonial compulsion* ... 1167
30. *Appreciation of evidence* ... 1167

COMMENTS

1. PRINCIPLE AND SCOPE

Under this section all persons are competent to testify, unless they are, in the opinion of the Court (a) unable to understand the questions put to them, or (b) to give rational answers to those questions, owing to (i) tender years, (ii) extreme old age, (iii) disease of mind or body, or (iv) any other such cause. Even a lunatic, if he is capable of understanding the questions put to him and giving rational answers, is a competent witness.

This section does no more than enunciate the English rule with regard to the competency of parties as witnesses without in any way making admissible all the evidence, which might be given by them.

The evidence of a child witness is generally admissible in evidence but weight to be attached to it, is a matter of consideration for the Court.[1]

The competence of a witness to give evidence has to be distinguished from compellability to give evidence. For instance, Section 122 dealing with communications during marriage, Section 124 dealing with official communications, Section 125 dealing with information as to commission of offences from magistrates and police officers & Section 129 dealing with confidential communications with legal advisors, state that such persons cannot be compelled to disclose to the court by giving evidence.

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1. *Ghewar Ram* v. *State of Rajasthan*, 2001 Cr LJ 4460 (para 16) (Raj).

Competency is to be distinguished from compellability. A person may be admitted to give evidence, though in certain cases he will not be competent and compellable. A person, however, though competent and compellable as a witness may not be competent or may not be compellable to give evidence as to particular matters.[2]

With certain exceptions as to criminal proceedings, all witnesses who are capable of understanding the nature of an oath and giving rational testimony are competent.[3]

2. COMPETENT AND INCOMPETENT WITNESSES

In civil proceedings, every person[4] is now[5] a competent witness[6] unless he is (I) a child of such tender years that he has neither sufficient intelligence to testify nor a proper appreciation of the duty of speaking the truth[7]; (II) a person who at the time of being tendered as a witness is mentally incapable of testifying[8]; (III) deaf and dumb, and unable by writing or signs or otherwise to understand questions put to him, or to communicate his answers to others[9]; (IV) a person who, from temporary causes, such as illness or drunkenness, is for the time being incapable of understanding questions and of giving a rational account of events; or (V) a person who does not appreciate the nature and obligation of an oath or affirmation.[10]

In criminal cases the rules as to the competence and incompetence of witnesses are the same as in civil matters, subject to special statutory rules governing the unsworn evidence of young children[11], the right of an accused person to make an unsworn statement instead of giving evidence on oath or affirmation[12], and the evidence of the accused's wife or husband[13]

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2. PHIPSON-EVIDENCE 13th Edn., p. 690 (para 31.01).
3. PHIPSON-EVIDENCE 13th Edn., p. 693 (para 31.07).
4. A limited company is not a competent witness. Evidence which binds the company may be given by a proper officer: *Penn-Texas Corpn* v. *Murat (Anstalt)*, (1964) 1 QB 40 : (1963) I All ER 258 (CA). It was doubtful whether a person under sentence of death could give evidence: *R* v. *Webb*, (1867) II Cox CC 133, per LUSH J; of *R* v. *Fitzgerald*, (1884) cited in 2 TAYLOR'S LAW OF EVIDENCE (12th Edn.) 849n, per HARRISON J.
5. At common law there were various classes of person who were incompetent as witnesses, *e.g.* parties to an action or their husbands or wives, persons and persons who had no religious belief (**see** STARKIE'S LAW OF EVIDENCE (4th Edn.) 116) or had conscientious objections to taking an oath.
6. Persons interested were made competent witnesses by the Evidence Act 1843; parties to an action by the Evidence Act 1851, S. 2, and the Evidence Further Amendment Act 1869 (repealed); the husbands and wives of parties by the Evidence Amendment Act 1853 and the Evidence Further Amendment Act 1869 (repealed); persons previously convicted of a crime or offence by the Evidence Act 1843; and persons who had no religious belief or had conscientious objections to taking an oath by provisions re-enacted in the Oaths Act 1888. A husband who has been convicted of an agrravated assault on his a rights to be heard as a witness on an application by her to justices for a separation order on the ground of that conviction; *Jones* v. *Jones*, (1895) p. 201, although the merits of that conviction cannot be reviewed, *Bryant* v. *Bryant*, (1914) p. 227 DC.
7. *R* v. *Brasier*, (1779) 1 Leach 199, where a general rule, applicable to both civil and criminal proceedings, was stated. It has been said that it is most undesirable in any circumstances to call a child as young as five years old: *R* v. *Wallwork*, (1958) 42 Cr App Rep 153, CCA.
8. A person suffering from mental disorder may give evidence if the judge atthe trial at which he is tendered as a witness is satisfied that he is then of sufficient understanding to give rational evidence; the mere fact that such a person is then suffering from delusions does not make him incompetent if they do not make him incapable of dealing rationally with the matters about which he is to be asked; *R* v. *Hill*, (1851) 2 Den 254, CCR; *R* v. *Whitehead*, (1866) LR 1 CCR 33; *R* v. *Dunning*, (1965) Cri LR 372, CCA. Before a person who is known to be in such a state of mind can be received as a witness there should be a preliminary inquiry as to his fitness to give evidence; *Spittle* v. *Walton*, (1987) CRII Eq 420.
9. *Dickenson* v. *Blisset*, (1754) 1 Dick 268; *R* v. *Ruston*, (1786) 1 Leach 408; *Morrison* v. *Lennard*, (1827) 3 C&P 127; *Bartholomew* v. *George*, (1851) cited in Best's Law of Evidence (12th Edn.) 134, per Lord CAMPBELL CJ; *R* v. *Whitehead*, (1868) LR 1 CCR 33; *R* v. *Imrie*, (1916) 12 Cr App Rep 282, CCA.
10. An adult may be incompetent from insufficient appreciation of the moral duty of speaking the truth; *R* v. *Wade*, (1825) 1 Moo. CC 86, CCR; However, no inquiry is normally conducted into a witness's appreciation of the duty to tell the truth.
11. Children and Young Persons Act 1933, S. 38.
12. See the Criminal Evidence Act 1898, S. 1 proviso (h).
13. Criminal Evidence Act 1898, Ss. 1, 4. At common law the spouse of a party was generally incompetent as a witness either for or against him. In civil cases this disability was removed by statute, see note 3, *supra*. *In Monroe* v. *Twistleton*, (1802) Peake Add Cas 219 it was held that the disability was not removed, so ar as transactions taking place during the marriage are concerned, by dissolution of the marriage by Act of Parliament. Although not

With a few exceptions, all persons are now competent[14] as distinct from compellable, to give evidence in judicial proceedings, including probably the Sovereign[15] judges[16]; and counsel[17]. As to these last, advocates may in strictness, although the practice is highly undesirable, testify either for or against the party whose case they are conducting[18]. The same rule applies to arbitrators[19]; jurymen[20]; and the parties in civil cases[21], and their wives or husbands[22]. Also included are persons interested in the result[23] bankrupts, the debtor being also competent to prove the petitioning creditor's debt,[24] believers of all creeds, as well as atheists[25]; deaf mutes, providing the court is satisfied that they understand the nature of an oath[26]; accomplies[27]; and convicts.[28] Even a person convicted of perjury is competent[29], as also is a person under sentence of death[30].

"In civil cases, the basic test of competence is whether the witness is capable of understanding the nature of an oath and of giving rational testimony. In order to test a witness's understanding of the nature of an oath, it is not appropriate to embark on a detailed examination of theological appreciation.[31] Rather, it should be ascertained whether the witness has a sufficient appreciation of the solemnity of the occasion, and the added responsibility to tell the truth which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.[32] The basic test of competence applies to all adults, but is not the test used for children in all circumstances.

In criminal cases, the basic test of competence is whether the person is able to (1) understand questions put to him as a witness, and (2) give answers to them which can be understood.[33] A witness who satisfies this basic test of competence and who has attained the age of 14 may be sworn unless he or she is shown not to have sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking an oath.[34] A witness who has not attained the age of 14 may not be sworn."[35]

Any body can give evidence in the Court provided that he is acquainted with the facts of the case. It is not necessary that persons giving evidence on behalf of bank must have power of attorney or written authorisation.[36]

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specifically overruled or abrogated, this decision cannot be regarded as representing the modern law. (HALSBURYI LAWS OF ENGLAND, 4th Edn., Vol. 17, p. 162) (para 131).

14. For the former disqualifications, *i.e.* interest which included parties, consorts and other witnesses, atheism and crime, **see** PHIPSON (11th ed.), ff 30-13 to 30-15, but for husband and wife, **see** f 31-06, *post*.
15. Berkeley Peerage, The Times, June 27, 1891; *R* v. *Mylius*, The Times, February 2, 1911.
16. *Ante*, ff 2-08, 14-11.
17. *Ante*, f 14-13.
18. *Cobbett* v. *Hudson*, (1852) 1 E&B 11, not **following** *Stones* v. *Byron*, (1846) 4 D & L 393 and *Deane* v. *Packwood*, 4 Dowl & L. 395n; **see also** *R.* v. *Secretary of State for India*, (1941) 2 K.B. 169. **See** *post*, f 31-43 as to when this evidence may be given without oath.
19. *Ante*, f 14-12.
20. *Ante*, f 14-14; *R* v. *Rosser*, (1836) 7 C&P 648; *Manley* v. *Shaw*, (1840) *Car. & M* 361.
21. Evidence Act 1851, S. 2.
22. Evidence (Amendment) Act 1853, S. 1; Evidence Further Amendment Act 1869, S. 3; Matrimonial Causes Act 1973, S. 48.
23. Evidence Act 1843, S. 1.
24. Ex P., Haes (1902) 1 K.B. 98.
25. Providing they comply with the provisions of the Oaths Act 1978, *post*, ff 31-34 *et seq*.
26. *R.* v. *Ruston*, (1786) 1 Leach 408; *R.* v. *O'Brien*, (1845) 1 Cox 185, **See** *post*, f 33-03.
27. Post, f 32-06.
28. Evidence Act 1843, S. 1; *R.* v. *Dytche*, (1890) 17 Cox 39, *ante*, f 10-28.
29. **See** 65 JP 496; **contra**, OKE'S MAG. SYNOP. (14th ed.), p. 879.
30. *R.* v. *Fitzgerald*, (1884) Dublin, November 6, 1884, per HARRISON J., **cited** TAY., S. 1347n., not **following** *R* v. *Webb*, (1867) 11 Cox 133, **contra**, which case is doubted both in TAY., S. 1347n. and STEPH, art. 116n.
31. *R.* v. *Bellamy*, (1985) 82 Cr App R 222, 225.
32. *R.* v. *Hayes*, (1977) 64 Cr App R 194, 196. This case involved children but the test was said to apply *a fortiori* to adults in *R.* v. *Bellamy*, (1985) 82 Cr App R 222.
33. Youth Justice and Criminal Evidence Act 1999, S. 53(3).
34. Youth Justice and Criminal Evidence Act 1999, S. 55.
35. PHIPSON ON EVIDENCE, 15th Edn. (2000), pages 150-151 (paras 8-08 and 8-09).
36. *Central Bank of India* v. *Tarseema Compress Wood Mfg. Co.*, AIR 1997 Bom 225.

3. COMPETENT TO TESTIFY

The competency of a person to testify as a witness is a condition precedent to the administration to him of an oath or affirmation and is a question distinct from that of his credibility when he has been sworn or has been affirmed. In determining the question of competency the Court, under this section, has not to enter into inquiries as to the witness's religious belief or as to his knowledge of the consequences of falsehood in this world or the next. It has to ascertain, in the best way it can, whether, from the extent of his intellectual capacity and understanding, he is able to give a rational and intelligent account of what he has seen or heard or done on a particular occasion. If a person of tender years or of very advanced age can satisfy these requirements, his competency as a witness is established.[37]

Even the husband or wife of a party is a competent witness against the other spouse in view of Section 120. Under Section 119 even a deaf and dumb person may be a competent witness *provided* he gives evidence by writing or by signs in open court, making them intelligible, and is able to understand the questions put to him.

Section 118 deals with the competence of a person to testify before the Court. The incompetence of a person is recognised in the case of persons of tender years, extreme old age, and disease whether of body or mind, or any cause of the same kind. A child of tender years thus becomes incompetent only in case the Court considers it as incompetent. The test contemplated in this section is to find out whether the person is prevented from understanding the questions put to him or from giving rational answers to those questions. If the child understands the questions put to it and gives rational answers to those questions it can be taken that he/she is a competent witness to be examined.

Where the Court, without giving a finding as to the competency of the injured witness, relied on her evidence and acquitted the accused, the trial was held to be vitiated and re-trial was ordered.[38]

4. COMPETENCE

Section 4 of the Oaths Act says that all witnesses are to take oath or affirmation. But under the proviso, Sections 4 and 5 of that Act shall not apply to a child witness under the age of 12 years. Therefore, if once the Court is satisfied that a child below 12 years of age is a competent witness then such witness can be examined without oath or affirmation.

Where the court is satisfied that the child witness understands the duty of speaking the truth though he does not understand the nature of an oath or affirmation, the provisions of Sections 5 and 6 Oaths Act do not apply and court should proceed to record the evidence.[39]

The competency of a child witness is different from his understanding the effect of oath or affirmation. Unless the child understands the effect of oath, it is not necessary to administer the oath.[40]

Such evidence, if tendered for the prosecution, must be "corroborated by some other material evidence in support thereof implicating the accused.[41]

5. COMPETENCE—OMISSION TO TAKE OATH

Even Section 7 (old Section 13) of the Oaths Act states that even if there was omission to take any oath or make any affirmation, it would not invalidate any proceeding or render inadmissible any evidence. Section 7 is unqualified in its terms and applies to all omissions accidental or deliberate.

The Supreme Court in *Rameshwar* v. *State*[42] observed: "An omission to administer an oath, even to an adult, goes only to the credibility of the witness and not his competency. The question of competency is dealt with in Section 118 Evidence Act. The Oaths Act does not deal with competency and under Section 13 of that Act omission to take oath does not affect the admissibility of the evidence. It therefore

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37. *Queen-Empress* v. *Lal Sahai*, ILR (1888) 11 All 183; *Quasim Ali* v. *State*, ILR (1952) Raj 435; *Purna Chandra* v. *State*, AIR 1959 Cal 306; *Ghewar Ram* v. *State of Rajasthan*, 2001 Cr LJ 4460 (para 16) (Raj).
38. *State of Karnataka* v. *Shahabuddin*, 1995 Cr LJ 3237 (paras 12 and 13) (Kant).
39. *Shamba @ Muniswamy* v. *State*, ILR 1960 Mys 311.
40. *Sudhakaran* v. *State*, 1983 Ker LT 5941.
41. Section 38(ii) (PHIPSON EVIDENCE, 13th Edn., p 695) (para 31.11).
42. AIR 1952 SC 54. **See also** *Bhagwania* v. *State of Rajasthan*, 2001 Cr LJ 3719 (para 21) (Raj).

follows that the irregularity in question cannot affect the admissibility of the evidence of the girl." The court relied on *Md Sugal Esa* v. *The King*[43], wherein it was observed "Section 13 Oaths Act, is quite unqualified in its terms and there is nothing to suggest that it is to apply only where the omission to administer the oath occurs *per incuriam*. If that had been the intention of the Legislature, it would have been simple to insert the words in this section to that effect....It may be observed that this question can no longer arise in India because in 1939 the Legislature passed the Oudh (Amendment) Act 39 of 1939 which settles the law in accordance with the Bengal and Oath decisions referred to above." The decisions referred to by the Privy Council are *R* v. *Sewa Bhogta,*[44] and *Ram Samujh* v. *Emperor*, 10 OC 337.[45]

6. ACCUSED AS A WITNESS

Previously the accused was not a competent witness to testify on his own behalf. So he could not be administered an oath. Prior to the amendment of the Cr. P. Code it was held that the accused though competent to testify is an incompetent witness.[46]

By reason of the amendment of Section 342-A, Cr. P.C. in 1955 (Present Section 315(1), Cr. P.C. of 1973), the accused may wish to examine himself as a defence witness. In such a case he has to take the oath.

Under English Law, in criminal proceedings the accused[47] and the wife or husband of the accused (except in certain cases[48]) are incompetent as witnesses for the prosecution.

Taking an oath or making an affirmation is an indispensable pre-requisite for any person giving evidence in a court, excepting under special laws like under Section 7 of the Prevention of Corruption Act or in proceedings under Section 107, Cr. P.C. or maintenance proceedings under the Cr. P.C. The accused is not a competent witness.[49]

Accused who answers questions put to him u/Section 342, old Cr. P.C. (now Section 313, Cr. P.C.) can not be treated as a witness.[50]

An accused who is convicted on his own plea of guilty is a competent witness against his co-accused, the reason being that on his conviction he ceases to be an accused, and the bar under Section 5 of the Oaths Act (old) against administration of oath to him cannot apply. The fact that his conviction was wrong or was subsequently set aside in appeal, cannot affect his competency.[51]

Evidence adduced by accused in his defence is not inadmissible against co-accused, though, such evidence should be received with great scrutiny and care.[52] The mere fact that a person was convicted for the same offence does not in any way detract from his competence to give evidence against his co-accused.[53] Even when the pardon granted to an accused is withdrawn he is a competent witness against other accused, and there is no bar to his examination at the fresh trial necessitated by the retirement of the Sessions Judge.[54] If once an accused is either discharged or convicted or acquitted or his case is withdrawn he becomes a competent witness for prosecution.[55]

Art. 20(3) of the Indian Constitution states that no person accused of an offence shall be compelled to be a witness against himself. It is a protection given to an accused, but if he volunteers to give

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43. AIR 1946 PC 3.
44. 14 Beng. LR 294 (FB).
45. *Lalaram Hariram* v. *State of M.P.*, AIR 1960 MP 59; *Rameshwar* v. *State of Rajasthan*, AIR 1952 SC 54; *Dhansai Sahu* v. *State*, AIR 1969 Ori 105; *Lalaram* v. *State*, AIR 1969 MP 59; *R.* v. *Sewa Bhogta*, 14 Beng. LR 294 (FB); *Hari Ramji* v. *Emperor*, 20 Bom LR 365 : AIR 1918 Bom 212; *R.* v. *Sashi*, 24 CWN 767; In re : *Chinna Venkadu*, ILR 38 Mad 550; *Emperor* v. *Viraperumal*, ILR (1892) 16 Mad 105.
46. Re : *Nga Po Min*, 1932 Rang 198 FB; *Nafar Sheikh* v. *Emperor*, AIR 1914 Cal 276.
47. *R.* v. *Rhodes*, (1889) 1 Q.B. 77; Criminal Evidence Act 1898, S. 1(a) (**see** *Appendix* f 42-01).
48. *Post*, ff 31-20 *et seq*.
49. Re : *B.N. Ramakrishna Naidu*, AIR 1955 Mad 100.
50. *Ranjit Singh* v. *State*, AIR 1952 HP 81.
51. *Ranjha* v. *State*, AIR 1952 HP 5.
52. *Sriramulu Naidu* v. *State*, (1963) 2 Cr LJ 546 (AD); **following** *Shapurji Sorabji* v. *Emperor*, AIR 1936 Bom 154; *Nandgopal* v. *State*, AIR 1951 Nag 189.
53. *Vaikuntham Jaganadham* v. *State*, AIR 1952 Ori. 164.
54. *State* v. *Bhoora*, AIR 1961 Raj 274.
55. *Tulshi Lal Sao* v. *Union of India*, 1970 BLJR 915.

evidence there would not be any compulsion to give evidence and so Art. 20(3) would not be attracted. (see Section 73 of this Act)[56]

Where there are two accused a Magistrate cannot convert one of them into a witness against the other except when a pardon has been lawfully granted.[57]

7. EVIDENCE OF ACCOMPLICE

In *Laxmipat Choraria* v. *State of M.P.*[58] when one Ethyl Wong arrived at Bombay, two customs officers who were waiting for her, questioned her. She admitted her part in a smuggling racket set up by another man and gave a statement. The prosecution did not name her as one of the accused in the case. The other accused in the trial court raised a question that she should also be tried along with them so that her testimony might not be available against them.

Subsequently the accused did not raise that question. HIDAYATULLAH. J., observed: "Now there can be no doubt that Ethyl Wong was a competent witness. Under Section 118 of the Indian Evidence Act all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them for reasons indicated in that section.....If the customs authorities treated Ethyl Wong as a witness and produced her in court she was bound to answer all questions and could not be prosecuted for her answers.....In India the privilege of refusing to answer has been removed so that the temptation to tell a lie may be avoided, but it was necessary to give this protection. The protection is further fortified by Art. 20(3) which says that no person accused of any offence shall be compelled to be a witness against himself. This Article protects a person who is accused of an offence and not those questioned as witnesses. A person who voluntarily answers questions from the witness box waives the privilege which is against being compelled to be witness against himself, because he is then not a witness against himself but against others. Section 132 of the Evidence Act sufficiently protects him since his testimony does not go against himself. In this respect the witness is in no worse position than the accused, who volunteres to give evidence on his own behalf or on behalf of a co-accused. There too the accused waives the privilege conferred on him by the Article since he is subjected to cross-examination and may be asked questions incriminating him. The evidence of Ethyl Wong cannot, therefore, be ruled out as that of an incompetent witness. Since Ethyl Wong was a self-confessed criminal, in conspiracy with others who were being tried, her evidence was accomplice evidence.....Section 133 of the Evidence Act makes the accomplice a competent witness against an accused person."

Dealing with the question whether she could be administered an oath in view of the prohibition of Section 5 of the Oaths Act, after referring to Section 5 of Oaths Act and Section 342-A (old) Criminal Procedure Code and Section 337 Cr. P.C. (old) Section 338 Cr. P.C. (old) observed: "The consensus of opinion in India is that the competency of an accomplice is not destroyed because he could have been tried jointly with the accused but was not and was instead made to give evidence in the case. Section 5 of Indian Oaths Act and Section 342 Cr. P.C. do not stand in the way of such a procedure."

8. APPROVER'S EVIDENCE

An approver is a competent witness.[59] During the course of a police investigation into a case of house-breaking and theft, several persons were arrested, one of whom made certain disclosures to the police and pointed out several houses which had been broken into by his accomplices. Thereupon the police discharged him, and made him a witness. At the trial he gave evidence against his accomplices, who were all convicted. It was held that his evidence was admissible under this section though he had been illegally discharged by the police.[60]

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56. In re : *Central Calcutta Bank Ltd.*, AIR 1957 Cal 520.
57. *Reg.* v. *Hanmanta*, ILR (1877) 1 Bom 610. See *Nabi Bakhsh* v. *Emperor of India*, (1902) PR No. 12 of 1902 (Cr); *Allahabad* v. *King Emperor of India*, (1906) PR No. 9 of 1906 (Cr).
58. AIR 1968 SC 938.
59. *State of Bihar* v. *Srilal Kejriwal*, AIR 1960 Pat 459.
60. *Queen-Empress* v. *Mona Puna*, ILR (1892) 16 Bom 661.

9. WITNESS FOR DEFENCE

Though a witness was cited along with others as eye-witnesses in the charge-sheet, and that witness was examined as defence witness, it was held that as a defence witness, she is a competent to speak to the occurrence.[61]

There is no provision in Criminal Procedure Code warranting a practice of examining the same person as a witness for prosecution and also for the defence. Such practice is to be condemned.[62]

10. CHILD WITNESS—COMPETENCE

With respect to children, no precise age is fixed by law within which they are absolutely excluded from giving evidence on the presumption that they have not sufficient understanding. Neither can any precise rule be laid down respecting the degree of intelligence and knowledge which will render a child a competent witness. In all questions of this kind much must depend upon the good sense and discretion of the Judge. In practice, it is not unusual to receive the testimony of children of eight or nine years of age when they appear to possess sufficient understanding.[63]

"There is no fixed age below which children are incompetent to give evidence.[64]

In civil proceedings, a child is clearly competent if the Court is of the opinion that he or she understands the nature of an oath. However, even if a child does not understand this, his or her evidence may still be heard by the Court if it is of the opinion that (1) he understands that it is his duty to speak the truth, and (2) he has sufficient understanding to justify his evidence being heard. .....

.....

In criminal proceedings, a person of any age is competent to give evidence if he or she is able to (1) understand questions put to him or her as a witness, and (2) give answers to them which can be understood."[65]

Competency of the child witness can be ascertained by questioning him/her to find out intelligence to understand the occurrence witnessed and duty to speak the truth before the Court and thereby his/her statement inspiring confidence can be relied upon even without corroboration.[66]

Competency of a child witness cannot be questioned if his evidence is otherwise probable and true.[67] A child witness is not an incompetent witness whose evidence may have to be always discarded.[68]

Child of three and a half years is not a competent witness due to the tender age.[69]

A child of 8 years who does not understand questions or is unable to give rational answers, is not a competent witness.[70] If a boy in spite of his young age can both understand questions and give rational answers to them he should be examined.[71] The Supreme Court accepted the evidence of a child of five years who was the sole witness to murder by a domestic servant.[72]

A girl of five years appeared as a witness and stated that the accused, her step-mother, had thrown her and her younger sister aged about three years into the well. The question arose whether she was a competent witness because of her tender age. It was held that a child of tender years was a competent

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61. *Joseph* v. *State of Kerala*, 1957 Ker LT 500.
62. *Gopiram* v. *State*, AIR 1954 MB 21.
63. TAYLOR, 12th Edn., S. 1377, p. 869; *Arulan Israel* v. *State*, ILR (1954) TC 1200.
64. *R* v. *Z.*, (1990) 2 QB 355, 359-361; *DPP* v. *M.* (1998) 2 WLR 604. Criminal cases. Youth Justice and Criminal Evidence Act 1999, S. 53(1).
65. PHIPSON ON EVIDENCE, 15th Edn. (2000), pages 152-153 (para 8-11).
66. *Ram Bilas Singh* v. *State of Bihar*, 1999 Cr LJ 2360 (paras 7 and 9) (Pat). **See also** *Dhani* v. *State*, 1999 Cr LJ 2712 (para 6) (Ori).
67. *Niranjan Amratlal* v. *Uttamran Atmaram*, ILR 1970 Guj 691: 1979 Raj Cr C 15.
68. *Radhey Shyam* v. *State of U.P.*, 1993 Cr LJ 3709, (para 6) (All).
69. *Padam Singh* v. *State of Rajasthan*, 1982 Raj LW 469.
70. *State of Bihar* v. *Hanuman Koeri*, 1971 Crl LJ 187 (Pat).
71. *Queen-Empress* v. *Ram Sewak*, ILR (1900) 23 All 90.
72. *Suresh* v. *State of U.P.*, AIR 1981 SC 1122. **Also see** *Ram Bilas Singh* v. *State of Bihar*, 1999 Cr LJ 2360 (paras 9, 11 and 12) (Pat). Testimony of a child witness found unreliable, acquittal upheld. *State of Delhi* v. *Vijay Pal*, AIR 1980 SC 1621; *CP Fernandes* v. *U.T. Goa*, AIR 1977 SC 135.

witness. The question to be decided in each case is whether a particular child who has appeared in the witness-box is intelligent enough to be able to understand as to what evidence he or she is giving and to be able to understand the question and to be able to give a rational answer.[73] Even in the absence of oath the evidence of a child witness can be considered, provided that such a witness is able to understand the questions and is able to give rational answers thereof. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.[74] Where the questions asked during the preliminary examination were not recorded but the answers recorded indicated the questions asked, such an omission does not render the evidence of the child witness unworthy of acceptance.[75]

Children particularly of tender age have good memory and no conscience. They can easily be taught stories which they believe to be true, and are influenced by fear and punishment or hope of reward and by desire of notoriety. While considering the evidence of a child, these considerations should not be lost sight of.[76]

Where the children, who deposed against the accused were his daughters and possessed sufficient understanding, their testimony could be acted upon.[77]

11. CHILD WITNESS—PRELIMINARY INQUIRY

The Supreme Court has held that it is desirable that judges and magistrates should always record their opinion that the child understands the duty of speaking the truth, and state why they think so. Otherwise the credibility of the witness may be seriously affected, so much so that in some cases it may be necessary to reject the evidence altogether.[78]

In *Md. Sugal Esa* v. *The King*,[79] the Privy Council observed. "It is not to be supposed that any judge would accept as a witness a person who he considered was incapable not only of understanding the nature of an oath but also the necessity of speaking the truth when examined as a witness."[80]

The competency of a person to testify as a witness is a condition precedent. To administer oath or affirmation is a question distinct from his credibility. The court is at liberty to test the capacity of a witness to depose by putting proper questions and know whether there was proper understanding and the person was able to give a rational account of what he has seen. If a person of tender years can satisfy those requirements he can be treated as a competent witness. That the judge can form his own opinion[81] vests in the Court the discretion to decide whether an infant is or is not disqualified to be a witness by reason of understanding or lack of understanding. The proposition that the competency of the witness should be tested before his examination is commenced is not quite justified by the provisions of this section.[82] According to the Bombay and the Rangoon High Courts when a witness is of tender years the

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73. *Dato* v. *State*, (1954) Pun 825. **Also see** *Narayan Iranna Potkanthi* v. *State of Maharashtra*, 1994 Cr LJ 1752 (para 10) (Bom); *Akbar Ashraf Khan* v. *State of Maharashtra*, 1995 Cr LJ 3575 (para 13) (Bom), **relying on** *State of Maharashtra* v. *Prabhu Barku Gade*, 1995 Cr LJ 1432 and *Vadivelu Thevar* v. *The State of Madras*, AIR 1957 SC 614.

74. *Dattu Ramrao Sakhare* v. *State of Maharashtra*, (1997) 5 SCC 341 : 1997 SCC (Cri) 685.

75. *State of Maharashtra* v. *Prabhu Barku Gade*, 1995 Cr LJ 1432 (para 18) (Bom).

76. *Kurrahwa* v. *State of U.P.*, 1985 All LJ 1036.

77. *State of Maharashtra* v. *Vilas Pandurang Patil*, 1999 Cr LJ 1062, at p. 1066 (Bom). Children of deceased, eye-witnesses, answering preliminary questions and satisfying that they were answering intelligently and fearlessly, giving details of occurrence, withstood test of cross-examination, their evidence acceptable. *Baby Kandayanathil* v. *State of Kerala*, 1993 Cr LJ 2605 (para 4) (SC) : AIR 1993 SC 2275; *Prakash* v. *State of M.P.*, AIR 1993 SC 65 (para 11); *Badi Guravaiah* v. *State of A.P.*, 1993 Cr LJ 3496 (paras 9 and 10) (AP); sole testimony of minor son of deceased found credible, *Dayanand* v. *State of Haryana*, 1994 Cr LJ NOC 407 (P&H).

78. *Rameshwar* v. *State*, AIR 1952 SC 54. **See also** In re : *Porapati Muthiah*, ILR 1965 AP 650; *State of Mysore* v. *Hanumantha*, 1962 Mad LJ (Cri) 355 : 39 Mys. LJ 823; In re : *Raju Shetty*, AIR 1960 Mys 48; *Dhanna* v. *State*, AIR 1951 Raj 37.

79. 1946 PC 3.

80. In re : *Raju Shetty*, AIR 1960 Mys 48.

81. *Purna Chandra* v. *State*, AIR 1959 Cal 306 **following** *Fakir* v. *Emperor*, 11 CWN 51; *Dhansai Sahu* v. *State*, AIR 1969 Ori 105; *Narasingha Karwa* v. *State*, 1975 Cr LJ 1560 (Ori); *Moti Mahal Theatres Ltd* v. *Babu Lal*, AIR 1955 Punj 109; *Abdul R. Patham* v. *State*, (1983) 1 Bom LR 489; *Bipin Bihari Sahu* v. *State*, 1986 Cr LJ 406.

82. *Krishna Kahar* v. *Emperor*, ILR (1939) 2 Cal 569 : AIR 1940 Cal 182; *Nafar Sheikh* v. *Emperor*, ILR (1913) 41 Cal 406 : AIR 1914 Cal 276.

Court should satisfy itself that the witness is competent to testify.[83] The object of putting questions to a child witness is that the time of the Court should not be wasted if it is found, as the result of a preliminary inquiry, that the child is neither intelligent nor can he give evidence which amy be acceptable.[84] But there is no legal obligation to ask preliminary questions[85] and recording of questions is also not necessary where the answers recorded clearly suggest the questions asked.[86]

Merely because the trial judge did not put certain formal questions to the child witness or that he did not append a certificate that the child understood the duty of speaking the truth, the statement of the child does not become ineffective and its probative force will not suffer on that ground.[87] Omission of the trial judge to put questions to a child witness, unconnected with the case, to satisfy himself whether the witness is able to understand the questions and to return co-herent answers and to incorporate that in the record, does not render the evidence of child witness inadmissible and unreliable.[88] Keeping a record of preliminary examination is not a condition precedent to taking of evidence. It may be desirable but not an invariable requirement of law.[89]

When no oath is administered to a child the evidence is required to be taken in the form of questions and answers; as a child witness is apt to be swayed away by influences. If it is done, not only the trial court but the appellate court also is in a position to gather whether the answers are relevant and whether they are tutored replies. It is a safeguard given to the accused to check the veracity of the child witness. Though, failure to record is not fatal, it is bound to result in some prejudice to the accused.[90]

In examining a child witness, the procedure contemplated under this section must be followed.[91]

12. INQUIRY—ENGLISH LAW

The conduct of an inquiry by the judge as to whether a child should be sworn or not may well present problems today. The rules were criticised indeed by the Criminal Law Revision Committee in trenchant forms in their eleventh report.[92]; "The inquiry whether the child understands the nature of the oath, if carried out conscientiously, seems to us unrealistic; and the investigation sometimes made by the court as to whether the child believes in divine retribution for lying is really out of place when the question is whether he understands how important it is for the proceedings that he should tell the truth to the best of his ability about the events in question in particular that he should not say anything against the accused which he does not really believe to be true and that he should say if he did not see something or does not remember it. For similar reasons the test in S. 38 of the 1933 Act whether the child 'understands the duty of speaking the truth' seems inadequate; for even very young children understand this duty in a general way without necessarily understanding the particular importance of telling the truth in the proceedings. Some judges fee that the inquiry which they have to make sometimes verges on force."

The Committee therefore recommended that children over 14 should always give evidence on oath and children under that age should always give evidence unsworn. This recommendation has the merit of simplicity and should be implemented.

The Court of Appeal has recently given guidance as to the principles to be applied to such inquiries today. In *R.* v. *Hayes*, the appellant had been convicted of offences involving indecency with three boys. It was said on appeal that the judge had wrongly allowed two of the boys to be sworn. One of them in answer to the judge's inquiry had revealed that he was ignorant of the existence of God. The Court said:

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83. *Emperor* v. *Hari*, (1918) 20 Bom LR 365; *Ah Phut* v. *King*, ILR (1940) Ran 104 : AIR 1939 Rang 402.

84. *Karu Singh* v. *Emperor*, ILR (1941) 20 Pat 893 : AIR 1942 Pat 159.

85. *Lakhan Singh* v. *King-Emperor*, ILR (1941) 20 Pat 898 : AIR 1942 Pat 183.

86. *State of Maharashtra* v. *Prabhu Barku Gade*, 1995 Cr LJ 1432 (para 19) (Bom).

87. In re : *Parapati Muthiah*, ILR 1965 AP 650 **following** *Rameshwar* v. *State of Rajasthan*, AIR 1952 SC 54; *State of Orissa* v. *Machindra Majui*, AIR 1964 Ori 100; *Raghbir Singh* v. *Union of India*, ILR 1955 Patiala 509; *Marianthony Mariasoosa* v. *State*, AIR 1955 T.C. 81; *State of Rajasthan* v. *Vijairam*, 1968 Cr LJ 270 (Raj); *Kabiraj Tudu* v. *State of Assam*, 1994 Cr LJ 432 (para 10) (Gau).

88. *Jaisingh* v. *State*, 1973 Cr LJ 1466 (All).

89. *Santhosh Mandal* v. *State*, 1983 Cr LJ 773 (Cal)(DB); *Nandeshwar Kalita* v. *State of Assam*, 1983 Cr LJ 1515 (Gau)(DB).

90. *Prabhu* v. *State*, ILR 1977 Bom 1505; *Ram Hazoor Pandey* v. *State*, AIR 1959 All 409 : 1959 Cr LJ 796; *Varkey Joseph* v. *State of Kerala*, AIR 1960 Ker 301; *J.V. Wagh* v. *State of Maharashtra*, 1996 Cr LJ 803 (para 15) (Bom).

91. *Talasila Sandhya* v. *A.P. State Road Transport Corporation*, 1996 AIHC 1680 (para 6) (AP).

92. PHIPSON 13th End., p. 697 (para 31.11).

"the fact that....questions and answers on their face, reveal the boy declaring that he is wholly ignorant of the existence of God does lend some force to the submission that if the essence of the sanction of the oath is a divine sanction, and if it is an awareness of that divine sanction which the court is looking for in a child of tender years, then here was a case where, on the face of it, that awareness was absent. The court is not convinced that that is really the essence of the court's duty in the difficult situation where the court has to determine whether a young person can or cannot properly be permitted to take an oath before giving evidence. It is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised. The important consideration, we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.

Against the background of those general considerations of principle, we think it right also to approach the matter on the footing that this is very much a matter within the discretion of the trial judge and we think that this court, although having jurisdiction to interfere if clearly satisfied that the trial judge's discretion was wrongly exercised, should hesitate long before doing so. The judge sees and hears the boy or girl, which means very much more than the bare written word, and it may easily be that the judge comes to the conclusion that the way in which he has initially been phrasing his questions has been such that the child to whom the questions are directed has not sufficiently understood them, and he may then attempt to phrase his questions in a different way."

In the case of village boys it is all the more necessary to put questions in order to find out whether they are intelligent enough to understand what they had seen.[1] Ordinarily, girls have full power of understanding and give rational answers after attaining age of 12 or 13 years, when they normally attain puberty.[2] As a rule of caution the court must decide whether the child witness is intelligent enough to understand the questions and give rational answers.[3] Though it may be desirable to make a record of the questions and answers the failure to record the same is not fatal, as the decision primarily rests with the trial judge.[4] The appellate court can examine the correctness of the trial court's decision regarding the competency of the child witness.[5]

When the Sessions Judge observed that the witness gave the evidence in a straight forward manner, it was held that in view of the observations made, such evidence should not be discarded on the ground of danger of the child being tutored.[6] The credibility of a child witness would be affected by the omission of the trial judge to record the reasons whether the child understood the duty of speaking the truth.[7] The opinion formed at the preliminary inquiry is not final and the judge may change that view if the examination and the cross-examination reveals the incompetency of the child.[8] Court should not discard the trial court's opinion about the credibility of witness on the sole ground that part of his testimony is not reliable. The appellate court must be very slow in discarding evidence of any witness, if he is found reliable by the trial court and if his testimony was accepted.[9]

When evidence of a child witness aged 8 years was recorded in a narrative form in a clear and cogent manner, it was held that merely because the evidence was not recorded in question and answer form its value would not be impaired. So also minor discrepencies would not affect the evidence.[10] Where the child immediately after the occurrence gave details of the incident and those facts were corroborated by the medical evidence, such evidence of the child could not be discarded.[11]

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1. *Ghasi Ram* v. *State*, AIR 1952 Bhopal 25.
2. *State* v. *Dukhidei*, AIR 1963 Ori 144; *Sadananda Bissoi* v. *State*, ILR 1968 Cut 972.
3. *Shiv Raj Singh* v. *State of V.P.*, AIR 1955 VP 36.
4. *Arulan Isreal* v. *State*, AIR 1955 Tr C 6; *Sataji Nathaji* v. *State*, (1976) 17 Guj LR 254; *Santhosh Mandal* v. *State*, 1983 Cr LJ 773 (Cal)(DB).
5. *Shankarlal* v. *Vijay Shanker Shukla*, AIR 1968 All 58; *Jaisingh* v. *State*, 1973 Cr LJ 1466; *Santhosh Mandal* v. *State*, 1983 Cr LJ 773 (Cal)(DB).
6. *Shabir Rashid* v. *State*, 1969 Cr LJ 1282 (Del).
7. *State* v. *Lobsang Sharap*, 1973 Cr LJ 85.
8. *Govind Nath* v. *State*, AIR 1961 Guj 11.
9. *Madhusudan Das* v. *Narayani Bai*, AIR 1983 SC 114.
10. *Biri Singh Majhi* v. *State of Assam*, 1977 Cr LJ 1349 (Gau).
11. *Kana Majhi* v. *State*, 1985 Cr LJ 1876 (Ori).

13. CHILD WITNESS—CORROBORATION

The Supreme Court in *Rameshwar* v. *State of Rajasthan*[12] relying on *Baskerville's* case[13] observed: "The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction, but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, and in jury cases, must find place in the charge, before a conviction without corroboration can be sustained. The tender years of the child which is the victim of a sexual offence, coupled with other circumstances appearing in the case such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary, but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand."[14]

In England[15] the unsworn evidence of a child requires to be corroborated by "some other material evidence in support thereof implicating the accused."[16] Other material evidence means evidence other than that admitted by this section.[17] Thus the un-sworn evidence of a child cannot corroborate the unsworn evidence of another child.[18]

In *D.P.P.* v. *Hester*[19] the House of Lords held that the evidence of an unsworn child could corroborate the sworn evidence of another child *provided* that the unsworn evidence is corroborated and that corroboration could be found in the evidence of the sworn child, subject to the jury being satisfied after suitably adequate guidance that each child is a truthful and satisfactory witness. It was stressed that a particularly careful warning should be given to the jury. However, the result is that the so-called rule against "mutual corroboration" is no more.[20] A *fortiori* a child's unsworn evidence may corroborate the sworn evidence of an adult and a child's sworn evidence may corroborate the unsworn evidence of another child.[21]

The general principle is that a person should only be convicted of a crime when the court is satisfied that the guilt has been established. When the conviction is to be based on the evidence of a child witness, what should be the nature of corroboration and to what extent there should be corroboration will depend upon the facts and circumstances of each case. It would be prudent to seek corroboration to the evidence of a child witness.[22] Evidence of independent witness is required only to make it reasonably safe to believe the story put forth by the child witness but it need not extend to all circumstances necessary to identify the accused.[23] A rule of caution makes it necessary to see whether the testimony of child has been corroborated in essential particulars, unless the circumstances render it safe to accept the tetimony without corroboration.[24] It is not safe to act on the evidence of a child of about four years without

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12. AIR 1952 SC 54.
13. (1916) 2 KB 658.
14. **See also** *Vasu* v. *State of Kerala*, ILR 1960 Ker 256; *Ghasiram Behara* v. *State*, ILR 1962 Cut 505; *Ulla* v. *King*, 1950 Ori 261; *Jalwanti Lodhori* v. *State*, 1953 Pat 246.
15. **See** generally Andrews., "The Evidence of Children" (1964) Crim LR 769 and *R.* v. *Khan*, (1981) Crim LR 330. The Court of Appeal said in that case that as a general rule there should be an inquiry as to the child's understanding of the oath.
16. Children and Young Persons Act 1933, S. 38.
17. *D.P.P.* v. *Hester*, (1973) AC 296 : (1972) 3 WLR 910 : (1972) 3 All ER 1056.
18. *D.P.P.* v. *Hester*, *ante*.
19. *Ante*, *R* v. *E.*, (1964) 1 All ER 205 must now be regarded as wrongly decided on this point.
20. For further authority on this point **see** *D.P.P.* v. *Kilbourne*, (1973) AC 729, 747 per LORD HAILSHAM L.C.
21. **See** *R.* v. *Gregg*, (1932) 24 Cr. App. R. 13.
22. *Bharvad Bhikha* v. *State*, AIR 1971 SC 1064; *Ulla Mahapatra* v. *King*, AIR 1950 Ori 261; *Arulan Israel* v. *State*, AIR 1965 Tra-Co. 6; *Ram Hazoor Pandey* v. *State*, AIR 1959 All 409; *Md. Sugal Esa* v. *King*, AIR 1946 PC 3; *Varkey Joseph* v. *State of Kerala*, AIR 1960 Ker 301; *State* v. *Dukhi Dei*, AIR 1963 Ori 144; *Ghasiram Behera* v. *State*, ILR 1962 Cut 506.
23. *Ghewar Ram* v. *State of Rajasthan*, 2001 Cr LJ 4460 (para 15) (Raj).
24. In re : *Porapati Muthiah*, ILR 1965 AP 650; In re : *Shaik Umar Saheb*, 1957 AP 343; *Abbas* v. *Emperor*, 1933 Lah 667; *Jalwanthi* v. *State*, 1953 Pat 246; *Munna* v. *State*, 1985 Cr LJ 1925 (All).

corroboration since there is a likelihood of his being tutored[25] but in case of unlikelihood of tutoring, no corroboration of his statement is required.[26]

When the version of the incident is found truthful the courts would be justified in believing the evidence of a child witness.[27]

When a girl below 12 years was kidnapped, and the court being satisfied that she realised the value of speaking the truth and the significance of the oath, appended the required certificate, her evidence, if believed, would, even without corroboration be sufficient to maintain the conviction. The rule that the statement of the prosecutrix must be corroborated in material particulars by some other evidence should be restricted to cases of rape only, and should not be extended to other cases of sexual nature.[28] Where there is no corroboration of the testimony of a prosecutrix in a rape case it is not safe to convict the accused.[29] Where a girl of 9 years, as a prosecutrix in a rape case gave evidence, it was held that as she was found to be intelligent and not tutored and that she gave a spontaneous and truthful version, there was no reason to disbelieve her even though there was no corroboration.[30] In a rape case, where the accused was a police officer, corroboration of the evidence of the prosecutrix is not necessary, as the standards of proof to be expected by the court must not be higher than is expected of an injured witness, unless circumstances warrant greater caution.[31]

In the case of corroboration of the evidence of one child by that of another the evidence of both the children is to be looked at with care and acted upon with caution.[32] Where the very statement of the child could form the basis for conviction, no corroboration is necessary.[33] If on close scrutiny of the evidence of a child witness it is found to bear the impress of truth there is no obstacle in the way of accepting the evidence whether corroborated or not.[34] Even if there be no infirmity in the evidence of a young boy it is desirable to seek corroboration of his evidence in view of his tender age.[35]

In a case of murder conviction on the evidence of sole testimony of child witness is not impermissible.[36] When the child witness of tender age gave evidence improving his statement before the sessions judge *vis a vis* his statement before the police, it is dangerous to convict a person for murder on the uncorroborated evidence of the child.[37]

Where the child witness cogently narrated the incident of murder immediately after the occurrence to his relations who narrated the incident in the Court as it was narrated to them by the child witness, their evidence had corroborative value to the testimony of the child witness and made his evidence credible.[38] Where the children of the deceased omitted to state injuries on the accused which they had failed to notice and there was evidence firmly establishing that the accused sustained injuries in the manner as told by one of the witnesses, the wife of the victim, child witnesses could not be guilty of suppression.[39]

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25. *Amar Singh Bhakthawar Singh* v. *State*, AIR 1954 Punj 282.
26. *Zafar* v. *State of U.P.*, 2000 Cr LJ 3786 (para 7) (All).
27. *Dalip Singh* v. *State of Punjab*, AIR 1979 SC 1173. A young lad of 13 years, not tutored, no infirmity, corroborated, cannot be discarded, *Shyam Narayan Singh* v. *State of Bihar*, 1993 Cr LJ 772 (para 41) (Pat).
28. *Kan Kanwari* v. *State of Rajasthan*, 1957 CrLJ 688 (Raj). Evidence of 4 year old girl, victim of rape, corroborated by circumstantial evidence, sufficient to prove guilt of accused, *Nagam Gangadhar* v. *State*, 1998 Cr LJ 2200 (para 10) (AP).
29. (1976) 3 Cr LT 431 (Punj). **Also see** *Narayan Iranna Potkanthi* v. *State of Maharashtra*, 1994 Cr LJ 1752 (para 14) (Bom).
30. (1975) 2 Cr LT 317 (HP).
31. *State* v. *Chandra Prakash Kewal Chand Jain*, 1990 Cr LJ 889 (SC).
32. *State* v. *Vijairam*, 1968 Cr LJ 270; *State* v. *Roop Singh*, ILR (1966) 16 Raj 252.
33. *Dharm Pal* v. *State*, AIR 1971 HP 17. Minor son of deceased, deposition free from infirmities, credible, trustworthy, no corroboration, conviction, *Beti Joga* v. *The State*, 1994 Cr LJ NOC 109 (Ori).
34. *Md. Sugal Esa* v. *King*, AIR 1946 PC 3.
35. *Bharved Bhikha Valu* v. *State of Gujarat*, AIR 1971 SC 1064. **See also** *Sitaram* v. *State*, AIR 1975 SC (Cri) 464; *Dhansai* v. *State*, 1967 Ori 105; *Lalu* v. *State*, 1988 Cr LJ 1301; *State of Maharashtra* v. *Prabhu Barku Gade*, 1995 Cr LJ 1432 (para 16) (Bom).
36. *Nandeshwar Kalita* v. *State of Assam*, 1983 Cr LJ 1515 (Gau).
37. *Ramsingh* v. *State*, 1976 Cr LJ 667 (Raj).
38. *Harka* v. *State of Rajasthan*, 1999 Cr LJ 1103, at p. 1106 (Raj).
39. *Valummel Thommachan* v. *State*, 1994 Cr LJ 1738 (para 21) (Ker).

14. CHILD WITNESS—CREDIBILITY

The evidence of a child witness is to be taken with great caution. Normally evidence of a child witness should not be accepted as it is notoriously dangerous unless immediately available and unless narrated before every possibility of coaching is eliminated. There should be close scrutiny of the evidence of child witnesses before the same is accepted by a Court of Law.[40]

Every child witness cannot be discredited as untrustworthy, for each case depends upon its particular facts and circumstances. The real test for accepting or rejecting the testimony is how consistent is the story related by him, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and circumstances of the case.[41] Evidence of a child witness cannot be rejected if it is found reliable.[42] Regarding appreciation of the evidence of a child witness, the Court has to see the surrounding circumstances and probabilities, to assess the credibility and trust- worthiness of the evidence.[43] Whether a child witness could be believed or not depends upon the circumstances of each case.[44]

A boy of thirteen years from rural area wih mature understanding cannot be treated as a child witness.[45] Where the version of a child witness regarding an incident was found truthful the Court is justified in believing his evidence.[46] Witness aged thirteen years knowing the difference between truth and falsehood is a competent witness.[47] When the evidence of a child does not give an impression of being tutored and that statement was corroborated by two other witnesses, the finding of the lower courts based on such evidence for conviction of the accused is not impeachable in revision.[48] When the witness is not only a teenager but also the only eye-witness, the evidence has to be scrutinised with care and caution. If he is able to stand the test of cross-examination successfully and there is no infirmity in his evidence, it cannot be discarded lightly.[49] Where the eye-witnesses were of tender age between 10 to 20 years but stood the test of searching cross-examination by defence counsel, minor contradiction in their statement that the accused delivered four blows by the sharp edge of the axe and then stating that three blows were given by the blunt side was held to be trivial and did not affect the substratum of the prosecution case.[50] However, where the child witness himself sustained injuries in the course of the very transaction at the very time and the place of occurrence, his deposition was truthful and unpolluted from any external influence, conviction could be based on such evidence.[51] In a case involving abduction and killing of children, the child witness himself had escaped from abduction attempt twice from the hands of the accused and his version was supported by the evidence of his father, brushing aside of his evidence was held to be not proper.[52] Where a girl aged about 11 years had seen last her neighbour and playmate a deceased, while they were playing together and later the dead body of the deceased was recovered, her

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40. *State* v. *Dukhi Dei*, ILR (1962) Cut 726; *Ganduchi* v. *State of Orissa*, 1985 Cr LJ 645; *Narayan Kanu Datavale* v. *State of Maharashtra*, 1997 Cr LJ 1788 (Bom). Precautions to be taken while recording statement of child witness. *Sudesh Jhaku* v. *K C.J.*, 1998 Cr LJ 2428 (para 38) (Del); *State of Maharashtra* v. *Prabhu Barku Gade*, 1995 Cr LJ 1432 (para 24) (Bom); *Zafar* v. *State of U.P.*, 2000 Cr LJ 3786 (para 7) (All).
41. *Bhoj Raj* v. *Sitaram*, AIR 1936 PC 60; *Ranjha* v. *State*, AIR 1951 HP 75; *Avansiappa Goundan* v. *State of Kerala*, 1960 Ker L T 435; *Chandan* v. *Crown*, AIR 1951 Punj 399.
42. *Panchhi* v. *State of U.P.*, AIR 1998 SC 2726 (para 11) : 1998 Cr LJ 4044.
43. *Ramachandra* v. *Champabai*, AIR 1965 SC 354.
44. (1966) 2 AWR 338.
45. *Tehal Singh* v. *State of Punjab*, AIR 1979 SC 1347 : 1979 Cr LJ 1031, **relied in** *Sanjay Ramchandra Tarare* v. *State of Maharashtra*, 1996 Cr LJ 713 (para 15) (Bom); *State of M.P.* v. *Deoki Nandan*, 1987 Cr LJ 1016 (MP).
46. *Dalip Singh* v. *State of Punjab*, AIR 1979 SC 1173.
47. *Daya Singh* v. *State*, ILR (1969) 19 Raj 317. Evidence of victims younger brother aged 14 who gave a proper account of the incident witnessed by him was accepted; *Prakash* v. *State of M.P.*, AIR 1993 SC 65.
48. 1971 Al Cr R 137. **See also** *Raj Mangal* v. *State*, 1999 Cr LJ 2418 (para 17) (All).
49. *Shivaji Genu Mohite* v. *State of Maharashtra*, AIR 1973 SC 55; *Kabiraj Tudu* v. *State of Assam*, 1994 Cr LJ 432 (para 10) (Gau
50. *State of Karnataka* v. *Maruthi*, (1997) 11 SCC 473. **See also** stood test of lengthy and searching cross-examination, *State of Maharashtra* v. *Raju Dadaba Borge*, 2001 Cr LJ 3638 (paras 10 and 12) (Bom) and *Nandeshwar* v. *State of Maharashtra*, 2001 Cr LJ 4351 (paras 7 and 8) (Bom). **Contra :** *R. Kulandavelu* v. *State*, 1993 Cr LJ 2574 (para 20) (Mad).
51. *Jasu* v. *State of Rajasthan*, 1995 Cr LJ 1160 (paras 14 and 17) (Raj).
52. *State of Maharashtra* v. *Damu Gopinath Shinde*, 2000 Cr LJ 2301 (para 30) (SC) : AIR 2000 SC 1691, **reversing** 1999 (2) Mah LR 42 (Bom).

testimony could not be rejected solely on the ground that it was not possible for a child of that age to remember what had happened three years ago.[53]

There is always danger in accepting the evidence of a child witness of about twelve years as the witness might have been coached by persons who may have influence on the child.[54] Where the child witness is aged only six years, his evidence is to be approached with great caution. When serious infirmities and contradictions are found in his evidence his testimony cannot be accepted.[55] Where a child witness by reason of his age is not able to make his answers in an intelligible and coherent manner, it is unsafe to rely on such evidence as a whole.[56] Children of the age of about seven years are apt to confuse between what they saw and heard; they could easily be persuaded to believe that they saw what is vividly narrated to them, though they are not untrustworthy in the sense that they speak deliberately falsehood as adults might. [An unsworn testimony of a child is not adequately corroborated by similar evidence of other children.][57] Where an eight year old child, in front of whom his mother was killed by his father, was examined after a lapse of two months, he was not shown to be uninfluenced and also failed to give full particulars of the incident, conviction on his evidence was set aside.[58] Where the child was said to have been the occurrence when he was 8 or 9 years old and six years later he gave evidence, it was held that it was difficult to place reliance on his recollections of the occurrence, and such evidence cannot be taken to corroborate other evidence.[59] When there are major discrepencies in the evidence and the conduct of the child is also extraordinary, in the absence of any independent corroboration, it is unsafe to base a conviction.[60]

The Supreme Court held that we cannot expect much consistency in the deposition of a child of seven years. But the Judge from the tenor of the deposition of the child has to find out whether the child has been tutored or not.[61]

The Court has to closely scrutinise the answers given to the questions put to the child witness before accepting the child as a witness.[62] No presumption of untrustworthiness lies in assessing the evidence of a child witness. It has to be scrutinised carefully and see that there is no possibiliy of tutoring.[63] While dealing with evidence of a child witness the court must be careful to examine the evidence to exclude the possibility of any tutoring.[64]

The competency of a child to give evidence is not regulated by the age but by the decree of understanding he appears to possess. The question depends upon a number of circumstances like possibility of tutoring, the consistency of evidence and how far the child stood the test of cross-examination.[65]

There is no legal impediment to the admissibiliy of evidence of child.[66]

When the statement of the child witness contained inconsistencies and patent improbabilities it is indicative of the witness being tutored[67] but where the medical evidence was not in entire conflict with the occular version of the child witness which differed only regarding the number of blows inflicted and

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53. *State of Maharashtra* v. *Damu Gopinath Shinde*, 2000 Cr LJ 2301 (paras 31 and 32) (SC) : AIR 2000 SC 1691.
54. *State of Bihar* v. *Kapil Singh*, AIR 1969 SC 53; *Gunduchi Patnaik* v. *State*, 1985 Cr LJ 645.
55. *C.P. Fernandes* v. *Union Territory, Goa*, AIR 1977 SC 135.
56. *Suresh* v. *State*, AIR 1981 SC 1122.
57. **Following** *Jalwanti Lodhin* v. *State*, AIR 1953 Pat 246.
58. *Pochammala Yellappa* v. *State of A.P.*, 1995 Cr LJ 3187 (paras 7, 8 and 9) (AP), **relying on** *Chhagandame* v. *State of Gujarat*, 1955 SC 182 and In re : *Dake Abbayi*, ILR 1956 AP 203 (DB).
59. *Ouseph Varkey* v. *State of Kerala*, AIR 1957 Ker 153.
60. *Dasarathi Mahanto* v. *State of Orissa*, (1961) 27 Cut LT 169.
61. *State of Assam* v. *Mafizuddin*, AIR 1983 SC 274. **See also** *Tarachand* v. *State of Rajasthan*, 2001 Cr LJ 3604 (paras 16-18) (Raj).
62. *Jalwanti Lodhin* v. *State*, AIR 1953 Pat 246. If it is found that he understands the question and given rational answers, he can be accepted as witness: *State* v. *Vijairam*,1958 Cr LJ 270; *Nafar Sheikh* v. *R.*, AIR 1914 Cal 276; *Lakshan Singh* v. *State*, AIR 1942 Pat 183; *Mahomed Bachhu Miah* v. *State of Tripura*, 1994 Cr LJ 197 (Gau).
63. *Vijay Kumar* v. *State*, ILR (1981) 2 Del 449; *Prem Shankar* v. *State*, ILR (1981) 1 Del 746 (DB); *Rajaram* v. *State*, 1959 All LJ 736; *State* v. *Shanker Prasad*, AIR 1952 All 776.
64. In re : *Kanya*, AIR 1960 AP 490; *Harumal* v. *State*, AIR 1951 Ajmer 25.
65. *Inder Singh* v. *State of Pepsu*, AIR 1953 Pepsu 193.
66. *Korangappa* v. *State of Kerala*, ILR (1967) 1 Ker 30; *A N T O Thefa* v. *State*, 1967 Manipur 11.
67. *Brahmdeo Yadav* v. *State of Bihar*, ILR (1979) 58 Pat 637.

which side of the weapon was used in the first instance, his version cannot be taken to be tutored merely because he was taken by the police for producing him as a witness.[68]

Where the evidence of unsophisticated school boys, not shown to be inspired by a feeling of enemity towards the accused, contained minor discrepencies, it was held that such minor discrepencies are the badge of truth rather than of falsehood and so their evidence can be relied on.[69]

Where in a dying declaration of the deceased there was no mention of the presence of her children and no explanation was offered for not recording the statements of the children immediately, it was held that it constituted a serious infirmity in assessing the testimony of the child witness.[70] Where the child witness of 11 years of age gave evidence and it was found his statement was inconsistent about when he came to the place of occurrence, and in the FIR there was no mention about the presence of the child witness or from where he saw the incident, it was held that it is unsafe to rely on his evidence.[71] Where there are material and significant contradiction in the evidence of a child witness, it is difficult to rely on such testimony and the accused is entitled to the benefit of doubt.[72]

Age of the child witness by itself is no criterion to reject the testimony.[73] A girl of five years appeared as a witness and stated that the accused, her stepmother, had thrown her and her younger sister aged about three years into the well. The question arose whether she was a competent witness because of her tender age. It was held that a child of tender years was a competent witness. The question to be decided in each case is whether a particular child who has appeared in the witness- box is intelligent enough to be able to understand as to what evidence he or she is giving and to be able to understand the question and to be able to give a rational answer.[74] The only test of competency of a child witness is his capacity to understand the questions and to give rational answers. But the question of credibility still remains to be satisfied. Being a child witness he is subject to all those frailties which are amenable to any ordinary witness and besides all these frailties, being tender in age he is likely to be tutored and therefore a precaution is to be observed to bring his testimony to a stage of credibility so that he could be stated to have proved or disproved a question of fact. For this, a corroboration is required to his statement.[75]

When the trial court satisfied itself before recording the deposition of the child witness and when it is corroborated, such evidence of the child is admissible.[76]

When the witness was found to be tutored no reliance can be kept on such evidence[77] but where the testimony of a child witness was not challenged in the cross-examination and remained uncontroverted, the fact of her admission of being tutored by her father, would not *ipso facto* wash her evidence on record.[78] Where the child witness was the only eye witness for the prosecution and when there were two different versions one in the committing court and another before the Sessions Court it was held that the child was tutored and as there was no corroborating evidence to connect the accused with the murder, no reliance could be placed on the child witness's evidence[79] and also where the child's version is uncorroborated and the subsequent conduct unnatural[80] and where the child admitted to have been brought to the Court by another person and was also told what to depose.[81]

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68. *Mangoo* v. *State of M.P.*, AIR 1995 SC 959 (paras 5 and 6) : 1995 Cr LJ 1461.
69. *Mohan Singh Balwant Singh* v. *State*, AIR 1965 Punj 291; *Dharmpal* v. *State*, AIR 1971 HP 17; *Birisingh Majhi* v. *Stae of Assam*, 1977 Cr LJ 1349 (Gau).
70. ILR 1984 Bom 2169.
71. *Balkari* v. *State of Rajasthan*, 1976 Cr LJ 828 (Raj); Presence of child witness at place of occurence doubtful, her statement contradictory to dying declaration, her testimony not credit worthy, *Vithal Mahadev Patil* v. *State*, 1996 Cr LJ 1796 (para 7) (Kant).
72. 1976 Raj Cr C 308.
73. (1985) 2 WLN 98 (Raj).
74. *Dato* v. *State*, (1954) Punj 825.
75. *Srinivas Murthy* v. *State of Karnataka*, 1977 (2) Kant LJ 341; *Sukhram* v. *State of M.P.*, 1995 Cr LJ 595 (para 18) (MP).
76. *Ram Achal* v. *State of U.P.*, 1990 Cr LJ 111 (All).
77. *Haria* v. *State of H.P.*, 1975 Cr LJ 78 (HP)(DB); *Pankaj Naik* v. *State of Orissa*, 1994 Cr LJ 829 (para 7) (Ori); *Chhagan Dame* v. *State of Gujarat*, 1994 Cr LJ 56 (para 3) : AIR 1994 SC 454.
78. *Sanjay* v. *State*, 1996 Cr LJ 3347 (para 18) (Del).
79. *Jogi Sahu* v. *State*, 1970 Cr LJ 637 (Ori).
80. *Krishnappa* v. *State of Karnataka*, 1996 AIHC 1030 (paras 6 and 7) (Kant).
81. *State of Karnataka* v. *Ningappa Bhimappa Uppar*, 2000 Cr LJ 1757 (paras 2 and 4) (Kant).

In a case where the child, the daughter of the accused, was said to be sleeping at the time of occurrence and that child was staying with the accused for seven months after the occurrence it was held that it was not improper for the prosecution in not examining that child witness.[82]

Rule of prudence requires the Court to examine the evidence of a child witness with caution. However where a child witness was herself a victim of rape and gave evidence in a natural manner and where there was no strained relationship or enemity with the family of the accused, it was held that there were no circumstances to doubt her evidence.[83] In a case the minor daughter of the deceased, the eye-witness of incident, connected her mother with her father's murder and described the role played by her. She also categorically stated that her deceased father named the accused as "offenders" in his dying declaration. It was held that her version was credible.[84] Where the child immediately after the occurrence gave the details of the incident and those facts were corroborated by the medical evidence, such evidence of the child could not be discarded.[85] Otherwise standing the test of cross-examination and her evidence being untutored and corroborated it could not be rejected solely on the ground that the words spoken by the sole child witness were not in the language which she knew.[86] Merely because there is no compelling reason for a person to be present at the time of occurrence that by itself need not necessarily mean that his evidence has to be rejected.[87]

Where the evidence of the child eye-witness was inconsistent with the medical evidence and that of the evidence of other witnesses, it was not relied upon.[88]

15. LEPER

It is not proper not to produce an attesting witness who is to prove the contents of a document on the ground that he is a leper, as he could be examined on commission.[89]

16. RUSTIC WITNESS

Where the witnesses are rustics, their behaviour pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of villages. When scanning the evidence of the various witnesses the Court has to inform itself that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered. The sluggish chronometric sence of the country-side communiy in Inida is notorious since time is hardly of the essence of their slow life; and even urban folk make mistakes about time when no particular reason to observe and remember the hour of minor event like taking a morning meal existed. Too much play on such slippery facts goes against realism so essential in a testimonial appraisal.[90]

17. POWER OF ATTORNEY HOLDER

The power of attorney holder is not entitled to appear as witness for the party so appointing him.[91] He can appear as a witness in his personal capacity and in the capacity of the party appointing him.[92]

18. SCRIBE

In *Musunuri Anjaneyulu* v. *Koona Lakshmi*,[93] it was held that endorsement on a pronote is not one of the documents which is required by the law to be attested or scribed. Hence, scribe need not be examined.

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82. *A.N.T.O. Thaba* v. *State of Manipur*, 1967 Cr LJ 1023 : AIR 1967 Manipur 11.
83. *Suresh Chand* v. *State of Haryana*, 1976 Cr LJ 452 (P&H).
84. *Kamala Sethi* v. *State*, 1994 Cr LJ 197 (para 10) (Ori).
85. *Kana Majhi* v. *State*, 1985 Cr LJ 1876 (Ori).
86. *Suryanarayana* v. *State of Karnataka*, 2001 Cr LJ 705 (paras 9 and 10) (SC).
87. *State of Kerala* v. *Narayanan Bhaskaran*, 1992 Cr LJ 238 (Ker); *Kuzhiyaramadujil Madhavan* v. *State*, 1994 Cr LJ 450 (para 11) (Ker).
88. *State of M P* v. *Surbhan*, 1996 Cr LJ 3199 (para 8) (SC) : AIR 1996 SC 3345.
89. *Ramkrishna Panda* v. *Arjuno Padhano*, AIR 1963 Ori 29.
90. *Shivaji Shahebrao* v. *State of Maharashtra*, AIR 1973 SC 2622.
91. *Ram Prasad* v. *Hari Narain*, AIR 1998 Raj 185 (para 8).
92. *Kanakapudi Bharthy* v. *Authority under A.P.S.E. Act-cum-Labour Officer*, 2000 AIHC 87 (para 5) (AP).
93. *Musunuri Anjaneyulu* v. *Koona Lakshmi*, AIR 1998 AP 214 (para 4).

19. PERSON OF EASY VIRTUE

Evidence of a person of easy virtue is not to be thrown away.[1]

See under Section 3.

20. ADVOCATE

A counsel who has advised the institution of a criminal case which led to a suit for malicious prosecution is a competent witness to prove good faith.[2]

The Court shall be greatly circumspect while deciding to grant permission to summon the counsel of the opposite party as a witness.[3]

21. POLICE OFFICER—WITNESS

It is not right to discard the evidence of a police officer (a prosecution witness) in the absence of evidence of his hostility to the accused.[4]

See under Section 3.

22. MEDICAL OFFICER

A medical officer to whom the deceased told that her mother-in-law had burnt her, is a competent witness and reliable though the doctor has not recorded the same in the medical register.[5]

See under Section 3.

23. INTERESTED PERSON

The fact that a witness is related to one of the parties cannot by itself be considered sufficient to warrant discarding his evidence *in toto*. The evidence of such witness should however be scrutinised carefully.[6] The credibility of a witness does not get affected merely because he is related to the deceased, or does not state the incident in the same language or manner which in the opinion of the Court is natural.[7] The fact that witnesses are partisan witnesses and are interested is by itself no ground for rejecting their testimony.[8] Mechanical rejection of the evidence of a close relation on the ground he is interested, is not warranted.[9]

An eye-witness, closely related to the victim is not an incompetent witness. Though his evidence cannot be disregarded it must be closely scrutinised.[10]

An interested witness means a person who wants to see the accused convicted because of his own *animus*. A relative may not be so interested.[11]

Because a witness is an interested witness his evidence cannot be totally disregarded.[12]

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1. *Shyam Sunder* v. *State*, 1997 Cr LJ 35 (Del).
2. *Corea* v. *Pieris*, 14 Cal WN 86 (PC).
3. *N. Yovas* v. *Immanueal Jose*, AIR 1996 Ker 1 (paras 8-11).
4. *Nathu Singh* v. *State of M.P.*, AIR 1973 SC 2783.
5. *Lichhamadevi* v. *State of Rajasthan*, AIR 1988 SC 1785.
6. *Chottia* v. *State*, ILR (1952) Raj 258.
7. *Rokad Singh* v. *State of M.P.*, 1994 Cr LJ 494 (para 6) (MP), **relying on** *State of U.P.* v. *Krishna Gopal*, AIR 1988 SC 2154 : 1989 Cr C 288.
8. *S.H. Kemkar* v. *State of Maharashtra*, AIR 1974 SC 1153. **Also see** *Sarat Chandra Panda* v. *State of Orissa*, 1994 Cr LJ NOC 17 (Ori).
9. *Brathi* v. *State of Punjab*, AIR 1991 SC 318.
10. *Arana Nagireddi* v. *State*, (1968) 1 An WR 178. (Note : **see** other cases under Section 3).
11. *Dalbir Kaur* v. *Punjab*, AIR 1977 SC 472; *Sarwan Singh* v. *State of Punjab*, AIR 1976 SC 2304.
12. *Bishwanath* v. *Sachhidanand*, AIR 1971 SC 1949; *Government of A.P.* v. *B. Jaggapuram Venkateswarlu*, AIR 1980 SC 1876, a woman was the only witness to the murder of her husband and two sons; she had no previous hostility towards the accused, conviction upheld.

The evidence of partisan witnesses, who were out to entrap the accused but were not willing and guilty participators in the crime, would not be tainted evidence, but it would be interested evidence which would require independent corroboration before acceptance. To convict an accused upon the uncorroborated evidence of such a person at whose instance a trap is laid by the police is neither illegal nor imprudent, but inadvisable. The *panchas* whom the police take with themselves before going for a raid are not members of the raiding party and therefore, their evidence does not require corroboration before acceptance.[13] Evidence of interested persons is not necessarily to be corroborated. A witness is normally to be considered independent unless such a witness has cause, such as enmity against the accused, to wish to implicate him falsely.[14]

See under Section 3.

24. ADVERSARY AS WITNESS

A party cannot be debarred from examining its adversary. The plaintiff cannot be debarred from examining the defandant as witness on his behalf. Such an order suffered from jurisdictional error and was liable to be interfered with in revision.[15]

25. EYE-WITNESS

Where the eye-witnesses categorically stated that the accused was responsible for the fatal injury on the stomach of the deceased, there being no animosity between them and the accused and their presence at the place of occurrence being proved, rejection of their version was not proper.[16]

See under Section 3.

26. *FALSUS IN UNO, FALSUS IN OMNIBUS*

Where a witness speaks to an entire event and in respect of a part of that version he has been disbelieved, it is not safe to accept the other part and convict an accused on that evidence.[17] The Supreme Court, however, has held that the maxim *falsus in uno, falsus in omnibus* (false in one thing, false in everything) is neither a sound rule of law nor a rule of practice.[18] for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth or, at any rate, exaggeration, embroidery or embellishment.[19] It is the duty of the Court to scrutinise the evidence carefully and separate the grain from the chaff.[20]

See under Section 3.

27. EXPLANATION—LUNATIC

The explanation applies to the case of a monomaniac or person afflicted with partial insanity. Such a person will be an admissible witness if the Judge finds him upon investigation capable of understanding the subject in respect of which he is required to testify.[21] An insane or an idiot is not a competent witness if he is incapacitated to such an extent that he is unable to understand the subject in reference to which he is called as a witness.

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13. *State* v. *Ramchand Tolaram*, (1956) 58 Bom LR 90.
14. *Kedar Behera* v. *State*, 1993 Cr LJ 378 (para 6) (Ori). Evidence of injured eye-witness convincing and corroborated, couldn't be discarded merely because of being interested witness. *Aidan* v. *State of Rajasthan*, 1993 Cr LJ 2413 (para 10) (Raj).
15. *Awadh Kishore Singh* v. *Brij Bihari Singh*, AIR 1993 Pat 122 (para 16), **distinguishing** CR No. 1525 of 1968, Dt. 3rd March, 1971.
16. *State of Maharashtra* v. *Rajendra Garbad Patil*, 1994 Cr LJ 145 : AIR 1994 SC 475.
17. *Jamal Mohammed* v. *State*, ILR 1954 TC 1086.
18. *Ugar Ahir* v. *State of Bihar*, AIR 1965 SC 277.
19. *Sohrab* v. *State of M.P.*, AIR 1972 SC 2020.
20. *Ugar Ahir* v. *State of Bihar*, AIR 1965 SC 277.
21. *Hill's* case, (1851) 2 Den CC 254, *Spittle* v. *Walton*, (1851) LR 11 Eq 420.

28. INCOMPETENCY FROM DEFECTIVE INTELLECT

A witness may be incompetent because he or she is prevented by mental illness, drunkenness and the like, from understanding the nature of the oath (where that is the test) or from understanding the questions asked and giving answers which can be understood.[22] But the incapacity is only co-extensive with the defect; thus, a mentally ill person is competent during a lucid interval, a drunkard upon his return to sobriety.[23] Where incapacity is merely temporary, the judge may, in his discretion, provided the application is made before the jury is sworn, postpone the trial until it is removed.[24] A person may still be a competent witness if that person's mental illness affects only one aspect of his or her character and does not diminish his or her capacity to recall information on the subject which is relevant to the proceedings or to appreciate the nature of an oath.[25]

Where the main issue in a case is the sanity of a particular person it may be undesirable to make a separate attempt to assess that person's competence as a witness, and testimony has been received where the issue was the witness's own sanity.[26] (PHIPSON ON EVIDENCE, 15th Edn. (2000), page 151, para 8.10).

29. TESTIMONIAL COMPULSION

Testimonial compulsion is the very foundation of the Law of Evidence for without such compulsion every refusal to give evidence will render administration of justice impossible. It is not legal fetish. It is a necessary and also the general rule.[27]

30. APPRECIATION OF EVIDENCE

Where the mother of the child witness was done away with a heavy single blow of an axe (*tikav*), it was held that the incident must have been over even before the nine year old child eye-witness could have thought of running away.[28]

See under Section 3.

Dumb witnesses.

S. 119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

COMMENTS

1. PRINCIPLE AND SCOPE

This section deals with the evidence of dumb witnesses.

When a deaf-mute is a witness the Court will ascertain before he is examined that he possesses the requisite amount of intelligence, and that he understands the nature of an oath. A deaf-mute's evidence may be taken (*a*) by written questions to which he may reply in writing or (*b*) by means of signs.

A dumb witness either by writing or by signs can make intelligible of what he has to speak. If he is able to communicate his statement perfectly by writing, it is a more satisfactory method of taking evidence.[29] When the dumb witness is not able to write, then he can make sings showing what he wants to say. If it is by signs, those sings must be recorded and not the interpretation of those signs. Where the

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22. *R.* v. *Lee*, (1988) Crim LR 525 CA. **See also** Youth Justice and Criminal Evidence Act 1999, S. 53.
23. *R.* v. *Hill*, 2 Den 254; *Spittle* v. *Walton*, LR 11 Eq 420; *R.* v. *Dunning*, (1965) Crim LR 372.
24. *R.* v. *Wade*, 1 Moo CC 86; *R.* v. *White*, 1 Lea 430n.
25. *R.* v. *Barratt*, (1996) Crim LR 495 CA, where the witness's fixed belief paranoia caused her to have bizarre beliefs about her private life but did not render her incompetent to give evidence of finding fingerprints.
26. *Hunter* v. *Edney*, 10 PD 93.
27. *Kanakapudi Bharthi* v. *Authority under A.P.S.E. Act-cum-Labour Officer*, 2000 AIHC 87 (para 5).
28. *State of Maharashtra* v. *Prabhu Barku Gade*, 1995 Cr LJ 1432 (para 22) (Bom).
29. *Morrison* v. *Lennard*, (1827) 3 S&P 127.

victim of the assault lost the power of speech, and in evidence he made signs and the trial court recorded the signs in respect of some questions but not of all questions for which only interpretations were recorded, it was held that recording interpretations of the signs is not a proper compliance with Section 119.[30] When a witness was not examined on the ground that he was unable to speak, it was held that, that such a ground was improper and the witness could have given evidence by writing, or signs and it could be reckoned as oral evidence.[31] It was held that that when a person was observing a vow of silence and was not able to speak on that ground, his evidence may be taken in writing without forcing him to break his religious vow and it must be taken that he is "unable to speak" within the meaning of this section.[32]

Examination of a deaf and dumb witness without the assistance of an expert or person familiar with his mode of conveying ideas to others in day to day life, is wrong and cannot be relied on.[33] When the services of an interpreter are required by any criminal court for the interpretation of any evidence or statement of a dumb person, the interpretor shall be bound to state the true interpretation of such evidence or statement under Section 119.[34] Where the prosecutrix, the victim of rape was dumb, evidence of the Principal, Govt. Residential School for Deaf as her interpreter is an expert evidence and her testimony with the help of such interpreter can be relied upon.[35] Doubts have been expressed as to whether the aid of an interpreter can be sought as no mention is made in this section of an interpreter. It is however submitted that as the purpose of signs is to make out what the witness has to say, the court is entitled to seek the aid of an interpreter to understand the witness.

When it is impossible to make the deaf and dumb person understand the questions put to him in cross-examination he is not a competent witness under the section.[36] Deaf and dumb persons, unable by writing or signs to communicate their answers and to understand questions put to them are not competent witnesses.

Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial.

S. 120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively , shall be a competent witness.

COMMENTS

1. PRINCIPLE AND SCOPE

Under this section, in civil proceedings the parties and the husband or wife of any party to the suit are regarded as competent witnesses. The section also deals with criminal proceedings, wherein the husband or wife of the accused shall be a competent witness.

Parties in civil proceedings are competent witnesses and therefore their testimony is to be scrutinised in the same manner as that of any other witness. There is no inflexible rule that if a party gives his testimony he must be disbelieved because he is a party to the suit.[37] In a suit for specific performance of an agreement of sale, the purchaser wife pleaded to have no knowledge of the previous agreement of sale but did not enter the witness-box. Her husband, being a competent witness, entered the witness-box and gave necessary evidence instead of his wife. It was held that non-examination of the wife would be of no consequence.[38]

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30. *Kumbhar Musa Alib* v. *State of Gujarat*, AIR 1966 Guj 101; **see also** *R.* v. *Abdulla*, ILR (1885) 7 All 385 (FB) (signs made by a dying woman were admitted as statement)
31. *Asit Nath Das* v. *Snehalata Devi*, (1969) 73 Cal WN 820. **Contra** : no adverse inference can be drawn against prosecution by non-examination, *Kishan Singh* v. *State*, 1995 Cr LJ 2027 (para 17) (Raj).
32. *Lakhan Singh* v. *R.*, ILR (1941) 20 Pat 898 : AIR 1942 Pat 183.
33. *Kadungoth Alavi* v. *State of Kerala*, 1982 Cr LJ 94 (Ker).
34. *Abdul Rahman Kunju* v. *Misariya Beevi*, 1979 Ker LT 123.
35. *Public Prosecutor, A.P. High Court* v. *Lingisetty Sreenu*, 1997 Cr LJ 4003 (AP).
36. *Venkattan* v. *Emperor*, 1912 MWN 100.
37. *Bhanwar Lal Vaid* v. *Bhanwar Lal Agarwal*, ILR (1951) Raj 1.
38. *K. Saroja* v. *Valliammal Ammal*, 1997 AIHC 1959 (para 29) (Mad).

Parties to the suit are not only competent witnesses but are witnesses whose duty is to assist the court. Where a party whose evidence is material does not give evidence the court should presume against him.

2. ACCUSED

In criminal cases an accused is not a competent witness. However he can be examined under Section 342(4) of old Cr.P.C. (now Section 313). In proceedings against a person under Section 107, under Chapter X to XII, Chapter XXVI or under Section 552 of old Cr.P.C., now Section 98 such person is a competent witness. In English Law an accused person of his/her, wife/husband is not a competent witness.

The section deviates from the rule of English Law namely that husband and wife are not competent to give evidence for or against each other. So far as the wife and husband are concerned there is a restriction contained in Section 122 of this Act which says that no person who is or has been married shall be compelled to disclose any communications made during the subsistence of marriage to each other. Even there an exception is made relating to suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other. This section is subject to Section 122. (See commentary on Section 122).

Even at English Common Law, however, an exception was always made, from necessity, in cases of personal violence or forcible marriage, and perhaps also from public policy, in cases of treason. By statute also this general incompetence has been gradually removed, in both civil and criminal cases[39] (PHIPSON ON EVIDENCE, 15th Edn. (2000), Para 8-05, page 150).

Section 118 makes all persons competent witnesses which includes wife and husband. They are competent to prove non-access.[40]

See for further discussion cases under Section 112.

In divorce proceedings the English Rule was that neither the husband nor the wife can be examined for purpose of proving non-access during the marriage.[41] It was followed in India in *Sweeney* v. *Sweeney*.[42] It may be noted that by Matrimonial Causes Act, 1949, it was made possible for the parents to give evidence about access or non-access during the subsistence of marriage. (PHIPSON 13th Edn., page 291, para 15.02) Now see Matrimonial Causes Act, 1965, S. 43.

The old privilege relating to the question of adultery in divorce cases has been abolished by the Civil Evidence Act, 1968, S. 16(5), and this section governs testimony, discovery and interrogatories.[43]

In application for divorce on the ground of impotency under the Hindu Marriage Act, the parties are allowed to give evidence.[44] In a petition for nullity of marriage by a wife on the ground of husband's incapacity, where the wife waited for seven years since her marriage before filing the petition and the husband did not contest the allegation, the wife's evidence was accepted without corroboration.[45] In a husband's petition for dissolution of marriage on the ground of wife's adultery and desertion, when both the respondents remained *ex parte*, it was held that petitioner's evidence without any corroboration was sufficient for granting relief.[46] Truthfulness of the statement of the wife, the eye-witness, could not be

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39. For civil cases see, 21 Jac. 1, c. 19, S. 6; the Country Courts Act, 1846, S. 83; Evidence Amendment Act, 1853, S. 1; the Evidence Further Amendment Act, 1869, S. 3; and the Law Reform (Miscellaneous Provisions) Act, 1949, S. 7; Matrimonial Cases Act, 1973, S. 48. For criminal cases see, Criminal Evidence Act, 1898; Sexual Offences Act, 1956, S. 39; Theft Act, 1968, S. 30; Police and Criminal Evidence Act, 1984, S. 80; Youth Justice and Criminal Evidence Act, 1999, S. 53 and Sched. 4, para 13.
40. *Howe* v. *Howe*, 38 Mad 466 (FB); *Mayandi Asari* v. *Sami Asari*, ILR 55 Mad 292 : AIR 1932 Mad 44; *Vira Reddy* v. *Kistamma*, AIR 1969 Mad 235; *Shantabai* v. *Dalchand*, AIR 1953 Nag 374; *Venkateswarlu* v. *Venkatanarayana*, AIR 1954 SC 176; *Shyam Sing* v. *Sai Balini Ghose*, AIR 1947 Cal 183; *Bai Kamla* v. *Babubhai*, AIR 1926 Bom 385; *G.R. Sane* v. *D.S. Sanavane & Co.*, AIR 1946 Bom 110; *Hanumantha Rao* v. *Ramachandrayya*, AIR 1944 Mad 376.
41. *Russel* v. *Russel*, 1924 AC 687.
42. ILR 62 Cal 1080; *Premchand Hira* v. *Bai Galal*, AIR 1927 Bom 594.
43. *Nast* v. *Nast and Walker*, (1972) Fam 142 (CA).
44. *T. Rangaswami* v. *T. Aravindammal*, AIR 1957 Mad 243.
45. *Suvarna bahen* v. *Rashmi Kant*, AIR 1970 Guj 43.
46. *Antoniswamy* v. *Anna Manickam*, AIR 1970 Mad 91.

disbelieved simply because of her emotional reaction while witnessing the murder of her husband was different from what it should have been, in the opinion of the Court.[47]

Proceedings under old Section 488 Cr.P.C. old (Section 125 new) are in the nature of civil proceedings within the meaning of this section and the person who is sought to be charged for maintenance is a competent witness on his own behalf.[48]

Judges and Magistrates.

S. 121. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

ILLUSTRATIONS

(a) *A*, on his trial before the Court of Session, says that a deposition was improperly taken by *B*, the Magistrate. *B* cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(b) *A* is accused before the Court of Session of having given false evidence before *B*, a Magistrate. *B* cannot be asked what *A* said, except upon the special order of the superior Court.

(c) *A* is accused before the Court of Session of attempting to murder a police-officer whilst on his trial before *B*, a Sessions Judge. *B* may be examined as to what occurred.

SYNOPSIS

1. *Principle and Scope* ... 1170
2. *Judges and Magistrates as witness* ... 1171
3. *Juror* ... 1172
4. *Arbitrator* ... 1172
5. *Powers of appellate court* ... 1173

COMMENTS

1. PRINCIPLE AND SCOPE

Under this section a Judge or Magistrate shall not be compelled to answer questions as to (*a*) his conduct in Court as such Judge or Magistrate, or (*b*) anything which came to his knowledge in Court as such Judge or Magistrate, except upon the order of a Court to which he is subordinate. He may be examined as to other matters which occurred in his presence while he was so acting.

Sections 121-132 declare exceptions to the general rules that a witness is bound to tell the whole truth, and to produce any document in his possession or power relevant to the matter in issue.[49] They deal with the privilege of certain classes of witnesses.

The privilege given by this section is the privilege of the witness, that is, of the Judge or Magistrate of whom the question is asked. If he waives such privilege, or does not object to answer such question, it does not lie in the mouth of any other person to assert the privilege.[50] The privilege of the Judge or the Magistrate, extends only "to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrae".

A distinctiosn should be drawn between questions which a witness cannot be compelled to answer (Sections 121, 124 and 125) and those which he cannot be permitted to answer (Sections 123 and 126). The latter class of questions might properly be forbidden but questions of the former class are in no way barred; a witness has merely the right of refusing to answer such questions, without any hostile inference being drawn from his refusal. The most that a Court can do, in the case of a witness who is ignorant of

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47. *Aidan* v. *State of Rajasthan*, 1993 Cr LJ 2413 (para 16) (Raj).
48. *Tokebibee* v. *Abdool Khan*, ILR 5 Cal 536; *Nur Mohammed* v. *Bismulla Jan*, ILR 16 Cal 781; *Hiralal* v. *Saheb Jan*, ILR 18 All 107; *Rozario* v. *Ingles*, ILR (1894) 18 Bom 468.
49. *Queen* v. *Gopal Doss*, ILR (1881) 3 Mad 271, 277 (FB).
50. *Empress of India* v. *Chidda Khan*, ILR (1881) 3 All 573 (FB).

his privilege, is to warn him that he need not answer. But if the witness elects to waive his privilege of refusing to answer, his answer is admissible in evidence.[51]

2. JUDGES AND MAGISTRATES AS WITNESS

Judges and Magistrate are competent witnesses *R.* v. *Chidda Khan*,[52] but they cannot be compelled to answer any question as to their conduct in court as such Judges or Magistrates (Best Art. 181). As a matter of public policy Judges enjoy these and other privileges. A judge is as competent and compellable a witness as any other person in regard to a matter which he comes to know otherwise than in his capacity as a judge.

"Although, however, judges and juries may, in arriving at decisions, use their *general* information and that knowledge of the common affairs of life which men of ordinary intelligence possess,[53] they may not, as might juries formerly, act on their own *private knowledge or belief* regarding the facts of the particular case.[54]

However there is another line of cases which shows that a judge may rely on his own local knowledge where he does so "properly and within reasonable limits".[55] This judicial function appears to be acceptable where "the type of knowledge is of a quite general character and is not liable to be varied by specific individual characteristics of the individual case".[56] This test appears to allow a judge to use what might be called "Special (or local) general knowledge," and its application presents inferior and appellate courts with a task of some nicety.[57] It has been held that justices acted properly in using their knowledge of local tidal conditions.[58]" (PHIPSON ON EVIDENCE 15th Edn. (2000), paras 2-08, 2-09, pages 33, 34).

A judge may waive his privilege and choose not to object to answer any question in which case it is not open to any other person to assert that privilege.[59]

"A Judge, before whom the cause is tried, must conceal any fact within his own knowledge, unless he be first sworn, and, consequently, if he be the sole Judge, it seems that he cannot depose as a witness, though if he be sitting with others, he may then be sworn and give evidence. In this last case, the proper course appears to be that the Judge, who has thus become a witness, should leave the bench, and take no further judicial part in the trial, because he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another."[60]

A person having to exercise judicial functions may give evidence in a case pending before him when such evidence can and must be submitted to the independent judgment of other persons exercising similar judicial functions sitting with him at the same time.[61]

Where a Judge is the sole Judge of law and fact, he cannot give evidence before himself or import matters into his judgment not stated on oath before the Court in the presence of the accused.[62] The accused is entitled to have nothing stated against him in the judgment which was not stated on oath in his

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51. *Mahomed Aly* v. *Emperor*, (1909) 12 Cr LJ 277.
52. ILR (1881) 3 All 573 (FB).
53. *Peart* v. *Blockow, Vaughan & Co.*, (1925) 1 KB 399; **see also** *Byrne* v. *Londonderry Co.*, (1902) 2 IR 457; **approved in** *Hennessy* v. *Keating*, (1908) 1 IR 43, 83; *R* v. *Jones*, (1970) 54 Cr. App. R. 63, 68.
54. *R* v. *Sutton*, (1816) 4 M&S 532; *Palmer* v. *Crone*, (1927) 1 KB 804; *R* v. *Antrim J.J.*, (1895) 2 IR 603, 649. But **see** *R* v. *Blick*, (1966) 50 Cr App R 280, where a juror passed a note to the judge informing him of the juror's knowledge of a particular locality which was at variance with the defendant's testimony, whereupon rebutting evidence was called by the prosecution.
55. *Reynolds* v. *Llanelly Associated Tinplate Co.*, (1948) 1 All ER 140, (per LORD GREENE, M.R.).
56. *Ibid.*
57. **See** *Keane* v. *Mount Vernson Colliery Co.*, (1933) AC 309, esp. at 317; *Owens* v. *Llay Marri Collieries Ltd.*, (1932) 25 BWCC 573; *Roberts & Ruthven Ltd.* v. *Hall*, (1912) 106 LT 769; *Mothersdale* v. *Cleveland Bridge & Engineering Co.*, (1930) 142 LT 541.
58. *Ingram* v. *Percival*, (1969) 1 QB 548. **See also** *Borthwick* v. *Vickers*, (1973) RTR 394 (DC).
59. *R.* v. *Cludarshan*, 3A 573 (FB).
60. TAYLOR, 12th Edn. 1379, p. 870.
61. *Queen* v. *Mookta Singh*, (1870) 13 WR (Cr) 60.
62. *Queen-Empress* v. *Manikam*, ILR (1896) 19 Mad 263; *Empress* v. *Donnelly*, ILR (1877) 2 Cal 405.

presence, and which he had no oportunity of testing by cross-examination and rebutting.[63] If the Judge knew any facts concerning the case, he is bound to state to the accused, so far as he could, what were the facts he himself observed, and to which he himself could bear testimony, and the accused in such situation has a right, if he thought it desirable, to cross- examine the Judge, whose evidence should be recorded, and form part of the record in the case.[64]

A Judge would not be justified to act on his own knowledge and belief or on public rumours.[65] A Magistrate should not decide a case relying on statement made to him out of court.[66] Without giving evidence as a witness a Judge or Magistrate cannot import his own knowledge into a case.[67] When a Judge has any interest in the subject-matter or takes any part in the prosecution case he is disqualified from trying that case.[68]

It was held that inaccuracy on the part of a Magistrate in making notes of injuries on the person of the complainant is not a ground to call for answers and not a ground for transfer of the case.[69]

3. JUROR

The Calcutta High Court held that jurors are not to be examined as to the grounds on which they have based their verdict.[70]

4. ARBITRATOR

The term Judge or Magistrate is not defined in this Act. Though, Section 3 defines court, it excludes arbitrators. Therefore, the arbitrators would not be within the rule of this section to claim privilege. Normally, the arbitrator would not be summoned to give evidence to show how he arrived at the conclusions in a matter.[71] But when *mala fides* are attributed and if it is found that there is some *prima facie* case, the court may summon the arbitrator.[72]

An arbitrator who is selected by the parties would come within the general obligation of being bound to give evidence.

The Privy Council observed,[73] "An arbitrator, selected by the parties, comes within the general obligation being bound to give evidence, and where a charge of dishonesty or partiality is made, any relevant evidence which he can give is without doubt properly admissible. It is, however, necessary to take care that evidence admitted as relevant on a charge of dishonesty or partiality is not used for a different purpose; namely, to scrutinize the decision of the arbitrator on matters within his jurisdiction, and on which his decision is final.

When a petition was filed to amend a decree passed on the basis of an award given by an arbitrator, on the ground of certain clerical mistakes in the proceedings of the arbitrator; it was held that it is open to the court to examine the arbitrator to find out whether any slip or omission had entered in the proceedings.[74]

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63. *Girish Chunder Ghose* v. *Queen-Empress*, ILR (1893) 20 Cal 857, 866: *Hari Kishore Mitra* v. *Abdul Baki Miah*, ILR (1894) 21 Cal 920.
64. *Hurro Chunder Paul*, In re : (1873) 20 WR (Cr) 76.
65. *Meethum Bibee* v. *Busheer Khan*, (1867) 11 MIA 213: *Satrughan* v. *R.*, 50 IC 357.
66. *Sri Balusu* v. *Sri Balusu*, (1898) 22 Mad 427; *R.* v. *Sahadev*, ILR (1890) 14 Bom 572.
67. *Kishore Singh* v. *Ganesh Mookerjee*, 9 WR 252; *Haropd* v. *Sheo Dayal*, 26 WR 55: *Girish Chunder* v. *R.*, ILR 20 Cal 857.
68. *R* v. *Pheroz Sha Pestonji*, ILR 18 Bom 442: *Aloo Nathu* v. *Gayusha Dipsangji*, ILR (1894) 19 Bom 608: *Loburi Domini* v. *Assam Railway Co.*, 10 Cal 915. **(See also** Section 479 Cr PC of 1973).
69. *D.J. Vaghela* v. *Kantibai*, 1985 Cr LJ 974 (Guj).
70. *Emperor* v. *Derajtulla Sheikh*, AIR 1930 Cal 443.
71. *M.C. Verghese* v. *T.J. Poonan*, AIR 1970 SC 1876.
72. *Union of India* v. *Orient Engineering & Co.*, (1978) 1 SCR 632 : AIR 1977 SC 2445: **approving** *Khublal* v. *Bishambhar Sahai*, AIR 1925 All 103.
73. *Amir Begum* v. *Badr-u-ddin*, 36 All 336 : AIR 1919 PC 105.
74. *Narayanan Nair* v. *Devaki Amma*, AIR 1945 Mad 230.

5. POWER OF APPELLATE COURT

Section 121 of the Evidence Act empowers the appellate court to question the trial court on matters relating to the proceedings before him and the answers to such questions should certainly be taken into account while deciding the appeal.[75]

Communications during marriage.

S. 122. No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

SYNOPSIS

1. *Principle and scope* ... 1173
2. *'Shall not be permitted'* ... 1174
3. *'During marriage'* ... 1174
4. *'Representative in interest'* ... 1174
5. *Communication* ... 1174
6. *Except in suits..... against the others* ... 1176
7. *Crime committed against another* 1178

COMMENTS

1. PRINCIPLE AND SCOPE

Section 120 enables the wife or husband to be a competent witness in civil as well as in criminal proceedings. But this section deals with the privilege affecting compellability from disclosure of all communications between wife and husband during the subsistence of a marriage, except in some cases between them for example proving non-access.

This section "rests on the obvious ground that the admission of such testimony would have a powerful tendency to disturb the peace of families to promote domestic broils, and to weaken, if not to destroy, that feeling of mutual confidence which is the most endearing solace of married life. The protection is not confined to cases where the communication sought to be given in evidence is of a strictly confidential character, but the seal of the law is placed upon all communications of whatever nature which pass between husband and wife. It extends also to cases in which the interests of strangers are solely involved, as well as to those in which the husband or wife is party on the record. It is, however, limited of such matters as have been communicated 'during the marriage'.[76] This section limits the rule enunciated in S. 120.

Under this section a married person shall not be:

(1) compelled to disclose any communication made to him during marriage by any person to whom he is married; and

(2) permitted to disclose any such communication, except

(a) when the person who made it or his representative in interest consents or

(b) in suits between married persons, or

(c) in proceedings in which one married person is prosecuted for any crime committed against the other.

STEPHEN in his DIGEST (Art. 110) states "The protection afforded by this section is greater than that conferred by the English Law, because in India, the witness is not permitted to disclose communications, so that the person making it, as well as the witness to whom it is made, is protected. But in England only the witness is protected."

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75. *Banke Biharilal* v. *Mahadeo Prasad*, AIR 1953 All 97.
76. TAYLOR, 12th Edn., 909 AP 572; *Emperor* v. *Ram Chandra*, (1932) 35 Bom LR 174; *Fateh Singh* v. *State*, 1995 Cr LJ 88 (paras 6 and 7) (All).

The prohibition under this section rests on no technicality that can be waived at will, but is founded on a principle of high import which no court is entitled to relax.[77]

The first part of the section deals with a case where the witness does not wish to disclose the communication. In such a case the witness shall not be compelled to disclose it. The second part deals with a case where the witness is willing to disclose the communication. Even then the witness shall not be permitted to do so without the consent of the husband or wife of the witness.

The provisions of this section do not apply to communications to a mistress.[78]

2. 'SHALL NOT BE PERMITTED'

Even if one of the spouses is willing to disclose a communication, he or she will not be permitted to disclose it unless the person who made it or his representative in interest consents, except in suits or prosecutions between married persons. The consent cannot be implied. It is incumbent upon the Court to ask the party against whom the evidence is to be given.

The Supreme Court in *M.C. Verghese* v. *T.J. Ponnen*[79] reversing the decision in *T.J. Ponnen* v. *M.C. Verghese*[80] held that the communication between the spouses during the marriage cannot be disclosed or deposed to by the spouse without the consent of the other who made the communication.

3. 'DURING MARRIAGE'

The protection conferred by the section is limited to such matters as have been communicated during marriage. A communication made to a woman before marriage would not be protected. But the privilege continues even after the marriage has been dissolved by death or divorce. The bar to the admissibility in evidence of communications made during marriage attaches at the time when the communication is made, and its admissibility will be adjudged in the light of the status at that date and not the status at the date when evidence is sought to be given in Court.[81]

When a communication was between the accused and his wife after the wife obtained a divorce decree, it was held that the marriage cannot be treated as subsisting after the divorce decree and hence the communication was not made during marriage so as to come within the protection under Section 122.[82]

4. 'REPRESENTATIVE IN INTEREST'

A communication may be disclosed with the consent of the husband or wife or his/her representative in interest.

Where there is no "representative in interest" who can consent, under this section, to the disclosure of communications made by a deceased husband to his wife during marriage, the wife should not be permitted, even if willing, to disclose such communications. The widow of a deceased husband is not his "representative in interest," for the purpose of giving such consent.[83]

5. COMMUNICATION

The ban of the section is confined to communications only. A wife can testify to the deeds of her husband of which she was the eye-witness.[84]

This is so because Section 120 declares her to be a competent witness against her husband. This approach obviates the difficulties experienced by English law in this respect. The accused was charged with two counts of assault occasioning actual bodily harm on his 8 months' old daughter. On both the

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77. *Nawab Howladar* v. *Emperor*, ILR (1913) 40 Cal 891.
78. *Shankar* v. *State of T.N.*, 1994 Cr LJ 3071 (paras 27 and 35) (SC).
79. (1970) 2 SCJ 353 : AIR 1970 SC 1876. **See also** *Nagaraj* v. *State of Karnataka*, 1996 Cr LJ 2901 (para 25) (Kant)
80. AIR 1967 Ker 228.
81. *M.C. Verghese* v. *T.J. Ponnan*, AIR 1970 SC 1876.
82. *S.J. Choudhary* v. *State*, 1985 Cr LJ 622 (Del).
83. *Nawab Howladar* v. *Emperor*, ILR (1913) 40 Cal 891.
84. *Ram Bharose* v. *State of U.P.*, AIR 1954 SC 704.

occasions the baby suffered multiple injuries to her face and head. The wife implicated her husband. It was not disputed that the accused was left at home with the baby and that the baby suffered injuries. The accused tried to lay the blame upon the 22½ years old brother of the baby but that was found to be factually false. Even so the Court held that the wife was not a compellable witness. She could choose to save her marriage by refusing to testify.[85]

A wife was not allowed to tell what her husband told her about a murder with which he was charged.[86]

The Supreme Court observed "The statements of the accused to his wife that he would give her jewels and he had gone to the house of the deceased to get them are inadmissible under Section 122. But the wife's statement that the accused was seen in the early hours, while it was dark, coming down the roof of his house and that he went to the *Bhusa Kothri* and came out again and had a bath and put on the *dhoti* again is not inadmissible under Section 122 as it has reference to acts and conducts of the accused and not to any communication by him to his wife."[87]

A document, even though it contains a communication from a husband to a wife or *vice versa*, in the hands of third persons, is admissible in evidence; for, in producing it there is no compulsion on or permission to the wife or husband to disclose any communication. The section protects the individuals, and not the communications if it can be proved without putting into the box for that purpose the husband or the wife to whom the communication was made.[88] A communication can be proved in any other way without putting the husband and the wife into the witness box.[89] In a case before the House of Lords the appellant a member of the crew of a ship gave a sealed cover addressed to his wife to another member of the crew, asking him to post that cover outside an English port. The member to whom it was given, handed over the cover to the captain of the ship, who opened it at the request of the police. It appeared that the contents of the letter were tantamount to a confession of a murder by the appellant. It was held that the letter was admissible in evidence; that unless the spouse is a witness and claims privilege, it is admissible and a witness other than the spouse can give evidence in respect of that communication.[90]

VISCOUNT REDCLIFFE in a judgement dissenting from the majority view held that the legal policy of marriage in relation to the law of evidence was the general one to ensure conjugal confidence, that the courts concerned was that no marriage relation, while it subsisted should be infected by the fear or suspicion, that things said only by reason of the special confidence might later become the material of legal evidence affecting the speaker. That principle is wider than that of excluding witnesses on the ground of interest in the subject-matter of the suit.

In a later case in *Duchess of Argyll* v. *Duke of Argyll*[91] approving the dissenting judgment of VISCOUNT REDCLIFFE, it was held that the confidential communications between husband and wife during coverture were within the scope of the court's protection against the breach of confidence. Subsequent to the case of *Duchess of Argyll* v. *Duke of A*, Section 43(1) Matrimonial Causes Act of 1965, was repealed by Section 16(4), Civil Evidence Act of 1968, making it possible in England for a husband or wife to give evidence of marital intercourse. Even in civil cases as per Section 16(3) of the Civil Evidence Act of 1968 there is no privilege in England.

Letters written by husband to wife were held to be provable otherwise than through wife.[92] On a trial for the offence of breach of trust by a public servant, a letter was tendered in evidence for the prosecution which had been sent by the accused to his wife at Pondicherry and had been found on a search of her house made there by the police; it was held that the letter was admissible in evidence against the accused.[93] The communication between husband and wife is not protected if it can be proved

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85. *R* v. *Rut*, (1982) 3 All ER 63, noted All ER Annual Rev 1982 at 138 a direct consequence of the rulings in *Leach* v. *R.*, (1912) AC 305 and *R.* v. *Hoskyn*, (1978) 2 All ER 136 to the effect that even when she is competent she is not compellable.
86. *Ram Chandra* v. *Emperor*, AIR 1933 Bom 153 : 1985 Raj LR 1018.
87. *Ram Bharose* v. *State of U.P.*, AIR 1954 SC 704.
88. *Queen-Empress* v. *Donaghue*, (1898) 22 Mad 1.
89. *Verghese* v. *Ponnan*, AIR 1970 SC 1876 : (1970) 2 SCJ 353.
90. *Rumping* v. *D.P.P.*, (1962) 3 All ER 256 (HL).
91. (1965) 1 All ER 611.
92. *A. Manibhushana Rao* v. *A. Surya Rantam*, AIR 1981 AP 58.
93. *Queen-Empress* v. *Donaghue*, ILR (1898) 22 Mad 1, 4.

without their assistance and by letting evidence of overhearers for *e.g.*, extra-judicial confession which was overheard by others.[94]

6. EXCEPT IN SUITS..... AGAINST THE OTHERS

Under this section a person is permitted to disclose the communication in suits between married persons or in proceedings in which one married person is prosecuted for any crime committed against the other.

Marital communications can be proved by evidence of the over-hearers.[95] Confession to wife in the presence of others were allowed to be proved by others.[96]

Regarding privilege in divorce proceedings see commentary under Section 120.

7. CRIME COMMITTED AGAINST ANOTHER

The words "proceeding in which one married person is prosecuted for crime committed against the other" in Section 122 refer to such crimes as assault or bodily injuries, wrongful confinement, etc., by one of the spouses against the other; there may be also other forms of crime but the gist of this exception is that it must be the crime committed by one married person against the other; the question whether an unlicensed pistol was in the possession of the husband or the wife cannot be said to involve any crime committed by one against the other; but the wife cannot be compelled to disclose what she was told by her husband (accused) in her conversation with him.[97]

An offence against a son is not an offence against the husband and a confession by a woman to her husband that she murdered the son is not admissible.[98]

A prosecution for bigamy/adultery would be a crime committed against the husband or wife as the case may be.

Evidence as to affairs of State.

S. 123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

SYNOPSIS

1. *Principle and scope* ... 1176
2. *Section 123 Evidence Act and Section 94(1) (Section 91 New) of Criminal Procedure Code* 1179
3. *No officer can be permitted to give any evidence* ... 1179
4. *Unpublished official records* ... 1180
5. *Relating to any affairs of the State* ... 1180
6. *Not affairs of State* ... 1183
7. *Officer at the head of the department concerned* ... 1184
8. *Head of the department—Certain cases* ... 1184
9. *Who shall give or withhold such permission as he thinks fit* ... 1185
10. *Constitution and Section 123* ... 1187
11. *Manner in which privilege is to be claimed* ... 1188
12. *Except with the permission* ... 1188

COMMENTS

1. PRINCIPLE AND SCOPE

This section deals with the privilege of unpublished official records relating to any affairs of the State from being produced.

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94. *Appu* v. *State*, AIR 1971 Mad 194.
95. *Appu* v. *State*, AIR 1971 Mad 194.
96. *Ibid.*
97. *Norendra Nath* v. *State*, AIR 1951 Cal 140.
98. *Fatima* v. *Emperor*, (1950) 15 Cr LJ 613.

This section is in the nature of an exception to the general rule of admissibility under the Evidence Act.[1]

This section involves two things: (1) That the document is an unpublished official record relating to any affairs of State, and (2) that the officer at the head of the department concerned may give or withhold the permission for giving the evidence derived therefrom. On the grounds of public policy, evidence derived from unpublished official records of State cannot be given, except with the permission of the head of the department concerned.

In HALSBURY 4th Edn. Vol. 17, para 238, Page 167 it is stated: "Secrets of State (For offences in respect of official secrets, see CRIMINAL LAW, Vol. II, Paras. 809 *et. seq.*). The Parliamentary Commissioner for Administration and his offers may not disclose information coming to their knowledge in the course of their investigations, and they may not be compelled to give evidence of such matters except in certain specified proceedings: (Parliamentary Commissioner Act, 1967, Section II(2); see PARLIAMENT). State papers, confidential official documents and communications between the Government and its officers or between such officers are inadmissible in evidence if their disclosure would be contrary to the public interest.[2]

It was held that the protection is based on the broad principle of State policy and public convenience. The papers protected, as might have been expected, have usually been public official documents of a political or administrative character; yet, the rule is not limited to these documents; its foundation is that the information cannot be disclosed without injury to the public interest and not that the documents are confidential, which alone is no reason for their non-production.[3]

The Supreme Court held by the majority that the documents which embodied the minutes of the meetings of the Council of Ministers and indicate the advice which the Council of Ministers gave to the Raj Pramukh and the documents embodying the advice tendered by the Public Service Commission to the Council of Ministers are protected under Section 123 and if the head of the department does not give permission for their production, the court cannot compel the State to produce them. The advice given by the Cabinet to the Raj Pramukh or the Governor is expressly saved by Article 163(3) of the Constitution. The report received by the Council of Ministers from the Public Service Commission carries on its face the character of a document, the disclosure of which would lead to the injury to the public interest. It falls in that class of documents which on grounds of public interest must as a class be withheld from the production.[4]

The majority overruled.[5]

In a separate judgment while agreeing with the majority view SUBBARAO J., gave the scope of the section in clear terms at para 105 as follows : "The aforesaid discussion yields the following propositions: (1) under Section 162 of the Evidence Act the court has the overriding power to disallow a claim of privilege raised by the State in respect of an unpublished document pertaining to matters of State; but in its discretion, the court will exercise its power only in exceptional circumstances when public interest demands that is, when the public interest served by the disclosure clearly outweighs that served by the non-disclosure. One of such instances is where the public interest served by the administration of justice in a particular case overrides all other aspects of public interest. (2) The said claim shall be made by an affidavit filed by the Minister in charge of the department concerned describing the nature of the document in general and broadly the category of public interest its non-disclosure purports to serve. (3) Ordinarily the court shall accept the affidavit of a Minister, but in exceptional circumstances, when it has reason to believe that there is more than what meets the eye, it can examine the Minister and take other evidence to decide the question of privilege. (4) Under no

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1. *State of J&K* v. *Anwar Ahmed Aftab*, AIR 1965 J&K 75.
2. *Conway* v. *Rimmer*, (1968) AC 910 : (1968) 1 All ER 874 (HL); *Rogers* v. *Secretary of State for the Home Dept.*, (1973) AC 388 : (1972) 2 All ER 1957 (HL); *Alfred Crompton Amusement Machines Ltd.* v. *Customs and Excise Commr. (No. 2)*, (1974) AC 405 : (1973) 2 All ER 1169 (HL). **See** further DISCOVERY, Vol. 13 (para 86) *et. seq.* If evidence is inadmissible under this rule, there is no privilege that can be waived; *Rogers* v. *Secretary of State for the Home Dept. supra.*
3. *Asiatic Petroleum Co. Ltd.* v. *Anglo Persian Oil Co.*, (1916) 1 KB 822. **See also** *Henry Greer Robinson* v. *State of South Australia*, AIR 1931 PC 254.
4. *State of Punjab* v. *Sodhi Sukhdev Singh*, AIR 1961 SC 493 **reversing** *Sodhi Sukhdev Singh* v. *State of Punjab*, AIR 1960 Pun 407.
5. *W.S. Irwin* v. *D.J. Reid*, AIR 1921 Cal 282; *Nazir Ahmed* v. *Emperor*, AIR 1944 Lah 434.

circumstances can a court inspect such a document or permit giving of secondary evidence of its contents. (5) Subject to the overriding power of the court to disallow the claim of privilege in exceptional cases, the following provide working rules of guidance for the courts in the matter of deciding the question of privilege in regard to unpublished documents pertaining to matters of State; (a) "records relating to affairs of the State" mean documents of State whose production would endanger the public interest; (b) documents pertaining to public security, defence and foreign relations are documents relating to affairs of State; (c) unpublished documents relating to trading, commercial or contractual activities of the State are not ordinarily, to be considered as documents relating to affairs of State; but in special circumstances they may partake of that character; (d) in cases of documents mentioned in (c) *supra*, it is a question of fact in each case whether they relate to affairs of State or not in the sense if they are disclosed public interest would suffer."

The Orissa High Court held "For the purpose of claiming the privilege under Section 123, the expression "Heads of departments" has two distinct meanings, it may be limited to heads of the various departments of the secretariat, namely, the secretaries of the departments, or else it may also include heads of departments of attached offices either under the Union Government or under the State Government. The privilege should be claimed by the Minister in charge who is the political head of the department concerned, if not, the secretary of the department who is the departmental head. The reason for this limiting the expression to the highest officials in the State is that privilege under Section 123 is only claimed in respect of "affairs of the State"..... The National Savings Commissioner is not the secretary of the Finance Department and his claim of privilege under Section 123 must fail. In the case of a Collector the claim is still weaker because he is not a head of the department even for the purpose of Orissa Service Code."[6]

The decision impliedly overruled the decisions in.[7]

In *S.P. Gupta* v. *Union of India*[8]; the Supreme Court overruled the decision in *Sodhi Sukhdev Singh's* Case[9].

VISCOUNT SIMON in *Duncan* v. *Cammell Laird and Co. Ltd.*,[10] observed: "The rule that the interest of the State, must not be put in jeopardy by producing documents which would injure it, is a principle to be observed in administering justice, unconnected with the interest of claims of the particular parties in litigation, and indeed, is a rule upon which the judge should, if necessary, insist even though no objection is taken at all. This has been pointed out in several cases, *e.g.*, in *Chatterton* v. *Secretary of State*.[11] It was further held "It is not a sufficient ground that the documents are 'State Documents' or 'Official' or are marked 'confidential'. It would not be a good ground that, if they were produced, the consequences might involve the department or the Government in Parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tender to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the Minister or the department does not want to have the documents produced. The Minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, *e.g.*, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service."

The Supreme Court in *State of Punjab* v. *Sodhi Sukhdev Singh*,[12] observed "As a result of Section 123 a document which is material and relevant is allowed to be withheld from the court and that undoubtedly constitutes a very serious departure from the ordinay rules of evidence. The principle on which this departure is justified is the principle of the overriding and paramount character of public

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6. *Union of India* v. *Sudhir Kumar*, AIR 1963 Ori 111; **following** *State of Punjab* v. *Sodhi Sukhdev Singh*, AIR 1961 SC 493; *Duncan* v. *Cammell Laird & Co. Ltd.*, 1942 AC 624.
7. *Chiragh Din* v. *Crown*, 52 Cr LJ 161; G.G. in *Council* v. *Peer Mohammad Khuda Bux*, 1950 EP 228 (FB), *Public Prosecutor* v. *D. Venkata Narasayya*, AIR 1957 AP 486; *Lakhuram Hariram* v. *Union of India*, AIR 1960 Pat 192; *Emperor* v. *Rasul Bux*, AIR 1944 Sind 145; *Devayjoti Burman* v. *D. Nalinakshya Ammal*, AIR 1954 Cal 216.
8. AIR 1982 SC 149.
9. AIR 1961 SC 493.
10. 1942 AC 624 : (1942) 1 All ER 587, 595.
11. (1895) 2 QBD 189.
12. AIR 1961 SC 493, 501.

interest. A valid claim for privilege made under Section 123 proceeds on the basis of the theory that the production of the document in question would cause injury to public interest. Care has, however, to be taken to see that interests other than the interest of the public do not masquerade in the garb of public interest. Subject to this reservation the maxim *salus populiest suprema lex*, which means that regard for public welfare is the largest law, is the basis of the provisions contained in Section 123."[13]

CHAGLA C.J. observed: "The principle of the section is that it is not all records that are privileged, but only those the disclosure of which would result in an injury being caused to the public interest. The section gives effect to the principle that public interest must be paramount and private interest must give way when there is any conflict between the public and private interest."[14]

The Supreme Court held that the foundation of the Law behind Section 123 and 162 of the Evidence Act, is the same as in English Law. It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents, if disclosed, would injure public and national interest.[15]

The head of the department should never claim privilege on the ground that the disclosure of the document in question may defeat the defence raised by the State. The considerations which are relevant in claiming privilege on the ground that the affairs of the State may be prejudiced by disclosure, must always be distinguished from the considerations, of expediency which may persuade the head of the department to raise a plea of privilege.

The mere fact that a document is marked confidential will not afford sufficient justification for objecting to its production under this section nor will it be a good ground that the production may involve a department of the Government in a discussion in the legislative assembly or in public criticism. Neither will it be a good ground that production may tend to expose want of efficiency in administration or to lay the department open to claim for compensation[16] or it is apprehended that the document if produced would defeat the defence raised by the State. The impact of the document on the head of the department or the Minister incharge of the department or even the Government in power, has no relevance in making a claim for privilege under this section.[17]

The provision of Section 123 and 124 would apply to the trial of election petitions.[18]

A commission of inquiry, not being a Court, cannot direct to produce the documents.[19]

2. SECTION 123 EVIDENCE ACT AND SECTION 94(1) (SECTION 91 NEW) OF CRIMINAL PROCEDURE CODE

It was held that the discretion of the court under Section 94(1) Cr.P.C. is absolute, certain limitations are however placed on the exercise of the discretion of the court by sub-Section 3 of Section 94 by which the court cannot by making an order under sub-Section 1 of Section 94, Cr.P.C. set at naught the provisions of Section 123 and 124 of the Indian Evidence Act. The power of the Court to make an order under Section 94(1) is not limited by Section 123 Evidence Act but the discretion of the court is a judicial discretion and it should not ordinarily be exercised in such a way as to conflict with privilege against disclosure conferred by Section 123.[20]

3. NO OFFICER CAN BE PERMITTED TO GIVE ANY EVIDENCE

The term evidence refers to both oral and documentary evidence.[21]

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13. *State of U.P.* v. *Raj Narain*, AIR 1975 SC 865; *S.P. Gupta* v. *Union of India*, AIR 1982 SC 149; *State* v. *V.D. Kumar*, 1975 Cr LJ 1411.
14. *Dinbai* v. *Dominion of India*, AIR 1951 Bom 72.
15. *State of U.P.* v. *Raj Narain*, AIR 1975 SC 865.
16. *Tukaram* v. *King Emperor*, ILR 1946 Nag 385 : AIR 1946 Nag 256; *Jagannath Dwarakanath Raje* v. *State*, (1971) 74 Bom LR 320.
17. *State of Punjab* v. *Sodhi Sukhdev Singh*, AIR 1961 SC 493; *Amar Chand Butail* v. *Union of India*, AIR 1964 SC 1658 : (1965) ISCJ 243; **following** *State of Punjab* v. *Sodhi Sukhdev Singh*, AIR 1961 SC 493.
18. *Subba Rao* v. *Brahmananda Reddy*, AIR 1967 AP 155.
19. *Central Bureau of Investigation* v. *Kumher Inquiry Commission*, 1996 AIHC 1971 (paras 13, 23 and 24) (Raj).
20. *Chandubhai* v. *State*, AIR 1962 Guj 290 **following** *Emperor* v. *Bilal Mahomad*, AIR 1940 Bom 361
21. STOKES Vol. II. p. 919 f.n. 2.

4. UNPUBLISHED OFFICIAL RECORDS

If the contents of a document have already been published there is no question of claiming privilege in respect of that document.[22]

The word 'Published' in Section 123 does not mean only those documents or papers which are printed for general publication. Even if a secret document or a part of it is revealed, the document will lose the sanctity as an unpublished record because there cannot be any guarantee as to whom and in what contingency the other parts may also be made known. The blue-book which was marked as secret document and parts of which had already been disclosed in the Lok Sabha debates and in writ proceedings before the High Court could not be held to be an unpublished record within the meaning of Section 123.[23] The word 'unpublished' in Section 123 and the disclosure contemplated in Section 124 relate primarily to the person against whom privilege is claimed under those sections. And if he has been permitted by lawfully to see those papers and also to take copies of the same. It will be futile for the authorities to claim privilege under either of those sections.[24] Documents placed on record in an earlier suit filed by a different person, cannot be called as unpublished or undisclosed documents.[25] The claim of privilege cannot be rejected on the ground that a copy of the document was produced by the opposite party. The court in such cases has to examine the document for itself and then decide whether or not claim of privilege is just, proper and *bona fide*.[26] Letters, and demi-officials addressed to a contractor if duly received by him would not be unpublished documents within the meaning of Section 123.[27] When an open enquiry is made and statements recorded they cannot be deemed to be confidential, much less relating to the affairs of the State. Similarly, any application or complaint made by a person cannot be held to relate to the affairs of State.[28]

The privilege under Section 123 extends only to unpublished or undisclosed official records or documents relating to the affairs of the State.[29] Notings, instructions and correspondence which are part of office file are unpublished official record, provided they are not made use of in the orders passed by the concerned officials. In respect of documents forming part of the order no privilege can be claimed.[30]

5. RELATING TO ANY AFFAIRS OF STATE

The Supreme Court observed: "At the time when the Evidence Act was enacted, 'affairs of State' may have had a comparatively narrow content. Having regard to the notice about governmental function and duties which then obtained, "Affairs of State" would have meant matters of political or administrative character relating, for instance, to national defence, public peace, and security and good neighbourly relation. But, the inevitable consequence of the change in the concept of the functions of the State is that the State in pursuit of its welfare activities undertakes to an increasing extent activities which were formerly treated as purely commercial, and documents in relation to such commercial activities undertaken by the State, in the pursuit of public policies of social welfare are also apt to claim the privilege of documents relating to the affairs of State. As the Legislature has advisedly refrained from defining the expression "affairs of State" it would be inexpedient for judicial decisions to attempt to put the said expression into a straight jacket of a definition judicially evolved. The question as to whether any particular document or a class of documents answer the description must be determined in each case on the relevant facts and circumstances adduced before the court."[31]

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22. *Conway* v. *Rimmer*, (1968) 1 All ER 874; *Robinson* v. *State of South Australia*, AIR 1931 PC 254.
23. *State of U.P.* v. *Raj Narain*, AIR 1975 SC 865.
24. *Union* v. *Sudhir Kumar*, AIR 1963 Ori 111; **relying on** *Robinson* v. *State of South Australia*, AIR 1931 PC 254; *Mehtab Singh* v. *Secretary of State*, AIR 1933 Lah 157; *Bhalchandra Dattarya* v. *Chanabasappa*, AIR 1939 Bom 237; *Chandradhar Tewari* v. *Deputy Commissioner*, AIR 1939 Oudh 65; *Dinbai* v. *Dominion of India*, AIR 1951 Bom 72.
25. *Khairathi Lal* v. *Delhi Development Authority*, ILR (1974) 2 Del 51.
26. *Union of India* v. *Lalli*, AIR 1971 Pat 264.
27. *Mehtab Singh* v. *Secretary of State*, AIR 1933 Lah 157.
28. *Mahabirji & Co.* v. *Prem Narain*, AIR 1965 All 494.
29. *Khairathi Lal* v. *Delhi Development Authority*, ILR (1974) 2 Del 51.
30. *Amarchand* v. *Sukh Ram*, ILR 1973 HP 459.
31. *State of Punjab* v. *Sodhi Sukhdev Singh*, AIR 1961 SC 493, **following** *Duncan* v. *Cammell Laird and Co. Ltd.*, 1942 AC 624.

JUSTICE VENKATARAMAYYA while concurring with BHAGAWATHI in *S P. Gupta* v. *Union of India*[32] observed "The expression" "affairs of State" in Section 123 should receive a very narrow meaning. Any claim for interpreting it with a wider connotation may expose Section 123 to be challenged as being unconstitutional". "Affairs of State" is a very wide expression. Every communication which proceeds from one officer of State to another officer of the State is not necessarily relating to the affairs of State. What are the "affairs of State" has got to be determined by a reference to the grounds on which privilege can be claimed in respect of a particular document. It is only such documents which relate to the affairs of the State the disclosure of which would be detrimental to the public interest that come within the category of unpublished official records relating to affairs of State entitled to protection under this section.[33]

"Affairs of State" will include any matter of a public nature with which the Government is concerned, *i.e.*, all secrets of State, such as State papers and all communications between Government and its officers, the privilege in such cases not being that of the person who is in possession of the secret, but that of the public as a trustee for whom the secret has been entrusted to him.[34]

Classes of documents to which the immunity may be accorded are not closed and in the life of a fast changing society rapidly growing and developing under the impact of vast scientific and technological advances, new class or class of documents may come into existence to which the immunity may have to be granted in public interest.[35] "Affairs of the State" means administrative instructions and guidance notes secretly given to various departments of Governments. They can claim status of being documents relating to affairs of State.[36] It may cover the case of documents in respect of which the practice of keeping them secret is necessary for the proper functioning of the public service.[37]

Departmental notes contained in official files involving public interest are privileged, as they would relate to affairs of State.[38] Observations or notings made by officers by way of comment or opinion from the reports of the speeches made at public election meetings are only privileged and rest of the reports containing factual data would not be covered by Section 123.[39] Decisions of the Cabinet of the Government for the execution of public policies would be affairs of State.[40] A document which embodies the minutes of the discussion between private party and State Minister which indicate the advice given by the Minister is which relates to affairs of State.[41]

The unpublished records of the affairs of State may include:—

1. Documents that pass between two States.
2. Documents between the State and its own subjects.
3. Documents between the State and subjects of another State.
4. Documents between subjects of more than one State.
5. Documents that pass between Head of Departments or between Ministers of State.[42]

All the documents relating to deployment of armed forces are unpublished official records. And in the very nature of things they are confidential and secret papers.[43] Whenever it is found necessary by the State to maintain law and order in a particular locality, the armed force can be deployed at the discretion of the authorities responsible for maintenance of law and order. All such papers relating to that matter would be documents relating to affairs of State.[44] In a case a letter by an under-secretary to the

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32. AIR 1982 SC 149.
33. *Chamarbhag Walla* v. *Palpia*, (1948) 52 Bom LR 231.
34. BEST, 12th Edn., S. 578, p. 495.
35. *S.P. Gupta* v. *Union of India*, AIR 1982 SC 149 per BHAGHAVAT'S.
36. *Sujit Kantha* v. *Union of India*, AIR 1970 Assam 131.
37. *S.B. Choudhury* v. *I.P. Changkakati*, AIR 1960 Assam 210.
38. *State of Orissa* v. *Jagannath*, AIR 1977 SC 2201.
39. *Kanwarlal* v. *Amarnath*, AIR 1975 SC 308.
40. *Orient Paper Mills* v. *Union of India*, AIR 1979 Cal 114.
41. *Kotah Match Factory* v. *State of Rajasthan*, AIR 1970 Raj 118.
42. *Iqbal Ahmed* v. *State of Bhopal*, AIR 1954 Bhopal 9.
43. *Subhasini Jena* v. *Commandant of 6th Battalian*, 1988 Cr LJ 1570 (Ori).
44. *Subhashini Jena* v. *Commandant 6th Battalion, Cuttack*, 1988 Cr LJ 1570.

Government of India and another to the Secretary to the Government of Bombay, P.W.D. Department and another letter by the Secretary to the Bombay Government to the officers of the Railway were held as unpublished official records and relate to affairs of the State.[45] Punjab Police Rules 23, 31, 27, 24(2) treat the contents of surveillance register as strictly confidential and pertaining to public security or public peace.[46] Reports by police officers to the Government about the investigation of allegations of the commission of an offence are privileged under this section and Section 124 as they are unpublished records and are submitted in official confidence. The privilege which the Government can claim in respect of documents relating to matters of State is a narrow one and must be sparingly used.[47] The verbatim reports of the meetings held in elections and recorded by the special branch of police were held to be form part of the records pertaining to maintenance of peace and security and thus they relate to the affairs of State.[48] A report regarding the activities of an individual with a view to enable the State to take action against him under the Preventive Detention Act, as it does not only relate to the affairs of the individual, but it also relates to the affairs of the state so far as they effect the affairs of the State.[49] A complainant filed a complaint against a public officer for illegally permitting Kuwait foreign nationals to enter Kerala State through airport without a vaild visa and allow them to stay for certain period. In the enquiry under 202, Cr.P.C. before the Criminal Court, the complainant filed an application requiring the officers to produce certain documents in their possession before the Court. It was held that the production of the documents would cause greater injury to the public interest than their non-production, and the magistrate was justified in rejecting that application on the ground of privilege.[50] The character roles and confidential reports of Government employees relate to affairs of State.[51] The confidential record of the Controller of Stationery relating to the watermark of cartridge papers cannot be compelled to be produced in Court.[52] Secretariat files containing notes, minutes and correspondence between Government and Public Service Commission were held privileged documents within the meaning of Section 123 and 124 of the Evidence Act, though that privilege is not absolute.[53] When a report was sent by the High Court to the Government regarding the promotion or reversion of a subordinate Judge, it is in the nature of consultations under 233 of the Constitution and therefore, a privileged document exempted from being produced.[54] It was held by the M.P. High Court that the State was justified in claiming a privilege against production of the relevant file concerning the grant of mining lease as it contained letters written by the Head of the Department to the subordinate officers of the Department and *vice versa* and between that Department and other Departments which were unpublished and contained State secrets.[55]

In a suit for injunction restraining the Government from diverting the water flow into the plaintiff's tank by construction of a dam, it was held that the correspondence between the Madras and Travancore Government, regarding the construction of a dam was privileged while the reports by sub-ordinate officers and the Statements recorded by them are not privileged.[56] Documents concerning administration relating to defence foreign affairs, cabinet minutes and advice or notes exchanged between Ministers and other heads of departments of the Government which may cover fields of trade, commerce, etc., which are to be kept in secret, But, simply because as matter relates to affairs of State it would not be protected under 123 unless evidence is derived from the unpublished record.[57]

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45. *Mutsaddilal* v. *Union of India*, AIR 1955 Hyd 61.
46. *State* v. *Hariram*, ILR (1969) 2 Punj 338.
47. *Rajal Raojee* v. *Provincial Government, Central Provinces*, ILR 1950 Nag 690.
48. *Kanwarlal Gupta* v. *Amarnath Chawla*, ILR (1972) 2 Del 291: **see CONTRA** *Ramasrinivasan* v. *Shanmugham*, AIR 1969 Mad 781: (Speeches at public meetings recorded by police officers under departmental instructions).
49. *S.B. Choudhury* v. *I.P. Changkakati*, AIR 1960 Assam 210 **following** *Emperor* v. *Nanda Singh*, AIR 1925 Oudh 540: In re : *Manthubhai Mehta*, AIR 1945 Bom 122.
50. *Sundaresan Thampi* v. *Ramachandrani*, 1987 Cr LJ 108 (Ker) **following** *S.P. Gupta* v. *Union of India*, AIR 1982 SC 149.
51. *State of Punjab* v. *Surjit Singh*, AIR 1975 Punj 11; *H.L. Rodhey* v. *Delhi Administration*, AIR 1969 Del 246.
52. *Jaffarul Hossain* v. *Emperor*, ILR (1931) 59 Cal 1046 : AIR 1932 Cal 468.
53. *State of Bihar* v. *Kripalu Shankar*, AIR 1987 SC 1554. **See also** ILR (1977) 2 Cut 125, 140
54. *Barada Kanta Misra* v. *State*, ILR 1966 Cut 503 (In view of AIR 1982 SC 149 this may not be good law).
55. *Durga Prasad* v. *Parveen*, AIR 1975 MP 196.
56. *M. Yusuff* v. *State of Madras*, AIR 1971 Mad 468.
57. *Raj Narain* v. *Smt. Indira Nehru Gandhi*, AIR 1974 All 324 (this proposition was not touched while reversing the decision in *State of U.P.* v. *Raj Narain*, AIR 1975 SC 865.

Statements made and documents produced by assessees before Income-tax Officers for the purpose of showing the income of such assessees do not refer to matters of State, and are not privileged under this action.[58] Also the Govt. cannot claim this privilege regarding the admission of foreign students.[59]

6. NOT AFFAIRS OF STATE

The Diary of a foot constable who was shadowing the movements of a suspect is not an unpublished document relating to the affairs of a State.[60] Statements made and recorded by a forest range officer in the course of an investigation are not unpublished documents, relating to any affairs of the State.[61] Departmental enquiry papers are not unpublished documents relating to affairs of the State. Consequently where the probity or conduct of a public servant is a matter in issue the State cannot screen his conduct from the purview of the Court.[62] Documents showing the steps for selection to the appointment of the Chief Secretary which has to be done on merit with due regard to seniority under Rule 3(2-A) of the Indian Administration Service Rules of 1954 cannot be held to be a document relating to the affairs of the State.[63] In a suit for payment of dues under a contract, the document concerning the fixation of price relates to a commercial transaction and it does not relate to the affairs of the State, and so no privilege can be claimed.[64] Statements of witnesses recorded by C.I.D. Inspector during enquiry neither constitutes documents relating to affairs of State nor are they communications made to a public officer in official confidence.[65]

Where a Government employee challenged the steps taken by a departmental promotion committee and asked for (1) proceedings of the committee dealing with scrutiny of candidates (2) confidential reports of the person concerned and (3) file and minutes of the committee, it was held that except the confidential reports there is no privilege in respect of other documents.[66] The privilege claimed regarding production of character roll of an employee on the ground that its disclosure would cause injury to the freedom and candour of expression of opinion by the concerned authorities cannot be sustained as the notes and minute in such documents do not relate to determination and execution of public policies.[67]

A Government supplier of chrome ore wanted to recover the price fixed by the Department in their files. The Court held that the document concerning fixation related to a commercial transaction in respect of which no privilege could be claimed.[68] Statements made by witness in the course of a departmental enquiry into the conduct of police officers who were subsequently put upon their trial on charges of taking illegal gratification are not privileged under this section or S. 124 or 125.[69] The particulars contained in a record of assessment under Section 32(1) of U.P. Sales Tax Act are not confidential record and Section 123 would not apply.[70] Public Services Commission which is a body independent of the State under the Constitution cannot claim privilege in respect of a document which is the basis of the selection of candidates made by it.[71] It was held that conciliator's report in an industrial dispute is not a privileged document, or a confidential document. The party to the dispute is entitled to a copy of the report.[72] It was held that the accounts of different officers of Government and other bodies are audited

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58. *Venkata Chella Chettiar* v. *Sampathu Chettiar,* (1908) 32 Mad 62.
59. *Sajitha G* v. *Secretary to Govt. of India, Ministry of External Affairs,* AIR 1994 Mad 204 (para 11).
60. *Mohan Singh* v. *Emperor,* AIR 1940 Lah 217; *Ibrahim Sheriff Yazdani* v. *Secretary of State,* AIR 1936 Nag 25.
61. *Kaliappa Udayan* v. *Emperor,* AIR 1937 Mad 492.
62. *Niranjan Dass Sehgal* v. *State of Punjab,* AIR 1968 Punj 255.
63. *N.P. Mathur* v. *State of Bihar,* AIR 1972 Pat 93 (FB) **following** *State of Punjab* v. *Sodhi Sukhdev Singh,* AIR 1961 SC 493; *Amarchand Butail* v. *Union of India,* AIR 1964 SC 1658.
64. *F.A. Corporation Ltd.* v. *Industrial Development Corporation Ltd., Orissa,* AIR 1986 Ori 199; **following** *S.P. Gupta* v. *Union of India,* AIR 1982 SC 149; *Durga Prasad* v. *Praveen,* AIR 1975 MP 196; *Dinbai* v. *Dominion of India,* AIR 1951 Bom 72.
65. *B. Kondaswamy Reddy* v. *State of A.P.,* 1982 Cr LJ 393.
66. *Commissioner of I.T.* v. *Good will picture Ltd., Delhi,* ILR (1972) 1 Del 146.
67. *Maini* v. *Commissioner of I.T.,* ILR (1970) 1 Del 879.
68. *Ferroy Alloys Corporation Ltd.* v. *Industrial Development Corporation of Orissa,* AIR 1986 Ori 199. The Court **rlied upon** *State of Punjab* v. *Sodhi Sukhdev Singh,* AIR 1961 SC 493 (partly **overruled** by the Supreme Court in *S.P. Gupta* v. *U.P.,* AIR 1982 SC 149 and Section 162 which requires documents to be produced.
69. *Harbans Sahai* v. *Emperor,* (1912) 16 CWN 431.
70. *Allah Bux* v. *Ratanlal Jain,* ILR 1958 All 829.
71. **Referring to** *Amarchand* v. *Union of India,* AIR 1964 SC 1658; *Gourahari Mishra* v. *State,* ILR (1978) 2 Cut 477.
72. *H. S. Bande* v. *State Industrial Court, Nagpur,* AIR 1967 Bom 174.

by auditors from the Accountant General's Office; in prosecutions for criminal misappropriations and criminal breach of trust arising out of different reports prepared by them, the Accountant General or his office ought to adopt a helpful attitude and should not claim privilege, otherwise the guilty persons are likely to escape punishment.[73] Where the documents had no bearing on the security of nation as well as on friendly relations with various foreign countries, privilege could not be claimed in respect of those documents.[74] Certain documents, referred to in the show cause for the removal of a President of a Municipal Council, cannot be said to be privileged documents as they do not involve any question relating to the affairs of the State disclosure of which would be against the interest of the State or public interest.[75]

If the court found on inspection that any part of the document was innocuous in the sense that it did not relate to affairs of State, the court could order disclosure of the innocuous part, provided that would not give a distorted or misleading impression. Where the court orders disclosure of an innocuous part, the court should seal up the other parts because their disclosure would be undesirable.[76]

7. OFFICER AT THE HEAD OF THE DEPARTMENT CONCERNED

The privilege should be claimed generally by the Minister in-charge who is the political head of the department concerned, if not; the Secretary of the department should claim the privilege.[77] The expression "Head of the Department" occuring in Section 123 is confined to the Minister concerned and in special circumstances to the Secretary of the Department concerned. The Inspector General of Police cannot be an officer at the Head of the Department for the purpose of Section 123.[78]

8. HEAD OF THE DEPARTMENT—CERTAIN CASES

Where the question of loyalty of a pilot of Air-India was involved the affidavit given by an officer of high status in Air-India was accepted and the High Court which held that the privilege claimed was based on proper grounds and refused to peruse... the documents.[79] Under the Prevention of Corruption Act the affidavit by the Head of Anti-corruption Department claiming privilege is sufficient.[80] It was held under the Co-operative Societies Act the Registrar of the Co-operative department is the highest executive authority in the State for the department; for the purpose of Section 123.[81]

The Chief Personal Officer N.E. Railway is not a Head of the Department for claiming privilege under Section 123.[82] Director of Industries is not the head of the department for purpose of the sector though he may be called as the head for other purposes.[83] Though, the Governor of Reserve Bank of India, is also head of the various departments of the Bank, it is the officer at the head of the department concerned that has to claim privilege under Section 123 and not the Governor of the R.B.I.[84] Secretary to Board of Education is not the head of the Department to claim privilege in respect of reviewers report submitted to the Board.[85] National Savings Commissioner is not the secretary of the Finance Department and so cannot be treated as the Head of the Department to claim privilege under Section 123.[86]

Where the Government claimed want of knowledge of proceedings under Section 46 of U.P. Zamindari Abolition and Land Reforms Act the party denied such a claim and applied for discovery and inspection of certain documents. The Government claimed privilege. The Supreme Court held that the

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73. *Krishna Nandan Prasad* v. *State*, AIR 1958 Pat 166 (DB).
74. *Niyamvedi* v. *Ramon Srivastava*, 1995 Cr LJ 1976 (para 10) (Ker).
75. *Baburao Vishwanath Mathpati* v. *State*, AIR 1996 Bom 227 (para 60).
76. *State of U.P.* v. *Raj Narain*, AIR 1975 SC 865.
77. *State of Punjab* v. *Sodhi Sukhdev Singh*, AIR 1961 SC 493; *State of A.P.* v. *Ramu Naido*, (1964) 2 An LT 25; *Public Prosecutor* v. *D Venkata Narasayya*, AIR 1957 AP 486; *State of Madras* v. *S.A. Baffakki*, AIR 1954 Mad 926.
78. *State* v. *Jagannath Jena*, ILR 1973 Cut 427.
79. *V.P.S. Gill* v. *Air India*, AIR 1988 Bom 416.
80. *State* v. *V.D. Kumar*, 1975 Cr LJ 1411.
81. *Public Prosecutor* v. *D. Venkata Narasayya*, AIR 1957 AP 486 **relying on** *State of Madras* v. *S.A. Baffakki*, AIR 1954 Mad 926.
82. *Union of India* v. *Indradeo Kumar*, AIR 1963 Pat 129.
83. *Construction Private Ltd.* v. *State of Punjab*, 1963 Cur LJ 130 (Punj).
84. *Reserve Bank of India* v. *Sudershan Kumar Khanna*, ILR 1969 Del 460.
85. *Debajyothi* v. *Dr. Nalimakshya*, AIR 1954 Cal 216.
86. *Union of India* v. *Sudhir Kumar*, AIR 1963 Ori 111.

compensation officer will be required to decide whether the claim of privilege raised by the Government should be sustained or not.[87]

9. WHO SHALL GIVE OR WITHHOLD SUCH PERMISSION AS HE THINKS FIT

In *State of Punjab* v. *Sodhi Sukdev Singh*,[88] Supreme Court observed" Thus our conclusion is that reading Sections 123 and 162 together the court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide but the Court is competent, and indeed is bound, to hold a preliminary enquiry and determine the validity of the objections to its production and that necessarily involves an enquiry into the question as to whether the evidence relates to an affairs of State under Section 123 or not.

In this country the court has to determine the character or class of the document. If it comes to the conclusion that the document does not relate to affairs of State, then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to the affairs of State, it should leave it to the head of the department to decide whether he should permit its production or not". This decision was however overruled in *S.P. Gupta* v. *Union of India*,[89]. JUSTICE BHAGAVATHI, J. observed "Now if the court has no power to inspect the document, it is difficult to understand how the court can find, without conducting an enquiry as regards the possible effect of the disclosure of the document upon public interest, that the document is one relating to affairs of State, as ex-hypothesi a document can be said to relate to affairs of State only if its disclosure will cause injury to public interest. It might be that there are certain classes of documents which are of such a character that even without inspecting them or conducting an enquiry, it might be possible to say that by virtue of their character, their disclosure would be injurious to public interest and therefore they are documents relating to affairs of State. But there might be other documents which do not fall within this description and yet whose disclosure might be injurious to public interest and in case of such documents it would not be possible for the court without inspecting them or at any rate without holding an enquiry to determine whether their disclosure would be injurious to public interest and they should therefore be classified as documents relating to affairs of State. Even so, according to GAJENDRAGADKAR, J. and the other learned Judges, the court can and must determine whether such documents relate to affairs of State without inspecting them and without even holding an enquiry into the possible injury to public interest which might result from their disclosure. The view taken by GAJENDRAGADKAR, J. and the other learned Judges in *Sodhi Sukhdev Singhs'* case[90] (*supra*) thus runs into an inconsistency and creates an illogical situation. He further observed: "The court has to balance the detriment to the public interest on the administrative or executive side which would result from the disclosure of the document against the detriment to the public interest on the judicial side which would result from non-disclosure of the document though relevant to the proceeding. Vide the observations of LORD PEARSON in *Reg.* v. *Lewes, JJ, Exparte, Hoke Secretary*,[91] (*supra*) at page 406 of the report. The court has to decide which aspect of the public interest predominates or in other words whether the public interest which requires that the documents should not be produced outweighs the public interest that a court of justice in performing its function should not be denied access to relevant evidence.

The court has thus to perform a balancing exercise and after weighing the one competing aspect of public interest against the other decide where the balance lies. If the court comes to the conclusion that on the balance, the disclosure of the document would cause greater injury to public interest than its non-disclosure, the court would uphold the objection and not allow the document to be disclosed but if on the other hand, the court finds that the balance between competing public interest lies the other way, the court would order the disclosure of the document. This balance between two competing aspects of public interest has to be performed by the court even where an objection to the disclosure of the document is taken on the ground that it belongs to a class of documents which are protected irrespective of their contents, because there is no absolute immunity for documents belonging to such class. Even in *Conway* v. *Rimmer*[92], at p. 952 LORD REID recognised an exception that cabinet minutes and the like can be

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87. *Sub-divisional Officer, Mirzapur* v. *Raja Srinivasa*, AIR 1966 SC 1164.
88. AIR 1961 SC 493.
89. AIR 1982 SC 149.
90. AIR 1961 SC 493.
91. 1973 AC 388.
92. (1968) AC 910.

disclosed when they have become only of historical interest and in *Lanyon Pvt. Ltd.* v. *Commonwealth*,[93] (*Supra*). MENZIES J. agreed that there might be "special circumstances" in which such documents might be examined LORD SCARMAN also pointed out in the course of his speech in *Burmah Oil Co.* v. *Bank of England*[94] (*Supra*) that he did not accept "that there are any classes of documents which however harmless their content and however strong the requirement of justice, may never be disclosed until they are only of historical interest". The learned Lawlord said and we are quoting here his exact words since they admirably express our own approach to the subject:

"But is the secrecy of the inner workings of the Government machine so vital a public interest that it must prevail over even the most imperative demands of justice? If the contents of a document concern the national safety, affect diplomatic relations or relate to same State secret of this importance, I can understand an affirmative answer. But if they do not (and it is not claimed in this case that they do), what is so important about secret of Government that it must be protected even at the price of injustice in our court?".

The reasons given for protection the secrecy of Government at the level of policy making are two. The first is the need for candour in the advice offered to Minister, the second is that disclosure 'would create or fan ill-informed or captious public or political criticism'. LORD REID in *Conway* v. *Rimmer*, thought the second "the most important reason". Indeed he was inclined to discount the candour argument.

I think both the reasons are factors legitimately to be put into the balance which has to be struck between the public interest in the proper functioning of the public service. (i.e., the executive arm of the Government) and the public interest in the administration of justice. Sometimes the public service reasons will be decisive of the issue; but they should never prevent the court from weighing them against the injury which would be suffered in the administration of justice if the document was not to be disclosed.

The same view was expressed by GIBBS A.C.J. in *Sankey* v. *Whitlam*[95] (*Supra*), where the learned acting Chief Justice said:—

"I consider that although there is a class of documents whose members are entitled to protection from disclosure irrespective of their contents, the protection is not absolute, and it does not endure for ever. The fundamental and governing principle is that documents in the class may be withheld from production only when this is necessary in the public interest. In a particular case the court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice. The court will of course examine the question with special care, giving full weight to the reasons for preserving the secrecy of documents of this class but it will not treat all such documents as entitled to the same measure of protection—the extent of protection required will depend to some extent on the general, subject-matter with which the documents are concerned."

There is nothing sacrosanct about the immunity which is granted to documents because they belong to a certain class. Class immunity is not absolute or inviolable in all circumstances. It is not a rule of law to be applied mechanically in all cases. The principle upon which class immunity is founded is that it would be contrary to public interest to disclose documents belonging to that class, because such disclosure would impair the proper functioning of the public service and this aspect of public interest which requires that justice shall not be denied to any one by withholding relevant evidence. This is a balancing task which has to be performed by the Court in all cases.

JUSTICE DESAI observed: Undoubtedly there must be such affairs of the State involving security of the nation and foreign affairs where public interest requires that the disclosure should not be ordered. It is however, equally well recognised that fair administration of justice is itself a matter of vital public interest. Therefore if the two public interests conflict, the Court will have to decide whether the public interest which formed the foundation for claiming privilege would be jeopardised if disclosure is ordered and on the other hand whether fair administration of justice would suffer by non-disclosure and decide which way the balance tilts. In the ultimate analysis the approach of the Court while deciding the question of privilege would be that it has to balance public interest in just justice and just administration

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93. 129 Commonwealth LJ 650.
94. (1979) 3 All ER 700.
95. (1978) 21 ALR 505.

of justice and State affairs at high level to respect of appointment to high constitutional offices and then decide which way the balance tilts."

JUSTICE VENKATRAMAIAH observed:

> "There is residual power in Court to decide whether the disclosure of a document is in the interest of public and for that purpose, if necessary to inspect the document and that the statement of head of the department that the disclosure would injure public interest is not final, *State of U.P.* v. *Raj Narain*, AIR 1975 SC 365, **Rel. on**".

In the above case a further question arose as to the scope of judicial scrutiny regarding the advice tendered by the Council of Ministers to the President. Justice BHAGAVATHI speaking for the majority observed: "There can be no doubt that the advice tendered by the Council of Ministers to the President is protected against Judicial Scrutiny. But the material on which the advice tendered by the Council of Ministers is based cannot be said to be part of the advice and the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India which constituted the material forming the basis of the decision of the Central Government must accordingly be held to be outside the exclusionary rule enacted in Cl. (2) of Article 74."

However the Supreme Court observed: "Where the documents like official notes etc., which are sought to be produced in court, are part of the preparation of documents leading to the formation of the advice tendered to the President of India they are privileged under Art. 74(2) of the Constitution, which provides that the question whether any, if so what advice was tendered by Ministers to the President, shall not be enquired into in any court. The court is precluded from asking for production of such document. It is true that there is no sacrosanct rule about the immunity from production of documents and that the privilege should not be allowed in respect of each and every document. The claim of immunity and privilege has to be based on public interest. It is also well-settled that the privilege cannot be waived. It is the duty of the Supreme Court to prevent disclosure where Art. 74(2) is applicable.".[1] The oath of office of secrecy adumbrated in Art. 75(4) and Schedule III of the Constitution does not absolve the Minister either to state the reasons in support of the public interest immunity to produce the state documents or as to how the matter was dealt with or for their production when the discovery order *nisi* or rule *nisi* was issued. The Minister has to act in aid of the Court.[2]

In view of the fact that *Sukhdev Singh's* case at present stands **overruled** by the decision in *S.P. Gupta's* case, the decisions which **followed** *Sukhdev Singh's* case cannot be considered to be good law. As there is a conflict between the decision of the Supreme Court in *Sukhdev Singh's* case and *S.P. Gupta's* case and also later case in *Dypuck Systems Pvt. Ltd.*, the matter has been referred to a larger Bench of Nine Judges.

10. CONSTITUTION AND SECTION 123

The High Court in exercise of its powers under Art. 226 of the Consitution of India can call for scrutiny and perusal by it, unpublished official records. In so doing the Court is not permitting anybody to give any evidence from these records relating to any affairs of State within the meaning of this section.[3] In a petition for the issue of a Writ of *Cerciorari* for quashing the proceeding, the Government has to submit its file to the Court.[4] Claim for privilege can hardly prevail over the Constitutional mandate of disclosure under Art. 22(5) of the Constitution in cases of preventive detention. The privilege claim by virtue of Cl. (6), Art. 22 must be properly placed before the Court.[5]

Any communication between the Chief Minister and the Governor of the State under Art. 163(3) of the Constitution concerning the land acquisition proceedings is a privileged communication and is not

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1. *Doypack Systems Pvt. Ltd.* v. *Union of India*, AIR 1988 SC 782. **See also** *S.R. Bommai* v. *Union of India*, AIR 1994 SC 1918 (para 32), **dissenting from** *State of Rajasthan* v. *Union of India*, AIR 1977 SC 1361 : (1978) 1 SCR 1.
2. *R.K. Jain* v. *Union of India*, AIR 1993 SC 1769 (para 39).
3. *R. Ramanna* v. *State*, AIR 1971 AP 196.
4. *Joseph John* v. *State*, AIR 1953 Tra-Co 363 (FB).
5. *Mohd. Abubukar Marwari* v. *Union of India*, 1982 Cr LJ 53 (Bom) **relying** on *Lawrence D' Souza* v. *State of Bombay*, AIR 1956 SC 531.

open to question before the High Court[6] but not the records relating to action taken by the Govt. in regard to formation of the Human Rights Commission.[7]

The Union Govt. representing the Cabinet can claim no privilege or protection against the disclosure of "otherwise information" in its possession and which was made the basis of proclamation under Art. 356.[8]

11. MANNER IN WHICH PRIVILEGE IS TO BE CLAIMED

The proper course to claim privilege in respect of certain documents would be to file a reply to the affidavit claiming the privilege and the question be then considered after hearing both the parties on the point.[9] The claim should always be made in the form of an affidavit. The affidavit should show that each document in question has been carefully read and considered, and the person making the affidavit is satisfied that its disclosure would lead to public injury; if there are a series of documents included in a file, it should appear from the affidavit that each one of the documents whose disclosure is objected to, has been duly considered by the authority concerned, the affidavit should also indicate briefly within permissible limits, the reason why it is apprehended that their disclosure would lead to injury to public interest. In a proper case the person making the affidavit whether he is Minister or the Secretary should be summoned to face cross-examination on the relevant points.[10]

The fact that on an earlier occasion when the document was asked to be produced, no claim of privilege was made, by itself will not make the claim *mala fide*, when made, after the final order to produce the documents was passed.[11]

An affidavit through the personal assistant, of a Collector who was in direct charge of the record was accepted.[12]

Averments in an affidavit that files contained several letters written by the held of the department who is subordinate and *vice versa* or that they were secrets of State do not constitute material to infer that documents refer to affairs of State.[13]

Mere claim that disclosure of the documents would be prejudicial to public interest is not enough. The claimant must give the reasons therefor within permissible limits for claiming privilege.[14]

Where an order is passed by a court permitting the inspection of documents, for which privilege has been claimed it was held that the objection must be deemed to have been overruled.[15]

When it has been expressly averred that the officer concerned has very carefully considered the document in issue and also given detailed reason in his affidavit claiming privilege, the mere absence of the word "read" or words "*Bona fide*" would in no way detract from the validity of such an affidavit.[16]

12. EXCEPT WITH THE PERMISSION

It was held that even the documents forming part of unpublished official record and relating to any affairs of the State can be given in evidence if the head of the department concerned grants permission for it.[17]

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6. *Shree Swami* v. *State of Rajasthan*, AIR 1995 Raj 69 (para 9). **See also** *People's Union for Civil Liberties, Allahabad* v. *State of U.P.*, AIR 2000 All 103 (para 28) : 2000 AIHC 2803.
7. *People's Union for Civil Liberties, Allahabad* v. *State of U.P.*, AIR 2000 All 103 (para 28) : 2000 AIHC 2803.
8. *Sunderlal Patwa* v. *Union of India*, AIR 1993 MP 214 (para 30).
9. *George Mathew (Dr.)* v. *Union of India*, (1997) 10 SCC 537.
10. *Ijjat Ali Talukdar* v. *Emperor*, AIR 1943 Cal 539 **approved**; **see also** *Amarchand Butail* v. *Union of India*, AIR 1964 SC 1658 **reversing**; *Amarchand* v. *Union of India*, AIR 1962 HP 43; **See also** *Ramachandran* v. *Alagiriswamy*, AIR 1961 Mad 450; *Public Prosecutor* v. *D. Venkata Narasayya*, AIR 1957 AP 486; *Union of India* v. *Indradeo Kumar*, AIR 1963 Pat 129; *Narayana Swamy* v. *State*, AIR 1953 Mad 228; *Lakuram Hariram* v. *Union*, AIR 1960 Pat 192. *Brijinath Kedarnath* v. *State*, 1957 Cr LJ 134 (M.B.).
11. *Union of India* v. *Lalli*, AIR 1971 Pat 264.
12. In re : *Killi Suryanarayana Naidu*, AIR 1954 Mad 278.
13. *Joti Prasad Sharma* v. *Addl. Civil Judge, Dehradun*, AIR 1968 All 42.
14. *State* v. *Kailashwati*, AIR 1979 Raj 221.
15. *B.S. Sindhu* v. *Union of India*, (1971) 1 SLR 600 (HP).
16. *State* v. *Hariram*, ILR (1969) 2 Punj 338.
17. *Pulin Behari* v. *State*, AIR 1965 Tri 33.

Official communications

S. 124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

SYNOPSIS

1. *Principle and scope* ... 1189
2. *No public officer shall be compelled to disclose* ... 1189
3. *Sections 123 & 124* ... 1190
4. *Communications made in official confidence* ... 1192
5. *Official confidence* ... 1192
6. *Communications had in official confidence—some instances* ... 1193
7. *Communications not in official confidence—instances* ... 1193
8. *Public interest should suffer by the disclosure* ... 1194
9. *When he considers that the public interests would suffer by the disclosure* ... 1194
10. *Who is to decide?* ... 1195

COMMENTS

1. PRINCIPLE AND SCOPE

Under this section a public officer cannot be compelled to disclose communications made to him in confidence if he considers that public interests would suffer by the disclosure.

This section is based on the same principle as Section 123, the object being the same for the two sections, and they are based on public policy.

This section is designed to prevent the knowledge of official papers that is to say papers in official custody, beyond that circle which would obtain knowledge of them in confidence whether the confidence was express or implied. It would normally include all officers including clerks of superior officers and might also apply to non- officials to whom such papers were disclosed on the understanding express or implied that the knowledge should go no further.[18] Public interests are paramount as compared with the individual interests of a party in a Court of Justice. It is obsolutely essential to the welfare of the State that the names of parties who interpose in situations of this kind should not be divulged, for otherwise, be it from fear or shame, or the dislike of being publicly mixed up in inquiries of this nature, few men would choose to assume the disagreeable part of giving or receiving information respecting offences, and the consequence would be that many great crimes would pass unpunished.[19]

The right to claim privilege is available only to public servants.[20]

When communication is made in official confidence its non-disclosure is necessary for proper functioning of public service.[21]

A commission of inquiry, not being a Court, cannot compel to disclose the official communication.[22]

2. NO PUBLIC OFFICER SHALL BE COMPELLED TO DISCLOSE

The term 'Public Officer' means an officer with public as opposed to private duties who receives communications made to him in official confidence of such a nature that disclosure in certain cases would injure the public interests. The word 'disclose' means the first disclosure of communications made in official confidence and does not apply to a disclosure in a court of law of what has already been disclosed outside it. The object of the section is to prevent the disclosure of things not known outside that circle which is in confidence and the section has no application when once there has been disclosure to a member of the public to whom the contents of such papers have not been made known in confidence. [23] Though "Public officer" is not defined under the Act all officers who in discharge of their regular duties

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18. *Chandra Dhar Tewari* v. *Deputy Commissioner, Lucknow*, ILR (1938) 14 Luck 351 : AIR 1939 Oudh 65.
19. TAYLOR, 12th Edn. S. 941, p. 597.
20. *Ramaswami Chettiar* v. *Mahadevan K.J.*, (1968) 2 Mad LJ 393.
21. *H.L. Rodhey* v. *Delhi Administration*, AIR 1969 Del 246.
22. *Central Bureau of Investigation* v. *Kumher Inquiry Commission*, 1996 AIHC 1971 (para 34) (Raj).
23. *Chandra Dhar Tewari* v. *Deputy Commissioner, Lucknow*, ILR (1938) 14 Luck 351 : AIR 1939 Oudh 65.

receive communications made to them in official confidence and are expected not to disclose confidential information to others must be held to be public officers within the meaning of Section 124.[24]

If the officer who received the communication, in his turn forwards it to another officer for further action the latter officer can claim the privilege under Section 124 by filing an affidavit to the effect that the public interest would suffer by the disclosure of the communication, and it would be sufficient to support the claim.[25]

The Vice Chancellor of the Punjab University is a 'Public Officer' within the meaning of this section.[26] The privilege can only be claimed by the head of the department or by the Secretary of that department on an affidavit. Filing of a certificate only is not enough.[27] Where it is an unpublished official record relating to an affair of the State, the question whether the disclosure of its contents would be against public interest and whether privilege could be claimed rested with the head of the department and if the head of the department refused to disclose it, the court would not compel him to produce the document or disclose its contents.[28] Compensation Officer under the U.P. Zamindari Abolition and Land Reforms Act was held to be a public officer.[29]

3. SECTIONS 123 AND 124

There is clear distinction between Sections 123 and 124:

Section 123	Section 124
1. No one shall be permitted to give evidence.	No public officer shall be compelled to disclose.
2. Derived from unpublished official records.	Communications made to him (Public Officer) in official confidence.
3. They must relate to affairs of State.	When he considers that public interest would suffer by the disclosure.
4. Except with the permission of the head of department concerned who shall give or withhold such permission as he thinks fit.	

Section 123 covers all persons who receive evidence derived from unpublished official records whereas Section 124 covers only public officer to whom communications are made in official confidence. Under Section 123 the unpublished record must relate to affairs of the State where as under Section 124 the communications need not necessarily relate to affairs of State but must have been made in official confidence. But both the sections are based on public policy, *i.e.*, there should be possible injury to public interest from the disclosure of either unpublished official record relating to the affairs of the State or any communications made in official confidence. Under Section 123 it must be a document which is in the form of a record. But under Section 124 the communication may be oral or documentary. Under Section 123 it is only the head of the department concerned who can permit or withhold the permission to disclose the unpublished official record. Under Section 124 the official who receives the communication is the person concerned and not necessarily the head of department, who is competent to permit or withhold the disclosure of the communications.

Sometimes 'Communications' which expression is used in Section 124 may relate to affairs of the State in which case Section 123 would apply. In such cases Section 124 is more or less supplementary to Section 123. In this connection Section 162 of this Act becomes relevant as it states that a witness once summoned to produce shall, if it is in his possession or power, bring it to court not withstanding any objection which there may be to its production or admissibility and the validity of any such objection shall be decided by the court. On its production, if the court thinks fit, it may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine its admissibility.

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24. *P.P.* v. *Pocku Syed Ismail*, 1973 Cr LJ 931 (AP).
25. *Union of India* v. *Sudhir Kumar*, AIR 1963 Ori 111.
26. *University of the Punjab, Lahore* v. *Jaswant Rai*, ILR (1946) 27 Lah 561.
27. *S. Ajit Singh* v. *Ashwani Kumar*, ILR (1954) Pun 359.
28. *Mutsaddilal* v. *Union of India*, ILR (1955) Hyd 256 : AIR 1955 Hyd 81; *Public Prosecutor* v. *D. Venkata Narasayya*, ILR (1957) AP 174 : AIR 1957 AP 486.
29. *Sub-divisional Officer* v. *Raja Sri Niwas Prasad Singh*, AIR 1966 SC 1164.

The provisions contained in Section 123 and 124 of the Evidence Act are supplementary to each other and are based on broad principles of public policy. The courts are to see that the officials of the State Government do not use the provisions as a mere cloak for withholding necessary and relevant evidence only to defeat a just claim of any party. Though an arbitrator does not constitute a regular court, he has to use sound judicial discretion and he may, in certain cases compel the production of documents, which he thinks, do not contain any evidence derived from unofficial records relating to the affairs of the State or are communications in official confidence.[30]

A communication which is made to a public officer and which may relate to the affairs of the State would be covered by the Section 123 but if the official communication is made in official confidence and where the affairs of the State are not involved and if public interest would otherwise suffer by disclosure Section 124 shall apply. If a case falls under Section 124, the court can inspect the document in question and determine the claim of privilege. The returns submitted to an Income-tax Officer and a statement made to him cannot be said to be made in official confidence within the meaning of Section 124.[31]

Reports made by one public officer to another in the discharge of his official duties would come both within the ambit of Section 123 and within the scope of Section 124. When the public officer to whom they are sent in official confidence considers that the public interest would suffer by their disclosure if they relate to matters relating to public policy, they come within the meaning of Section 123. In both Section 123 and 124 the court is the judge as to whether the documents in respect of which privilege is claimed is a State document or whether the communications was made in official confidence. Under Section 124 the court can inspect the document to determine the claim of privilege. If the document comes within the Section 123, the court cannot inspect it though it can take other evidence to determine the character attributed to the document. As regards the questions whether a disclosure will or will not be prejudicial to the public interest the head of the department concerned under Section 123 or the officer concerned under Section 124 is the judge and it would be final.[32]

It was held by the Supreme Court that the privilege claimed by the State in regard to the departmental notings contained in official files should not be rejected except when the affidavit filed on behalf of the Government did not adequately bring out the involvement of public interest, consequent upon the disclosure of the notings. The High Court is to be confined to the particular facts of the case for rejecting the calling upon the Government to produce confidential notings in the official files, if the disclosure thereof is calculated to impair public interest.[33]

Under Section 124 the public officer may waive a privilege in his own discretion without any reference to the Head of the Department. Whereas under Section 123, even if privilege is not claimed, the document cannot be admitted if public interest suffers. Mere marking as confidential does not by itself be the basis of claiming privilege under Section 124. But it must be further shown that the public interest would suffer by the disclosure of that document.[34]

In cases of departmental enquiry the statements of witnesses during investigation by the C.I.D. do not come within Section 162, Cr.P.C. and the parties are not entitled to be given copies of those statements, the C.I.D. can claim privilege under Section 123 or 124.[35]

Income-tax Officer in certain cases can be treated as a public officer and can claim privilege under Section 124.[36]

The contention that this section applies only to an officer who received the document and it does not prevent producing that document, by the sender of the document, cannot be accepted as it would completely put at naught the provisions of Section 124.[37]

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30. *Kapoor Nilokheri Co-op. Dairy Farm* v. *Union of India*, ILR (1971) 1 Punj 391.
31. *Jethanand* v. *State of Rajasthan*, 1972 Cr LJ 1496 (Raj); *B.R. Srinivasan* v. *B. Parakala Swamy Mutt*, AIR 1960 Mys 186; *Bhalachandra* v. *Chanbasappa*, AIR 1939 Bom 237; *Chiragh Din Md. Bakhsh* v. *Crown*, 52 Cr LJ 161 (Lah).
32. *State of A.P.* v. *Appanna*, (1962) 2 CrLJ 649, **relying on** *State of Punjab* v. *Sodhi Sukh Dev Singh*, AIR 1961 SC 493; *Nagarrja Pillai* v. *Secretary of State*, AIR 1915 Mad 1113; *Local Government Board* v. *Arlidge*, 1915 AC 120; *Gangaram* v. *Union of India*, AIR 1964 Pat 444. The decision in *State of Punjab* v. *S.S. Singh*, 1961 SC 493 *supra* was **overruled in** *S.P. Gupta* v. *Union of India*, 1982 SC 149 **see** commentary at the end of this section.
33. *State of Orissa* v. *Jaganath Jona*, AIR 1977 SC 2201.
34. *Firm G. Mohi-ud-Din* v. *State of J&K*, AIR 1961 J&K 20.
35. *James Bushi* v. *Collector of Ganjam*, AIR 1959 Ori 122.
36. *Kader Kutty* v. *Agricultural Income-tax Officer, Tellicherry*, AIR 1961 Ker 32.
37. 1967 Cur LJ 488.

4. COMMUNICATIONS MADE IN OFFICIAL CONFIDENCE

The first question that arises under this section is whether the communications in question was made to the public officer in official confidence. This is a condition precedent to the claim, and the question is to be primarily decided by the Court before whom the privilege is claimed. There is no clear cut rule of procedure as to when and how the privilege should be claimed. It would be claimed at the earliest opportunity by the public officer concerned when in reply to the summons he produces the document in his control or charge.[38] Communications in official confidence import no special decree of secrecy and no pledge or direction for its maintenance, but include generally all matters communicated by one officer to another in the performance of their duties. The question whether such communication was made in the course of such performance is for the court to decide.[39] A demi-official letter addressed by one officer by name to another officer by name, in view of the reasons for which demi-official letters are usually written, is written in official confidence within the meaning of this section.[40] If communications are not made in official confidence they cannot be regarded as privileged, *e.g.*, statements made to a station master of a railway in the course of an inquiry of a theft by some railway employees.[41]

A Government resolution containing opinions of Government officers, including a legal adviser, is a privileged document within the meaning of this section.[42] A statement made to the Collector by the proprietors applying for taking over their estate by the court of Wards, showing the details of their property and liabilities, is a communication made to a public officer in official confidence within the meaning of this section and cannot be used as acknowledgement of any liability mentioned therein.[43]

5. OFFICIAL CONFIDENCE

It was held that the words "Official Confidence" in Section 124 indicate that the section applies to communications from one public officer to another public officer in discharge of their official duties and not to communications to such officer by outsiders.[44] For the protection under Section 124 the communication in official confidence must be such as to involve a wilful confiding of secrets to avoid publicity by reason of the official position of the person in whom trust is reposed.[45]

Where an eqnuiry is one under Section 176, Cr.P.C. the copies of depositions of witnesses taken in such an enquiry, should be furnished to the accused. The enquiry under police standing order 145 is not a statutory enquiry. As the enquiry is held in open and witnesses are examined in the presence of others, the question of privilege under Section 124 would not arise, and the communications made by any witness to the officer conducting the enquiry cannot be held to be in official confidence.[46]

Accused has no right to the free or certified copies of statements of the witnesses made during the investigation of a different offence in an earlier investigation, as they are communications made in official confidence, to the investigating officer.[47] But the case diary maintained by the police is privileged, as it does not form part of the case record.[48] It was held in a defamation case, that the statements made before the police officer during the course of investigation is not absolutely privileged.[49] However in a defamation case it was held that the complaint made to a police officer is absolutely privileged.[50] In *Chandradhar* v. *Deputy Commissioner, Lucknow*,[51] it was held that the term

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38. *Bhalchandra* v. *Chanbasappa*, (1938) 41 Bom LR 391 : AIR 1939 Bom 237.
39. *Nagaraja Pillai* v. *Secretary of State*, ILR (1914) 39 Mad 304, 311 : AIR 1919 Mad 1113.
40. *Chandra Dhar Tewari* v. *Deputy Commissioner, Lucknow*, ILR (1938) 14 Luck 351 : AIR 1939 Oudh 65.
41. *King-Emperor* v. *Bhagwati Prasad*, ILR (1929) 5 Luck 297.
42. *Sursingji Dajiraj* v. *Secretary of State*, (1926) 29 Bom LR 1213 : AIR 1926 Bom 590.
43. *Collector of Jaunpur* v. *Jamna Prasad*, ILR (1922) 44 All 360 : AIR 1922 All 37.
44. *State of A P* v. *Appanna*, (1962) 2 Cr LJ 649, **relied on** *Nagaraja Pillai* v. *Secretary of State*, AIR 1915 Mad 1113.
45. *Ramanna* v. *Govt. of A.P.*, AIR 1971 AP 196.
46. In re : *Subramanian Chettiar*, 1967 Cr LJ 1232.
47. *Suryamani Tarai* v. *State*, 1967 AIR Ori 189; **See also** *Jhumarlal* v. *State*, AIR 1957 Raj 185; *Purushotham* v. *State of Kutch*, AIR 1954 SC 700; *Gurbachan Singh* v. *State of Punjab*, AIR 1957 SC 623.
48. *Mahabirji* v. *Prem Narain*, AIR 1965 Lah 494 **relying** on *Emperor* v. *Dharam Vir*, AIR 1933 Lah 498.
49. *Maroti Sadashiv* v. *Narayan Rao*, AIR 1959 Bom 443, **see CONTRA**, *Sanjivi* v. *Koneri*, AIR 1926 Mad 521, *Madhab Chandra* v. *Nirod Chandra*, AIR 1939 Cal 477.
50. *K. Ramadas* v. *P. Samu Pillai*, (1969) 1 Mad LJ 338.
51. AIR 1939 Oudh 65.

'public officer' in Section 124 must be construed to be an officer with public, as opposed to private, duties, who receives communications made to him in official confidence of such as nature that disclosure in certain cases would injure the public interest. The court of wards for the purpose of Section 124 should be taken as coming within the term public officer.[52] Opinions given by a Law Secretary who functions as a legal Remembrancer to the State, regarding the plaintiff's claim against the State and which are in the nature of advice given by the legal adviser to his client are privileged communications.[53]

6. COMMUNICATIONS MADE IN OFFICIAL CONFIDENCE—SOME INSTANCES

A statement made in a confidential departmental enquiry for gathering information by the department to guide them in future action, would be a case of communication made in official confidence.[54] A communication made by one Secretary to another Secretary of the Government is a communication in official confidence and privilege can be claimed.[55] Observations made by the High Court on a report of an enquiry officer against the conduct of a Judicial Officer, forwarded to the Governor are communications made in official confidence and are privileged.[56] The correspondence between superior authorities with regard to the confirmation or non-confirmation of a Government servant in a particular post are communications made in official confidence and they are privileged.[57] Statement made to a Collector by the proprietors applying for taking over their estates by the Court of wards, showing their financial position and their liabilities were held as communications made in official confidence.[58] A report from a Deputy Tahsildhar to the Collector is a communication in official confidence.[59]

7. COMMUNICATIONS NOT IN OFFICIAL CONFIDENCE—INSTANCES

Communications made by one officer to another in matters which arise out of commercial relations which subsist between the State on one side and a private citizen on the other, cannot be treated as communications made in official confidence.[60] The mere fact that the production of the document might adversely tell upon the fortunes of the litigants would not be sufficient to hold that the documents were made in official confidence, and that their disclosure would affect adversely the interest of the State.[61] Cables sent are not communications to public officer in official confidence.[62] Communications between officers empowerd to impose penalty and the higher authorities with regard to assessment or penalty proceedings under the Income- tax Act cannot be said to be communications made in official confidence, and the authorities are not entitled to privilege under Section 124 because in law these authorities are not entitled to exchange opinions or give advice in regard to Judicial Proceedings.[63] A party to an action who had made a communication to the Government or to a head of the department is entitled to ask for its production. The Government or the head of the department has no right to claim any privilege in respect of such a document as it was not made in official confidence.[64] A valuation statement given by a Revenue Inspector on the basis of which the award was passed could not be said to be a communication made in official confidence.[65] Statements recorded during investigation by a police officer are not

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52. *Vishnomal* v. *Court of Wards*, AIR 1928 Sindh 76; *Queen-Empress* v. *Mathura Prasad (Manager of Court of Wards)*, 21 All 127, **see CONTRA**, *Nanda Lal Bose* v. *Ashutosh Ghose*, AIR 1920 Cal 167 (case of Manager of Court of words).
53. *Tirath Ram* v. *Govt. of J&K*, AIR 1954 J&K 11.
54. In re : *Suryanarayana Naidu*, AIR 1954 Mad 278; *B.R. Srinivasan* v. *B. Parakalaswamy Mutt*, AIR 1960 Mys 180.
55. *K.S. Venkatesam Naidu* v. *State of Madras*, AIR 1959 Mad 335; *State of A.P.* v. *Appanna*, (1962) 1 An WR 256.
56. *Md. Ilyas Alvi* v. *State of Maharashtra*, AIR 1965 Bom 156.
57. *Har Prasad Gupta* v. *State of U.P.*, AIR 1963 All 415.
58. *Collector of Jaunpur* v. *Jamna Prasad*, ILR 44 All 360 : AIR 1922 All 37.
59. In re : *Makky Moithu*, AIR 1943 Mad 278.
60. *Tirath Ram* v. *Govt. of J&K*, AIR 1954 J&K 11.
61. *Tirath Ram* v. *Govt. of J&K*, AIR 1954 J&K 11.
62. *Hussain Umar* v. *Dalipsinghji*, AIR 1970 SC 45, 52.
63. *Union of India* v. *Sheo Shankar Sitaram*, (1974) 95 ITR 523 (All).
64. *Firm Ghulam Mohi-ud-din* v. *State of J&K*, AIR 1961 J&K 20.
65. *Kunjanam Antony* v. *State of Kerala*, AIR 1964 Ker 274.

statements made in official confidence.[66] Particulars contained in the record of assessment are not made in official confidence.[67]

A distinction has to be drawn between cases where two citizens engaged in civil litigation want official communications to be disclosed at the time of the trial and the cases in which the State has entered into a commercial transaction with a private citizen in the course of which the State has made certain communications pertaining to the cases in which it is interested as a defendant or a plaintiff. In the former case the State not being interested either way a Government Officer is expected to keep before himself only the interests of public before a privilege is claimed, but in a case in which the State itself is a party, the court must be satisfied that the mind of the responsible officer has been applied to the question as to whether the safety of the public interest warrants giving or withholding of the information. The court must also be convinced that the privilege is not claimed to avoid inconvenient disclosure which may tell against its own side in the litigation, or as a matter of mere departmental routine.[68]

8. PUBLIC INTEREST SHOULD SUFFER BY THE DISCLOSURE

The second condition to the claim under Section 124 is that the disclosure of the contents of the communication to the public officer must in his opinion, be proved to be injurious or detrimental to public interest. The court must therefore apply its mind and peruse each document before disallowing any claim of privilege, as there may be portions of a document which cannot be disclosed without injury to public interest. Where the document is partly privileged and partly not, the court is neither competent nor justified to direct its production as it is really not in public interest to permit the production of such a document. It is only in cases where the court is satisfied that the disclosure of the contents of the document or information or statement would in any way injure or adversely affect public interest, the claim of privilege can be rejected, but not otherwise. The ingredients of Section 124 must be held to have been satisfied if the communication is made to a public officer either by a private citizen or another public officer in official confidence and if the public officer considers that the disclosure of the contents of the same would injure public interest. The very intention and purpose of Sections 123, 124 and 125 is to safeguard the interests of general public. Hence, the provisions of Section 124 must be construed liberally so as to take it within their ambit any communications made to public officer in official confidence irrespective of the person who communicates.[69]

The public officer before claiming protection under Section 124 must come to a positive conclusion that by the disclosure of the communications public interest would suffer. He cannot claim protection under Section 124 on any other ground.[70]

The government can claim privilege in respect of the file on which decision as to the appointment of the President of Customs, Excise and Gold Control Appellate Tribunal was made by it.[71]

9. WHEN HE CONSIDERS THAT THE PUBLIC INTERESTS WOULD SUFFER BY THE DISCLOSURE

The public officer claiming privilege has to exercise his own discretion in giving or refusing disclosure.[72] His decision must not be arbitrary or capricious. He should not claim privilege merely because such disclosure would either advance the case of the adversary or damage his case. This section must in no event be resorted to as a cloak to shield the truth from the Court.[73]

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66. *Apparao* v. *Suryaprakasa Rao*, AIR 1951 Mad 864; *Tilka* v. *State*, AIR 1959 All 543; In re : *Subramaniam Chettiar*, 1967 Cr LJ 1232; *Mahabirji* v. *Prem Narain*, AIR 1965 All 494; *Soryamoni Tarai* v. *State of Orissa*, AIR 1967 Ori 189.
67. *Allah Bux* v. *Ratanlal Jain*, AIR 1958 All 829.
68. *Tirath Ram* v. *Govt. of J&K*, AIR 1954 J&K 11.
69. *Public Prosecutor, A.P.* v. *Pocku Syed Ismail*, 1973 Cr LJ 931 (AP); In re : *Suryanarayana Naidu*, AIR 1954 Mad 278; In re : *Subramanian Chettiar*, 1967 Cr LJ 1232 (Mad); *Kotah Match Factory* v. *State of Rajasthan*, AIR 1970 Raj 118; *Venkatesam Naidu* v. *State of Madras*, AIR 1959 Mad 335.
70. *B.R. Srinivasan* v. *B. Parakalaswamy Mutt*, AIR 1960 Mys 186; *Excelsior Film Exchange* v. *Union of India*, AIR 1968 Bom 322.
71. *R.K. Jain* v. *Union of India*, AIR 1993 SC 1769 (paras 4 and 60).
72. *Jehangir* v. *Secretary of State*, (1903) 6 Bom LR 160; *King-Emperor* v. *Bhagwati Prasad*, ILR (1929) 5 Luck 297
73. *Excelsior Film Exchange* v. *Union of India*, (1966) 69 Bom LR 878 : AIR 1968 Bom 322.

10. WHO IS TO DECIDE ?

Under Section 124 whether the communication in question was made in official confidence is a matter for the court to decide.[74]

It was held by VENKATASUBBRAO J., that there are two matters involved in this section. *Firstly*, whether a particular document for which the privilege is claimed falls within it, *i.e.* whether the document is a communication made to a public officer in official confidence. On a proper construction of the section, it is for the court to decide that question. *Secondly*, if the court decides that the document is of the nature contemplated by the section, then the public officer himself is the sole judge as to whether by its disclosure public interest would suffer. (that alone being the ground of privilege).[75] This distinction of deciding the two matters involved in this section was drawn earlier in *Venkatachela Chetty* v. *Sampathu Chetty*[76].

In all these above cases it was held that the second question, namely whether disclosure of the communication results in public interest being harmed (would suffer) is to be decided by the public officer concerned. However, the Supreme Court held that the court has the inherent power to look into the document and decide and the head of the department is not the sole judge to decide that question.[77]

In view of the decision in *Gupta's* case the decisions above referred to insofar as they decide that the decision of the officer concerned whether the disclosure by the communication is in public interest is final and cannot be received by the Court are no longer good law.

See Commentary under Section 123.

Information as to commission of offences.

S. 125. No Magistrate or Police-officer, shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue-officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

***Explanation.*—"Revenue-officer" in this section means any officer employed in or about the business of any branch of the public revenue.**

SYNOPSIS

1. *Principle and Scope* ... 1195
2. *Source of Information* ... 1196
3. *Police officer* ... 1197
4. *No adverse inference if objection is raised* ... 1198

COMMENTS

1. PRINCIPLE AND SCOPE

This section which provides that no Magistrate or Police Officer shall be compelled to say whence he got any information as to the commission of an offence and that no Revenue Officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue, is based on public policy. It is of importance to the public for the detection of crimes that those

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74. *B.R. Srinivasan* v. *B Parakalaswamy Mutt*, AIR 1960 Mys 186; *Thirath Ram* v. *Government of J&K*, AIR 1954 J&K 11; *Kunjanam Antony* v. *State of Kerala*, AIR 1964 Ker 274; *State of Kerala* v. *Midland Rubber and Products Co.*, 1971 Ker 228; *Kunjannam* v. *State of Kerala*, ILR (1964) 2 Ker 83; *Brijnath Kerdarnath* v. *State of M.P.*, 1957 Cr LJ 134; In re : *Suryanarayana Naidu*, AIR 1954 Mad 278; *Gangaram* v. *Union of India*, AIR 1964 Pat 444; *Public Prosecutor* v. *Pocku Syed Ismail*, 1973 Cr LJ 931.
75. *Vythilinga Pandarasannidhi* v. *Secretary of State*, 1953 Mad 342.
76. ILR 32 Mad 62; *Nagaraja Pillai* v. *Secretary of State*, AIR 1915 Mad 1113; *Collector of Jaunpur* v. *Jamnaprasad*, ILR 44 All 360 : AIR 1922 All 37; In re : *Mantu Bhai Mehta*, AIR 1945 Bom 122; *Bhalchandra* v. *Chanbasappa*, AIR 1939 Bom 237; *Chandra Dhar* v. *Deputy Commissioner, Lucknow*, AIR 1939 Oudh 65; *Tirath Ram* v. *Govt. of J&K*, AIR 1954 J&K 11; In re : *Suryanarayana Naidu*, AIR 1954 Mad 278; *State of Punjab* v. *Sodhi Sukhdev Singh*, AIR 1961 SC 493.
77. *S.P. Gupta* v. *Union of India*, AIR 1982 SC 149 **following** the earlier case in *Union of India* v. *Rajnarayana*, AIR 1975 SC 865.

persons who are the channel by means of which the detection is made should not be unnecessarily disclosed.

"It is perfectly right, that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner, but there is a rule which has universally obtained on account of its importance to the public for the detection of crimes, that those persons, who are the channel by means of which the detection is made, should not be unnecessarily disclosed."[78]

The section places a prohibition on compelling the Magistrate, Police Officer or Revenue Officer to say from which source he had the information referred to in the section. It appears therefore that he can give the information if he is so willing in which case he waives the privilege.[79] Thus a Magistrate or Police Officer or Revenue Officer has the discretion to give out such information as to the commission of the offence or not. But under the English Law it is the duty of the Judge to exclude such information whether any objection is taken by the witness, or not, if it is detrimental to the public interest. But if the Judge feels that such exclusion results in miscarriage of justice, he may relax the rule.[80]

The above principle was adopted by WOODROFFE J., who observed: "Though the section (Section 125) does not in express terms prohibit the witness, if he be willing, from saying whence he got the information, both the English authorities from which the rule is taken and a consideration of the foundation to the rule show that the protection should not be made to depend upon a claim of privilege being put forward, but that it is the duty of the judge, apart from objection taken, to exclude the evidence. A *fortiori* if objection is taken, it cannot, since the law allows it, be made the ground of adverse inference against the witness."[81]

The Allahabad High Court observed: "Section 125 entitles a Police Officer to refuse to disclose the source of his information as to the commission of any offence, while public policy demands that no adverse inference be drawn against the prosecution for withholding an information from the witness-box."[82]

It is absolutely essential to the welfare of the State that the names of spies, decoys or informers should not be divulged; for, otherwise, be it from fear, or shame, or the dislike or being mixed up in enquiries of this nature, few men would choose to assume the disagreeable part of giving or receiving information respecting offences, and the consequence would be that a great many crimes would pass unpunished.

2. SOURCE OF INFORMATION

What is prohibited under the section is the disclosure of only the source of information as to the commission of offence. In England the law is different. The rule protects not only the names of the persons by, or to, whom the disclosure was made, but the nature of the information given, and any other question as to the channel of communication or what was done under it.[83] Thus the witness cannot be asked whether he himself was the informer[84] or even by whom he had been advised to communicate his information to the authorities[85] nor can a police constable be cross-examined as to what passed between himself and his superior officer[86]; or as to inquiries made in the course of his duties.[87] A witness may, however, be asked whether the person to whom he made the communication was a Magistrate or not[88];

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78. Per EYRE, LORD CHIEF JUSTICE in *R* v. *Hardy*, (1794) 24 How. St. Tr. 199. **see** TAYLOR, 939; *Amrita Lal Hazra* v. *Emperor*, ILR 42 C 957 : 29 IC 513 : 16 Cr. LJ 97.
79. *Mahamed Ally* v. *Emperor*, 12 Cr LJ 277.
80. *Marks* v. *Beyfus*, (1890) 25 QBD 494 CA; *Hennesey* v. *Wright*, (1888) 21 QBD 509.
81. *Weston* v. *Peary Mohan Dass*, ILR 40 Cal 898.
82. *State of U.P.* v. *Randhir Sri Chand*, AIR 1959 All 727, **following** *Home* v. *Bentick*, (1820) 2 B&B 162.
83. *R* v. *Hardy*, (1794) 24 How. St. Tr. 199; *R* v. *Watson*, (1817) 32 How. St. Tr. 82; *Marks* v. *Beyfus*, *ante*, *Auten* v. *Rayner*, (1958) 1 WLR 1300.
84. *Att.-Gen.* v. *Briant*, (1846) 15 M&W 169.
85. *R.* v. *Hardy*, *ante*.
86. *R.* v. *Herlihi*, (1898) 32 Ir. LT 38.
87. *R.* v. *Carpenter*, (1911) 156 C.C.C. Sess. Pap. 261, per CHANNELL J.
88. *Ibid.*

and a constable has been compelled to disclose in which house he was secreted whilst watching licensed premises kept open after hours.[89]

In Sarkar's Law of Evidence (1990 Re-print of 13th Ed., p. 1236) it is however observed "The law does not appear to be otherwise in India. 'Information' must necessarily include not only names of persons but also the nature and source of information. It includes all questions relating to the channel through which the detection is made. If information is confined to names only, the rule would be infructuous. But the privilege does not apply to the contents of the statement, for the contents of the communication must necessarily be disclosed while prosecuting the offender."

The Madras High Court held that Section 125 contemplates only the prohibition of the source from whom the Magistrate or the Police Officer got the information as to the commission of the offence and not as to the custody of any documents or other material objects, that might have been seized and that might be tendered in evidence in support of the commission of the offence.[90] Section 125 secures privilege for a Magistrate or a Police Officer to refuse to say whence he got any information as to the commission of any offence. The FIR is not a privileged document to get any protection under Section 125.[91] This section has no application to an informer who lays sworn information and thereby initiates criminal proceedings.[92] If in asking for the production of a complaint the object is to ascertain the informer's name, the complaint can be refused to be produced.[93]

Section 162, Cr PC prohibits the use of statement of a witnesses recorded by the Police Officer except for contradicting the statement of the witness. Under Section 125, a Police Officer cannot be compelled to say as to how he got the information relating to the commission of any offence. Under Section 91, Cr PC, (Section 94 old) the discretion for production of a document should be exercised so that it may not come into conflict with the policy of Section 125.[94]

3. POLICE OFFICER

A prohibition officer under the Prohibition Act is a Police Officer only for the purpose of Section 125 and not for any other purpose.[95] (Excise Inspector empowered under the Opium Act can claim privilege as a Police Officer). It may be noted that for purpose of Section 25 of this Act (relating to Confession) it was held that a prohibition officer is not a Police Officer.[96]

A Police Officer can not be questioned as to the source from which he got information. He can not say that from a source he learnt that certain persons were going to commit dacoity in a certain locality, because it would be hearsay evidence, and is inadmissible.[97]

Where a Magistrate suggested that the spy should have been examined, it was held that he ignored the provisions of Section 125 which provides that no Magistrate or Police Officer shall be compelled to disclose the source of information as to the commission of an offence.[98]

The accused is not entitled to elicit from a prosecution witnesses whether he was a spy or an informer, or discover from police officials the names of persons from whom they had received information; but a detective cannot refuse, on grounds of public policy, to answer a question as to where he was secreted.[99]

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89. *Webb* v. *Catchlove*, (1886) 3 TLR 159.
90. *Public Prosecutor* v. *M. N. Govindaraja Mudaliar*, AIR 1954 Mad 1023.
91. *Munnasingh Tomar* v. *State of M.P.*, 1989 Cr LJ 580 (MP)(DB).
92. *Liladhar* v. *Emperor*, (1915) 16 Cr LJ 447.
93. *Bagumal* v. *Emperor*, (1917) 18 Cr LJ 70.
94. *R.* v. *Bilal Mahommed*, ILR 1940 Bom 768.
95. *Public Prosecutor* v. *Shaik Dawood*, AIR 1957 AP 977; *State of Kerala* v. *Chacka*, ILR (1967) 2 Ker 687.
96. In re : *Venkata Reddy*, AIR 1948 Mad 116; *Srinivasa Narasimha* v. *State*, 1954 Mad WN 659.
97. *Sitaram Mahato* v. *State*, ILR (1957) 2 Cal 57.
98. *State of U.P.* v. *Dhanpati*, AIR 1960 Pat 582.
99. *Amrita Lal Hazra* v. *Emperor*, ILR (1915) 42 Cal 957 : AIR 1916 Cal 188.

4. NO ADVERSE INFERENCE IF OBJECTION IS RAISED

If objection is taken, it cannot, since the law allows it, be made a ground of adverse inference against the witness.[1]

Professional communications.

S. 126. No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided **that nothing in this section shall protect from disclosure—**

(1) any such communication made in furtherance of any illegal purpose;

(2) any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client.

***Explanation.*—The obligation stated in this section continues after the employment has ceased.**

ILLUSTRATIONS

(a) *A*, a client, says to *B*, an attorney—"I have committed forgery and I wish you to defend me."

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(b) *A*, a client, says to *B*, an attorney—"I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(c) *A*, being charged with embezzlement, retains *B*, an attorney, to defend him. In the course of the proceedings, *B* observes that an entry has been made in *A's* account book, charging *A* with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by *B* in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

SYNOPSIS

1. *Principle and Scope*	...	1199	9. *Time of consultation—Rejection or Retention*	...	1204
2. *Privilege may be waived*	...	1200	10. *Or to state the contents or condition of any document*	...	1204
3. *Barrister, Attorney*	...	1201	11. *"Express Consent"*	...	1205
4. *Chartered Accountant*	...	1202	12. *Provisos—Illegal purposes*	...	1205
5. *At any time*	...	1202	13. *Pleading and Proof*	...	1206
6. *To Disclose*	...	1202			
7. *Any Communication*	...	1203			
8. *In the course and for the purpose of his employment*	...	1203			

1. *Weston* v. *Peary Mohan Dass*, ILR (1912) 40 Cal 898, 920.

COMMENTS

1. PRINCIPLE AND SCOPE

Sections 126 to 129 deal with the privilege that is attached to professional communications between the legal adviser and the client. Sections 126 and 128 mention the circumstances under which the legal adviser can give evidence of such professional communications. Section 127 provides that interpreters, clerks or servants of legal advisers are restrained similarly. Section 129 says when a legal adviser can be compelled to disclose the confidential communication which has taken place between him and his client.

Under this section no barrister, attorney, pleader or vakil shall any time be permitted to:

(1) disclose (i) any communication made to him by or on behalf of his client or (ii) any advice given by him to his client

in the course and for the purpose of his employment;

(2) to state the contents or conditions of any document with which he has become acquainted

in the course and for the purpose of his employment.

The section does not protect from disclosure—

(1) any communication made in furtherance of any illegal purpose;

(2) any fact observed in the course of employment showing that any crime or fraud has been committed since the commencement.

This section is based upon the principle that if communications to a legal adviser were not privileged, a man would be deterred from fully disclosing his case, so as to obtain proper professional aid in a matter in which he is likely to be thrown into litigation.[2]

The section not only protects the legal adviser from disclosing communications made to him by his client when interrogated as a witness, but he is not permitted to do so even if he is willing to give evidence unless with the express consent of his client. Section 126 has been enacted for the protection of the client and not of the lawyer. And it is founded on the impossibility of conducting legal business without professional assistance and on the necessity, of securing full and unreserved intercourse between the two, in order to render that assistance effectual.

The privilege is the privilege of the client and not of the legal advisor. The latter is therefore bound to claim the privilege unless it is waived by his client expressely under Section 126 or impliedly under Section 128, *e.g.* by examining the legal advisor as to the privileged communication.[3]

In HALSBURY LAWS OF EVIDENCE, 4th Ed., Vol. 17, Para 237, page 166 it is observed: "Confidential communications passing between a client and his legal adviser and made for the purpose of obtaining or giving legal advice are in general, privileged from disclosure. The privilege is available in respect of the oral testimony of witnesses, and the principles which determine whether a communication is or is not privileged are the same for both oral and written communications. The privilege is that of the client and may be waived by him."

In PHIPSON ON EVIDENCE, 15th Edn. (2000), Paras 20-04, 20-05 and 20-06, Pages 506-507 it is observed: "In *Wheeler* v. *Le Marchant*,[4] JESSEL M.R. analysed legal professional privilege as a manifestation of the principle protecting confidentiality, distinguishing for this purpose between communications with a lawyer which do enjoy this protection and communications with a doctor, priest or confidant, which do not. The protection is restricted to the obtaining of legal advice and assistance and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery in order that that legal advice may be obtained safely and sufficiently. The policy justifying a rule "which protects confidential communications from discovery as regards the other side" was described by JESSEL M.R. in *Anderson* v. *Bank of British Columbia*[5] as follows :

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2. *Greenough* v. *Gaskel*, (1833) 1 Myl & K 98.
3. *Ayasha Bi* v. *Peer Khan Sahib*, AIR 1954 M 741.
4. (1881) 17 Ch D 675, 681.
5. (1876) 2 Ch D 644, 649.

"The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have resource to the assistance of professional lawyers, and being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating [of] his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent) that he should be enabled properly to conduct his litigation. That is the meaning of the rule."

The historical development of legal advice privilege is reviewed in detail in *R.* v. *Derby Magistrates ex p. B.*[6]

Confidential communications between a lawyer and client which come into existence for the purpose of giving or getting legal advice are privileged at all times. The privilege may be asserted by successors in title. It covers direct communications and communications through agents. It covers all documents generated for the purpose of giving or getting legal advice, not merely letters to and from solicitors and instructions to and opinions from counsel, but also all working papers and drafts. The privilege exists whether or not litigation is contemplated or pending.

The second category of legal professional privilege is wider than the first but arises only when litigation is in prospect or pending. From that moment on, any communications between the client and his solicitor or agent or between one of them and a third party will be privileged if they come into existence for the sole or dominant purpose of either giving or getting advice in regard to the litigation or collecting evidence for use in the litigation. This is the basis for claiming privilege for correspondence with witnesses of fact or experts and proofs, reports or documents generated by them.

The rule was stated by JAMES L.J. in *Anderson* v. *Bank of British Columbia*[7]:

". . .as you may have no right to see your adversary's brief, you have no right to see that which comes into existence merely as materials for the brief . . ."

A more modern rationalisation was set out by DONALDSON M.R. in *Lee* v. *South West Thames Health Authority*[8]:

"The principle is that a defendant or potential defendant shall be free to seek evidence without being obliged to disclose the result of his researches to his opponent."

In order for litigation privilege to apply, there must be a confidential communication between client or lawyer or agent, or between one of these and a third party made for the dominant purpose of use in litigation, that is, to seek or provide information or evidence to be used in or in connection with litigation in which the client is or may become a party and when litigation is either in process or reasonably in prospect."

The rule is established for the protection of the client, not of the lawyer; and is founded on the impossibility of conducting legal business without professional assistance, and on the necessity, in order to render that assistance effectual, of securing full and unreserved intercourse between the two.[9]

2. PRIVILEGE MAY BE WAIVED

The privilege, therefore, may be waived by the client, but not by the adviser.[10]

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6. (1996) 1 AC 487.
7. (1876) 2 Ch D 644, 676.
8. (1985) 1 WLR 845, 850.
9. *Jones* v. *Great Central Ry.* (1910) AC 4, 5; *Lyell* v. *Kennedy*, (1884) 9 App. Cas. 81, 86; *Wheeler* v. *Le Merchant*, (1881) 17 Ch. D. 675, 681-682. *Waugh* v. *British Railway Board*, (1980) AC 521 (HL) per LORD WILBERFORCE at p. 531 CF).
10. *Wilson* v. *Rastall*, (1792) 4 TR 758; *Proctor* v. *Smiles*, (1886) 55 LJQB 527 (CA); *Re. Cameron's Co.*, 25 Beav. 1, 4; *R.* v. *Leverson, ante*; *Humphrey* v. *Wake*, (1917) 33 TLR 433.

Nor can the latter claim the benefit of the privilege.[11]

In PHIPSON ON EVIDENCE 15th Edn. (2000), para 20-07, page 508 it is observed: "The rule is established for the protection of the client, not the lawyer. It follows from this that the privilege can be waived by the client but not the lawyer.[12] The lawyer is under a professional obligation to assert the privilege until it is waived by the client.[13] Thus the lawyer has no locus to assert the privilege in his own right or commence proceedings in his own name for that purpose.[14] Nor can the lawyer invoke the privilege or use it for his own benefit if the client waives it.[15] Nor can the person to whom a litigant communicates under the cloak of litigation privilege claim to rely on it."[16]

3. BARRISTER, ATTORNEY

The restrictions imposed by this section extend also to communications made to *Mukhtears* when acting as pleaders for their clients.[17]

In HALSBURY'S LAWS OF EVIDENCE, 4th Edn., Vol. 17, para 237, page 166 it is stated: "Salaried legal advisers acting as such are in the same position for the purposes of this rule as independent legal advisers.[18] This rule was followed in *Bombay Municipal* v. *Vijay Metal Works*,[19] Foreign Legal advisers are in the same position, *Duncan Garfield* v. *Jay*.

Law Officers have been held to be within the scope of the section.[20] Communications between an insurer and his counsel are also privileged.[21]

Opinion given by a Law Secretary who functions as a legal remembrancer to the State, regarding the plaintiff's claim against the State and which are in the nature of an advice given by the legal adviser to his client are privileged.[22]

If an attorney discloses the facts which came to his knowledge while he was engaged as an attorney, he will be guilty of professional misconduct.[23]

In PHIPSON ON EVIDENCE, 13th Ed., Para 15.09, Page: 296 it is stated: "The privilege attaching to confidential professional disclosures is confined to the case of legal advisers. This term certainly embraces salaried legal advisers. *Amusement Machines Ltd.* v. *Customs and Excise Commissioners*.[24] (The point was conceded in the House of Lords), and it may be that it goes further and includes any person to whom resort is made for specifically legal advice, notwithstanding that that person has no formal legal qualifications.[25] Foreign legal advisers are certainly within the scope of the privilege.[26]

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11. *Cf. Haywood* v. *Wegg-Prosser*, (1978) 122 SJ 792 which is either incompletely reported or rets on a confusion between the privilege against the production of documents and privilege as that term is used in the law of defamation.
12. *Wilson* v. *Rastall*, (1792) 4 TR 753, **cited in** *Derby Magistrates' Court* by Lord TAYLOR C.J.
13. *R.* v. *Central Criminal Court, ex p. Francis & Francis*, (1989) 1 AC 346, 381, per Lord GRIFFITHS; *Proctor* v. *Smiles*, (1886) 55 LJQB 527.
14. *Abbey National* v. *Clive Travers*, May 19, 1999 CA; *R.* v. *Central Criminal Court, ex p. Francis & Francis*, (1989) 1 AC 346.
15. *Re International Power Industries*, (1985) BCLC 128, where the lawyer sought to rely on the privilege in answer to a personal subpoena despite the fact that client had waived it.
16. *Schneider* v. *Leigh*, (1955) 2 QB 195; *Lee* v. *South West Thames Health Authority*, (1985) 1 WLR 845.
17. *Abbas Peada* v. *Queen-Empress*, ILR (1898) 25 Cal 736.
18. *Alfred Crompton Amusement Machines Ltd.* v. *Customs and Excise Commissioners*, (No 2) (1972) 2 QB 102 : (1972) 2 All ER 353 at 371, CA; **affirmed on** other grounds (1974) AC 405 : (1973) 2 All ER 1169, HL.
19. 1982 Bom 60.
20. *M C. of Greater Bombay* v. *Vijay Metal Works*, AIR 1982 Bom 6.
21. *R. Ramalingam* v. *P.R. Thakur*, AIR 1982 Del 486.
22. *Tirath* v. *Government of Jammu*, AIR 1954 J&K 11.
23. In re : *An Attorney*, (1924) 26 Bom LR 887, FB : 1925 All 1 (FB).
24. *Crompton (Alfred) Amusement Machines Ltd.* v. *Customs and Excise Commissioners*, (1972) 2 QB 102 (CA) : (1972) 2 All ER 353.
25. *M W Graxebrook Ltd.* v. *Wallens*, (1973) 1 CR 256 (NIRC).
26. *Mac Farlan* v. *Rolt*, (1872) LR 14 EQ. 580; *Great Atlantic Insurance Co.* v. *Home Insurance Co.*, (1981) 2 All ER 485 (CA).

The communication made to the advocate by the client in furtherance of his illegal purpose (here obtaining decree on a forged promissory note) is not privileged.[27]

The evidence of a practising lawyer that he was living half a kilometer away from the place of occurrence and the accused alone had gone to his house on the intervening right does not fall under this section and were, therefore, admissible.[28] Where an advocate was sought to be summoned to prove sending of notice to the defendant, claiming privilege in respect of it was not permissible as the contents of the said notice were not confidential as the same was already communicated.[29]

4. CHARTERED ACCOUNTANT

Where a Chartered Accountant disclosed the information acquired in the course of his professional engagement without the consent of his client, a bank, to third parties, he was held to be guilty of professional misconduct.[30]

5. AT ANY TIME

These words indicate that the legal adviser is not to disclose the communication even when the relation is ended or even after the client's death. The rule is "once privileged always privileged"[31] The explanation to the section clearly shows this.

The privilege continues throughout and does not get terminated by the termination of the litigation or the death of the parties.[32] This section imposes secrecy of the communications even after the employment has ceased, in view of the explanation under the section, and it has nothing to do whether at the time of making the communications there was any pending litigation or any prospect of it.[33] But the communication must have been made during the subsistence of the relationship between the legal adviser and the client.[34] And such privilege continues even when the client dies[35] and ensures for the benefit of successors of the client in any action when the relevant interest subsists.[36]

Privilage extends to communications made in contemplation of a suit.[37]

6. TO DISCLOSE

Communications protected by the section must be confidential. The word 'disclose' shows that the privileged communication must be of a confidential or private nature.[38] The word 'disclosure' implies that which was not already made known to others. If the communication by the client to the advocate is put in the form of a notice and that notice is produced in court in a defamation case, there is already a disclosure. So when the advocate is called upon to prove that notice he is not disclosing any fact for the first time, but is only substantiating what is already disclosed. Section 126, therefore does not stand in the way of summoning the advocate for this purpose.[39]

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27. *Gurunanak Provisions Stores* v. *Dulhonumal Savanmal*, AIR 1994 Guj 31 (para 23).
28. *V. Ravi* v. *State of Kerala*, 1994 Cr LJ 162 (para 26) (Ker), **distinguishing** *Hakam* v. *Emperor*, AIR 1934 Lahore 269 : 1935 (36) Cr LJ 31.
29. *P.G. Anantasayanam* v. *Miriyala Sathiraju*, AIR 1998 AP 335 (para 2).
30. *Council of the I.C.A.I.* v. *Mani S. Abraham*, AIR 2000 Ker 212 (para 6).
31. Per COCKBURN CJ *in Bullock* v. *Corrie*, (1878) 3 QBD 356.
32. *Ayeasha Bi* v. *Peerkhan Sahib*, 1954 M 741; *Bullock* v. *Corrie*, (1878) LR 3 QBD 356—once prvileged always prvileged.
33. In re : *An Attorney*, (1924) 26 Bom LR 887 (FB) : AIR 1925 Bom 1; *Moti Bai* v. *State of Rajasthan*, AIR 1954 Raj 241.
34. *Minter* v. *Priest*, (1930) AC 558.
35. *Bullivant* v. *Attorney-General for Victoria*, (1901) AC 196.
36. *Schneider* v. *Leigh*, (1955) 2 All ER 173.
37. *Gansford* v. *Grammer*, (1809) 2 Comp 9 but run in consultation in vague amherpation of *Crompton (Alfred) Amusement Mechines Ltd.* v. *Customs and Excise Commissioners*, (1972) 3 All ER 353 (CA).
38. *Framji Bhicaji* v. *Mohansingh Dhansingh*, ILR (1893) 18 Bom 263, 272; *Memon Hajee Haroon Mahomed* v. *Moulvie Abdul Karim and Moola Ahmed Molla Abdulla*, ILR (1878) 3 Bom 91, *Emperor* v. *Rodrigues* (1903) 5 Bom LR 122; *Kalikumar Pal* v. *Rajkumar Pal*, (1931) 58 Cal 1379 : AIR 1932 Cal 148.
39. *P. Rajamma* v. *P. Chantiah*, (1972) 2 An WR 253.

7. ANY COMMUNICATION

It is not every communication made by a person to his legal adviser that is privileged from disclosure. The privilege extends only to communications made to him confidentially, and with a view to obtaining professional advice.[40] This rule covers only the private and confidential communication between the client and the lawyer, which cannot be disclosed either by means of direct questions or elicited by means of indirect tactics. It does not preclude the lawyer from replying to the opposite party who wants to proceed against him for stating that what all he did was in pursuance of the instructions given to him and not on his own volition. The rule under Section 126 does not require that a lawyer should vicariously make himself responsible for an offence which he never committed. And in any event he will not be advancing his client's cause by remaining mute since in that case it is a fair inference to draw that what he did was either in violation or in excess of the instructions given to him.[41] Where the imputation concerning a third person was made by a lawyer in the presence of his client, the protection under Section 126 would not arise.[42] Communication to a third person in lawyers presence is not privileged.[43] The section applies as much to what a witness has learned by observation, *e.g.*, by watching a manufacturing process being carried on, as to what is communicated to him by word of mouth or writing.[44]

8. IN THE COURSE AND FOR THE PURPOSE OF HIS EMPLOYMENT

The privilege applies to all communications oral or documentary in the course of or for the purpose of the employment as legal advisor.[45]

It was observed: "The Privilege extends to all communications between client and legal adviser in the course and for the purpose of his professional employment. If the communication is not made to a legal adviser in the course of professional employment, it does not matter if it was made under seal of secrecy. A mere gratuitous communication is not protected, it must be made to a person as professional adviser. Consultation as a friend is not sufficient. The privilege does not apply to communications made before the existence of the relationship or after it has ceased."[46]

A widow who wanted to adopt a son employed an attorney for the purpose of drawing up an adoption deed. After the draft was drawn up, it was approved by another independent firm of attorneys on behalf of the boy to be adopted. In a suit filed by a Bank for recovery of money alleging that the adoption was invalid, the attorney produced some papers including the draft adoption deed and also made some statements regarding the instructions he had from the widow. It was held that if the attorney was acting for the widow alone, the disclosures made by him were contrary to Section 126; if it is taken that the attorney was engaged by the widow and also the adopted son, it would not be open to the attorney to disclose the facts relating to the documents in the suit brought by the third party (bank) against the widow's husband, and the adopted boy; even if the negotiations for adoption took place in the presence of the friend of the widow, it would not relieve the attorney from his obligation.[47]

The privilege attaches only if the opinion was given professionally. Even if the services were rendered without fee, still the communications would be privileged.

Whether an opinion was given professionally or in a friendly capacity or otherwise is a matter of fact to be inferred from circumstances, such as the local habits of life and other cognate matters. In *Green Law* v. *King*[48] LORD LANGDALE MR held that the correspondence with the solicitor was as a confidential friend but not in his professional capacity and therefore not privileged. Lively, J. stated in *Woodrum* v.

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40. *Framji Bicaji* v. *Mohansingh Dhansingh*, ILR (1893) 18 Bom 263; *Emperor* v. *Bala*, (1902) 4 Bom LR 460; *Park Horst* v. *Lowthen*, (1819) 2 Swanst 194—PA LORD ELDOW The moment confidence ceases, privilege ceases.
41. *Ayeasha Bi* v. *Peer Khan Saheb*, AIR 1954 Mad 741.
42. *Rebecca Mohdal* v. *R*, AIR 1947 Cal 278.
43. *Hanson* v. *Bran*, (1892) 51 Minn 546.
44. *Gopi Lal* v. *Lakhpat Rai*, ILR (1918) 41 All 125 : AIR 1918 All 38.
45. *Ayeasha Bi* v. *Peerkhan Saheb*, AIR 1954 Mad 741.
46. *Greenough* v. *Gaskell*, (1833) 1 Myl. & K 101.
47. In re : *An Attorney*, AIR 1925 Bom 1 (FB).
48. (1838) 1 Beav 137.

Price[49] regarding communication with an attorney friend that it was common knowledge that lawyers were consulted in the rural areas for gratuitous information without any suggestion of employment as lawyer. These opinions are called "Curbstone" or "Horseback" opinions. In such cases the burden is on the objector to show that the relationship of client and lawyer existed.

9. TIME OF CONSULTATION—REJECTION OR RETENTION

The privilege of the client attaches to a communication that his lawyer makes during negotiations in relation to the retainer for fee. On principle, the client must be protected in his preliminary statements for he does not know whether the attorney would accept the fee suggested by him. Even if the lawyer refuses to work for him for the fee suggested by the client, still privilege attaches to the communication made during such a negotiation. It does not matter that the lawyer's refusal for the retainer was due to disagreement as to the fee suggested by the client or was due to the client's own withdrawal by reason of the large fee demanded by the lawyer. In *Minter* v. *Priest*[50] the solicitor ultimately declined to work for the client but the communication by the solicitor during an interview with the person requesting him to act, was held privileged. This decision is still good law though on appeal, it was reversed on other grounds by the House of Lords. However, if the client continues his communication even after the attorney's refusal to act for him, or if a person knowingly admits to retain one who has already been retained by the opponent and consequentially not retainable by him, he does not need or deserve the protection of the privilege. The communication of a client seeking to retain an attorney who declined because of a prior retainer on the other side was held not privileged.[51] (From the paper read by Justice M. JAGANNADHARAO at the workshop organised by the A.P. State Bar Council at Visakhapatnam in May 1984).

10. OR TO STATE THE CONTENTS OR CONDITION OF ANY DOCUMENT

Under this section an advocate is not permitted to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment. The protection against production or disclosure does not extend to any original document which might have come into the possession of the advocate from his client *e.g.* a letter addressed to the client which was alleged to be in the brief of the counsel.[52]

A succession certificate was granted to a widow who applied through her pleader, without production of the will. Later, another person applied for letters of administration to the estate of the deceased. It was held that the refusal of the pleader to disclose the contents of the will when he was examined as a witness was proper as the pleader became acquainted with the contents of the will in the course of and for the purpose of professional employment which was privileged under Section 126.[53]

In a criminal case the protection under Section 126 cannot be availed of against an order to produce a document. After the document is produced, then under Section 162, Evidence Act, it will be for the court, after inspection of the documents to decide any objection regarding its production and admissibility.[54]

The House of Lords decided that when the motive for preparing a document was not predominantly for use in anticipated litigation it was not to be privileged. The report concerned a railway accident which was investigated by the Board and which gave rise to the cause of action.[55]

Communications passed by third persons to a solicitor were held to be privileged on the ground that the solicitor received them for the purpose of advising his clients[56]. In another case the Court of Appeal observed that it would be strange if a forger could hide behind a claim of legal professional privilege by

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49. (1927) 104 W. Vr 382 : 140 SE 346.
50. (1921) 1 KB 655.
51. *Tukker* v. *Pinch*, (1886) 66 WIS 17 : 27 NW 817.
52. *Chandubhai* v. *State*, AIR 1962 Guj 290.
53. *Bai Kanta* v. *Bhailal*, AIR 1929 Bom 414; **see also** *Davies* v. *Waters*, (1842) 9 M&W 608.
54. *Gangaram* v. *Habibullah*, ILR 58 All 364; *Public Prosecutor* v. *M S Menoki*, AIR 1939 Mad 914; *Chandu Bhai* v *State*, AIR 1962 Guj 290; *Emperor* v. *Bilal Mahamed*, AIR 1940 Bom 361.
55. *Waugh* v. *British Railways Board*, 1980 AC 521.
56. Re : *Getty (Sarah C.) Trust*, (1985) 2 All ER 809.

the simple device of sending all the incriminating documents in his possession to his solicitors to be examined by the expert.[57]

11. "EXPRESS CONSENT"

Mere failure on the part of the accused/client to claim privilege does not amount to "express consent."[58]

12. PROVISOS—ILLEGAL PURPOSES

The protection of the section will not extend to any communications made in furtherance of illegal purpose in view of proviso 1, or to any fact showing that a crime or fraud has been committed since the commencement of the employment; in view of proviso 2.[59] If a client and his lawyer co-operate in effecting a crime the lawyer ceases to be a counsellor and becomes a criminal along with his client and there would be no privilege.[60]

This proviso differs from the English law. Under it any communiction made in furtherance of an "illegal purpose" is not privileged. Under the English law the purpose must be 'criminal and not merely 'illegal'. The privilege under Section 126 is not absolute but qualified. The Common Law of England under which an advocate can claim an absolute privilege for words uttered in the course of his professional duty is not applicable to India.[61]

The existence of an illegal purpose would prevent any privilege attaching to any communication. Illustration (b) exemplifies this.

A Government employee who was found guilty of misconduct by a tribunal, sent a notice under Section 80, CPC, through his advocate which contained highly defamatory aspersions against the members of the tribunal. The complaint was filed under Section 500, IPC, read with Section 198(b), Cr PC, both against the advocate and his client. The advocate pleaded good faith under Section 499, IPC, stating that he acted on the instructions of the client. The client pleaded that as the said notice was not signed by him, he is not liable and the lawyer alone was responsible for the contents of the notice. Thereupon a revision petition was filed to quash the proceedings. It was held that the immunity from disclousre which can be claimed by a client in respect of a communication made to his lawyer is not absolute but limited in its scope; and Section 126 prescribes those limits.....The interests of justice requires unity of identity between a lawyer and his client and so a lawyer is precluded from making a disclosure of the communication made to him by his client; but this rule of law is for very good reasons restricted in its scope by the two proviso contained in the section itself, no communication made to further any illegal purpose is protected.....It cannot be the duty of a lawyer to advise his client how to commit a breach of the law or evade the law or commit a fresh crime in order to defend him against the charge of a crime which he has already committed. Such conduct would be covered fully by the first proviso as it would be clearly in furtherance of an illegal purpose. The question in the case is whether the defamatory imputations contained in the notice were necessary or justifiable for the purpose of a civil suit. If the conclusion is that there was no justification for making those imputations the case would fall under proviso 1 of Section 126 and not under the general rule of this section. Then it would not be a privileged communicaton and there would be no bar to a lawyer making a disclosure." It was held that Section 126 does not help the applicant and the revision petition was dismissed.[62] With regard to defamatory statement in court proceedings or defamatory suggestions to witnesses, privilege cannot be claimed under this section. The privilege intended under the section is only to protect the interests of the client in respect of any action for any prior act or offence. And it is not intended to apply to cases of

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57. *R.* v. *King*, (1983) 1 All ER 929, noted in All ER Annual Rev. 1983.
58. *Mandesan* v. *State of Kerala*, 1995 Cr LJ 61 (paras 10 and 13) (Ker).
59. *Ayesha Bi* v. *Peer Khan Sahib*, AIR 1954 Mad 741; *Mahli Bhai* v. *State of Rajasthan*, 1954 Raj 241; *Sonreva* v. *State of U.P.*, AIR 1963 All 33.
60. *Mathews* v. *Hougland*, (1891) 40 HJEQ 455.
61. *Satish Chandra* v. *Ram Doyal*, AIR 1921 Cal 1 (SB); **followed** in *Nirsu Narayan Sinha* v. *King Emperor*, AIR 1926 Pat 499; *Gendan Lal* v. *R*, AIR 1948 All 409.
62. *K.C. Sonreva* v. *State of U.P.*, AIR 1963 All 33; **following** *Ayeasha Bi* v. *Peer Khan Sahib*, AIR 1954 Mad 741; *Deep Chand* v. *Sampath Raj*, AIR 1970 Mys. 34.

commission of any offence in future. A defamatory imputation about a person in the instructions to an advocate is not a privileged communication.[63]

In the case of a conviction on a charge of instructing a lawyer to put defamatory questions, it was held that the conviction based on evidence of the lawyer is unsustainable, as it is a communication between a client and his lawyer which is privileged under Section 126.[64] In a defamation case a letter containing imputations concerning the complainant was dictated by the advocate (accused) to his clerk and sent to the complainant's advocate in reply to a notice issued to him, it was held that there was no publication of the imputation, but the statement is protected under Section 126.[65]

13. PLEADING AND PROOF

In regard to communications by a client to his advocate, before getting protection under this section, privilege must be claimed before the advocate is called upon to give evidence.[66]

The Privy Council held that when the document is in fact a privileged one, from its non-production no adverse inference can be drawn because if adverse inference is drawn, it would destroy the privilege.[67]

Section 126 to apply to interpreters, *etc.*

S. 127. The provisions of Section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils.

COMMENTS

1. PRINCIPLE & SCOPE

The extension of the protection to interpreters is particularly important in a country like India, in which there are so many races speaking different languages, and in which the important portion of the administration of justice is conducted in a foreign language. (FIELD ON EVIDENCE, 11th Ed., Vol. 5, P. 4573).[68]

This section extends the privilege given by S. 126 to interpreters, clerks, or servants of lawyers. It extends to a communication made to a pleader's clerk the same confidential character that attaches to a communication to the pleader direct under Section 126.[69] The privilege extends to communications made to the pleader's clerk as no pleader can work without the assistance of a clerk.[70] Confidential Secretary of a lowyer is included in the privilege.[71]

Privilege not waived by volunteering evidence.

S. 128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in Section 126; and, if any party to a suit or proceeding calls any such barrister, pleader, attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.

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63. *Autony* v. *G.S. Naidu*, AIR 1967 Mad 395.
64. *Appayya* v. *Rama Subbayya*, AIR 1950 Mad 537; *Palaniappa Chettiar* v. *R*, 1935 Mad WN 460; *Saukhi Gope* v. *Uchit Rai*, AIR 1948 Pat 56.
65. *P R Ramakrishnan* v. *Subbaramal*, AIR 1988 Ker. 18; *Rev Fr. Bernard* v. *Ramachandran Pillai*, 1987 Cr LJ 739 (Ker).
66. *Autony* v. *G.S. Naidu*, AIR 1967 Mad 395.
67. *Dulhin* v. *Harnandan*, AIR 1916 PC 157; *Weston* v. *Peary Mohan Das*, ILR 40 Cal 898; *Wentworth* v. *Lloyd*, (1864) HLC 591.
68. *Taylor* v. *Foester*, (1825) 2 C&P 195; *Bowman* v. *Norton*, (1831) 5 Cr P 177; *Lyell* v. *Kennedy*, (1881) 9 App Cas 91.
69. *Kameshwar* v. *Amanutulla*, ILR (1898) 26 Cal 53.
70. *Kameshwar* v. *Amanutulla*, ILR (1898) 26 Cal 53; *Ramakrishnan* v. *Subbaramma Sastrigal*, AIR 1988 Ker 18; *Abbas Pedda* v. *R*, ILR 25 Cal 736.
71. *Taylor* v. *Taylor*, (1934) 179 Cr 691.

COMMENTS

1. PRINCIPLE AND SCOPE

This section states that, if a party to the suit gives evidence, he shall not be deemed to have consented to any disclosure as mentioned in Section 126. This section also says that the privilege would not be lost even if the legal adviser is called as a witness, unless the party questions him on a particular point. The privilege belongs to the client and therefore he alone can waive it. The privilege is not lost by calling the legal adviser as a witness, unless the party having the privilege questions him relating to confidential matters.

"By calling the solicitor as a witness, unless he (client) also examines the solicitor in-chief as to the matter privileged, the client would not waive his privilege; and even in that case, it has been held in Ireland that the cross-examination must be confined to the point upon which the witness has been examined in-chief." (TAYLOR).

"A privileged person cannot be allowed, after disclosing as much as he pleases, to withhold the remainder; he may elect to withhold or disclose, but after a certain point, his election must remain final."

WIGMORE indicated the following distinctions:—

(1) The client's offer of his own testimony in the cause at large is not a waiver, for the purpose either of cross-examining him to the communications or of calling the attorney to prove them.

(2) The client's offer of the attorney's testimony in the cause at large is not a waiver so far as the attorney's knowledge has been acquired casually as an ordinary witness, but otherwise it is a waiver.

(3) The client's offer of his own testimony as to specific facts about which he has happened to communicate with attorney is not a waiver, for the same reason as in (1) *supra*; but his offer to the attorney's testimony as to such specific facts is waiver, for the same reason as in (2). *supra*;

(4) The client's offer of his own or the attorney's testimony as to specific communication to the attorney is a waiver as to all other communications to the attorney on the same matter; for the privilege of secret consultation is intended only as an incidental means of defence, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former.

(5) The client's offer of his own or his attorney's testimony as to a part of any communication to the attorney is a waiver as to the whole of that communication on the analogy of the principle of completeness. (WIGMORE ON EVIDENCE, Section 2327).

Confidential communications with legal advisers.

S. 129. No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

COMMENTS

1. PRINCIPLE AND SCOPE

This section states that no one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal adviser. But this privilege is subject to a condition namely, if he offers himself as a witness, he may be compelled to disclose any such communications which may appear to the court necessary in order to explain any evidence he has given in the witness box. This section provides protection to any witness including the client, whereas Sections 126, 127 & 128 provide protection to the legal adviser, his clerks etc., from disclosing confidential

communication between them and the client. If protection is not provided for the client as was done in this section the protection given to the advocate or legal adviser under Section 126, 127 and 128 would become illusory.

"It has long been established that, where the client himself as the party interrogated all communications between the solicitor and client, whether pending and with reference to litigation or made before litigation and with reference thereto, or made after the dispute between the parties followed by litigation, though not, in contemplation of, or with reference to, that litigation, are protected." (TAYLOR, 924).

If a party becomes a witness of his own accord he shall, if the Court requires it, be made to disclose everything necessary to the true comprehension of his testimony.[72] If the client offers himself as a witness, then alone he can be compelled to disclose the confidential communication, if the court is satisfied such disclosure is necessary in order to explain the evidence given by the witness.[73]

Where the propounder of a will obtained a brief note for the execution of the will, and subsequently that person was examined as a witness, it was held that the brief note was privileged from production and the caveators were not entitled to see it, and the judges should not have allowed their minds to be influenced in considering the evidence by the fact that the note was not produced in court for the information of the caveators.[74]

Section 129, unlike Section 126 where the word "permitted" is used, uses the word "compelled". Whereas the legal adviser is not at liberty to disclose any professional communication without his client's consent, the client may, if he so wishes, disclose the communication, but if he refuses to do so, he cannot be forced to make the disclosure. Therefore, where evidence concerning a privileged communication is given by the client without any pressure being put upon him, the evidence would be admissible.[75]

2. COMPELLED

This word compelled does not mean subpoenaed. The section uses the words 'compelled to disclose' with reference to the case when a man has offered himself as a witness, and must refer to some force put upon the witness after he is in the witness box.[76]

3. COMMUNICATION WITH THIRD PARTIES

"Whereas all that passes between a lawyer and his lay client is privileged, if it does so in the course of a professional relationship, where either the lawyer[77] or the client[78] has communicated with a third party about a matter relevant to the litigation in hand, that communication will be privileged only if it has been made in contemplation of the litigation. Thus a report made to the officials of a trade union, enclosing relevant statements and evidence, so as to obtain the consent of the trade union to the reference of a claim for wrongful dismissal to a solicitor was held not to be privileged.[79] Where litigation is not contemplated[80] or the communication owes its existence to extraneous and independnet considerations[81], no privilege attaches to the communication. Whether or not litigation is in contemplation is often a

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72. **See** *Munchershaw Bezonji* v. *New Dhurumsey S&W Company*, ILR (1880) 4 Bom 576, 581.
73. *Union of India* v. *Om Prakash Gupta*, ILR (1969) 2 Punj 473.
74. *Dulhin* v. *Harnandan*, AIR 1916 PC 157 : 20 Cal WN 617 (PC).
75. **See** *Moher Sheikh* v. *Queen Empress*, ILR (1893) 21 Cal 392, 400.
76. *Moher Sheikh* v. *Queen-Empress*, ILR (1893) 21 Cal 392, 400.
77. *Crompton (Alfred) Amusement Machines Ltd.* v. *Customs and Excise Commissioners (No. 2)*, (1973) 2 All ER 1169 (HL).
78. *Pacey* v. *London Tramways Co.*, (1876) 2 Ex. D. 440n. (C.A.); *Friend* v. *London, Chatham and Dover Ry.*, (1877) 2 Ex. D. 437 (C.A.); *Southwark Co.* v. *Quick*, (1878) 3 QBD 315 (CA).
79. *Jones* v. *Great Central Ry. Co.*, (1910) AC 4 (HL). The decision, in principle correct, is a trap for the unwary. In most such cases, in modern conditions, the dispensation in favour of employed solicitors inaugurated by Cromptons case (*ante* 15-09) will protect such communications.
80. *Abbas Peada* v. *Queen-Empress*, ILR (1898) 25 Cal 736.
81. *Woolley* v. *N. L. Rly.*, (1869) LR 4 CP 602; *G.E. Crippen & Associates* v. *Vancouver Tug Boat Co.*, (1971) 2 Lloyd's Rep. 207, 210; *Wheeler* v. *Le Marchant*, (1881) 17 Ch. D. 675 (CA). **See also** *Abbas Peada* v. *Queen-Empress*, ILR (1898) 25 Cal 736.

difficult question. It is clear that it is not essential that a cause of action has arisen[82]. It has been said that a mere request for information from the third party was not privileged even when litigation was probable, because nothing in the request to the third party indicated the purpose for which the information was sought[83]; but this decision is of doubtful validity[84]; there is no obvious reason why the third party should be told that litigation is contemplated. (Indeed there is something to be said for the view that his evidence will be the more reliable if he does not know a result in most cases impossible to achieve). Often the dealings with the third party are not prompted by a single motive, and in such cases it is necessary to investigate the purpose for which the communication with the third party chiefly took place.

A document would attract legal professional privilege only if the sole or predominant purpose of its preparation is to enable it to be used by lawyers. The only question to be answered is whether the dominant purpose of the document was that it should be submitted to legal advisers.[85]

"No privilege attaches to communications between claimant and defendant, or between opposing parties. There can be no confidentiality in such communications. It follows that there can be no confidentiality, and no privilege, in notes or reports of matters at which both sides were present. Thus a transcript of proceedings in chambers, in open Court or before arbitrators will not be privileged.[86] This is so whether the transcript is prepared by a Court reporter, either present taking a shorthand note or from the tape, or a solicitor or barrister. Any tape-recording of such proceedings will also not be privileged. Nor will depositions in prior foreign proceedings between the same parties attended by representatives of both parties.[87]

It also follows from this that a solicitor's attendance note of a meeting with the solicitor for the opposing party will not be privileged. This was held in *Parry* v. *News Group.*[88] It was alleged in a libel action that a concluded agreement was reached between the parties during a telephone conversation between the plaintiff's solicitor and the defendants' legal manager. The plaintiff's solicitor prepared a file note of the telephone conversation, and disclosed it. It was argued this was a waiver of privilege and gave rise to an obligation to disclose additional privileged documents. The Court of Appeal rejected the contention that the document was ever privileged. It was not suggested that the oral exchange between the parties was itself subject to legal professional privilege and in consequence the contemporaneous note could not be subject to privilege." PHIPSON ON EVIDENCE, 15th Edn. (2000), Para 20-10, pp 510-511.

The privilege, where it attaches, remains in all cases that of the litigant, and the third party from whom the information is sought cannot claim privilege.[89] It may be observed that the principle of *Calcraft* v. *Guest*[90] whereby secondary evidence of privileged documents is admissible, has never, so far as is known, been sought to be applied to a third party by way of *subpoena duces tecum*).

Where a legal adviser collates and copies material not in itself privileged for the purpose of advising a client or preparing the case, it has been held that the copies are privileged[91]. In *Buttes Gas & Oil Co.* v. *Hammer* (No. 3),[92] LORD DENNING M.R. disapproved some of these authorities and would have denied privilege to copies of documents the originals of which were not privileged, on the ground that the maker of the original could be made the subject of a *subpoena duces tecum*.[93] It is perhaps doubtful whether it was open to the learned Master of the Rolls to discard several decisions of the Court of Appeal; but at all events his *dicta* can only have been intended to extend to documents in the hands of the client, as the

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82. *Bristol Corporation* v. *Cox*, (1884) 26 Ch. D. 678.
83. *Anderson* v. *Bank of British Columbia*, (1876) 2 Ch. D. 644. **See also** 15-30, n. 71.
84. *Cf. di Pietrantonio* v. *Austin Hospital-Heidelberg*, (1958) V.R. 325.
85. *Melick* v. *Norwich Union*, (1980) 1 Lloyd's Rep. 523 (assessors report to insurers); *Neilson* v. *Laugharne*, (1981) 1 All ER 829 (CA) (report for a complaint, the report being made pursuant to a duty under the Police Act 1964, (S. 49). **In both cases, privilege was refused following** *Waugh* v. *B.R.B.* (*ante*).
86. *Ainsworth* v. *Wilding*, (1900) 2 Ch 315, 320.
87. *Visx Inc* v. *Nidek Co.*, (1999) FSR 91.
88. (1990) 140 NLJ 1719.
89. *Schneider* v. *Leigh*, (1955) 2 QB 195 (CA).
90. (1898) 1 QB 759 (CA) **see** *ante*, 15-04.
91. *Lyell* v. *Kennedy*, (1884) 27 Ch D 1 (CA); the Palermo (1884) 9 P.D. 6 (CA); *Watson* v. *Cammell Laird*, (1959) 1 WLR 702 (CA).
92. (1980) 3 All ER 475, 489 g-h : (1981) 3 WLR 787. **See** *ante* n. 17a.
93. *Ibid.* at p. 484 f-h.

authority approved by him would suggest[94]. It can hardly be the case that copies taken in the course of evidence-gathering are not privileged.

The Bombay High Court held "Although a document may not be such as passed directly between the legal adviser and the client, yet, if it is of such a nature as to make it quite clear that it was obtained confidentially for the purpose of being used in litigation and with a view to being submitted to legal advisers, then, the court will not compel the production of such a document.[95]

Letters written by one of the defendant's servants to another for the purpose of obtaining information with a view to possible future litigation, are not privileged, even though they might, under the circumstances, be required for the use of the defendant's solicitor. In order that privilege may be claimed, it must be shown on the face of the affidavit that the documents were prepared or written merely for the use of the solicitor.[96] Reports made by defendant's servants to the defendant regarding the subject-matter of the suit are not privileged.[97]

Production of title-deeds of witness, not a party.

S. 130. No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

COMMENTS

1. PRINCIPLE AND SCOPE

This section states that a witness who is not a party to the suit shall not be compelled to produce his title deeds to any property, or any document under which he holds the property as a pledgee or a mortgagee, or any document the production of which might tend to incriminate him. But he may agree to produce such document in which case such agreement must be in writing.

This section is based on the principle that great inconvenience and mischief would result to witnesses if they are compelled to disclose their titles by the production of their title-deeds. The object of the privilege is that the title may not be disclosed and examined.

The section protects a witness, who is not a party to the suit in which he is called, from producing—

(1) title-deeds to any property, or

(2) any document in virtue of which he holds any property as pledgee or mortgagee, or

(3) any document the production of which might tend to criminate him, unless he has agreed in writing to produce such document.

It would be entirely optional for the witness to produce his title-deeds, and to raise any objection whatever.

STEPHEN in his Digest (Art. 118) states: "That Section 130 differs from the English Law in one respect that the section does not excuse a witness from producing a document which might expose him to a penalty or forfeiture; whereas the English Law does excuse. But, both according to the English and the Indian Law a witness is not excused from producing a document on the ground that the production might render him liable to civil action." The privilege under this section has to be claimed in an affidavit stating that the documents constitute exclusively evidence of his own case or title.[98]

Section 131 extends the protection to an agent which Section 130 provides for a principal.

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94. *Chadwick* v. *Bowman*, (1886) 16 QBD 561 (DC).
95. *Vishnu Yeshawani* v. *New Life Insurance Co.*, (1905) 7 Bom LR 709.
96. *Bipro Dass Dey* v. *Secretary of State for India in Council*, ILR (1885) 11 Cal 655.
97. *Central India Spinning & Co.* v. *G.I.P. Railway*, (1926) 29 Bom LR 414 : AIR 1927 Bom 367.
98. *Balamoney* v. *Ramaswami*, ILR 30 Mad 230; *Attorney General* v. *Emerson*, 10 QBD 191.

TAYLOR ON EVIDENCE (8th Ed., Section 458 & 428) states "Upon principles of reason and equity judges will refuse to compel either a witness or a party to a cause to produce either his title deeds, or any document the production of which may tend to criminate him, or any document which he holds as mortgagee or pledgee."

It is stated in PHIPSON 13th Edn., pages: 312 & 313, para: 15.32 & 15.33 as follows:

"A witness, if a stranger, cannot be compelled to produce his title-deeds, or documents in the nature of title-deeds.[1] This rule can only apply in criminal proceedings, being abrogated in any other legal proceedings by the Civil Evidence Act 1968, S. 16(1)(b).

In criminal proceedings, the old rule of law that a party cannot be compelled to produce documents which relate solely to his own case and do not tend to support the title or case of his adversary[2] still presumably applies to the prosecution in criminal proceeding. But this rule has been abrogated in civil proceedings by Section 16(2) of the Civil Evidence Act 1968.[3]

A witness cannot withhold production, as distinguished from delivery, of a document on the ground that he has a lien upon it as against a stranger[4]. However, he can withhold production, where the lien is against the party requiring its production[5] unless the rights of third parties would be prejudiced thereby, as in the case, *e.g.* of Bankruptcy[6]; Administration[7]; Winding-up[8]; or Partition actions[9]. It has been held that the witness cannot withhold production even where the third party claims through the person against whom the lien exists.[10]

Order XVI, Rule 6, C.P.C. provides that any person may be summoned to produce a document without being summoned to give evidence. Order XI, C.P.C. provides for discovery and inspection of the documents in the possession of a party to the suit.

Section 162 of the Evidence Act states that a witness summoned to produce a document shall, if it is in his possession or power, bring it to the court, not withstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the court. This is a mandatory provision and the person to whom the summons is issued has to produce the document and then can claim privilege either under Section 130 or 131.

In English Law however the oath of the witness is conclusive as to the nature of the document.[11]

"In England the title-deeds to land are of such extraordinary importance that as, when a witness called on to produce documents under a *subpoena duces tecum* swears that they are his documents of title, the court always excuses him from producing them." (BEST-8th Edn. See 138 p. 115).

2. TITLE-DEED

A lease deed is the title-deed of a lessee within the meaning of this section.[12] A will is the title-deed of a devise (TAYLOR, 459).

Where a stranger who was directed to produce a document, stated that it was his own title-deed and it was not in his possession but offered to produce it the next day, and the court proceeded against him under Section 476, Cr. P.C. (old) (Section 340 new), it was held that if the document is his own title-deed

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1. *Doe* v. *Date*, (1842) 3 QB 690; *Pickering* v. *Noyes*, (1823) 1B & C. 262.
2. *Morris* v. *Edwards*, (1891) 15 App. Cas. 309; *Milbank* v. *Milbank*, (1900) 1 Ch. 376; *Miller* v. *Kirwan*, (1903) 2 IR 120, *Chowwood* v. *Lyall*, (1929) 2 Ch. 406; *Budden* v. *Wilkinson*, (1893) 2 QB 432; *Frankerstein* v. *Gavin*, (1897) 2 QB 62; *Bursill* v. *Tanner*, (1885) 16 QBD 1; *Volant* v. *Soyer*, (1853) 13 CB 231; *Phelps* v. *Prew*, (1854) 3 E&B 430; *Hibberd* v. *Knight*, (1848) 2 Ex. 11.
3. See n.91, above.
4. Re.: *Hawkes, Ackerman* v. *Lockhart*, (1898) 2 Ch. 1, and cases cited.
5. Re.: *Hawkes, ante;* Re.: *Jones*, 21 TLR 352.
6. Bankruptcy Act 1914, S. 25; Re.: *Winslow*, (1886) 16 QBD 696. A claim by a bankrupt not to answer questions as to a secret process was rejected In re : *Keene* (1922) 2 Ch. 475; cf. Re.: *Stevenson* (1918-19) B&CR 106.
7. Re.: *Broughton*, 23 Ch D 169; Re.: *Hawkes, ante.*
8. Companies Act 1948, S. 268; Re.: *Capital Fire Assoc.*, (1884) 24 Ch D 408.
9. *Boden* v. *Hensby*, (1892) 1 Ch 101.
10. *Lockett* v. *Cary*, (1864) 10 Jur. (N.S.) 144; but see Re.: *Hawkes, ante.*
11. *Morris* v. *Edwards*, (1891) 15 AC 309.
12. *Imrit Chamar* v. *Sridhar Pandey*, 17 CWN 108 : 13 I.C. 120.

he would be entitled to refuse to produce it and he could not be compelled under Section 130 and 131 of the Evidence Act, and that before taking any proceeding the court should have determined the nature of the document; and without determining the nature of the document no proceedings can be taken.[13]

Normally, in the case of joint ownership of property one holding the document cannot be compelled to produce the same, or if the document is in possession of another person, he also cannot be compelled. A seller who sells part of the property is entitled to retain the title-deed under proviso to Section 55(3), T.P. Act. Where one sells his entire property to different purchasers in plots, the buyer of the plot of greatest value will be entitled to all the documents. In such cases the other buyers will take an agreement from the buyer of the highest value to produce the title-deeds whenever required.

In the case of a person pleading joint ownership as a ground for non-production of the document, it was held that he should satisfy the court as to the nature of the joint ownership.[14]

3. CONSEQUENCE OF REFUSAL

If the witness refuses to produce his title deed, as he cannot be compelled to produce it, the party who wants its production may be allowed to give secondary evidence of the contents of the document.[15]

But the person claiming privilege cannot himself be examined as to its contents.[16]

Production of documents or electronic records which another person, having possession, could refuse to produce.

[17][S. 131. No one shall be compelled to produce documents in his possession or electronic records under his control, which any other person would be entitled to refuse to produce if they were in his possession or control, unless such last-mentioned person consents to their production.]

COMMENTS

1. THE INFORMATION TECHNOLOGY ACT, 2000 PRODUCTION OF DOCUMENTS

The Section 131 as substituted by the Act mentioned above accommodates electronic records in the expression "documents" and says that no person shall be compelled to produce documents in his possession or electronic records under his control which any other person would be entitled to refuse to produce, if they were in his possession unless he consents to their production.

2. PRINCIPLE AND SCOPE

Persons in possession of documents on behalf of others are generally agents, attorneys, mortgagees, trustees, etc. This section extends to these persons the same protection which the preceding section provides for a witness who is not a party to a suit.

The Act is silent as to whether the agents, mortgagees or pledgees can be compelled to give the contents of the document though they are protected from producing the document itself under the section. BAROLD ALDERSON observed, "It would be perfectly illusory for the law to say that a party is justified in not producing a deed, but that he is compellable to give parol evidence of its contents: that would give him, or rather his client through him, merely an illusory protection, if he happens to know the contents of the deed, and would be only a round-about way of getting from every man an opportunity of knowing the defects may be in the deeds and titles of his estate."[18]

FIELD adds that the same rule will, no doubt be followed in India. (FIELD 11th Edn., p. 1433).

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13. *Bhagabat Prasad Singh* v. *Emperor*, (1911) 12 Cr LJ 450 (Cal).
14. *Dhirabala* v. *Tincouri*, 31 CWN 80.
15. *Imrit Chamar* v. *Sridhari*, 17 CWN 108.
16. *Davies* v. *Waters*, (1842) 9 M&W 608.
17. Substituted by the Information Technology Act, 2000, S. 92, Sch. II (w.e.f. 17-10-2000).
18. *Davies* v. *Waters*, 9 Meeson & Wels By's Rep 612 : 60 RR 843.

Where summons were issued under Section 94, Cr.P.C. to accused company's employee for production of certain documents, it was held the company can under Section 131 object to its own employees producing its documents in court, without its consent, and that no summons under Section 94, Cr.P.C. can be issued to produce documents against the company's employees.[19]

If a person refuses to produce the document under this section the court is not entitled to draw an adverse inference as to its contents.

Witness not excused from answering on ground that answer will criminate.

S. 132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Proviso.

Provided **that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.**

SYNOPSIS

1. *Principle and scope*	...	1213	7. *Customs Act*	...	1215
2. *Oath of witness necessary but not conclusive*	...	1214	8. *Companies Act*	....	1215
3. *Claim must be bona fide*	...	1214	9. *Any question as to any matter relevant to the matter in issue*	...	1216
4. *Applicability*	...	1214	10. *Proviso—Protection to answer*	...	1216
5. *Approver*	...	1215	11. *Exceptions to this section*	...	1218
6. *Art. 20(3) of the Constitution & Section 132 Evidence Act*	...	1215			

COMMENTS

1. PRINCIPLE AND SCOPE

Under this section a witness shall not be excused from answering any question as to any matter relevant to the matter in issue, in any criminal proceedings (among others) upon the ground that the answer to such a question will incriminate or may tend directly or indirectly to expose him to a penalty or forfeiture of any kind. The safe-guard to this compulsion is that no such answer which the witnesses is compelled to give exposes him to any arrest or prosecution or can it be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answers.[20]

The privilege is based on the policy of encouraging persons to come forward with evidence in Courts of Justice by protecting them, as far as possible, from injury or needless annoyance, in consequence of so doing. A sensible compromise has, however been adopted in several modern statutes by compelling the disclosure, but indemnifying the witness in various respects against its results.[21]

Where there were cross-cases under Section 107, Cr.P.C. in a case, a prosecution witness (the defendant in the defamation suit) used abusive language against the accused who was a lawyer (plaintiff in the defamation suit). In the suit for defamation it was held that though using abusive language is a gross abuse of the privilege of a witness, in view of the peculiar position of the plaintiff as an accused in that case, the defendant was protected under the proviso of Section 132 and was not liable.[22]

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19. *State of Maharashtra* v. *Nagpur Electric Light & Power Co. Ltd.*, AIR 1961 Bom 242.
20. *State* v. *Jagjit Singh*, AIR 1989 SC 598.
21. PHIPSON 13th Edn. (para 15-36) p. 314.
22. *Rajindra Kishore Sahi* v. *Durga Sahi*, AIR 1967 All 476.

The Evidence Act does not apply to interrogations by a Customs Officer exercising powers under Section 171-A of the Sea Customs Act, and Section 132 cannot be attracted.[23]

In a case before the Supreme Court, the Customs Officers questioned one lady who was said to be involved in a smuggling racket. She admitted her own part along with others. But, the customs authority proceeded against others leaving that lady so that they might examine her as a prosecution witness. A contention was raised that she should also be tried along with them, so that her testimony might not be available against them. HIDAYATULLAH, J. observed "In India the privilege of refusing to answer has been removed so that temptation to tell a lie may be avoided but it was necessary to give this protection. The protection is further fortified by Art. 20(3), which says that no person accused of any offence shall be compelled to be a witness against himself. This article protects a person who is accused of an offence and not those questioned as witnesses. A person who voluntarily answers questions from the witness box waives the privilege which is against being compelled to be a witness against himself because he is then not a witness against himself but against others. Section 132 of the Indian Evidence Act sufficiently protects him since his testimony does not go against himself. In this respect the witness is in no worse position than the accused who volunteers to give evidence on his own behalf or on behalf of the co-accused. There too, the accused waives the privilege conferred on him by the Article since he is subjected to cross-examination and may be asked questions incriminating him. The Evidence of Ethyl Wong cannot, therefore, be ruled out as that of an incompetent witness"[24]

2. OATH OF WITNESS NECESSARY BUT NOT CONCLUSIVE

A witness cannot refuse to go into the witness-box on the ground that he might criminate himself; he can only claim the privilege after he is sworn and the question put.[25] And he must pledge his oath that he honestly believes the answer will or may tend to criminate him,[26] though even this does not necessarily suffice; for the court is entitled to see, from the circumstances of the case and the nature of the evidence the witness is called to give, that there is reasonable ground to apprehend danager from his being compelled to answer[27] but, once such danger is made apparent, great latitude should be allowed to the witness in judging for himself of the effect of any particular question.[28]

3. CLAIM MUST BE *BONA FIDE*

The court must also be satisfied that the claim is made genuinely for the protection of the witness, and not for ulterior purposes (*R.* v. *Armagh, ante*; *Re Reynolds, ante,* where a witness, having declined to answer whether he had, as trustee, executed a post- nuptial settlement made by a bankrupt on the ground that he might be charged with conspiracy to defeat the latter's creditors, the court disallowed the objection, considering it a mere device to stifle inquiry.). Moreover, the claim may be made at any stage of the proceedings and, when allowed, protects both future and past answers.[29]

4. APPLICABILITY

Section 132 of the Evidence act, does not apply to a statement made by a person during an investigation under Section 161, Cr.P.C. An investigation under Chapter XIV, Cr.P.C. may be a proceeding but is certainly not a suit or a civil or criminal proceeding. A person who is interrogated under Section 161 by a Police Officer making an investigation is not a witness within the meaning of Section 132, as it refers only to a person who enters the witness box and is sworn as a witness. So

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23. *Hira H. Advani* v. *State of Maharastra,* AIR 1971 SC 44; *Shankerlal* v. *Collector of Central Excise,* AIR 1960 Mad 225; *Maniklal Soni* v. *Union of India,* 1984 Cr LJ 1359 (Guj).
24. *Laxmipat Choraria* v. *State of Maharashtra,* AIR 1968 SC 938.
25. *Boyle* v. *Wise Men,* (1855) 10 Ex 647.
26. *Webb* v. *Egst.* (1880) 5 Ex D 108; *Lamb* v. *Munster, ante;* Re.: *Genese,* 3 Morrell 223 (CA); *National Association of Operative Plastrs.* v. *Smithies,* (1906) AC 434, 438.
27. *Rio Tinto Zinc Corp.* v. *Westinghouse Electric Corp.,* (1978) AC 547 (HL).
28. *Ibid.* and **see** *R* v. *Boyes,* (1861) 1 B & S 311; *Reynolds,* 20 Ch D 294; *Lamb* v. *Munster,* (1883) 10 QB 110 *ante;* Re.: *Genese,* (1985) 3 MBR 223 (CA). *National Assn of Operative Plasters* v. *Smithies,* (1906) AC 434, 438 [PHIPSON 13th Edn. (para 15-41) page 319].
29. *R.* v. *Garbett,* (1847) 1 Den CC 236.

defamatory statement made by a person in an answer to interrogatories during investigation under Section 161 are not protected u/s. 132.[30]

5. APPROVER

The moment the pardon is tendered to the accused he must be presumed to have been discharged whereupon he ceased to be an accused and becomes a witness, though, a formal order of discharge is not recorded.[31]

In a criminal trial for offences of violating a control order, the prosecution witness became hostile. Later that witness was made an accused under Section 319(1) of the control order and was convicted without any evidence on the basis of incriminating statements made by him. It was held that conviction was illegal and as a witness in the criminal case he is entitled for protection under the proviso to Section 132 though incriminating statements were made as a witness.[32]

The Madras High Court held that an accused, who had been jointly charged with another but whose case had been separated before the trial commenced so that he could be examined as a witness in the case of the other accused, could not be denied the benefit of the proviso to Section 132. He is as much a witness as any other, when once he is not an accused person within the meaning of Section 342, (old) Cr.P.C. (now Section 313). When an oath could be administered to such a person, naturally the incidents of Section 132 will also attach themselves to such a person as a witness.[33]

6. ARTICLE 20(3) OF CONSTITUTION & SECTION 132 EVIDENCE ACT

Article 20(3) of the Constitution provides a protection for an accused person charged with any offence stating that he shall not be compelled to be a witness against himself. But this provision under Section 132 applies to any witness in a civil or criminal proceedings.

Section 342(a), Cr.P.C. (old) corresponding to Section 313(1), Cr.P.C. of 1973 provides that even an accused can give evidence in his defence.

The Supreme Court in *Tukaram* v. *Shukla*[34] held that is cannot be said that if an accused enters the witness box to substantiate his defence, he is thereby compelled to be a witness against himself under Article 20(3) of the Constitution.

The rule laid down by Art. 20(3) of the Constitution is narrower than the Anglo- American rule since the privilege has been kept confined to persons "accused of any offence", an 'offence' being defined by Section 2(38) of the General Clauses Act. Witnesses in India have been left untouched by the Constitution and continue to be governed by Section 132 and other provisions of the Evidence Act.[35]

7. CUSTOMS ACT

Where a notice was issued to the petitioners under Section 171-A Sea Customs Act, to appear before the Customs Officers and to show cause why penalty should not be imposed under Section 167(8) of that act and the petitioner was compelled to answer certain questions, it was held that the proceedings before the Customs Officer are not judicial proceedings and the petitioners are not accused and so Art. 20(3) of the Constitution does not apply; however, if the petitioners are likely to be proceeded against in criminal court, they become accused and then only they can claim protection under Art. 20(3) of the Constitution.[36]

8. COMPANIES ACT

There were two proceedings against a Managing Director, one under Section 185 Company's Act, and the other a Criminal Proceeding in respect of the same subject-matter. When the Managing Director

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30. *Haji Ahmed Hussain* v. *State*, AIR 1960 All 623.
31. *A.J. Peiris* v. *State*, AIR 1954 SC 616; *Sheorati* v. *R*, 18 Cal WN 1213; *Banusingh* v. *R*, (1906) 10 Cal WN 962.
32. *Paulose* v. *State of Kerala*, 1990 Cr LJ 100 (Ker); *Gangadharan* v. *State*, 1989 Cr LJ 2455 (Ker).
33. In re : *Kandaswami Gounder*, AIR 1957 Mad 727; **see also** 1970 Pat LJR 424.
34. AIR 1968 SC 1050.
35. *Subedar* v. *State of Allahabad*, AIR 1957 All 396.
36. *Shankerlal* v. *Collector of Central Excise, Madras*, AIR 1960 Mad 225; *Maniklal Soni* v. *Union of India*, 1984 Cr LJ 1359 (Guj); *Hira H. Advani* v. *State of Maharashtra*, AIR 1971 SC 44.

asked for adjournment of the proceedings under Section 185 Companies's Act till the disposal of the criminal case, it was held that the Managing Director was not an accused in the proceedings under Section 185 of the Companies Act and as he was not being compelled to make any statement as a witness he could not claim protection beyond what was contained in proviso to Section 132 of the Evidence Act. And the ground for adjournment under Art. 20 Cl. (3) would not be applicable to the proceedings under the Companies Act.[37]

9. ANY QUESTION AS TO ANY MATTER RELEVANT TO THE MATTER IN ISSUE

The section does not in terms deal with all criminatory questions which may be addressed to a witnesses, but only with questions as to matters relevant to the matter in issue. Irrelevant questions should not be allowed, and it may be implied from the limitations in this section that a witnesses could be excused from answering questions tending to criminate as to matters which are irrlevant.[38]

10. PROVISO—PROTECTION TO ANSWER

The section makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, and gives him a protection in the latter of these cases only. Protection is afforded only to answers which a witness has objected to give or which he has asked to be excused from giving and which then he has been compelled by the Court to give[39]. The mere subpoeaning of a witness or ordering him to go into the witness-box does not compel him to give any particular answer or to answer any particular question. The words "shall be compelled to give "in the proviso apply to pressure put upon a witness after he is in the box, and when he asks to be excused from answering a question.[40] The Allahabad High Court has held that this is too narrow an interpretation. A common sense meaning should be given to the word 'compelled'. It is impossible to deny that in the case of ordinary laymen unacquainted with the technical terms of this section, they are compelled to answer on oath questions put either by the Court or by counsel, especially when the question is relevant to the case. An answer given by a witnesses under such circumstances is protected by this section. Whether or not a witness is 'compelled' within the meaning of this section to answer any particular question put to him while in the witness-box is in each case a question of fact.

In a case a witness for the prosecution admitted in evidence that he helped the accused in the disposal of the dead body. On that admission he was prosecuted latter for the offence of helping to suppress the evidence under Section 201, I.P.C. In that trial the accused stated in his examination under Section 342, (old) Cr.P.C. (now Section 313) that in the original case he stated that fact on the instigation by the police. It was held that the witness in order to be entitled to the protection under Section 132 should object to the question which tends to incriminate him. The question whether a statement was made voluntarily or under compulsion is a question of fact, but an obligation under law to state the truth as a witness on oath, cannot *ipso facto* be equated with compulsion and admission made by a witness in the witness box about the commission of an offence by him, can be used against him in evidence. The present explanation for the statement during the examination under Section 342, (old) Cr.P.C. (now Section 313) could be regarded in the context as true and sufficient for the purpose of discharging the onus of explaining away the admission, and answers given by the accused in the examination under Section 342, (old) Cr.P.C. (now Section 313).[41]

'A' the husband of 'B' married 'C'. During the trial of A for bigamy the father of the complainant 'B' requested the court that 'C' may be summoned as a witness though there was no allegation against 'C' in the complainant. An objection was raised by 'C' stating that she will be deposing against her own

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37. *People's Insurence Co.* v. *Sardul Singh*, AIR 1962 Punj 101.
38. *Queen* v. *Gopal Doss*, (1881) 3 Mad 271, 277, 278 FB; *Peddabba Reddi* v. *Varadda Reddi*, (1928) 52 Mad 432; *Queen-Empress* v. *Ganu Sonba*, ILR (1888) 12 Bom 440; *Queen* v. *Gopal Doss*, ILR (1881) 3 Mad 271 FB; *Queen-Empress* v. *Moss*, ILR (1893) 16 All 88; *Kallu* v. *Sital*, ILR (1918) 40 All 271; *Emperor* v. *Pramatha Nath Bose*, ILR (1910) 37 Cal 878; *Jaganath* v. *King-Emperor*, (1934) 10 Luck 169 : AIR 1934 Oudh 386; *Rasool Bhai* v. *Lall Khan*, ILR (1939) Ran 479.
39. *Queen-Empress* v. *Ganu Sonba*, (1888) 12 Bom 440.
40. *Moher Sheikh* v. *Queen Empress*, ILR (1893) 21 Cal 392.
41. *State of Orissa* v. *Aitu Durva*, (1963) 2 Cr LJ 475 : ILR 1962 Cut 965; **relying** on *State of Maharashtra* v. *Laxman*, AIR 1962 SC 1204; *Peddabba Reddi* v. *Varada*, AIR 1929 Mad 236.

interest and it would amount to compelling her to make a statement against herself. It was held that the proviso to Section 132 provides a sufficient safeguard to 'C'.[42]

According to an earlier decision of the Madras High Court a witness is not guilty of defamation for any statements made in witness-box.[43] But subsequently it has held that a witness who answers a question put to him by counsel without seeking the protection of this section is not entitled to any protection as the statements made by him are entitled not to an absolute but only to a qualified privilege.[44]

The compulsion contemplated by this section may be express or implied. DEVADOSS, J., observed: "Whether the witness seeks the protection of the court in a set form of words or not, if the witness is made to understand directly or indirectly that he has no option in the matter but to answer all the questions put to him I conceive he would bring himself within the proviso to Section 132 I am not prepared to hold that the proviso would only apply to witnesses who ask in so many words the protection of the court under Section 132. The words of the proviso should be understood in the ordinary sense and the word 'compelled' means forcing or insisting upon a witness to answer the question. The witness may not know that he should apply for protection; but any reasonable man ought to know that any statement defamatory of another would expose him to a charge of defamation. If he hesitates to answer and the court tells him he must answer the question, I would hold that hesitation and the direction of the court to the witness to answer would bring the witness within the proviso".[45]

The Bombay High Court observed: "If a man voluntarily makes an incriminating statement, he must take the consequences for it. He can only plead protection if he has specifically declined to make the statement, and has been specifically compelled to do so by the Court."[46] The Bombay High Court has in another Full Bench case laid down that relevant statements made by a witness on oath or solemn affirmation in a judicial proceeding are not protected by this proviso where the witness has not objected to answering the questions put to him.[47] A witness who makes defamatory statements in a witness box comes within the purview of Section 499, Indian Penal Code (*ibid*).

The Calcutta High Court has held that a witness who makes a voluntary and irrelevant statement not elicited by a question put to him while under examination is not protected by this section. It has therefore, held that a witness making a voluntary and irrelevant statement to injure the reputation of another is guilty of defamation.[48] Where a witness makes a voluntary and irrelevant statement with some malice and when it is not elicited by putting any question, he cannot claim any protection under Section 132 and he would be liable for the offence under Section 500, I.P.C.[49]

The Rangoon High Court held that Section 132, everrides the provisions of the Penal Code and it gives complete protection if the witness is compelled to answer, but that protection must be claimed either directly or impliedly.[50]

Where in a prosecution for the offence of cheating, the petitioners were cited as witnesses, it was held that the petitioners were bound to answer all questions and they could not be prosecuted for their answers in view of proviso to Section 132.[51]

In the case of a witness making defamatory statements in the witness box, it was held that the witness who was proceeded in a suit for damages in a civil action can set up the privilege and the immunity provided under Section 132. But no such privilege is recognised by the Penal Code beyond the limits of exceptions embodied in Section 499, IPC and the principles of English law cannot be invoked by going beyond what is enacted in the said exceptions. But where the witness is compelled by the court

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42. *Usha Devi* v. *Jagdish Prasad*, 1988 Cr LJ 1239 (All).
43. *Manjayya* v. *Sesha Shetty*, ILR (1888) 11 Mad 477.
44. *Peddabba Reddi* v. *Varada Reddi*, ILR (1928) 52 Mad 433 : AIR 1929 Mad 236.
45. *Peddabba Reddy* v. *Varada Reddy*, AIR 1929 Mad 236.
46. *Emperor* v. *Cunna*, AIR 1920 Bom 270 (FB).
47. *Bai Shanta* v. *Umrao Amir*, (1925) 28 Bom LR 1 : ILR 50 Bom 162 FB : AIR 1926 Bom 141.
48. *Haider Ali* v. *Abru Mia*, ILR (1905) 32 Cal 756.
49. *Surajmal* v. *Ramnath*, AIR (1928) Nag 58.
50. *Rasool Bhai* v. *R*, AIR 1939 Rang 371.
51. *Teneja* v. *State of Rajasthan*, (1970) Cr LJ 945 (Raj).

to make such a statement in answer to a question he can claim protection under the proviso to the section, unless the statement is false.[52]

The distinction between 8th Exception to Section 499, IPC and the Proviso to Section 132 is that the former excludes a statement from the definition of defamation altogether, whereas the latter excludes prosecution for defamation and bars proof of the accusation in a trial for a defamation. The proviso to Section 132 assumes that the accusation contained in the answer is punishable as defamation under Section 500, I.P.C. Consequently in order to consider whether proviso is applicable or not, it is irrelevant to consider whether the answer contains a defamation under Section 500, I.P.C. or not, as the proviso will apply even though the statement is not made in good faith and hence is not covered by exception 8 to Section 499, I.P.C. The proviso to Section 132 would come into play when the witness was compelled to give the answer to the questions. When witnesses in their chief examination itself voluntarily and without any protest or hesitation give certain answers containing defamatory matter they would not be entitled for protection under the proviso to Section 132. And so they can be prosecuted for defamation and the accusation made by them in their depositions can be proved against them. The compulsion contemplated by the proviso should be special compulsion by the Presiding Officer of the court, and it must arise from refusal of his prayer to be excused.[53]

WIGMORE (3rd Ed., Para. 2192) observes: "A person, by virtue of his very existence in civilised society, owes a duty to the community to disclose for the purposes of justice all that is in his control which can serve the assertainment of the truth.

A citizen owes his Government a duty to attend its courts and give his testimony whenever he is properly summoned.[54]

In para 2196, it is observed: "The claim of privilege can be made solely by the witness himself, the privilege is purely personal."

11. EXCEPTIONS TO THIS SECTION

Section 94 of the Representation of People's Act of 1951 is an exception to Section 132 and so a voter cannot be compelled to divulge to whom he voted, as the secrecy of the ballot has to be maintained.[55] Protection under the proviso to this section cannot be granted to an officer of a company with regard to answers given by him in his public examination which might tend to incriminate him and can be used in criminal as well as civil proceeding that might ensue, even though he may be compelled to give the same by reason of the provisions of S. 478(5) of the Companies Act, 1956.[56]

Accomplice.

S. 133. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

SYNOPSIS

1. *Principle and Scope*	... 1219	7. *Accomplice a competent witness*	... 1230
2. *Accomplice: Who is and who is not*	... 1222	8. *Accomplice—corroboration*	... 1230
3. *Accessories after the fact*	... 1225	9. *Murder—accomplice*	... 1233
Victim of Rape	... 1225	10. *Accomplice related to accused*	... 1233
4. *Bribery*	... 1226	11. *Accomplice—Approver*	... 1233
5. *Partisan witness*	... 1228	12. *Confession*	... 1236
6. *Trap witness*	... 1228		

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52. *Gayaram* v. *Shanti Kinwar, ILR 1971 MP 373*; **relying on** *Haji Ahmed Hussain* v. *State*, AIR 1960 All 623; *Rajinder Kishore* v. *Durga Sahi*, AIR 1967 All 476; *Brijlal Prasad* v. *Mohanlal Das*, ILR (1940) Nag 125; *Bobba Bala Tripurasdari* v. *Building Inspector Municipality, Vijayawada*, (1983) 2 Chand. LR (Crl) 406 : 1982 Cr LJ 180 NOC (AP).
53. *Chotkan* v. *State*, AIR 1960 All 606; *Gir Raj* v. *Sulla*, AIR 1965 All 597; *Hemraj Poonam Chand* v. *Babulal Bhagirath*, AIR 1962 MP 241.
54. *Blackmer* v. *United States*, (1931) 284 US 421 : 76 L. Ed 375.
55. *Raghubir Singh Gill* v. *Gurcharan Singh*, AIR 1980 SC 1362.
56. *Gill & Co. (P) Ltd.* v. *Madhav Mills*, (1969) 72 Bom LR 679.

COMMENTS

1. PRINCIPLE AND SCOPE

This section states that an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The first part of the section may not be necessary because Section 118 provides that all persons are competent to testify, subject to certain exceptions. Reference may be made to Section 114, Illus. (b), which states that an accomplice is unworthy of credit, unless he is corroborated in material particulars. This section states that a conviction based on the uncorroborated testimony of an accomplice is not illegal. PEACOCK C.J. observed: "I am of opinion that a conviction upon the uncorroborated testimony of an accomplice is legal. This is not a new law, nor founded upon a new principle. This point was decided in England, as far back as the 10th Dec., 1662 after conference with all the judges".[57]

The Bombay High Court observed: "The rule in Section 114 and that in Section 133 are part of one subject and neither section is to be ignored in the exercise of judicial discretion. The illus. (b) is, however, the rule, and when it is departed from, the court could show, or it should appear, that the circumstances justify the exceptional treatment of the case."[58]

The Madras High Court held by a majority that "It is impossible consistently with the Indian Evidence Act to hold that, as a matter of law, the presumption must be raised and rebutted by special circumstances or by corroboration."[59] SUNDERA IYYAR. J., observed: "It would be an ordinary right to require a judge to draw the presumption, but it is not necessary to draw the presumption in every case."

This section is the only absolute rule of law as regards the evidence of an accomplice. But illustration (b) to S. 114 is a rule of guidance to which also the Court should have regard, It is, however, not a hard and fast presumption incapable of rebuttal, a presumption *juris et de jure*.[60] The combined effect of this section and Section 114, illustration (b), is that though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal, yet the Courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars.[61]

The Privy Council observed: "Reading these two enactments together, the Courts in India have held that whilst it is not illegal to act upon the uncorroborated evidence of an accomplice it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act upon the evidence of an accomplice unless it is corroborated in material respects so as to implicate the accused; and further that the evidence of one accomplice cannot be used to corroborate the evidence of another accomplice. The law in India, therefore, is substantially the same on the subject as the law in England, though the rule of prudence may be said to be based upon the interpretation placed by Courts on the words "corroborated in material particulars" in Illus. (b) to Section 114."[62]

The Supreme Court, dealing with Section 133 and Section 114, illus. (b) observed "There is no antithesis between S-133 and illus (b) to S-114 of the Evidence Act, because the illustration only says that the court 'may' presume a certain state of affairs. It does not seek to raise a conclusive and irrebuttable presumption". It is hazardous, as a matter of prudence, to proceed upon the evidence of a self-confessed criminal, who, so far as an approver is concerned, has to testify in terms of the pardon tendered to him. The risk involved in convicting an accused on the testimony of an accomplice, unless it is corroborated in material particulars, is so real and patent that what during the early development of law was felt to be a matter of prudence has been elevated by judicial experience in to a requirement of law. It is necessary to understand that what was hardened into a rule of law is not that this conviction is illegal, if it proceeds upon the uncorroboration testimony of an accomplice but that the rule of corroboration

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57. *Queen* v. *Elahee Buksh*, 5 WR (Cri) 80 (FB).
58. *Queen Empress* v. *Chagan Dayaram*, ILR (1890) 14 Bom 331.
59. *Muthukumaraswamy Pillai* v. *R.*, ILR 35 Mad 397 (SB of five judges).
60. *Emperor* v. *Shrinivas Krishna*, (1905) 7 Bom LR 969.
61. *Bhiva Doulu Patil* v. *State of Maharashtra*, (1962) 65 Bom LR 347 : AIR 1963 SC 599.
62. *Bhuboni Sahu* v. *The King*, AIR 1949 PC 257, 258.

must be present to the mind of the judge and that corroboration may be dispensed with only if peculiar circumstances of a case make it safe to dispense with it.[63]

The classic judgement which was followed in several cases inclduing the Supreme Court was rendered by Lord READING in *R.* v. *Baskerville*[64] "There is no doubt that the uncorroborated evidence of an accomplice is admissible in law. But it has been long a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice, and in the discretion of the judge, to advise them not to convict upon such evidence, but the judge should point out to the jury that it is within their legal province to convict upon such confirmed evidence.....This rule of practice has become virtually equivalent to a rule of law, etc.....We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect the accused with the crime. In other words, it must be evidence which implicates him, that is which confirms in some material particular not only the evidence that the crime has been committed but also that prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offence for which corroboration is required by statute. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence which shows or tends to show that the story of the accomplice that the accused committed the crime it true, not merely that the crime has been committed by the accused.....The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection "with the crime".

The above view was followed by several courts in England and also in India.[65]

The Supreme Court observed: "The combined effect of Sections 133 and 114 Ill. (b) may be stated as follows: According to the former which is a rule of law, an accomplice is competent to give evidence and according to the latter which is a rule of practice it is almost always unsafe to convict upon his testimony alone. Therefore, though, the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet, the courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars".[66]

A judge is not required to adopt the English rule as laid down in.[67]

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63. *Abdul Sattar* v. *Union Territory of Chandigarh*, AIR 1986 SC 1438; *C. Chellappan* v. *State of Kerala*, AIR 1979 SC 1761; *Dagdu* v. *State of Maharastra*, AIR 1977 SC 1579; *Union Territory of Arunachal Pradesh* v. *Lag Tagum*, 1982 Cr LJ 1519 (Gau)(DB); *Chinna Gowda etc.* v. *State of Mysore*, 1965 (2) SC J 500; *Bhiua Doulu Patil* v. *State of Maharastra*, AIR 1963 SC 599; *Bhuboni Sahu* v. *King*, AIR 1949 PC 257; *Rex* v. *Baskerville*, 1916 (2) KB 658; *Khushal Rao* v. *State of Bombay*, AIR 1958 SC 22; *Kilimanni Abu* v. *State of Kerala*, 1965 (2) Cr LJ 557 (Ker); *Nand Lal More* v. *State*, 1965 (1) Cr LJ 393 (Punj); *Kunj Behari* v. *State*, AIR 1951 Pat 84; *Abraham John* v. *State of Kerala*, 1969 Cr LJ 1577 (Ker); *Suraj Mal* v. *Sundar Mal Patwa*, ILR (1965) Madh Pra. 800.

64. (1916) 2 KB 658 : 86 L.J.K.B. 28.

65. **See** *Davies* v. *D.P.P.*, (1954) 1 All ER 507; In re : *Venkata Subba Reddy*, 54 Mad 931 : AIR 1931 Mad 689; *Noor Mohammed* v. *R*, 38 Cal WN 108; *Khadim* v. *R*, AIR 1937 Sind 162; *Safdar Ali Shah* v. *R*, AIR 1941 Lah 82; *Ramdayal Kahar* v. *R.*, AIR 1942 Pat 271; *Bishnu Pada* v. *R.*, AIR 1945 Cal 441; In re : *Chinnasami*, AIR 1960 Mad 462; In re : *Padma Raja Chetty*, (1949) 2 MLJ 428; *Rameshwar Kalyan Singh* v. *State*, AIR 1952 SC 54; *Vemireddy* v. *State of Hyderabad*, AIR 1956 SC 379; *Jnanendra Nath* v. *State of W.B.*, AIR 1959 SC 1199; In re : *Bassi Redy*, 1972 Cr LJ 1141 (Mys); *Haroom Haji Abdulla* v. *State of Maharashtra*, AIR 1968 SC 832; *L.S. Raju* v. *State of Mys.*, AIR 1953 Bom 297 DB; *Kashmira Singh* v. *State of M.P.*, AIR 1952 SC 159; *Ramchand* v. *State*, AIR 1952 HP 57; *Gorakh Nath* v. *Emperor*, AIR 1935 All 86; *Gurnam Singh* v. *State of Raj.*, 1979 Cr LJ (Noc) 215; *Emperor* v. *Mohiuddin Sahib*, 25 Mad 143; *Emperor* v. *Rama Saran*, ILR 8 All 306; *Crown* v. *Karam Singh, Sadhu Singh*, AIR 1951 Pepsu 73 DB; *Lalchand Khatri* v. *State*, AIR 1961 Pat 260; *Kalyan Singh* v. *State of Raj : Lachmandas* v. *State*, ILR (1971) 2 Delhi 426; *State of Bihar* v. *Basawan Singh*, AIR 1958 SC 500; *Bhan Singh Jubar Singh* v. *State*, 1957 Cr LJ 67 (MB); *Bhaskaran Nair* v. *State of Kerala*, ILR 1970 2 Ker 283; *Gurunath K. Reddy* v. *V. Seshaiah*, AIR 1966 AP 331.

66. *Bhiva Doulu Patil* v. *State of Maharashtra*, AIR 1963 SC 599, **following** *R* v. *Baskerville*, (1916) 2 KB 658 : 86 L.J.K.B. 28 and *Bhuboni Sahu* v. *King*, 1949 PC 257. **See also** *Empress* v. *Govindam*, ILR 9 All 528; *R* v. *Ram Saran*, ILR (1885) 8 All 396; *Rattan Dhanuk* v. *Emperor*, ILR 8 Pat 235; *Nanhak Ahir* v. *Emperor*, ILR 13 Pat 529; *Surajpal Singh* v. *Crown*, ILR (1938) Nag 516; *King* v. *Nga Myo*, ILR (1938) Ram 190 (FB) : AIR 1938 Rang 177 FB.

67. *R* v. *Baskerville*, (1916) 2 KB 658 : 86 L.J.K.B. 28; *Bereng Griffith Lerotholi* v. *King*, AIR 1950 PC 10.

The Privy Council has laid down in *Mahadeo* v. *King*[68] which is a decision on appeal from Fiji Islands, where the English law of evidence is in force, that the evidence of an accessory must be corroborated in some material particular not only bearing upon the facts of the crime but upon the accused's implication in it. Evidence of one accomplice is not available as corroboration of another. It further holds that this rule of corroboration, which was long a rule of practice, is now virtually rule of law. In keeping with this principle the House of Lords have again emphasised that a clear warning must be given to the jury that "it is dangerous to convict" and not merely telling them to proceed with caution. The facts of *R* v. *Bagshaw*[69] were virtually repeated in *R.* v. *Spencer*[70]. The accused were charged with various offences of maltreating patients in the same mental hospital which figured in *R.* v. *Bagshaw*. The prosecution evidence was wholly based upon the evidence of patients themselves. In such cases the Court may feel unsafe to convict because of the character of such witnesses.[71] The majority of the decisions of the Bombay[72], the Calcutta[73] and the Lahore High Courts[74] and the late Chief Court of Oudh.[75] and Full Bench decision of the Madras High Court[76] have taken the same view. The Allahabad[77] , the Patna[78], the Rangoon[79] and the Nagpur[80] High Courts have taken a different view.

The Calcutta High Court has held that it is now the universal practice of the Courts not to convict where an accomplice's evidence is uncorroborated. Where the trial is by jury, a conviction after clear warning cannot be set aside.[81]

In special circumstances the uncorroborated testimony of an accomplice can be relied upon for basing a conviction.[82]

There is no violation of Arts. 14 and 20 of the Constitution of India when there is power to tender an accomplice as a witness instead of trying him as an accused.[83]

An enquiry officer, conducting enquiry against a public servant is not bound by the strict rules of law or evidence. Hence, illus (b), S. 114 of the Evidence Act cannot be literally applied and it is open to his officer to hold a public servant guilty even on the basis of the evidence of an accomplice.[84]

Even in civil case, while assessing evidence the court has to require corroboration of evidence of an accomplice for no other reason but that the witness has a serious stain upon his evidence as a participant in a nefarious act.[85]

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68. (1936) 38 Bom LR 1101, PC **followed** in *Surajpal Singh* v. *Crown*, ILR (1938) Nag 516.
69. (1984) 1 All ER 971.
70. (1985) 1 All ER 673.
71. For comments **see** All ER Annual Review 1985.
72. *Queen-Empress* v. *Maganlal*, ILR (1889) 14 Bom 115, 119; *Queen-Empress* v. *Chagan Dayaram*, ILR (1890) 14 Bom 331.
73. *Emperor* v. *Lalit Mohan Chuckerbutty*, (1911) 38 Cal 559; *S.B. Ambica Charan Roy* v. *Emperor*, (1931) 35 CWN 1270 (SB); *Bimalkrishna Biswas* v. *Emperor*, ILR (1935) 62 Cal 819, **Contra**, *Nirmal Jiban Ghosh* v. *Emperor*, ILR (1934) 62 Cal 238 (SB) **followed** in *Purnanand Das Gupta* v. *Emperor*, ILR (1939) 1 Cal.
74. *Sher Singh* v. *Crown*, ILR (1932) 14 Lah 111; *Katar Singh* v. *Crown*, ILR (1935) 17 Lah 518; *Nikka* v. *Crown*, (1936) 17 Lah 541.
75. *Baboo Singh* v. *King-Emperor*, (1935) 11 Luck 662; *Beni Madho* v. *King-Emperor*, (1933) 9 Luck 22; *Gaya Prasad* v. *King Emperor*, ILR (1931) 6 Luck 658; *Lale* v. *King Emperor*, ILR (1929) 5 Luck 101, **Contra** *Jagannath alial Khairati* v. *King Emperor*, 1941 17 Luck 516.
76. *Rajgopal B.K.* In re., ILR (1944) Mad 380 F.B. : AIR 1944 Mad 117. The following cases are not referred to in the Full Bench case and they laid down that an accomplice need not be corroborated in material particulars before it can be acted upon and that it is open to the Court to convict upon the uncorroborated testimony of an accomplice if the Court is satisfied that the evidence is true; *King Emperor* v. *Nilakanta*, ILR (1912) 35 Mad 247 (SB); *Muthukumaraswami Pillai* v. *King-Emperor*, ILR (1912) 35 Mad 397 FB.
77. *Queen-Empress* v. *Gobardhan*, ILR (1887) 9 All 528; *Queen Empress* v. *Ram Saran*, ILR (1885) 8 All 306.
78. *Rattan Dhanuk* v. *King-Emperor*, ILR (1928) 8 Pat 235; *Nanhak Ahir* v. *King-Emperor*, ILR (1934) 13 Pat 529.
79. *King* v. *Nga Myo*, ILR (1938) Ran 190 210, FB.
80. *Surajpalsingh* v. *Crown*, ILR (1938) Nag 516 and *Mohanlal* v. *King-Emperor*, ILR 1946 Nag 982.
81. *Ganeshdas Mimani* v. *King*, ILR (1950) 1 Cal 462.
82. *State* v. *Sardara*, 1974 Cr LJ 43 (Raj); *State* v. *Anil Ranjan Dutta*, AIR 1952 Cal 534; *Rangaswami* v. *State of Kerala*, ILR 1958 Ker 420; *Data Ram* v. *State of Rajasthan*, 1977 Cr LJ 1428 (Raj).
83. *Laxmipat Choraria* v. *State of Maharashtra*, AIR 1968 SC 938.
84. *Anil Behari Saran* v. *State of Bihar*, AIR 1967 Pat 43; *Made Gowada* v. *State of Mysore*, AIR 1966 Mys 220.
85. *Surajmal* v. *Sundarlal Patwa*, ILR 1965 Madh Pra 800.

"Accomplices are usually interested and always infamous witness and whose testimony is admitted from necessity, it being often impossible without having recourses to such evidence, to bring up the principal offenders to justice". (TAYLOR ON EVIDENCE).

2. ACCOMPLICE: WHO IS AND WHO IS NOT

An accomplice is a person who participates in the commission of the actual crime charged against an accused. He is to be a *participes criminis*. There are two cases, however, in which, a person has been held to be an accomplice even if he is not a *participes criminis*:

(1) Receivers of stolen property are taken to be accomplices of the thieves from whom they receive goods, on a trial for theft.

(2) Accomplices in previous similar offences committed by the accused on trial are deemed to be accomplices in the offences for which the accused is on trial, when evidence of the accused having committed crimes of identical type on other occasions be admissible to prove the system and intent of the accused in committing the offence charged.[86] Under S. 337, (old) Cr. PC (now Section 306) "an accomplice" is any person supposed to have been directly or indirectly concerned or privy to the offence.[87]

The word 'accomplice' is inter-changeable with an associate in crime who is so connected with the criminal act done by his confederate, that he on account of the presence of necessary *mens era* and his participation in the crime in some city or the other can be tried along with that confederate actually perpetrating the crime.[88] A person who is present at the commission of the crime and who is interested in not disclosing the commission of the crime is a person who is in the position of an accomplice.[89] When a witness goes on watching the alleged offence from beginning to end without raising any hue and cry, the witness is none else than an accomplice.[90] Witnesses to whom assurances are given are themselves guilty of offences and they are accomplices.[91] Leaders of a community accepting money for voting from a candidate at an election are accomplices.[92] The person who offers a bribe to a police officer was treated as an accomplice.[93]

The **following** have been held to be accomplice:

An *ekka* driver who took passengers with criminal intention and aided them to escape from the place of offence.[94]

Who aids, knowingly of the offence, in the disposal of the property.[95]

Police agents in gambling cases.[96]

Persons without any judicially recognised amnesty requires corroboration.[97] reversed on another point in 1971 SC 520.

Pimps and prostitutes are accomplices and require corroboration.[98]

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86. *R.K. Dalmia* v. *Delhi Admin.*, AIR 1962 SC 1821 : 1962 2 Cr LJ 805 (SC); *Davies* v. *Director of Public Prosecution*, (1954) AC 378; *Mohd. Hussain Umar* v. *K.S. Dalip Singhji*, AIR 1970 SC 45; *State of Assam* v. *Upendra Nath, Raj Khowa*, 1975 Cr LJ 354 (Assam); *Ramaswami Gounden* v. *Emperor*, ILR (1903) 27 Mad 271; *Jagannath* v. *Emperor*, ILR (1941) 17 Luck 516 : AIR 1942 Gudn 221; *Kishan Chand Mangal* v. *State of Rajasthan*, AIR 1982 SC 1511.
87. *State* v. *Murli*, AIR 1957 All 53 DB.
88. *State* v. *Bashambher Dayal*, AIR 1953 Pepsu 83 (DB); *K.S. Nirmal Kumar Singhji* v. *State*, AIR 1954 Sau 55 (DB).
89. *Behari Mandal* v. *State*, AIR 1957 Ori 260 (DB); *Narayan* v. *State*, AIR 1953 Hyd. 161 (DB).
90. *Harnath* v. *the State*, AIR 1952 Ajmer 49; *Ranjit Singh* v. *State*, AIR 1952 HP 81.
91. *Sirajuddin* v. *Govt. of Madras, represented by the Chief Secy. Madras*, AIR 1968 Mad 117.
92. *Trilochan Singh* v. *Karnail Singh*, AIR 1968 Punj 416 AB.
93. *R* v. *Maganlal*, ILR 14 Bom 115, 14 Bom 331 *Supra*.
94. *State* v. *Ram Avtar*, AIR 1955 All 138.
95. *Mavythalayan* v. *Emperor*, AIR 1934 Mad 721.
96. *State* v. *Jethanand*, (1968) 9 Guj LR 832.
97. *P. Sirajuddin* v. *Govt. of Madras*, 1968 Cr LJ 493 : AIR 1968 Mad 117 **reversed** on another point in AIR 1971 SC 520.
98. *Bhulu Mia* v. *State*, AIR 1969 Cal 416 : 1969 Cr LJ 1553.

In view of Section 165 A of IPC (now *repealed*) a complainant who gives the bribe is in no better position than an accomplice in a case of bribery.[1]

A person cannot be said to be an accomplice unless he had consciously participated in the commission of the crime so that he could along with other accused be jointly indicted for the criminal act. Where a person is not concerned with the commission of the crime for which the accused is charged and happens to be merely one cognizant of a crime or one who has made no attempt to prevent it or disclose its commission, he canot be said to an accomplice in this crime. All accessories before the fact, if they participate in the preparation for the crime are accomplies, but if their participation is limited to the knowledge that the crime is to be committed they are not accomplies. Whether a person is or is not an accomplice depends upon the facts of each particular case. Persons to be accomplices must participate in the commission of the same crime as the accused persons.[2] A rustic village labour who acted according to his master's advice under threat of death is not disclosing for sometime the offence committed, by his mater but thereafter he disclosed the same to the informant, the police and before the Magistrate, cannot be called an active participant in crime *i.e.* an accomplice.[3] If a man sees the perpetration of a crime that does not give information to any one, he might be regarded as an accomplice.[4] A witness, who assisted the criminals to the extent of keeping a look out to see whether the police were approaching, is in the position of an accomplice.[5] A Police Officer by posing himself to be son of a rich planter represented that he would exchange his genuine currency notes for counterfeit notes, which he wanted to distribute amongst his labourers towards their wages. As this was an illegitimate trap, the Police Officer and his associates were held to be accomplices and their evidence could not be accepted without effective corroboration.[6]

The evidence of an accomplice must be confirmed not only as to the circumstances of the crime but also as to the identity of the prisoners. The corroboration need not be by direct evidence that the accused committed the crime. It is sufficient if there is circumstantial evidence of his connection with the crime. The judge should warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice and in his discretion advise them not to convict upon such evidence, but he should at the same time point out to them that it is within their legal province to disregard the caution and to convict upon such unconfirmed evidence if believed by them.[7] It is the invariable practice of the Courts to require the corroboration by an independent witness of so much of the evidence of an accomplice as goes to identify the accused person as the offender[8]. Such corroboration ought to be that which is derived from unimpeachable or independent evidence.[9]

It may be noted that the above principle may prove to be an extra step and a dangerous one, as in some cases people out of fear of being victimised may not dare to give out information to anyone. The safe rule seems to be that if such person has necessary *mens rea* (guilty mind) then he can be said an accomplice.[10] A witness, who is not a guilty associate in crime or who does not sustain such a relation to the criminal act, is not an accomplice as the element of *mens rea* is entirely absent. A witness who only happens to be conversant with a crime or who makes no attempt to prevent it or who does not disclose it,

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1. *Panalal Damodar Rattni* v. *State of Maharastra*, AIR 1979 SC 1191.
2. *Ranchhod* v. *State*, AIR 1956 Madh Bha 262 (DB); *Anna* v. *State of Hyd.*, AIR 1956 Hyd. 99 (DB); *Abdul Munim Khan* v. *State of Hyd.*, AIR 1953 Hyd. 145; *Ghulam Nabi* v. *State*, AIR 1953 J&K 3; *Vemireddy Satyanarayan Reddy* v. *State of Hyd.*, AIR 956 SC 379; *Rameshwar Kalyan Singh* v. *State of Raj*, AIR 1952 SC 54; *State* v. *Mansingh Majhi*, ILR 1973 Cut 967; *State* v. *Abdul Aziz*, ILR (1971) 21 Raj 209; *Md. Sardar* v. *State of H.P.*, 1988 Cr LJ Noc 80 AP.
3. *Subash Chandra Panda* v. *State of Orissa*, 2001 Cr LJ 4108 (para 13) (Ori).
4. *Vemireddy Satyanarayan Reddy* v. *State*, AIR 1956 SC 379; *Umed Sheikh* v. *Emperor*, 45 Cal LJ 581; *Queen* v. *Chando chandalinee*, (1875) 24 WR (Cr) 55; *Ishan Chandra* v. *Queen Empress*, ILR 21 Cal 328; *Loki Prasad* v. *State*, AIR 1957 Ori 258; *V. Jagannadham* v. *State*, AIR 1952 Ori 164; **Contra:** *Ramaswami Gounden* v. *Emperor*, ILR 27 Mad 271; In re : *Addanki Venkadu*, AIR 1939 Mad 266; *Nural Amin* v. *Emperor*, AIR 1939 Cal 335 (can no longer be law).
5. *Dhanapati De* v. *Emperor*, ILR (1944) 2 Cal 312.
6. *Karim Kunju* v. *State*, 1972 Cr LJ 292 (Ker); *Shiv Bahadur Singh* v. *State of Vidh Pra.*, AIR 1954 SC 322; *Ramyanam Singh* v. *Bihar State*, AIR 1956 SC 643; *Hiralal* v. *State of Haryana*, AIR 1971 SC 356; *Bhanu Prasad Hari Prasad Dave* v. *State of Gujarat*, AIR 1968 SC 1323.
7. *Ramarao* v. *State*, ILR (1951) Nag 349.
8. *Emperor* v. *Kostalkhan*, (1902) 4 Bom LR 431; *Queen-Empress* v. *Krishnabhat*, ILR (1887) 10 Bom 319.
9. *Emperor* v. *Bajikrishna*, (1904) 6 Bom LR 481.
10. In re : *Ambujam Ammal*, AIR 1954 Mad 326.

is not an accomplice and the rule of practice as to corroboration does not apply to his evidence.[11] There is no warrant for the proposition that if a man sees the perpetration of a crime and does not give information of it to anyone else, he might well be regarded as an accomplice.[12] A man who quietly looks on at a murder, may not necessarily be an accomplice; but he is not a safe witness against the alleged murder.[13] The fact that a person is engaged to witness a crime does not make him an accomplice unless he is proved to have participated in the commission of the crime.[14] A pretended confederate such as a detective, spy or decoy is not an accomplice. "If such a person has made himself an agent for the prosecution before associating with the wrongdoers or before the actual perpetration of the offence he is not an accomplice; but he may be an accomplice if he extends no aid to the prosecution until after the offence has been committed.[15] A person's knowledge of the deliberations in the course of which a dacoity was planned, his having seen the accused departing for a particular purpose or his having accompanied the accused when the latter went for disposal of the stolen articles cannot make him an accomplice.[16] Persons giving illegal gratification under coercion and fear of being harassed are not accomplices.[17] Witness printing offending leaflet would not make him an accomplice.[18] An innocent purchaser for value of gold without notice that the gold was tainted with the vice of smuggling is in no sense liable to be regarded as an accomplice.[19] Accused engaged a coolie to carry bundle containing stolen property but the coolie has no knowledge that bundle contained stolen articles. The coolie is not in a position of an accomplice.[20] A witness who merely lends himself to a scheme for the purpose of catching the guilty is not an accomplice.[21] The clerk in the office of the Municipal Corporation was a subordinate of the accused. He was actually working directly under accused No. 2 and at the instances of the accused he procured his municipal labour and material and carried out his repairs to the house of accused No. 1. The clerk was not a party to the offence under Section 409, IPC and not an accomplice.[22] A witness who is a relative of this deceased shares his hostility to the victim cannot be classed as an accomplice.[23] A police officer who has no intention to and does not accept an amount offered to him as bribe in order to enrich himself, but who merely lays a trap in order to bring to book his person offering it and to bring him to punishment for attempting to corrupt a public servant is not an accomplice.[24] A prosecutrix in a rape case is not an accomplice.[25] Generally stated, an abducted woman is not an accomplice.[26] A Food Inspector is not an accomplice.[27] A Minister informing the Anti-Corruption Bureau and filing a complaint against the person offering him bribe to gain certain favour, cannot be equated with an accomplice and the accused could be convicted on his uncorroborated testimony.[28] Likewise the person paying bribe so as to expose the conduct of a public servant and as directed by the police, is not an accomplice.[29]

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11. *Ghudo* v. *King Emperor*, ILR (1945) Nag 315.
12. *Vemi Reddy Satyanaranayan Reddy* v. *State of Hyderabad*, ILR (1956) Hyd. 386.
13. *Kandhai Manfer* v. *State of V.P.*, AIR 1953 Vind. Pra 38.
14. *State of Ori* v. *Minaketan Patnaik*, AIR 1953 Ori 160 (SB); *Kunhaman* v. *State of Kerala*, 1974 Ker LJ 328; *Hayatu* v. *Emperor*, AIR 1929 Lab 540.
15. *Basheeruddin Ahamed* v. *State of Mysore*, ILR (1951) Mys 464.
16. *K.S. Nirmal Kumar Sinhji* v. *State*, AIR 1954 Sau 55 DB.
17. *Dalpat Singh* v. *State of Raj*, AIR 1969 SC 262; *G. Moogappa* v. *State*, AIR 1961 Mys 44; *Nyalchand* v. *State*, AIR 1955 Sau 117; *Kamini Kumar* v. *State*, AIR 1971 Tri 26; *Srinibas Mall* v. *Emperor*, AIR 1947 PC 135; *K.S. Nirmal Kumar Sinhji* v. *State*, AIR 1954 Sau 55; *P.K. Subbiah* v. *State*, AIR 1952 Tri 1; *Pyarey Mohan* v. *State*, AIR 1956 All 358.
18. *Virendra Singh* v. *Vimal Kumar*, AIR 1976 SC 2169; In re : *Veeral alias Kanal*, AIR 1970 Mad 298; *Hadu* v. *State*, AIR 1951 Ori 53.
19. *Vali Mahomed (M/s).* v. *C.T.A. Pillai*, AIR 1961 Bom 48.
20. *King Emperor* v. *Sheo Shanker Singh*, AIR 1954 Pat 109 (DB); *Lachhi Ram* v. *State of Punjab*, AIR 1967 SC 792.
21. *State Govt. of MP* v. *Hiralal Tejulal*, AIR 1952 Nag 58.
22. *Chandrakant Vishwanath Jakkal* v. *State of Maharastra*, 1978 Cr LJ 431 (Bom); *State of Assam* v. *Upendra Nath Raj Khowar*, 1975 Cr LJ 354 (Gau) DB.
23. *Chellammal* v. *Packiam*, 1976 Cr LJ 1666 (Mad).
24. *Mahadeo Daunappa Gunaki* v. *State*, 1952 Bom 435 (DB).
25. *Sidheswar Ganghuly* v. *State of W.B.*, AIR 1958 SC 143, 147; *A.W. Khan* v. *State*, AIR 1962 Cal 641; *Suresh Chand* v. *State of Haryana*, 1976 Cr LJ 452. (**See also** commentary infra under the head Sexual offences).
26. *State Govt. of Manipur* v. *K.G. Sarma*, 1968 Cr LJ 1390 (Manipur); *State of HP* v. *Kala*, AIR 1957 HP 42.
27. *Babulal Hargovindas* v. *State of Gujarat*, AIR 1971 SC 1277.
28. *C.R. Mehta* v. *State of Maharashtra*, 1993 Cr LJ 2863 (paras 13 and 30) (Bom).
29. *Rajasingh* v. *State*, 1995 Cr LJ 955 (para 10) (Mad) **explaining and distinguishing** *State of Bihar* v. *Basawan Singh*, AIR 1958 SC 500 : 1958 Cr LJ 976.

The burden of proof rests on the person who alleges that particular witness is an accomplice.[30]

An accomplice has to be distinguished from a co-accused. The statement of a co-accused may be admissible in certain circumstances, though not examined, but not that of an accomplice who is available to be examined.[31] A distinction has to be drawn between an accomplice and a decoy witness, the former being a person who joins another with the intention of aiding the commission of an offence and the latter who is instrumental in provoking the commission of the offence with the object of discovering the offence and detecting the offender.[32]

3. ACCESSORIES AFTER THE FACT

Three conditions must unite to render one an accessory after the fact, *viz* 1. the felony must be complete, 2. the accessory must have knowledge that his principal committed the felony and, 3. his accessory must harbour or assist the principal felon.[33]

An accessory after the fact may be an accomplice. Such accessory is not concerned with the main offence. Still he may be treated as an accomplice.[34] Whether or not accessories after the fact can be described as accomplices, their evidence is tainted evidence on the same footing as the evidence of an accomplice and requiring the same measure of corroboration.[35] Wife having illicit connection with accused and luring with him without raising alarm is accessory after the fact and is to that extent an accomplice.[36]

The Supreme Court has held that the rule laid down in *R.* v. *Baskerville*[37] with regard to the admissibility of the uncorroborated evidence of an accomplice is the law in India also, so far as accomplices are concerned and it is not any higher in the case of sexsual offences. The only clarification of the rule that is necessary for the purposes of India is where this class of offence is tried by a judge without the aid of jury. In such cases it is necessary, that the judge should give some indication in his judgement that he has had the rule of caution in his mind and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considers it safe to convict without corroboration in that particular case. There is, however no rule of law or practice that there must in every case be corroboration before a conviction can be allowed to stand.[38] The Supreme Court has also held that a conviction can be based on the uncorroborated testimony of an accomplice provided the judge has the rule of caution in mind.[39]

Victim of rape.—In the case of rape, the evidence of prosecutrix that she had been forcibly subjected to sexual intercourse by accused along with co-accused when her conduct and circumstances indicates that she was consenting party, has to be disbelieved by court unless there is adequate corroboration.[40] A prosecutrix cannot be considered as an accomplice and her testimony cannot be equated with that of an accomplice in an offence. As a rule of prudence, however, court normally looks for some corroboration of her testimony, so as to satisfy its conscience that she is telling the truth and the

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30. *Kamini Kumar* v. *State*, AIR 1971 Tri 26.
31. *Hadu* v. *State of Orissa*, 1951 Ori 53 (DB); *Des Raj Sharma* v. *State*, AIR 1951 Simla 14.
32. *State* v. *Bashamber Dayal, Naib Tehsildar*, AIR 1953 Pepsu 82 DB; *Ambalal Motibhai Patel* v. *State*, AIR 1961 Guj 1 DB; In re : *Ambujam Ammal*, AIR 1954 Mad 326; *T.A. Basheerruddin Ahmed* v. *Govt. of Mysore*, AIR 1952 Mys 42 (DB); *K.H. Bhattacharjee* v. *Emperor*, AIR 1944 Cal 374; *Kesho Pershad* v. *State*, AIR 1967 Del 57; *T. Narayan Rao* v. *Republic of India*, 1977 Cr LJ 1586 (Ori); *Miyabhai* v. *State*, AIR 1963 Guj 188; *Harak Chand* v. *State*, AIR 1954 Madh B 145.
33. *State of Bihar* v. *Srilal Kejriwal*, AIR 1960 Pat 459; *Mahadeo* v. *King*, AIR 1936 PC 242.
34. In re : *Ambujam Ammal*, AIR 1954 Mad 326; *Surya Kanta* v. *R*, AIR 1920 Cal 980 : Cal WN 119; *R* v. *Burn*, (1909) 11 Bom LR 1153.
35. *Pudur Rangaswami* v. *State of Kerala*, ILR 1958 Ker 420; *Pt. Darshan Lal* v. *Munnosingh*, AIR 1937 Oudh 258; *Ismail* v. *Emperor*, AIR 1947 Lah 220; In re : *S.A. Sattar Khan*, AIR 1939 Mad 283.
36. *Bhairon Lal* v. *State*, AIR 1953 Raj 131 (DB).
37. (1916) 2 KB 658 : 86 L.J.K.B. 28.
38. *Rameshwar* v. *State of Rajasthan*, (1952) SCR 377; *State of Bihar* v. *Basawan Singh*, AIR 1958 SC 500.
39. *Kashmira Singh* v. *State of Madhya Pradesh*, AIR 1952 SC 159 : 1952 SCR 526; *Bhairon Lal* v. *State*, ILR (1952) Raj 669; *State* v. *Autar Singh*, AIR 1960 Punj 364.
40. *Shri Rakshit Khosla* v. *State*, ILR 1969 Delhi 653; *Jarnail Singh* v. *State of Rajasthan*, 1972 Cr LJ 824 (Raj); *Bijoy Kumar Mohapatra* v. *State*, 1982 Cr LJ 2162 (Ori)(DB); *Ahamad Pillai* v. *State*, AIR 1951 TC 167.

person accused of rape on her has not been falsely implicated.[41] Corroboration is not the *sine qua non* for conviction in a rape case. The Indian courts refusing to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. There is no reason why the evidence of the girl or the woman who complains of rape or sexual molestation should be viewed with the aid of spectacles fitted with lenses tinged with doubt or disbelief or suspicion. To do so is to justify the charge of male chauvinism in a male dominated society.[42] In case of rape independent confirmation of every material circumstances is not required and the corroboration of the evidence of the prosecutrix need not be direct evidence that the accused committed the crime but it is sufficient if it is merely circumstantial evidence of the connection with the crime.[43] Corroboration of evidence of a prosecutrix in trial under Section 366, Penal Code is not necessary.[44] What she said at or about time of occurrence being part of *res gestae* can be corroborative evidence of her evidence and conviction can be based on testimony of the prosecutrix.[45]

In the case of rape on a girl of 7 years whose evidence was changing from time to time her evidence must be corroborated.[46] In the case of rape the evidence of the girl should carry more weight than the evidence of an ordinary witness.[47]

4. BRIBERY

The rule requiring corroboration of the evidence of an accomplice applies with very little force where the accused is charged with the offence of extorting a bribe and the accomplice is not a willing participant in the offence but a victim of that offence[48]. Persons coming technically within the category of accomplices cannot be treated precisely on the same footing.[49] The uncorroborated evidence of a witness who would be characterised as an accomplice being a bribe-giver is unworthy of credit.[50] Where a person had given bribe to the accused on previous occasions, it is proper to require the same degree of corroboration for his evidence in regard to the alleged bribe as in the case of an accomplice.[51] A person who offers bribe and another person who goes with him are clearly witnesses who are agents provocateur whose evidence needs corroboration.[52] In a bribery case, the payer's testimony carries little conviction in the absence of reassuring support.[53] In a bribery case the complainant is a partisan witness and it is not safe to rely upon his uncorroborated evidence.[54] The evidence of a punter and police investigating

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41. *Gurcharan Singh* v. *State of Haryana*, AIR 1972 SC 2661; *Ram Murti* v. *State of Haryana*, AIR 1970 SC 1029; *Rameshwar* v. *the State of Rajasthan*, AIR 1952 SC 54; *R.* v. *Basker Ville*, (1916) 2 KB 658; *Sailendra Kumar Roy Choudhury* v. *Territory of Tripura*, AIR 1959 Tri 11; *Kshetrimayum* v. *Union Territory of Manipur*, 1968 Cr LJ 690 (2); *Gopi Shanker* v. *State of Rajasthan*, AIR 1967 Raj 159; *Idan Singh* v. *State of Rajasthan*, 1977 Cr LJ 556 Raj; *Raju* v. *State*, ILR (1977) 1 Kant 307; *Idan Singh* v. *State of Raj.*, 1977 Cr LJ 556; *Sheikh Zakir* v. *State of Bihar*, AIR 1983 SC 911; *Sidheswar Ganguly* v. *State of West Bengal*, AIR 1958 SC 143; *A.W. Khan* v. *State*, AIR 1962 Cal 641; *Harnath* v. *State*, AIR 1952 Ajmer 49.

42. *Bharwada Bhoginabhai Hirjibhai* v. *State of Gujarat*, AIR 1983 SC 753; *Rameshwar Kalyan Singh* v. *State of Rajasthan*, AIR 1952 SC 54; *Emperor* v. *Mahadeo Tatya*, AIR 1942 Bom 121 (FB).

43. *Sheikh Zakir* v. *State of Bihar*, AIR 1983 SC 911; *Bhudanlal Sharma* v. *State*, 1961 (1) Cr LJ 689 (Ori); *Emperor* v. *Mahadeo Tatya*, AIR 1942 Bom 121 (FB); *Sidheswar Ganguly* v. *State of West Bengal*, AIR 1958 SC 143; *Dhaneshwar Thakur* v. *State*, AIR 1958 Pat 412; *State Govt. M.P.* v. *Sheo Dayal Gurudayal*, AIR 1956 Nag 8; *Rameshwar Kalyan Singh* v. *State of Rajasthan*, AIR 1952 SC 54; *Koli Tapu Dharamshi* v. *State*, AIR 1955 Sau 96 DB; *State of Kerala* v. *Kundumakara Govindan*, 1969 Cr LJ 818 (Ker).

44. *Motiram Krishna Rao* v. *State of M.P.*, AIR 1955 Nag 121.

45. *Santa Bala Dasi* v. *Sashi Bhusan Das*, AIR 1953 Cal 332.

46. *Arabinda Dey* v. *State*, AIR 1953 Cal 206; *Gangaram* v. *Crown*, AIR 1950 Nag 9; (723 Evidence has not corroborated by medical evidence) *Dulichand* v. *State*, AIR 1952 Ajmer 54 (Girl 9. 10 yrs. Corroboration and mother held sufficient).

47. *Bhagwat Prakash* v. *State*, AIR 1956 All 22; *Dharam Pal* v. *State*, AIR 1971 HP 17.

48. *Emperor* v. *Papa Kamalkhan*, (1935) 37 Bom LR 366 : ILR 59 Bom 486; *Deo Nandan Pershad* v. *Emperor*, ILR (1906) 33 Cal 649; **See also** *Yusuf Abdul Aziz* v. *State of Bombay*, AIR 1954 SC 321.

49. *King Emperor* v. *Malhar*, (1901) 3 Bom LR 694 : ILR (1901) 26 Bom 193; *Kamala Prasad* v. *Sital Prasad Sup. Banu Singh* v. *Emperor*, ILR (1906) 33 Cal 1353.

50. *Mehar Singh Hazara Singh* v. *State of Pepsu*, AIR 1955 Pepsu 156; *R.R. Chari* v. *State*, AIR 1959 All 149; *Manohar Rao Srinivas Rao* v. *State*, ILR 1973 Bom 1234; *P.K. Subbaiah* v. *State*, AIR 1952 Tri 1; *Kewal Krishan* v. *State of J&K*, 1975 Cr LJ 1963 (J&K); *Dewan* v. *State*, 1988 Cr LJ 1005 (Ker).

51. *M.M. Gandhi* v. *State of Mys.*, AIR 1960 Mys. 111 (DB).

52. *Nitya Nand Premlal* v. *State*, AIR 1954 Punj. 89 (DB).

53. *Raghubir Singh* v. *State of Haryana*, AIR 1974 SC 1516.

54. *Pandurang Laxman* v. *State*, AIR 1959 Bom 30; *C.J. Emden* v. *State of U.P.*, AIR 1960 SC 548

officer who are interested in securing a conviction, is unworthy of credit, and there is no reason why the principles applicable to the one type of witness who is unworthy of credit, *viz* an accomplice should not apply to another type of witness who is unworthy of credit for different reasons.[55]

Where a person paying bribe and the accused are the only persons, one cannot expect corroboration nor that corroboration in every particular is essential.[56] Where it is not possible to get a number of witnesses to speak to the incident amounting to an offence of receiving illegal gratification or criminal breach of trust the only manner in which the evidence of the accomplice can be tested is by seeing whether it is consistent with this circumstances and the circumstantial evidence in the case.[57] In a case of bribery where the person who pays the bribe is not a willing participant in the offence but is really a victim of the offence, conviction of the accused may be based on the evidence of the person paying the bribe if there is a slight independent corroboration of his evidence.[58]

Where the witness directly proving the tendering of the bribe is the full brother of the person to whom the bribe was offered his evidence has to be taken with some caution.[59] Though the witnesses who are willing parties to giving a bribe to the accused but are only actuated with the motive of trapping the accused, can be treated as partisan witnesses but not accomplices, their evidence cannot be relied upon without independent corroboration.[60] A person who pays a bribe to the accused, not voluntarily but merely with a view to render necessary assistance in the detection of the crime cannot be said to an accomplice in the commission of the offence under Section 161, IPC (now *repealed*), because he has not the *mens rea* that he is paying the amount to secure a favour from the accused. It cannot be said that he aided or abetted of offence of illegal gratification by the accused.[61] It does not seem to be law that if the money given as bribe is provided by a particular officer of the police then the evidence of all the witnesses becomes evidence of accomplices and must be looked at with the suspicion.[62] Independent corroboration on all material particulars from the evidence of *panch* and independent sources should be looked into by the Court before it can act on the testimony of the complaint in a trap case and the evidence of police officer cannot be used in order to corroborate the testimony of the complainant.[63] In an offence u/s. 51(1)(a) and (2) of Prevention of Corruption Act if the evidence of the police officer who laid trap is found reliable, corroboration is not necessary.[64] The officer functioning in the anti-corruption department must seriously endeavour to secure really independent and respectable witnesses, so that the evidence in regard to the trap inspires confidence in the mind of the court and the court is not left in any doubt as to whether or not any money was paid to the public servant by way of bribe. They should insist on observing this safeguard for the protection of public servants against whom a trap may have been laid.[65] In a case under the prevention of Corruption Act, for accepting the illegal grantification, when the circumstantial evidence is consistent with the guilt of the accused and not with his innocence, the accused can be convicted and the question whether a trap witness is independent or not becomes immaterial.[66] The decoy who is not acting for gain, but being himself the victim of the demand helps the authority sponteneously from a sense of duty, is a reliable and respectable witness.[67] Where there was the sole evidence of only the decoy witness about the taking of bribe by the accused and there was no

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55. *Miya Bhai Pir Bhai* v. *State*, AIR 1963 Guj 188.
56. In re : *K.V. Ayya Swamy*, AIR 1965 AP 105 (DB).
57. *State* v. *Narayanan*, AIR 1952 Trav. Co. 128 (DB); *C.M. Narayan* v. *State of Trav. Co.*, AIR 1953 SC 478.
58. *Narayan Prashad* v. *King Emperor*, ILR (1948) Nag 276; *State of Kerala* v. *Samuel*, AIR 1961 Ker 99; *P.K. Subbiah* v. *State*, AIR 1952 Tri 1; *Kewal Krishan* v. *State*, 1975 Cr LJ 1963 (J&K).
59. *Bhajahari Mandal* v. *State*, AIR 1956 Cal 385 DB; *Bhajahari Mondal* v. *State of West Bengal*, AIR 1959 SC 8; *Chadala Vada Subba Rao* v. *Kasu Brahmhananda Reddy*, AIR 1967 AP 155.
60. *Shiv Bahadur Singh* v. *State of Vindh-Pra*, AIR 1954 SC 322; *Pyarey Mohan* v. *State*, AIR 1956 All 358; *Prakash Chand Jain* v. *State*, 1968 Cr LJ 391 (All).
61. *K.M. Narayana Swami* v. *Kerala State*, AIR 1957 Ker 134 (DB); *Pappa Kamal Khan* v. *Emperor*, AIR 1935 Bom 230; *State* v. *Minaketan Patnaik*, AIR 1952 Ori 267; *Shiv Bahadur Singh* v. *State of Vindh Prad.*, AIR 1954 SC 322; *King* v. *Singh Rajasthan*, AIR 1951 Ori 297 (DB).
62. *Ramanlal Mohanlal Pandya* v. *State of Bombay*, AIR 1960 SC 961.
63. *Raghbir Singh* v. *State of Punjab*, AIR 1976 SC 91.
64. *Hazarilal* v. *State (Delh Admn.)*, AIR 1980 SC 873; *Manilal Harchand Mehta* v. *State*, ILR 1967 Guj 386.
65. *Raghbir Singh* v. *State of Punjab*, AIR 1976 SC 91.
66. *State of U.P.* v. *G.K. Ghosh (Dr.)*, AIR 1984 SC 1453.
67. *State of V.P.* v. *Shiva Bahadur Singh*, AIR 1951 VP 17.

other evidence either direct or otherwise and the explanation given by the accused is probable, the conviction of the accused is not proper.[68]

Where a trap witness was a person who was in the habit of bribing station masters in order to secure the booking of his goods and his story was that only because the Police Officer contacted him, he became a party to the trap, it was held the witness is in the position of an accomplaice rather than an honest trap witness.[69] Whether the criminal tendencies of a man might be, he has a right to expect that he will not be deliberatedly tempted beyond the powers of his frail endurance and provoked into breaking the law and this at the instance of those who are the guardians and keepers of the law. Where such method is employed, that alone might make the conviction illegal.[70]

The evidence of search witness can provide independent corroboration to the evidence of a bribe giver as a trap witness.[71]

5. PARTISAN WITNESS

In the case of evidence of an accomplice no conviction can be based on his evidence unless it is corroborated in material particulars, but as regards the evidence of a partisan witness it is open to a Court to convict an accused person solely on the basis of that evidence if it is satisfied that the evidence is reliable.[72]

But it may, in appropriate cases, look for corroboration.[73] A testimony cannot be rejected only on the ground that the witness was interested and inimical.[74] An interested witness is not like an approver, only more precaution is necessary[75]. A son of the deceased cannot be disbelieved[76].

The Supreme Court has held that in a case of mid-night murder, home people are natural witnesses.[77]

The independence and impartiality of the judiciary requires that Magistrates whose normal function is judicial should not be relegated to this position of partisan witnesses and required to depose to matter transacted by them in their official capacity unregulated by any statutory rules of procedure or conduct whatever—employing of Magistrates as trap witnesses depreciated.[78]

Whether a witness is partisan witness or not would depend upon the circumstances of each case.[79]

6. TRAP WITNESS

Though trap witnesses are interested witnesses, as a matter of law, their evidence cannot be rejected for want of corroboration.[80]

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68. *Ramanarayan Patnaik* v. *State*, (1989) Cr LJ 172 (Ori).

69. In re : *Venkatarama Iyer*, AIR 1957 AP 441.

70. In re : *R.G. Jacob*, AIR 1961 Mad 482; *Ramjanam Singh* v. *Bihar State*, AIR 1956 SC 643.

71. *M.P. Agarwal* v. *State of Bihar*, (1973) Cr LJ 1582 (Pat).

72. *Bhanuprasad Hari Prasad Dave* v. *State of Gujarat*, AIR 1968 SC 1323; *E.G. Barsay* v. *State of Bombay*, 1961 SC 1792; *Shiv Bahadur Singh* v. *State of Vindhya Pradesh*, AIR 1954 SC 322; *Ramachand Tolaram* v. *State*, AIR 1956 Bom. 287; *Dalpat Singh* v. *State*, AIR 1969 SC 17.

73. *Bhanu Prasad* v. *State of Gujarat*, (1968) 71 Bom LR 43 SC : AIR 1968 SC 1323; *State of Bihar* v. *Basawan Singh*, AIR 1958 SC 500.

74. *Babu* v. *State of U.P.*, AIR 1980 SC 443; **See** further *Ram Ashrit* v. *State of Bihar*, AIR 1981 SC 942 which explains the situation where all witnesses are interested *State of U.P.* v. *Manohar Lal*, AIR 1981 SC 2073. For difference between interested and related witness **see** *State of Rajasthan* v. *Kalki*, AIR 1981 SC 1390.

75. *State of U.P.* v. *Ballabh Das*, AIR 1985 SC 1384.

76. *Natthu* v. *U.P.*, AIR 1977 SC 2096; *Guli Chand* v. *Rajasthan*, AIR 1974 SC 775.

77. *State of U.P.* v. *Gajun Singh*, AIR 1980 SC 2128.

78. *State of Bihar* v. *Basawan Singh*, AIR 1958 SC 500; *M.M. Gandhi* v. *State of Mysore*, AIR 1960 Mys 111; *State of Bihar* v. *Basawan Singh*, AIR 1958 SC 500 : 1958 All WR NC 47; *Shiv Bahadur Singh* v. *State of Vindhya Pradesh*, AIR 1954 SC 322; *Ramkrishan* v. *Delhi State*, AIR 1956 SC 476.

79. 1956 Cr LJ 275.

80. *Dalpat Singh* v. *State of Rajasthan*, AIR 1969 SC 262; *Tarsemlal Shanti Ram* v. *State*, AIR 1960 Punj 72 (DB); *State* v. *Pundalik*, AIR 1959 Bom 543; *Ganadhesh* v. *State*, AIR 1968 Goa 63; *Khembu Ram* v. *State*, 1972 Cr LJ 381 (HP); *Balaram Singh* v. *State of Orissa*, 1984 Cr LJ (NOC) 21 (Ori); *T. Narayan Rao* v. *Republic of India*, 1977 Cr LJ 1586 (Ori); *Iswar Devi Malik* v. *Union of India*, AIR 1969 Delhi 183; *Srichand* v. *Dupendra Chandra*, ILR (1967) 19 Assam 521.

In the following cases it was held that corroboration by independent witnesses is required to support the evidence of trap witnesses.[81]

It is not safe to rely upon the evidence of a trap witness without corroboration. However it is not necessary to have corroboration of all the circumstances of every detail of the crime. It will be sufficient if there is corroboration as to the material circumstances of the crime and of the identity of the accused in relation to the crime.[82] The Supreme Court has however, cautioned against a harsh approach which would make things impossible of proof.[83]

Though it is neither illegal nor imprudent to convict the accused on the sole testimony of the partisan witness, it is advisable to look for independent corroboration though the Court has discretion in proper cases to dispense with a corrborating witness.[84]

As held in *Samprakash* v. *State*[85], if an honest and respectable man is to be treated as a partisan witness, it may impair confidence in the judicial system. Therefore, the Court has a duty to bestow care and view the evidence in the light of circumstances, probabilities and intrinsic credibility of the witness before looking for corroboration.[86] The Supreme Court held that every *panch* witness who helps in trapping the accused need not necessarily be regarded as a partisan witness.[87] Where, in a trap case, the judge magnified every minor detail or omission to falsify or throw even a shadow of doubt on the prosecution evidence then, it would be the very antithesis of a correct judicial approach to the evidence of witnesses in a trap case.[88] Police officials cannot be discredited in a trap case merely because they are police officials nor can other witnesses be rejected because on some other occasion they have been witnesses for the prosecution in the past. The court has to view the evidence in the light of probabilities and the intrinsic credibility of those who testify.[89] The demanding degree of proof traditionally required in a criminal case and the devaluation suffered by a witness who is naturally involved in the fruits of his investigative efforts suggest the legitimate search for corroboration from an independent source, human or circumstantial, to make judicial certitude doubly sure.[90]

Where no temptation nor bribe money was offered by the police when the trap was arranged and the Executive Magistrate merely sought to do his public duty of intercepting a crime which was otherwise in the process of fulfilment, the veracity of his testimony cannot be discredited.[91] A distrinction has to be drawn between an accomplice and a decoy–witness, the former being a person who joins another with the intention of aiding the commission of an offence and the latter who is instrumental in provoking the commission of the offence with the object of discovering the offence and detecting the offender.[92] Evidence of a decoy witness supported by another trap witness about the sale of spurious parts of a cycle by accused is sufficient to sustain conviction.[93]

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81. *Prakash Chand Jain* v. *State*, 1968 Cr LJ 391 (All); *Khalilur Rahman* v. *Nabi Hussain*, AIR 1967 Assam 55; *Khalilur Rahuman* v. *Nabi Hussain*, 1967 Cr LJ 1138; *Kesho Parshad* v. *State*, AIR 1967 Delhi 51; *Ganadesh* v. *State*, 1968 Cr LJ 925 : AIR 1968 Goa 83; *Cherian Lukose* v. *State of Kerala*, 1968 Cr LJ 168 : AIR 1968 Kel. 60; *Mehar Chand* v. *State of Rajasthan*, ILR (1969) 19 Raj 641.

82. *Major E.G. Barsay* v. *State of Bombay*, AIR 1961 SC 1762; *Raghubir Singh* v. *Haryana*, AIR 1974 SC 1516; *Maharaj Singh* v. *State of Rajasthan*, AIR 1981 SC 936; *Jadunath Khatua* v. *State*, 1982 Cr LJ 954 (Ori).

83. *State of Maharashtra* v. *Narsingrao*, AIR 1984 SC 63; *R.P. Arora* v. *State of Punjab*, AIR 1973 SC 498; *Hiralal* v. *State of Haryana*, AIR 1971 SC 356.

84. *Bhanuprasad* v. *State of Gujarat*, AIR 1968 SC 1223; *State of Bihar* v. *Basawan Singh*, AIR 1958 SC 500; *Dalpat Singh* v. *State*, AIR 1969 SC 17; *R.P. Arora* v. *State*, AIR 1973 SC 498; *Ramchand Tolaram* v. *State*, AIR 1956 Bom 287.

85. AIR 1974 SC 989.

86. *Gain Singh* v. *State of Punjab*, AIR 1974 SC 1024.

87. *Ramratan* v. *State of Rajasthan*, AIR 1962 SC 424.

88. *State of Maharashtra* v. *Narsingrao*, AIR 1984 SC 63.

89. *Gian Singh* v. *State of Punjab*, AIR 1974 SC 1024.

90. *Som Prakash* v. *State of Delhi*, AIR 1974 SC 989.

91. *Raghubir Singh* v. *State of Haryana*, AIR 1974 SC 1516.

92. *State* v. *Bashamber Dayal, Naib Tehsildar of Bihar*, AIR 1953 Pepsu 82 (DB); *Ambalal Motibhai Patel* v. *State*, AIR 1961 Guj 1 (DB); In re : *Ambujam Ammal*, AIR 1954 Mad 326; *Basheeruddin Ahmed* v. *Govt. of Mysore*, AIR 1952 Mys 42; *K.H. Bhattacharjee* v. *Emperor*, AIR 1944 Cal 374; *Kesho Parshad* v. *State*, AIR 1967 Del 51; *T. Narayan Rao* v. *Republic of India*, 1977 Cr LJ 1586 (Ori).

93. *Bahal Singh* v. *State*, AIR 1960 Punj 641; *Laurie E. Jacobs* v. *Union of India*, AIR 1958 All 481 (DB).

If a spy or informer in exuberance of enthusiasm actually instigates another to commit a crime, even if it be for detection of the offence, or to get his credit of having him arrested, he is an abettor under the penal law and his position cannot be anything than that of an accomplice.[1] Evidence of a person giving information to police for trapping the accused would not be tainted but it would be interested evidence which would require corroboration before acceptance as in the case of accomplice evidence.[2]

The Court can act upon uncorroborated testimony of trap witness if it is satisfied from facts and circumstances that the witness is witness of truth.[3] Though the trap witness is only a petty clerk his evidence cannot be rejected as wholly unreliable.[4] A *Panch* witness cannot be taken to be a trap witness as he is not interested in the success of the raid, and his evidence can be accepted without corroboration.[5]

7. ACCOMPLICE A COMPETENT WITNESS

An accomplice is a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. But whether it should be accepted is a different matter. Unless the case is a very exceptional one, an accomplice's evidence should not be accepted as being sufficient.[6] An accomplice witness as well as an ordinary witness are competent to testify, but the evidence of an accomplice, though admissible, remains suspect evidence because of the tainted source from which it comes.[7] The competency of an accomplice is not destroyed because he could have been tried jointly with the accused but was not and was instead made to give evidence in the case.[8] Where a driver of a lorry intentionally transports food grains from a village in Orissa to a village in Madras in contravention of the Orissa Food Grains Control Order 1947, under instructions of the petitioner, the driver is equally guilty of the offence. He is competent to depose as an accomplice witness and the mere fact that he was convicted for that offence does not any way detract from his competence.[9] The fact that this accomplice is a man of questionable character is not by itself sufficient to reject his evidence.[10] The court may call in aid the statement of an accomplice witness and use it to lend assurance to the other evidence and thus fortify itself into believing what without the aid of the statment it would not be prepared to accept.[11]

8. ACCOMPLICE—CORROBORATION

The reasons why accomplice evidence is held to be untrustworthy and to require corroboration are that from the very nature of his evidence:

(1) he is a person of low character who has participated in a crime and is therefore likely to have no regard to the sanctity of his oath;

(2) he is interested in falsely destroying the facts in order to shift the guilt from himself; and

(3) that he has the inducement of either a promissed or implied pardon for his own part in the crime, and is therefore likely to be biased in favour of the prosecution.[12]

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1. In re : *M Ranga Rajulu Naidu*, AIR 1958 Mad 368; *State* v. *Minaketan Patnaik*, AIR 1952 Ori 267 (DB); *Cherian Lukose* v. *State of Kerala*, AIR 1968 Ker 60.
2. *Ram Chand Tolaram Khatri* v. *State*, AIR 1956 Bom 287; *Mahabir Parshad* v. *State*, AIR 1951 Punj 424.
3. *Jadunath Khatua* v. *State*, 1982 Cr LJ 954 (Ori).
4. *Kishan Chand Mangal* v. *State of Rajasthan*, AIR 1982 SC 1511.
5. *State of Gujarat* v. *Mangabhai Jethabhai Vaghela*, 1982 Cr LJ 1317 (Guj).
6. *Rajgopal*, In re : ILR (1944) Mad 308 (FB).
7. *Ibrahim Husen* v. *State*, AIR 1969 Goa 68; *Sarwan Singh Rattan Singh* v. *State of Punjab*, AIR 1957 SC 637; *Bhiva* v. *State of Maharashtra*, AIR 1963 SC 599; *Ahmed Kunju* v. *State*, ILR 1971 (2) Ker 30; *Sheshanna Bhumanna* v. *State of Maharastra*, AIR 1970 SC 1330; *Kilimanni Abu* v. *State of Kerala*, (1965) 2 Cr LJ 557 (Ker); *Rex* v. *Baskerville*, (1916) 2 KB 658; *Dama Alias Damodar jena* v. *State*, ILR 1969 Cut 265; *Maghar Singh* v. *State of Punjab*, AIR 1975 SC 1320; *Purnananda Das Gupta* v. *Emperor*, 1939 Cal 65 (FB); *State of Rajasthan* v. *Chhuttanlal*, 1970 Crl LJ 1206 (Raj); *Sewa Ram* v. *Union of India*, 1983 Crl LJ 1788 (J&K).
8. *Laxmipat Choraria* v. *State of Maharastra*, AIR 1968 SC 938.
9. *Jaganadhan* v. *State of Orissa*, AIR 1952 Ori 164.
10. *Md. Yunus* v. *State of Bihar*, 1977 Cr LJ 1243 (DB); *Rama Shankar* v. *Rikhab Kumar*, AIR 1952 All 428 : 1952 Cr LJ 747 (All).
11. *State* v. *Murli*, AIR 1957 All 53 (DB); *Kashmira Singh* v. *State of Madhya Pradesh*, AIR 1952 SC 159.
12. In re : *Venkatarama Iyer*, AIR 1957 AP 441.

The Supreme Court held that the accomplice evidence cannot be accepted without corroboration.[13]

The fact that the accomplice is a man of questionable character is not by itself sufficient to reject his evidence.[14] The degree of suspicion which will attach to the evidence of an accomplice varies according to the extent and nature of his complicity.[15]

The Supreme Court observed: "It would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should or would be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged, but to this extent the rules are clear, *i.e.* it is not necessary that there should be independent confirmation of every material circumstance in the sense that independent evidence in the case, apart from the testimony of the complainant or the accomplice should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it."[16]

The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirmation in some material particulars the testimony of the accomplice or complainant that he committed the crime.[17] The corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another.[18] The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime.[19] The corroboration need not be of a kind which proves the offence against

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13. *Kanan* v. *State of Kerala*, AIR 1979 SC 1127. **See also** *Pandit Shree Krishna Selot* v. *Ramacharan Pujari*, (1969) 3 SCC 548.
14. *Md. Yunus* v. *State of Bihar*, 1977 Cr LJ 1243 (Pat)(DB).
15. In re : *Amir Sultan*, AIR 1957 Mad 796; *Sriniwas Mall* v. *Emperor*, AIR 1947 PC 135; *Chatru* v. *State*, AIR 1953 Bilaspur 3; *Ranjha* v. *State*, AIR 1951 HP 75; *Rattan Dhanuk* v. *Emperor*, AIR 1928 PC 630; *Sriniwas Mall* v. *Emperor*, AIR 1947 PC 135.
16. *Rameshwar Kalyan Singh* v. *State of Rajasthan*, AIR 1952 SC 54; *Major E.G. Barsay* v. *State of Bombay*, AIR 1961 SC 1762; *State of Bihar* v. *Basawan Singh*, AIR 1958 SC 500; *Tribhuvan Nath* v. *State of Maharastra*, AIR 1973 SC 450; *Kuruchiyam Kunhaman* v. *State of Kerala*, 1974 Ker LT 328; *Mukhtiar Kaur* v. *State of Punjab*, AIR 1980 SC 1871; *Nathuram Godse* v. *Rex*, ILR 1956 Punj 499; *Autar Singh* v. *State*, 1960 Punj 364 **relying** on; *Dalip Singh* v. *Emperor*, AIR 1933 Lah 294; *Kashmira Singh* v. *State of Madhya Pradesh*, AIR 1952 SC 159; *Harilal Gordhan* v. *Emperor*, AIR 1937 Bom 385; *Hormazdyar Ardeshir Iran* v. *Emperor*, AIR 1948 Bom 250; *Harak Chand* v. *State*, AIR 1954 MB 145; *Ambalal Motilal Patel* v. *State*, AIR 1961 Guj 1 (DB); *Rao Shiv Bahadur Singh* v. *State of Vidh Prad*, AIR 1954 SC 322; *Public Prosecutor* v. *A. Thomas*, AIR 1959 Mad 166; *Kunti Mohammed* v. *State*, AIR 1959 Ker. 88 (DB); *Basheeruddin Ahmed* v. *Govt. of Mysore*, AIR 1952 Mys. 42 (DB); *P. Venkata Rao* v. *King*, AIR 1951 Ori. 281; *State* v. *Bai Radha*, ILR 1967 Guj 1046; In re : *Gundla Narayana*, AIR 1959 AP 387.
17. *Rameshwar Kalyan Singh* v. *State of Rajasthan*, AIR 1952 SC 54; *Nandalal More* v. *State*, 1965 (1) Cr LJ 393 **relying** on *R* v. *Baskerville*, 1916 (2) KB 658; *Bhuboni Sahu* v. *King*, AIR 1949 PC 257; *Sarvan Singh* v. *State of Punjab*, AIR 1957 SC 637; *Major E.G. Barsay* v. *State of Bombay*, AIR 1961 SC 1762; *Bhiva* v. *State of Maharastra*, AIR 1963 SC 599; *State of Kerala* v. *Joseph*, 1963 (2) Cr LJ 454 (Ker); *Autar Singh* v. *State*, AIR 1960 Punj 364; **relying** on *Dalip Singh* v. *Emperor*, AIR 1933 Lah 294 (*supra*); *Kashmira Singh* v. *State of M.P.*, AIR 1952 SC 159 (*supra*); *Bhima Shah* v. *State*, AIR 1956 Ori. 177; *Vajeram Raghuram* v. *State of Kutch*, AIR 1954 Kut. 20; *Ramchand* v. *State*, AIR 1952 HP 57; **relying** on *Gorakhnath* v. *Emperor*, AIR 1935 All 86; *R* v. *Baskarville*, (1916) 2 KB 658 (*supra*); *Chacko Thomas* v. *State*, AIR 1952 TC 155; In re : *Padmaraja Setty*, AIR 1951 Mad 746; *C. Chellappan* v. *State of Kerala*, AIR 1979 SC 1761; *Asst. Collector of Customs* v. *Shantilal Laxmi Chand Modi*, ILR (1971) 2 Delhi 584; *State of Bihar* v. *Basawan Singh*, AIR 1958 SC 500; *Rabidas* v. *State*, 1976 Cr LJ 2004; *Chandra Kant* v. *State of Maharastra*, 1978 Cr LJ 431 (Bom).
18. *Rameshwar Kalyan Singh* v. *State*, AIR 1952 SC 54; *Shamsher Bahadur Saxena* v. *State of Bihar*, AIR 1956 Pat 404; *M.C. Taneja* v. *State of Rajasthan*, 1970 Crl LJ 945.
19. *Rameshwar Kalyan Singh* v. *State*, AIR 1952 SC 54; *K.K. Jadhav* v. *State of Gujarat*, AIR 1966 SC 821 **following** *Sathyanarayana* v. *State of Hyderabad*, AIR 1956 SC 379; *State of Bihar* v. *Basawan Singh*, AIR 1958 SC 500 **relying** on *R* v. *Baskerville*, 1916 (2) KB 658 (*supra*); *Mohamad Hussain Umar* v. *Dalip Singhji*, AIR 1970 SC 45 **relying** on *Bhiva Doulu Patil* v. *State of Maharastra*, AIR 1963 SC 599; *Ramanlal* v. *State of Bombay*, AIR 1960 SC 961; *Major E.G. Barsay* v. *State of Bombay*, AIR 1961 SC 1762; *Kuruchiyam Kunhaman* v. *State of Kerala*, 1974 Ker LT 328; *Sheikh Zakir* v. *State of Bihar*, AIR 1983 SC 911; *Shamsher Bahadur* v. *State of Bihar*, AIR 1956 Pat 404; *Nathuram Godse* v. *Rex*, ILR 1956 Punj 499; In re : *Gundla Narayana*, AIR 1959 AP 387; *Bhima Shaw* v. *State*, 1956 Ori 177; *Chacko Thomas* v. *State*, AIR 1952 JC 155; *Rehman* v. *State*, 1981 Cr LJ (NOC) 125; In re : *Boddu Sanyasi Patrudu*, AIR 1957 AP 482; *Bhuboni Sahu* v. *King*, AIR 1949 PC 257; *State* v. *Saradara*, 1974 Cr LJ 43 (Raj); *Mohan* v. *State*, 1996 Cr LJ 48 (para 12) (Mad). **relying on** *Chandran* v. *State of Rajasthan*, 1988 SC 599 at p. 600.

the accused. It is sufficient if it connects the accused with the crime.[20] The testimony of an accomplice cannot be said to have been corroborated by the evidence of a witness who is false and who contradicts other reliable evidence.[21] A person became approver after 20 months. Copies of the earlier statements to the police were not supplied to the defence. These facts weakened his evidence[22] One tainted evidence cannot be used to corroborate another tainted evidence[23]. Evidence of one accomplice cannot be corroborated with that of another.[24] The Supreme Court in *Md. Hussain Umar* v. *Dalip Singhji*[25] reiterated the above principle differing from the view taken by Justice Bose in *Kashmira Singh* v. *State*[26] that the evidence of an accomplice can be used to corroborate another in exceptional circumstances. Independent corroboration is required because one tainted witness cannot corroborate another tainted witness.[27] Where Several accomplices simultaneously and without previous concert give consistent account of the crime implicating the accused, the court may accept the several statements as corroborating each other.[28]

Evidence that the accused were, at the time the crime was committed, near the scene of the crime and so placed as to justify the inference that they were accompanying persons whose complicity in the crime has been satisfactorily proved by independent evidence, is sufficient corroboration of the testimony of an accomplice.[29] Where a person is only an accomplice by implication or in a secondary sense, his evidence does not require the same amount of corroboration as that of the person who is an actual participator with the principal offender.[30] The rule that evidence of an accomplice should receive corroboration in material particulars applies to the evidence of an accused who is convicted and sentenced on his own plea and who then appears as a witness against his co-accused.[31] *Panchas* accompanying the police for raid are independent witnesses and their evidence is good evidence and requires no corroboration before acceptance.[32] The fact that the accused who was charged with dacoity at the house of a person who was a money lender, was indebted to him, is no corroboration of the evidence of the accused accomplice.[33]

It is only when the court is not able to say whether the accomplice is wholly reliable, that the court should demand corroboration direct or circumstantial in material particulars in respect of the part played by the accused.[34]

Conviction of an caused under Section 201, I.P.C. based on the uncorroborated testimony of accomplices cannot be sustained when it appears that these accomplices have not given any clear evidence connecting the accused with the crime.[35]

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20. *S. Swaminathan* v. *State of Madras*, AIR 1957 SC 340.
21. *State (Delhi Admn.)* v. *V.C. Shukla*, AIR 1980 SC 1382, 1398.
22. *Lalchand* v. *Haryana*, AIR 1984 P&H 226.
23. *C. Chellappan* v. *State of Kerala*, 1979 Cr LJ 1335 (SC) : AIR 1979 SC 1761; *Baldeo Singh* v. *State of Punjab*, AIR 1979 SC 1280 : 1979 Cr LJ 871 (SC).
24. *Dagdu* v. *State of Maharashtra*, AIR 1977 SC 1579; *Kunj Behari* v. *State*, 1951 Pat 84; *T. Retnakaran* v. *State*, AIR 1955 Trav. Co. 87 (DB); *Bhuboni Sahu* v. *King*, AIR 1949 PC 257; *Kunj Behari* v. *State*, AIR 1951 Pat 84; *L.S. Raju* v. *State of Mysore*, AIR 1953 Bom 297 (DB); *Kashmira Singh* v. *State of M.P.*, AIR 1952 SC 159; *Ramchand* v. *State*, AIR 1952 HP 57; *Gorakhnath* v. *Emperor*, AIR 1935 All 86; *Gurnam Singh* v. *State of Raj.*, 1979 Cr LJ (NOC) 215; *Emperor* v. *Mohiuddin*, ILR 25 Mad 143; *Empress* v. *Ram Charan*, ILR 8 All 306.
25. AIR 1970 SC 45.
26. AIR 1952 SC 159.
27. *C. Chellappan* v. *State of Kerala*, AIR 1979 SC 1761.
28. *Mohd. Hussain Umar* v. *Dalip Singhji*, AIR 1970 SC 45; *Haroom Haji Abdulla* v. *State of Maharastra*, AIR 1968 SC 832; *Bhuboni Sahu* v. *King*, AIR 1949 PC 257; *Harichand* v. *State*, ILR (1974) 2 Delhi 706.
29. *Dhanapati De* v. *Emperor*, ILR (1944) 2 Cal 312 : AIR 1946 Cal 156.
30. *Kamala Prasad* v. *Sital Prasad*, ILR (1901) 28 Cal 339; *Banu Singh* v. *Emperor*, ILR (1906) 33 Cal 1353.
31. *Emperor* v. *Allisab*, (1932) 34 Bom LR 1453.
32. *Ramchand Tolaram Khatri* v. *State*, 1956 Bom 287 (DB); *State of Gujarat* v. *Mangabhai Jetnabhai*, 1982 Cr LJ 1317 DB.
33. In re : *Boddu Sanyasi Patrudu*, AIR 1957 AP 482.
34. *Data Ram* v. *State of Rajasthan*, 1977 Cr LJ 1428 (Raj).
35. *Kanka Singh* v. *State*, 1960 (26) Cut. LT 638; *Rameshwar Kalyan Singh* v. *State of Rajasthan*, AIR 1952 SC 54; *State of Bihar* v. *Basawan Singh*, AIR 1958 SC 500; *Bhuboni Sahu* v. *King*, AIR 1949 PC 257.

One has to take into consideration the nature and extent of the participation in the crime. If finds that the act is such as to render it probable that accessory himself would have been charged for the offence then this evidence is of absolutely no value.[36]

Corroboration of accomplices evidence by confession of accused believed to be voluntary and true is said to be good corroboration.[37] Testimony of accomplice, if corroborated in material particulars, can form basis of conviction.[38] Law is not that the accomplice evidence can under no circumstances be relied upon. There must be additional evidence rendering it plausible.[39] Where a co-accused was convicted on his pleading guilty and his evidence corroborated from the evidence of other co-accused, it was held that evidence of such co-accused could be acted upon.[40] Where the evidence of an accomplice is not totally unsupported by re-assuring circumstances, the accused could be convicted on the basis of such evidence.[41]

Where the accused failed to disclose incident of ghastly crime to any authority or person interested in detection and his statement was uncorroborated, it cannot form the basis of conviction.[42] The statement of the accomplice made before the Magistrate before pardon was tendered to him, can be used as corroborative material. It being his former statement, the Court attached no great weight in the instant case.[43]

9. MURDER—ACCOMPLICE

Conviction of the accused resting primarily on the testimony of the accomplice in a murder case in valid only if the testimony is reliable and is corroborated in material particulars.[44]

10. ACCOMPLICE RELATED TO ACCUSED

Where an accomplice is closely related to the accused, it is conceivable that he should try to implicate his accused falsely. In such circumstances, the maxim contained in illus (b), S-114 does not apply and the conviction of the accused would, as laid down in Section 133, not be illegal merely because it proceeded upon his uncorroborated testimony.[45]

11. ACCOMPLICE—APPROVER

When an accomplice turns as a witness on accepting the pardon granted by the Court under Section 306, Cr. P.C., to speak to the facts relating to the offence, he is called an approver.

Firstly, the Court has to satisfy itself that the statement of the approver is credible in itself and there is evidence other than the statement of the approver that the approver himself had taken part in the crime. Secondly, the Court should seek corroboration of the approver's evidence with respect to the part of

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36. *Abdul Munim Khan* v. *State of Hyderabad*, AIR 1953 Hyd. 145.
37. *Bhairon Lal* v. *State*, AIR 1953 Raj 131 (DB).
38. *Rampal Pithwa Rahidas* v. *State of Maharashtra*, 1994 Cr LJ 2320 (para 9) (SC). **See also** *Ramprasad* v. *State of Maharashtra*, 1999 Cr LJ 2889 (para 19) (SC) : AIR 1999 SC 1969. Evidence of approver corroborated, can't be rejected merely because of some discrepancy, *Balbir Singh* v. *State of Rajasthan*, AIR 1997 SC 1704 : 1997 Cr LJ 1179.
39. *Vasudevan* v. *State*, 1993 Cr LJ 3151 (para 21) (Ker), **following** *State of Bihar* v. *Basawan Singh*, AIR 1958 SC 500 : 1958 Cr LJ 976.
40. *Bhana Khalpa Bhai Patel* v. *Collector of Customs*, AIR 1998 SC 1487. **See also** *Narayan Chetanram Chaudhary* v. *State of Maharashtra*, 2000 Cr LJ 4640 (paras 34, 35 and 38) (SC) : AIR 2000 SC 3352.
41. *State of Tamil Nadu* v. *Suresh*, AIR 1998 SC 1044 : 1998 Cr LJ 1416 (para 22) (SC), **reversing** Cri A Nos. 782-83 of 1989, decided on 8-2-1991 (Mad).
42. *Shanker* v. *State of M.P.*, 1997 Cr LJ 3876 (MP). **See also** *Jagannath Prasad* v. *State of U.P.*, 2000 Cr LJ 923 (para 12) (All); uncorroborated, infirm and exaggerated version of victims of rape, offence not established beyond reasonable doubt, *Babulal* v. *The State of Madhya Pradesh*, 1994 Cr LJ NOC 283 (MP).
43. *Ramprasad* v. *State of Maharashtra*, 1999 Cr LJ 2889 (para 25) (SC) : AIR 1999 SC 1969.
44. *Santan Ghorai* v. *State of W.B.*, 1969 SCD 874; *State (Del. Admn.)* v. *V.C. Shukla*, AIR 1980 SC 1382; *Ravinder Singh* v. *State of Haryana*, AIR 1975 SC 856; *Gopal Krishna* v. *State*, AIR 1964 All 481; *State of Ram Autar Choudhary*, AIR 1955 All 138; *Raja Ram* v. *State*, 1966 All 192 (FB); *State* v. *Bassappa Challappa Bekwad*, AIR 1956 Bom 341; *Rangaswami Chettiar* v. *State*, AIR 1953 Trav. Co. 280; *State* v. *Youssuf Dar*, 1973 Cr LJ 955 (J&K); *Prananath Patnaik* v. *Banamali Patnaik*, AIR 1958 Ori. 228.
45. *Ranja* v. *State*, AIR 1951 HP 75.

other accused persons in the crime, and this evidence has to be of such a nature as to connect other accused with the crime.[46] The corroboration need not consist of evidence which, standing alone, would be sufficient to justify the conviction of the accused. If that were the law, it would be unnecessary to examine an approver. All that seems to be required is that the corroboration should be sufficient to afford some sort of independent evidence to show that the approver is speaking the truth with regard to the accused person whom he seeks to implicate.[47] Every detail of the story of the accomplice need not be confirmed by independent evidence although some additional independent evidence must be looked for to see whether the approver is speaking the truth and there must be some evidence, direct or circumstantial, which connects the co-accused with the crime independently of the accomplice.[48] Approver's evidence is looked upon with great suspicion, but, if it is found to be trustworthy, it can be decisive in securing conviction.[49]

Non-acceptance of the approver's evidence in respect of one of the co-accused for want of independent corroboration does make her evidence infirm or create any doubt regarding her reliability as a witness.[50] A conviction based on uncorroborated evidence of a trustworthy approver is not illegal though as a matter of practice corroboration in material particulars by independent evidence is insisted upon.[51] Where the evidence of the approver was fully corroborated on material aspects from truthful independent sources and the same showed that he was acting on the tunes of the accused, his evidence was held to be credible.[52] It is well-settled that the appreciation of approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witness. If this test is satisfied, the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration.[53] The evidence of the approver should be corroborated in material particulars connecting each of the accused with the crime.[54] It must be shown that the approver is a witness of truth, the evidence led to corroborate him in material particulars would be relevant for consideration. The court should bear this in mind in deciding whether the evidence of the approver should be acted upon or not.[55] The nature of corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroboration evidence is evidence which shows or tends to show that the story of the accomplice that the crime has been committed by the accused is true. The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is circumstantial evidence of his connection with the crime.[56] In a murder case, recovery of articles belonging to deceased from different accused and the deadbody from a particular place in pursuance of the statement of the approver, was held to be sufficient corroboration of the approver's statement connecting different accused with the crime.[57]

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46. *Saravanbhavan* v. *State of Madras*, AIR 1966 Mad 1273; **See also** *Lacchi Ram* v. *State of Punjab*, AIR 1967 SC 792.

47. *Bishnu Padu Chatterji* v. *Emperor*, ILR (1944) 2 Cal 327.

48. *Rameshwar* v. *State of Rajasthan*, AIR 1952 SC 54.

49. *Jasbir Singh* v. *Vipin Kumar Jaggi*, 2001 Cr LJ 3993 (para 19) (SC) : AIR 2001 SC 2734.

50. *Ranadhir Basu* v. *State of W.B.*, 2000 Cr LJ 1417 (para 9) (SC) : AIR 2000 SC 908.

51. (1972) 1 Cut. LR (Cri) 346; *Piara Singh* v. *State of Punjab*, AIR 1969 SC 961; *Haroom Haji Abdulla* v. *State of Maharastra*, AIR 1968 SC 832; *Krishna Biharilal* v. *State*, 1956 MB 86 (DB); *Chandrakant* v. *State of Maharastra*, 1978 Cr LJ 431 (Bom); *Debi* v. *State*, AIR 1953 Raj 49.

52. *Vinit* v. *State of Maharashtra*, 1994 Cr LJ 1791 (Bom).

53. *Piara Singh* v. *State of Punjab*, AIR 1969 SC 961; *Sarwan Singh* v. *State of Punjab*, AIR 1957 SC 637; *Sheshanna Bhumanna* v. *State of Maharastra*, AIR 1970 SC 1330; *Ram Deo* v. *State of Rajasthan*, 1966 Cr LJ 240 (DB); *Major E.G. Barsay* v. *State of Bombay*, AIR 1961 SC 1762; *Mohinder Singh* v. *State*, (1963) 2 Crl LJ 104 (P&H); *Sumer Singh* v. *State*, (1962) 2 Cr LJ 672 (MP); *State of Bihar* v. *Srilal Kerjiwal*, AIR 1960 Pat 459; *State* v. *Teka*, 1978 Cr LJ (NOC) 241; In re : *Mukhesh Ramachandra Reddy*, AIR 1958 AP 165.

54. *G.S. Bakshi* v. *State Delhi Admn.*, AIR 1979 SC 569; *Jnanendra Nath Ghose* v. *State of West Bengal*, AIR 1959 SC 1199; *S. Swami-Rathnam* v. *State of Madras*, AIR 1957 SC 340; *Ram Deo* v. *State of Rajasthan*, 1966 Cr LJ 240; *Sarwansingh Rattan Singh* v. *State of Punjab*, AIR 1957 SC 637; *R.* v. *Baskerville*, 1916 (2) KB 658; *Balwant Kaur* v. *Union Territory of Chandigarh*, AIR 1988 SC 139.

55. *State of A.P.* v. *Ganeswara Rao*, AIR 1963 SC 1850.

56. *Samunder Singh* v. *State*, AIR 1965 Cal 598 (DB); *Sheo Nandan* v. *State*, AIR 1964 All 139 (DB); *Sohan Singh Kesar Singh* v. *State*, AIR 1964 Punj 130 (DB); *State of Bihar* v. *Srilal Kerjiwal*, AIR 1960 Pat 459 (DB); *Rameshwar Kalyan Singh* v. *State of Rajasthan*, AIR 1952 SC 54; *Ram Singh* v. *Crown*, 1951 Simla 178; *Rabi Das* v. *State*, 1976 Cr LJ 2004 (DB)(Cri).

57. *Nizamuddin* v. *State*, AIR 1963 J&K 34 (D.B.).

When there is circumstantial evidence proved against accused that he was guilty of murder then it constitutes substantial corroboration of approver's statement in material particulars.[58]

Courts are naturally reluctant to act on the tainted evidence of an approver unless it is corroborated in material particulars by other independent evidence. But it would not be right to expect that such independent corroboration should cover the whole of the prosecution story or even all the material particulars. If such a view is adopted it would render the evidence of the accomplice wholly superflous. On the other hand it would not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details, because in such a case corroboration does not afford necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true.[59] Courts should be cautious to the uncorroborated testimony of approver.[60] A conviction ought not to be based on the testimony of the approver unless it is corroborated in material details not only with regard to the general story narrated by him, but also with regard to the *corpus delicti* and the identity of the accused. It is so even though his testimony does not suffer from inherent defects or improbabilities. It follows that the resiled statement of an accomplice naturally must be subjected to greater scrutiny.[61]

It is a general tendency on the part of approvers to minimise their own role in the offence but that cannot render the prosecution story unbelievable, when there is independent corroboration to his statement of the approver.[62] An approver's evidence cannot be discarded totally merely because it was found unbelievable in respect of the part played by one of the accused who was a acquitted.[63]

The evidence of an approver has to fulfil two tests for its acceptance. (1) it must be natural and credible. Where this is *prima facie* lacking, there is really no question of further corroboration and the prosecution can only rely upon other pieces of evidence. (2) even if a court is inclined to accept the evidence as natural or convincing, it must be corroborated in material particulars with regard to the participation of the accused concerned.[64]

Identification of one out of six of the accused in circumstances which make the identification questionable, is no corroboration of the evidence of the approver.[65] Where the approver's evidence is corroborated almost in every particular by medical evidence, it would be sufficient to convict the accused.[66] Certain clinching features disclosed by an approver pertaining directly to an accused, if reliable, by the touch stone of other independent credible evidence, would give the needed assurance for acceptance of his testimony on which a conviction may be based.[67]

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58. *Maghar Singh* v. *State of Punjab*, AIR 1975 SC 1320.

59. *Sheo Nandan* v. *State*, AIR 1964 All 139; *R.R. Chari* v. *State of U.P.*, 1962 (2) Cr LJ 510 (SC); *Sarwan Singh Rattan Singh* v. *State of Punjab*, AIR 1957 SC 637; *Jnanendra Nath Ghose* v. *State of W.B.*, AIR 1957 SC 1199; *A.P Kuttan Pancker* v. *State of Kerala*, 1963 (1) Cr LJ 669 (Ker); *Nizam-ud-Din* v. *State*, AIR 1963 J&K 34 (DB); *Rameshwar Kalyan Singh* v. *State of Rajasthan*, AIR 1952 SC 54; *V. Govindrajulu* v. *State of Mysore*, AIR 1962 Mys. 275; *State of Bihar* v. *Srilal Kerjiwal*, AIR 1960 Pat 459 (DB).

60. *S.C. Bahri* v. *State of Bihar*, 1994 Cr LJ 3271 (para 45) : AIR 1994 SC 2420.

61. In re : *Kasaboyina Muttiga*, AIR 1958 AP 255 (DB).

62. (1975) 2 Cr LJ 285 (HP); *Saravana Bhavan and Govinda Swamy* v. *State of Madras*, AIR 1966 SC 1273.

63. 1975 (2) Cr LJ 285 HP; *Piare Singh* v. *State of Punjab*, AIR 1969 SC 961; *Emperor* v. *Rai Singh Narain Singh*, AIR 1933 Lah. 871.

64. In re : *Chinnasami*, AIR 1960 Mad 462 (DB); *Sarwan Singh Rattan Singh* v. *State of Punjab*, AIR 1957 SC 637; *Rameshwar Kalyan Singh* v. *State of Rajasthan*, AIR 1952 SC 54; *R* v. *Baskerville*, 1916 (2) KB 658; *Ram Narain* v. *State of Rajasthan*, AIR 1973 SC 1188; *State* v. *Banwari*, ILR 1959 (9) Raj 107; *State of Bihar* v. *Basawan Singh*, AIR 1958 SC 500; *Rajanikanta Meheta* v. *State of Orissa*, 1976 Cr LJ 1674 (Ori); In re : *B.K. Rajgopal*, AIR 1944 Mad 117; *Bhuboni Sahu* v. *King*, AIR 1949 PC 257; *Nafiz Ahmed* v. *State*, 1989 Cr LJ 1296 (Bom).

65. *Samunder Singh* v. *State*, AIR 1953 Raj 182 DB; *Uma Krishna* v. *State of Ajmer*, AIR 1956 Ajmer 57.

66. *Shankar Tukaram* v. *State*, ILR 1979 Bom 300. **See also** *Rukhmmini Bhagoji Pardhi* v. *State*, ILR 1979 Bom 380.

67. *Ravinder Singh* v. *State of Haryana*, AIR 1975 SC 856; *State* v. *Hetep Boro*, 1972 Cr LJ 1074; *Tulugu Soura* v. *State*, 1973 Cr LJ 1426 (Ori); *Ram Deo* v. *State of Rajasthan*, 1966 Cr LJ 240 (Raj); *Rangaswami* v. *State of Kerala*, ILR 1958 Ker 420; In re : *Gundla Narayana*, 1959 AP 387 (DB); *Rameshwar Kalyan Singh* v. *State of Rajasthan*, AIR 1952 SC 54; *State of Orissa* v. *Bishnucharan Muduli*, 1985 Cr LJ 1573 (DB); *Aran Datti* v. *State*, AIR 1955 J&K 13 (DB); *State of Orissa* v. *Nazrul Ali Sekh*, 1985 Cr LJ 1311 (Ori); *Harihar Samal* v. *State of Orissa*, 1982 Cr LJ 1156 (Ori); *Khagendra Gohan* v. *State*, 1982 Cr LJ 487 (Ori); *Gurnam Singh* v. *State of Rajasthan*, 1979 Cr LJ (NOC) 215; *State* v. *Teka*, 1978 Cr LJ (NOC) 241 (DB); *Data Ram* v. *State of Rajasthan*, 1977 Cr LJ 1428 (Raj); *Sumer Singh* v. *State of Haryana*, 1977 Cr LJ (NOC) 32 (Punj); *Chandan* v. *State of Rajasthan*, AIR 1988 SC 599; *Ranjeet Singh* v. *State of Rajasthan*, AIR 1988 SC 672; *Ujit Ali* v. *State*, 1988 Cr LJ (NOC) 50 (Cal); *Lachhi Ram* v. *State of Punjab*, AIR 1967 SC 792.

The fact that a co-accused became an approver after a lapse of 20 months from the date of occurrence and copies of his earlier statements to the police were not supplied to the defence, was held sufficient to lessen the value of his evidence.[68] Where it is proved that there was ill feeling between the father of the approver and the accused the evidence of the approver implicating the accused loses much of its value. Further, where he has been made approver only to obtain the evidence against that accused, it is not possible to attach any weight to such evidence.[69]

The antecedetns of the approver do not make his evidence either better or worse. His evidence can be accepted on its own merits with corroboration.[70]

It cannot be laid down as a matter of law that the evidence of witnesses who support the statement of an approver is not corroborative evidence merely because their evidence was known to the police before the approver was given pardon.[71]

Approver does not cease to be a competent witness after withdrawal of his pardon.[72] That the approver had denied his complicity in the crimes during the earlier stages of investigation does not show that his evidence given by him in the court of session is false as prisoners make full and true disclosure of the whole of the circumstances within their knowledge relating to the offence under investigation only when they are assured of pardon.[73]

When approver was convicted and sentenced and on appeal the conviction was set aside and the case remanded, and after remand pardon was tendered to him and he was made approver, it was held that no reliance could be placed on the statement of such an approver.[74] Unless, the approver's statement is found credible and his part in the crime corroborated by other evidence, no useful purpose will be served by seeking corroboration of other part of his evidence by reference to other evidence on record.[75] An approver is generally a deserter in the hope of reward of pardon. So unless he is wholly reliable corroboration will be necessary.[76]

12. CONFESSION

The difference between evidence of accomplice and confession of an accused is that in the case of a person confessing who has resiled from his statement, general corroboration is sufficient, while an accomplice's evidence should be corroborated in material particulars.[77] A co-accused who confessed is naturally an accomplice and the danger of using the testimony of one accomplice to corroborate another has repeatedly been pointed out. The danger is no way lessened when the evidnece is not on oath and cannot be tested by cross-examination.[78] A confession intended to be used against a co-accused stands on a lower level than accomplice evidence because the latter is atleast tested by cross-examination whilst the former is not. The confession of co-accused are not evidence but if there is other evidence on which a conviction can be based; they can be referred to as lending some assurance to the verdict.[79] An extra judicial confession made by a person, who was subsequently made an approver, cannot be relied upon. The approver is no better than an accomplice and his testimony therefore, would need independent corroboration before it can be acted upon.[80] Corroboration of an accomplice's statement in the court must be found elsewhere and not in his confession, for an accomplice like an approver does not

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68. *Lal Chand* v. *State of Haryana*, AIR 1984 SC 226; *Bhiva Doulu Patil* v. *State of Maharastra*, AIR 1963 SC 599.
69. *Nathwa* v. *State*, AIR 1951 All 452; In re : *Mammadu*, AIR 1951 Mad 737.
70. *Saravana Bhavan and Govinda Swamy* v. *State of Madras*, AIR 1966 SC 1273.
71. *Kesar Singh* v. *State*, AIR 1954 Punj 286 DB.
72. *State* v. *Bhoora*, AIR 1961 Raj 274; *Dama alias Damodar Jena* v. *State*, ILR 1969 Cut 265.
73. *Kesar Singh* v. *State*, AIR 1954 Punj 286.
74. *Angom Kala Singh* v. *Manipur State*, AIR 1953 Mani 2.
75. *Magan Hema* v. *State*, ILR (1972) Guj 910; *Saravana Bhavan and Govinda Swamy* v. *State of Mysore*, AIR 1966 SC 1273; *Sarwan Singh Rattan Singh* v. *State of Punj.*, AIR 1957 SC 637.
76. *Data Ram* v. *State of Rajasthan*, 1977 Cr LJ 1428.
77. *Subramania Goundan* v. *State of Madras*, AIR 1958 SC 66.
78. *Kashmira Singh* v. *State of M P.*, AIR 1952 SC 159; *Bhaluka Behera* v. *State*, AIR 1957 Ori. 172.
79. *Haroom Haji Abdulla* v. *State of Maharastra*, AIR 1968 SC 832; *Lexman Padma Bagat* v. *State*, AIR 1965 Bom 195; *Bhubon Sahu* v. *King*, AIR 1949 PC 257; *Haricharan Kurmi* v. *State of Bihar*, AIR 1964 SC 1184; *Kashmira Singh* v. *State of M P.*, AIR 1952 SC 159; In re : *Deivendran*, 1996 Cr LJ 2209 (para 40) (Mad).
80. *State* v. *Debnu*, AIR 1957 HP 52.

corroborate himself. But his confession can certainly be referred to in order to show that his story related by him in the court has in its material particulars been throughout consistent.[81]

Where there is a single retracted confession corroborating other accomplice evidence, the caution must necessarily be still greater and the probative value smaller.[82]

Non-disclosure of the name of one accused person when questioned by police before he offered to confess, is not of much consequence when in the confessional statement he implicated himself and other accused persons.[83]

Number of witnesses

S. 134. No particular number of witnesses shall in any case be required for the proof of any fact.

SYNOPSIS

1. *Principle and Scope* ... 1237
2. *Single witness* ... 1238
3. *Sole witness—Corroborated by Confession* ... 1240
4. *Sole witness—Supported by Medical evidence* ... 1240
5. *Police officer* ... 1240
6. *Divorce cases* ... 1240
7. *Food Adulteration cases* ... 1241
8. *Unlawful assembly and riot* ... 1241
9. *Sexual offences* ... 1241
10. *Illustative cases where evidence of sole witness was relied on* ... 1242
11. *Illustrative cases where evidence of Sole witness was not relied on* ... 1243

COMMENTS

1. PRINCIPLE AND SCOPE

This section states that no particular number of witnesses shall be required in any case for proof of any fact.

See also commentary under the head "Number of witnesses" in Section 3.

BEST ON EVIDENCE (8th Ed., Sections 597, 598 P. 554 & 555) observed "Now we are by no means prepared to deny that under a system where the decision of all questions of law and fact is entrusted to a single judge or in a country where the standard of truth among the population is very low, such a rule may be a valuable security against the absue of power and the risk of perjury; but it is far otherwise where a high standard of truth prevails, and facts are tried by a jury directed and assisted by a judge. Add this that the anomaly of acting on the testimony of one person is more apparent than real; for the decision does not proceed solely on the story told by the witness, but on the moral conviction of its truth, based on its intrinsic probability and his manner of giving evidence."

In England, the general rule is the same as enacted by the present section[84] though there are certain exceptions where the testimony of a single witness is declared by Statute to be insufficient to prove a particular fact; *e.g.*, in cases of treason[85] perjury[86] and personation at elections[87], the testimony of a single witness is insufficient. In certain other cases corroboration of the testimony of a single witness is required by Statute; *e.g.*, in cases of breach of promise the testimony of the plaintiff must be corroborated to prove the promise[88], and in bastardy cases the mother's evidence must be corroborated.[89]

The Maxim under the English Law "*Unus Nullus*" (one is equal to none) was not followed in this section). But as a rule of caution and prudence in cases like perjury and in sexual cases the rule in English Law has been followed.[90]

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81. *Ranjha* v. *State*, AIR 1951 HP 75; *Nitai Chandra Jana* v. *Emperor*, AIR 1937 Cal 433.
82. *Haroom Haji* v. *State of Maharashtra*, AIR 1968 SC 832; *Sheshanna* v. *State of Maharashtra*, AIR 1970 SC 1330.
83. *Ramprasad* v. *State of Maharashtra*, 1999 Cr LJ 2889 (para 26) (SC) : AIR 1999 SC 1969.
84. PHIPSON, Ev., 6th Ed., 484.
85. See Treasons Act, 1695, Sections 2 and 4.
86. See Perjury Act, 1911, Section 13.
87. See 6 & 7 Vict., c. 18, Section 88; 35 & 36 Vict., c. 33, Sections 24 and 37.
88. 32 & 33 Vict., c. 68, Section 2.
89. 8 & 9 Vict., c. 10, Section 6; 35 & 36 Vict., c. 65 Section 4.
90. *Raj Lal Data* v. *State*, AIR 1952 HP 1; *Budhu Mian* v. *Emperor*, AIR 1947 Pat 416.

Under the English Law in certain cases two witnesses are necessary, *e.g.*, prosecution for perjury, treason etc. The Bombay High Court has laid down that in ordinary cases, and where the provisions peculiar to the Indian Law do not apply, the rule of English Law which is founded on substnatial justice may well serve as a safe guide to those who have to administer the criminal law in this country.[91]

The Court[92] should not leave the number of witnesses to be summoned to the whims and fancies of the party producing the witnesses. The Court has to apply its mind and restrict the number of witnesses to an extent which caters the requirement of the case. In determining the number of witnesses, a court should take into account the following guidelines:—

(a) Nature of litigation
(b) Number of issues required to be produced.
(c) Nature of the issues.
(d) The fact as to on whom the onus has been laid
(e) The specified purpose for which a particular witness is required to be produced. The party seeking to produce a witness is also required to specify the purpose for which the witness is proposed to be produced. Thus detailing out of a purpose is necessary requirement and in absence of that the Court will be within its limits to disallow summoning of that witness.

2. SINGLE WITNESS

The Supreme Court[93] observed:

"(1) As a general rule, a Court can and may act on the testimony of a single witness though uncorroborated, One credible witness outweighs the testimony of a number of other witness of indifferent character.

(2) Unless corroboration is insisted upon by statute, Courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example, in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character.

(3) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the judge before whom the case comes.

In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the Court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act, has categorically laid it down that "no particular number of witnesses shall, in any case, be required for the proof of any fact." The Legislature determined, as long ago as 1872, presumably after due consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses. In England, both before and after the passing of the Indian Evidence Act, 1872, there have been a number of statutes as set out in SARKAR'S 'LAW OF EVIDENCE'—9th Edition, at pages 1100 and 1101, forbidding convictions on the testimony of a single witness. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized in Section 134 quoted above. The section enshrines the well recognized maxim that "evidence has to be weighed and not counted". Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness, whose testimony has to be either accepted or rejected. If such a testimony is found by the Court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. Hence, in our opinion, it is a sound and

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91. PER JENKINS, C.J., in *Emperor* v. *B.G. Tilak*, (1904) 6 Bom LR 324, 339 : ILR 28 Bom 479.
92. *Yashpal Sawhney* v. *Gandotra Traders*, AIR 1996 J&K 32 (paras 7 and 9), **following** AIR 1983 SC 925.
93. *Vadivelu Thevar* v. *State of Madras*, AIR 1957 SC 614 : 1957 SCJ 527.

well-established rule of law that the Court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact.

Generally speaking oral testimony in this context may be classified into three categories, namely, (1) wholly reliable, (2) wholly unreliable and (3) neither wholly reliable nor wholly unreliable. In the first category of proof, the court should have no difficulty in coming to its conclusion either way—It may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subordination. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if Courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subordination of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect being that of a participator in crime But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable."

Where the deceased was strangled to death and there was only one eye-witness (P.W. 14) to the occurrence, the Supreme Court observed: "indeed, there can be no doubt that the evidence of a man like P.W. 14, should be scanned with much caution and we must be fully satisfied that he is a witness of truth, especially when no other person was present at the time to see the murder. Though he was not an accomplice, we would still want corroboration on material particulars in this particular case, as he is the only witness to the crime, and as it would be unsafe to hang four people on his sole testimony unless we feel convinced that he is speaking the truth....What the law requires is that there should be such corroboration of the material part of the story connecting the accused with the crime as will satisfy reasonable minds that the man can be regarded as a truthful witness."[94] In *Vadivelu Thevar* v. *State of Madras*,[95] the Supreme Court referred to this decision and distinguished on the ground that the court insisted on corroboration of the testimony of a single witness not on the ground that his was the only evidence but on the ground that his evidence was analagous to that of an accomplice in the peculiar circumstances of the case. In *Ramrathan* v. *State of Rajasthan*[96] **relying on** *Vadivelu Thewar* v. *State of Madras*[97], the Supreme Court reiterated the principle that as a general rule the court may act on the testimony of a single witness, though uncorroborated unless circumstances of a particular case where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon and that the question whether corroboration of the testimony of a single witness was or was not necessary, must depend upon facts and circumstances of each case. There is no hard and fast rule and in each case the court has to consider whether it can be reasonably satisfied to act even upon the testimony of a single witness for the purpose of convicting the person.[98]

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94. *Satyanarayan Reddy* v. *State of Hyd.*, AIR 1956 SC 379.
95. AIR 1957 SC 614.
96. AIR 1962 SC 424.
97. AIR 1957 SC 614.
98. *Badri* v. *State of Rajasthan*, AIR 1976 SC 560; *Maqsoodan* v. *State of U.P.*, AIR 1983 SC 126 (Neither the number of witnesses nor the quantity of evidence is material. It is the quality that matters); *Kunharu* v. *State of Kerala*, 1964 Mad LJ (Cri) 334 : 1963 Ker LT 325; *Sathya Vir* v. *State of U.P.*, AIR 1958 All 746; *Kochan Velayudhan* v. *State of Kerala*, AIR 1961 Ker 8; *Ram Bux* v. *State*, 1961 MPLJ (Notes); *Chhota Singh* v. *State*, ILR 1957 Cut 642; *Daya Singh* v. *State*, ILR 1969-19 Raj 317; *State* v. *Rambali*, AIR 1953 All 163; *State* v. *Dasurath Lahanu Kadu*, (1973) 75 Bom LR; *Apren Joseph* v. *State of Kerala*, 1972 Cr LJ 1162 : ILR (1971) 2 Ker 381 (Ker); *Kanaran* v. *State*, ILR (1972) 1 Ker 476; *Municipal Corporation Delhi* v. *J.B. Bottling Co. Pvt. Ltd.*, 1978 Cr LJ 1149 (MP); *Israful Seikh* v. *State of Bihar*, 1978 BLJ 381 (Pat) : 1978 Cr LJ (NOC) 240; *Balraj Singh* v. *State of Punjab*, 1976 Cr LJ 1471 (P&H); *Maqsoodan* v. *State*, 1982 All LJ 1524 : AIR 1983 SC 126; *Kewala Shankar* v. *State*, 1985 All LJ 1216 (DB); *Ganpat Hiraman* v. *State of Maharashtra*, ILR 1976 Bom 464; *Prabakar Behara* v. *State of Orissa*, (1984) 58 Cut LT 42 : 1985 Cr LJ (NOC) 6; *Lechha* v. *State of Rajasthan*, 1977 Raj LW 153 : 1978 Cr LJ (NOC) 112; *Binder Singh* v. *State of Rajasthan*, 1984 Raj LR 285 (DB) : 1984 Cr LJ (NOC) 178; *Appukuttan* v. *State of Kerala*, 1989 Cr LJ 2362 (Ker); *Ramashish Rai* v. *State of Bihar*, 1989 Cr LJ 336 (Pat); *State of Orissa* v. *Dillip Kumar Chand*, 1987 Cr LJ 1242 (Ori); *Rameshwar* v. *State of U.P.*, 1987 Cr LJ 442 (All); *Mahipal Pur Co-op., Society Ltd.* v. *Prabhati (Smt.)*, AIR 1986 Del 94; *Malik Abdul Salam* v. *State of Orissa*, 1985 Cr LJ 1871; *State of Maharashtra* v. *Raju Dadaba Borge*, 2001 Cr LJ 3638 (para 11) (Bom).

When the case rests on the testimony of the sole eye-witness, it should be wholly reliable.[1] Conviction can be based on the occular account of a solitary witness.[2] When the evidence of the eye-witness was acceptable, mere non-examination of another person (her eight year old son sleeping in the room of occurrence) was not fatal.[3] Though the evidence of the sole eye-witness should be scrutinised with greater care and caution, yet if it is creditworthy, conviction can be based thereon.[4]

It is open to a final Court of fact to believe or disbelieve a statement, but simply because statement is of one witness that cannot by itself be a ground for not acting upon that testimony.[5]

3. SOLE WITNESS—CORROBORATED BY CONFESSION

The single prosecution witness stated about the recovery of non-duty paid *ganja* from the possession of the accused. His evidence was corroborated by the confessional statement recorded by another prosecution witness. It was held conviction based on solitory evidence supported by confession is sufficient.[6]

4. SOLE WITNESS—SUPPORTED BY MEDICAL EVIDENCE

When the evidence of single eye-witness was corroborated by medical testimony, it would be sufficient to base the conviction.[7]

5. POLICE OFFICER

There is no law which requires the Sub-Inspector's evidence, like that of an accomplice, to be corroborated in material particulars, before it can be acted upon. His evidence has to be treated like that of any other material witness.[8]

6. DIVORCE CASES

Under Section 7 of the Indian Divorce Act, it was held that the English rule is to be applied in India and the uncorroborated testimony of the wife or the husband should not be accepted under Section 7 of the Divorce Act.[9]

In *Fairman* v. *F*[10], it was held that an adulterer when he/she gives evidence is an accomplice whose evidence requires corroboration.[11]

Under the Hindu Marriage Act, in a petition for judicial separation, it was held that the test is qualitative and not quantitative and corroboration is not a matter of law but a matter of precaution and prudence and every case has to be decided on its merits whether it requires corroboration or not.[12]

In a petition by the husband for dissolution of marriage under Section 10 of the Divorce Act on the ground of wife's adultery and desertion, both the respondents remained *ex parte* and the petitioner alone gave evidence. It was held that his evidence is sufficient to grant the relief.[13] In the case of paternity of a child, it was held that it is the trial court to find out whether the evidence of the mother alone on the facts

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1. *Kathi Odhabhai Bhimabhai* v. *State of Gujarat*, 1993 Cr LJ 187 (para 4) (SC) : AIR 1993 SC 1193.
2. *Shyamrao Vishnu Patil* v. *State of Maharashtra*, 1998 Cr LJ 3446 (para 10-A) (Bom).
3. *Jinnat Mia* v. *State of Assam*, AIR 1998 SC 533.
4. *Islam-ud-din* v. *State*, 1996 Cr LJ 2613 (Del), **relying on** *Kartik Malhar* v. *State of Bihar*, (1995) 8 JT (SC) 425 : 1995 AIR SCW 4540 : 1996 Cr LJ 889 (SC).
5. *Ram Nath* v. *Extra Assistant Commissioner, Jabalpur*, ILR (1953) Nag 361.
6. 1957 BLJR 149.
7. *Choota Singh* v. *State*, ILR 1957 Cut 642; *Radhakishan* v. *State of Rajasthan*, 1973 Cr LJ 481 (Raj); *Nandeswar Kalita* v. *State of Assam*, 1983 Cr LJ 1515 (Gau); (sole child witness); *Vahula Bhushan* v. *State of T.N.*, AIR 1989 SC 236.
8. 1957 Mad WN 615.
9. *Payne* v. *P.*, 42 MLJ 526 (FB); *Pendurthi* v. *P.* 43 MLJ 441 (FB); *Premchand* v. *Hira*, AIR 1927 Bom 594.
10. (1949) 1 All ER 939.
11. *Galler* v. *Galter*, (1954) 1 All ER 536.
12. *Saptami Sarkar* v. *Jagadish Sarkar*, ILR (1970) 1 Cal 272.
13. *Antoniswamy* v. *Anna Manikam*, AIR 1970 Mad 91.

and circumstances of the case could be believed, and there is no rule that it should be corroborated.[14] In a wife's petition for nullity or marriage on the ground of husband's incapacity, corroboration is not essential to the testimony of the wife, if it is reliable.[15]

7. FOOD ADULTERATION CASES

A fact can be proved by the evidence of a single witness namely the Food Inspector.[16] Evidence of Food Inspector alone about the purchase of sample food stuff is sufficient and it need not be disbelieved merely because the receipt bore no seal of the shop as attesting witness turned hostile.[17]

It is not safe to maintain a conviction on the sole testimony of the witness who made a false statement regarding the implication of the co-accused, or when it does not inspire confidence.[18]

8. UNLAWFUL ASSEMBLY AND RIOT

The testimony of one single witness, if wholly reliable, is sufficient to establish the identification of the accused as a member of an unlawful assembly. However, when the size of unlawful assembly is quite large and many persons would have witnessed the incident, it would be prudent to insist on at least two reliable witnesses for the identification of the accused.[19] In rioting and similar type of cases, it would be extremely hazardous to convict on the testimony of a single eye-witness. In such cases, the rule of prudence requires that the Courts should insist on plurality of eye-witness account.[20]

The Allahabad High Court has held that in communal riot cases it is unsafe to convict on the evidence of one witness alone, unless there is satisfactory circumstantial evidence in addition.[21] Where attacks and counter-attacks by two factions in a locality, created terror in the minds of the people living there, the prosecution examined some witnesses of the locality. It was held that as there was no evidence to show that any person other than the witnesses examined had seen the occurrence, the contention that the prosecution did not examine other witnesses of the locality could not be sustained. It is the quality of the evidence and not the number of witnesses that matters in such case.[22]

9. SEXUAL OFFENCES

In cases of rape no principle of law forbids a conviction on the victim's uncorroborated testimony, though she is wanting in chastity, if the jury are satisfied with the truth. However, the jury and the court should diligently guard themselves from the undue sympathy for the victim.[23]

The Supreme Court held that in sexual offence corroboration is not essential before conviction. As the victim of the rape cannot be treated as an accomplice it needs no corroboration. But depending on the circumstances of the case as a matter of prudence, corroboration may be required.[24] It was held by the Supreme Court that there are exceptions to the rule that conviction can be based on the solitary testimony of the witness, for *e.g.*, in cases of sexual offences or of testimony of an approver, in which, testimony of the witness is, by its very nature suspect being that of a participator in crime.[25] The court reiterated the principle that the victim of rape is not an accomplice and requires no corroboration though in some cases as a rule of prudence corroboration may be required.[26]

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14. (1970) 1 MLJ (Cri) 207.
15. *Suvarnabahen* v. *Rashmikantt*, AIR 1970 Guj 43.
16. *Chairman Suri Municipality* v. *Sisir Kumar Ghosh*, ILR (1961) 2 Cal 257; *Public Prosecutor* v. *Sub-ban Chettiar*, (1970) 1 MLJ 402; Conviction can be based on the sole testimony of food inspector if it is trustworthy; *P.P.* v. *Marappan*, 1980 Mad LJ (Cri) 256.
17. *State* v. *Appuswami*, 1980 Mad LJ (Cri) 734 : 1980 Cr LJ (Noc) 168 (Mad).
18. *Pritam Singh* v. *State of Punjab*, (1980) 2 FAC 356 (Punj); *Amar Singh* v. *State of Punjab*, (1980) 2 FAC 344 (Punj).
19. *Binay Kumar Singh* v. *State of Bihar*, 1997 Cr LJ 362 : AIR 1997 SC 322.
20. *Babu Hamidkhan Mestry* v. *State of Maharashtra*, 1995 Cr LJ 2355 (paras 10 and 11) (Bom), **following** *Masalti* v. *State of U.P.*, 1965 (1) Cr LJ 226 : AIR 1965 SC 202.
21. *Emperor* v. *Ujagar*, ILR (1933) 55 All 639.
22. *Appukuttan* v. *State of Kerala*, 1989 Cr LJ 2362 (Ker)(DB).
23. *Boddie* v. *S.*, (1875) 52 Ala 395 (as per BRICKELL C.J.)
24. *Rameshwar Kalyan Singh* v. *State*, AIR 1952 SC 54 **following** *R* v. *Baskerville*, (1916) 2 KB 658.
25. *Vadivelu Thevar* v. *State of Madras*, AIR 1957 SC 614.
26. *Siddeshwar* v. *State of W.B.*, AIR 1958 SC 143. **See also** *Shamsher Bahadur* v. *State of Bihar*, AIR 1956 Pat 404; *State* v. *Sheodayal*, AIR 1956 Nag 8.

The unsworn testimony of a minor girl aged 12 years was accepted, and the accused was convicted without any corroboration.[27]

In cases of rape or abduction the court has to satisfy itself that the victim is telling the truth and that the accused was not falsely implicated. As a matter of prudence corroboration may be required.[28] In a rape case, it was found that the girl had intimacy with a prostitute who was connected with the accused and also had intercourse before. It is in that case it was held that it was unsafe and dangerous to act upon the uncorroborated testimony of the girl without corroboration.[29] The rule of law is not that the testimony of a child witness cannot be believed in any circumstance unless it is corroborated by other evidence. Before passing a conviction on the sole testimony of a child witness as a rule of caution it may require corroboration.[30]

10. ILLUSTATIVE CASES WHERE EVIDENCE OF SOLE WITNESS WAS RELIED ON

Where there are no exceptional reasons, it is the duty of the Court to convict if it is satisfied that the testimony of a single witness is entirely reliable, without corroboration.[31] One credible witness outweighs the testimony of a number of other witnesses of doubtful veracity. If the testimony of a single witness is found to be entirely reliable on scanning the evidence, there is no legal impediment to the conviction of the accused on such evidence.[32] Even the evidence of a single witness can sustain the conviction of an accused person if the court which saw and heard him depose, regards him as a witness of truth.[33] It is open to the court to rest its finding on the solitary testimony of a witness whom it found to be credible even if the witness had a personal interest in the litigation.[34] Where an accused voluntarily caused seven stab injuries on the person of the complainant and the prosecution witness turned hositle, it was held, when the credibility of the complainant was not shaken in the cross-examination, the accused could be held guilty.[35] When the evidence of the solitary witness is found to be cogent and trustworthy and the medical evidence corroborated his testimony, conviction would be proper even in a murder case on the basis of his evidence.[36] When the evidence is convincing and consistent and unimpeachable, conviction can be based on the solitary testimony of a witness.[37] It is not necessary to prove a fact that a number of witnesses should assert it; proof of a fact would depend upon the character of the witness and the competency to speak to that fact; it is the assurance or persuasiveness of the evidence which alone inspires a judicial mind to put any reliance on the testimony.[38] It is the acceptability of the evidence that matters and not the numerical sufficiency of witnesses. Conviction can be based on the evidence of sole

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27. *Lalaram* v. *State of M.P.*, AIR 1960 MP 59.
28. *Gurcharan* v. *State of Haryana*, AIR 1972 SC 2661; *Madho Ram* v. *State of U.P.*, AIR 1973 SC 469.
29. *Surendra* v. *R.*, 38 Cal WN 52; **see also** *R.* v. *Banu Bai Ardeshir*, AIR 1943 Bom 150; *Motiram* v. *State of M.P.*, AIR 1955 Nag 121.
30. *State* v. *Jan Mohammad*, 1981 All LJ 367.
31. *Vadivelu Thebar* v. *State of Madras*, AIR 1957 SC 614; *Badri* v. *State of Rajasthan*, AIR 1976 SC 560; *Satyavir* v. *State*, AIR 1958 All 746; *Kochan Velayuddham* v. *State of Kerala*, AIR 1961 Ker 8; *Rupa Saura* v. *State*, ILR (1969) Cut 253 : 1969 CLT 175; *Pema Dukpa* v. *State of Sikkim*, 1981 Cr LJ 276; *Balraj Singh* v. *State*, 1976 Cr LJ 1471 (P&H).
32. *Kunharu* v. *State of Kerala*, 1964 Mad LJ (Cri) 334 : 1963 Ker LT 325.
33. *Baleshwar Rai* v. *State of Bihar*, 1963- 2 SCR 433 : 1964-1 Cr LJ 564 (SC); *Ganpat Hiraman* v. *State of Maharashtra*, ILR 1976 Bom 464; *State* v. *Ramaswamy*, 1983 Mad LW (Cri) 59 : 1983 Cr LJ (NOC) 178.
34. *Shiv Singh Rakha Das* v. *Jiwan Dass*, AIR 1958 Punj 164; *Narayana Pillai* v. *State of Kerala*, 1968 Cr LJ 1362 (Ker); (witness-a soda vendor); *Israful Seikh* v. *State of Bihar*, 1978 Cr LJ (NOC) 240 : 1978 BLJ 381 (Pat); *Gaj Raj Singh* v. *State*, (1985) 1 Crimes 895 (Del).
35. *Gaj Raj Singh* v. *State*, (1985) 1 Crimes 895 (Del).
36. *Vahula Bhushan* v. *State of Tamil Nadu*, AIR 1989 SC 236. **See also** *Badnayina Bheemanna* v. *State of A.P.*, 1996 Cr LJ 3095 (paras 11 and 12) (AP).
37. *Mulkhraj* v. *State*, 1969 Cr LJ 94 (Punj); *Pravakar Behara* v. *State of Orissa*, (1984) 58 Cut LT 42 : 1985 Cr LJ (NOC) 6; *Sidha Dehury* v. *State of Orissa*, 1982 Cr LJ 500 : (1981) 52 Cut LT 512; *Madkami Baja* v. *State of Orissa*, 1986 Cr LJ 433; *Ramachandra Jena* v. *State of Orissa*, (1984) 58 Cut LT 155 : 1985 Cr LJ (NOC) 64; *Madan Naik* v. *State of Orissa*, 1983 Cr LJ (NOC) 47 (Ori); *Nemai Mondal* v. *State of W.B.*, AIR 1966 Cal 194; unimpeachable evidence of sole eye-witness, wife of deceased, can form basis of conviction, *Kanhaisingh Nayak* v. *State*, 1993 Cr LJ 2812 (para 6) (Ori); *S.G. Gundegowda* v. *State*, 1996 Cr LJ 852 (para 21) (Kant); *Kartik Malhar* v. *State of Bihar*, 1996 Cr LJ 889 (para 6) (SC) : (1995) 8 JT (SC) 425 : 1995 AIR SCW 4540.
38. *Madhabananda Mohapatra* v. *Rabindranath Misra*, AIR 1954 Ori 40. Evidence is weighed and not counted, *Barkau* v. *State of U.P.*, 1993 Cr LJ 2954 (para 23) (All); *Surendra Narain* v. *State of U.P.*, AIR 1998 SC 192 : 1998 Cr LJ 359. Quality of evidence matter and not quantity, *Poolin Haldar* v. *State*, 1996 Cr LJ 513 (para 25) (Cal).

witness. Therefore, mere non-examination of some persons does not affect the credibility of the prosecution case.[39]

When the evidence of a single witness inspires confidence and is corroborated by other evidence on the record, the single testimony is not to be discarded.[40] Consistent and corroborated testimony of sole eye-witness cannot be discarded for the mere fact that the witness could not be confronted by defence.[41] Where of four eye-witnesses, three had turned hostile, conviction could be based on the corroborated evidence of the fourth one.[42] In the case of solitary witness, what is to be borne in mind is whether it would be safe to place implicit reliance on the testimony of such witness.[43] If the evidence of the solitary witness is unblemished and beyond all possible criticism and the court is satisfied that he was speaking truth, it is sufficient to base a conviction.[44] In a case the wife was the sole witness for the murder of her husband and son. The trial court rejected her evidence as she was an interested witness and for want of corroboration. It was held that when the presence of the wife of the deceased was admitted by the accused the trial court was wrong in rejecting her evidence; that a close relation would be the last to screen the real culprit and falsely implicate an innocent person.[45] Where the part of the evidence of the eye-witness was liable to be rejected but the remaining evidence relating to the incident inspired confidence in his credibility, conviction was upheld.[46]

11. ILLUSTRATIVE CASES WHERE EVIDENCE OF SOLE WITNESS WAS NOT RELIED ON

The question of corroboration arises only in regard to a witness who is neither wholly reliable nor wholly unreliable in which case the court should be circumspect.[47] Where there are inherent inconsistencies in the evidence of the wife of the deceased, the sole eye-witness in the case, it cannot be considered sufficient to find the accused guilty.[48] Where the solitary witness to a murder who was closely related to the accused claimed to know the accused, but his evidence showed that he was a stranger to the accused, it was held that such evidence cannot be relied and the accused is entitled to the acquittal.[49] If the only witness to prove a charge of murder can modulate his evidence to suit a particular prosecution theory for the deleberate purpose of securing a conviction, no conviction can be based on his testimony.[50] Where the solitary witness remained quiet for about six months without giving information about the incident on the ground that he was threatened by the accused, it was held it is unsafe to base the conviction for murder on such solitary testimony.[51] The testimony of only one eye-witness was held insufficient in a murder case where the occurrence took place in broad day-light and was seen by a large number of persons.[52] Where the sole witness failed to identify an accused in an earlier identification parade, but identified in a subsequent parade, it was held that the conduct of the witness showed that he was unreliable, and so conviction could not be based on the sole testimony of such witness.[53]

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39. *Kedar Behera* v. *State*, 1993 Cr LJ 378 (para 8) (Ori). Non-examination of independent witnesses from vicinity not material, *Munshi Prasad* v. *State of Bihar*, 2001 Cr LJ 4708 (para 11) (SC) : AIR 2001 SC 3031.
40. *Ramashish Rai* v. *State of Bihar*, 1989 Cr LJ 336 (Pat). Evidence of solitary eye-witness, corroborated by other evidence, inspiring implicit confidence, conviction could be sustained on such evidence, *Gopal Mahadeo Tambada* v. *State of Maharashtra*, 1997 Cr LJ 2425 (Bom). **Also see** *Ramesh Bhagwan Manjrekar* v. *State of Maharashtra*, 1997 Cr LJ 796 (Bom). **See also** *Lalya Dharma Khadkya* v. *State of Maharashtra*, 1995 Cr LJ 564 (para 10) (Bom).
41. *Ram Vilas* v. *State of M.P.*, 1993 Cr LJ 3251 (para 5) (SC).
42. *Ganpat Ram* v. *State of Rajasthan*, 1995 Cr LJ 1466 (paras 17, 24 and 25) (Raj).
43. *Gaital* v. *State*, 1988 Cr LJ 960 (All).
44. *Chandra Sekharan* v. *State*, 1987 Cr LJ 1715 (Ker).
45. *Chellammal* v. *Packiam*, 1976 Cr LJ 1666 (Mad), **following** *Vadivelu Thevar* v. *State of Madras*, AIR 1957 SC 614 and *Darya Singh* v. *State of Punjab*, AIR 1965 SC 328; **see also** (1985) 1 Ori L. Rev 117 (widow of the deceased); *Dhouba Padhan* v. *State*, (1983) 56 Cut LT 251; (mother of the deceased) (note: Section 3 cases under Near Relations); *Mangal Singh* v. *State of Rajasthan*, 1985 Cr LJ 602 (Raj); (15 years old daughter against her father).
46. *Barla Ganga Reddy* v. *State of A.P.*, 1993 Cr LJ 1998 (AP).
47. *Dinkar Bandhu Deshmukh* v. *State of Maharashtra*, AIR 1970 Bom 439.
48. *Ramji Surjya* v. *State of Maharashtra*, AIR 1983 SC 810 : (1983) 2 SCJ 20 : 1983 Cr LJ 105.
49. *State of U.P.* v. *Satish Chandra*, AIR 1986 SC 313.
50. *Badri* v. *State of Rajasthan*, AIR 1976 SC 560.
51. *Mahadeo* v. *State of Maharashtra*, AIR 1980 SC 102; **reversing** the decision of Bombay High Court.
52. 1957 All WR (HC) 48.
53. *Gofur Shiekh* v. *State*, 1984 Cr LJ 559 (Cal)(DB).

Where a search under the Arms Act was conducted, it was held that the solitary testimony of the Investigating Officer cannot form the basis of conviction.[54] Where there was evidence that besides the solitary witness, there were 14 or 15 persons who rushed to the scene of occurrence amongst whom there were independent persons not connected with the deceased or the accused, it was held conviction could not be based on the single testimony of an eye-witness.[55] Where the evidence of the sole witness was that the accused was seen by him running away with husking rod (not sharp or semi-sharp weapon) and the evidence of the doctor conducting postmortem was that the injury on the head was a cut injury caused by sharp or semi-sharp weapon but not by a blunt weapon, it was held that the solitory testimony of the witness cannot be relied and the accused cannot be convicted.[56] When the sole eye-witness is found not reliable accused has to be acquitted.[57] Where the eye-witness of the assault on the deceased omitted vital details in the F.I.R. relating to the manner of assault, his version was not worthy of credence and it could be said that he was falsely introduced as eye-witness.[58] Where the plea of *alibi* of the accused was acceptable, he could not be convicted on the lone testimony of the witness particularly when his name was not mentioned in the F.I.R. or during inquest.[59] Where the single eye-witness was the brother of the deceased and the evidence revealed that his presence in the village was highly improbable, it was held that his evidence is not reliable or trustworthy.[60] Where a Criminal Court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident.[61] In dacoity cases conviction should not be based on identification by a sole witness.[62]

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54. *Islamuddin* v. *State of Delhi*, 1975 Cr LJ 841 (Del).
55. *Manik Malakar* v. *State of Assam*, 1976 Cr LJ 1921 Gau.
56. *Mudhan Paying* v. *State of Assam*, 1982 Cr LJ 241 Gau.
57. *Malik Abdul Salem* v. *State of Orissa*, 1985 Cr LJ 1871 Ori.
58. *Govind Narain* v. *State of Rajasthan*, 1993 Cr LJ 2598 (para 6) (SC) : AIR 1993 SC 2457.
59. *Nallamsetty Yanadaiah* v. *State of A P.*, 1993 Cr LJ 408 (para 7) (SC) : AIR 1993 SC 1175.
60. *Balraj Singh* v. *State of Punjab*, 1976 Cr LJ 1471 Punj.
61. *Masalti* v. *State of Uttar Pradesh*, AIR 1965 SC 202 : (1965) 1 SCJ 665 : (1965) 1 Cr LJ 226.
62. *Wakil Singh* v. *State of Bihar*, AIR 1981 SC 1392; *Dhruba Charan Lenka* v. *State of Orissa*, 1984 Cr LJ 769 Ori; *Chandra Pal* v. *State*, AIR 1954 All 684.

CHAPTER X

OF THE EXAMINATION OF WITNESSES

Order of production and examination of witnesses

S. 135. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

COMMENTS

SYNOPSIS

1. *Principle and Scope* ... 1245
2. *Civil Cases* ... 1245
3. *Examination on Commission* ... 1246
4. *Examining the opposite party as a witness* ... 1246
5. *Power of court to order a witness to be outside court* ... 1247
6. *Criminal proceedings* ... 1247
7. *Material Witness* ... 1248

1. PRINCIPLE AND SCOPE

This section states that the order in which the witnesses are to be produced and examined shall be regulated by the rules of law and practice relating to civil and criminal proceedings. It also states that, in the absence of any rules and practice, the court has got the discretion to regulate the order in which the witnesses are to be produced and examined.[1]

In civil proceedings the order is to be regulated by the provisions of the Civil Procedure Code; and in criminal proceedings, by those of the Criminal Procedure Code. Failing these, the order is to be determined by the discretion of the Court. In practice, however, it is left largely to the option of the party calling witnesses to examine them in any order he chooses.

The court is very slow to interfere with the discretion of counsel as to the order in which witnesses should be examined.[2] While counsel has discretion, the Court has also the power to direct the order in which witnesses cited by the party shall be examined.[3]

2. CIVIL CASES

Order XVIII, Rule 1, C.P.C., states that the plaintiff has the right to begin unless the defendant has admitted the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief, which he seeks, in which case the defendant has the right to begin. Order XVIII, Rule 2, C.P.C. states that, on the day fixed for hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence. Sub-rule (4) to rule 2 was added in the new C.P.C. of 1976, enabling the court to direct or permit any party to examine any witness at any stage, for the reasons to be recorded by the court. Similarly, Rule 3(a) was included in Order XVIII, stating that where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the court, for reasons to be recorded, permits him to appear as his own witness at a later stage. Order XVIII, Rule 3, C.P.C. says that where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party.

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1. *Gopessur* v. *Bissessur*, 39 Cal 245; *Achyutana Pitchaiah Sarma* v. *Chinna*, AIR 1961 AP 420.
2. Per STANLEY, J. in *Kedar Nath Ghose* v. *Bhupendra Nath Bose*, (1900) 5 CWN XV.
3. In the goods of *Gopessur Dutt*, (1911) 16 CWN 265.

It is sometime said that, as the plaintiff is the party who brings the case into court, it is natural that he should be first heard with his complaint; and in one sense of the word, the plaintiff always begins; for without a single exception, the pleadings are opened by him or his counsel, and never by the defendant or his consel. But, as it is agreed on all hands that the order of proving depends on the burden of proof, if it appears on the statement of the pleadings that the plaintiff has nothing to prove,—that defendant had admitted every fact alleged, and takes on himself to prove something, which will defeat the plaintiff's claim,—he ought to be allowed to begin, as the burden of proof then lies on him.[4] The authorities on the subject present almost a chaos. This much only is certain that, if the onus of proving the issues or any one of the issues however numerous they may be, lies on the plaintiff, he is entitled to begin,[5] and it seems that, if the onus of proving all the issues lies on the defendant, and the damages which the plaintiff could legally recover are either nominal or mere matter of computation, here also the defendant may begin.

A party need not be the first witness in the suit.[6]

Where a plaintiff files a suit on the basis of a sale deed, but the defendant contends that it is a mortgage, as it is for the defendant to prove the same, he will have the right to adduce evidence first.[7]

When the plaintiff alleged that a particular document was brought into existence by fraud or misappropriation it is for him to prove the allegation. So the plaintiff has to begin his case. He cannot be allowed till after the evidence of the defendant, to place his evidence as a rebuttal evidence.[8]

3. EXAMINATION ON COMMISSION

In both civil and criminal proceedings witnesses may be examined on commission, where evidently the same rules will apply respectively.[9] Evidence taken on commission is later put on the record of the case.[10]

Though a witness is examined on commission under Order XXVI, Rule 8, C.P.C. when the witness is proved to be too ill to give his evidence in court, or his absence is for sufficient reason; the evidence so recorded by the commissioner should only be permitted to be used at the trial. No mode of procedure can be more unsatisfactory than that of following the principal defendant to give his evidence before the plaintiff's case has been opened or the evidence of his witnesses has been given.[11]

4. EXAMINING THE OPPOSITE PARTY AS A WITNESS

In *Lal Kunwar* v. *Chrianji Lal*[12]; LORD ATKINSON condemened such practices and described it as a vicious practice, unworthy of a high toned or reputable system of advocacy. The party has no right to summon the opposite party as a witness.[13]

Gurbaksh Singh v. *Gurdial Singh*, 1927 PC 230 at 233 (degrading practice). If a party, however, is permitted to examine the opposite party as his own witness, it has been held that the court should be careful not to allow him to cross-examine his own witness, because unless the witness is declared hostile; the party producing the wintness has no right to cross-examine his own witness.[14]

"If a party appears as a witness on behalf of the opposing party, the court should, before proceeding to record his statement, question him or his counsel as to whether he does not propose to appear as his own witness. If that party then declares that he does not propose to appear as his own witness, the court

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4. **See** Order 18 Rr-1-3, C.P.C. 1908.
5. *Wood* v. *Pringle*, 1 Moo & R 277; *Curtis* v. *Wheeler*, 4 C&P 196.
6. 1970 All WR (HC) 236.
7. *Nabakumar* v. *Haridas Singh*, AIR 1960 Manipur 11.
8. *Rashidunnissa* v. *Ata Rasool*, AIR 1958 All 67.
9. **See** Civil Procedure Code, Order. XXVI, Rr. 1-8; Criminal Procedure Code, Ss. 284-288.
10. *Kusum Kumari Roy* v. *Satyaranjan Das*, ILR (1903) 30 Cal 999; *Man Gobinda Choudhuri* v. *Shashindra Chandra Chowdhuri*, ILR (1907) 35 Cal 28.
11. *Satish Chandra* v. *Satish Kantha*, AIR 1923 PC 73; **see also** *Mahim* v. *Nabha*, AIR 1927 Cal 43; *Phanindra* v. *Pramatha*, 32 Cal WN 128.
12. ILR 32 All 104 (PC).
13. *Ebrahim Kunju* v. *Shahabudeen*, 1969 Mad LJ (Cri) 303 : 1969 Ker LT 170.
14. *Puran Singh* v. *Mathra Das*, AIR 1934 Lah 126.

should point out to the party producing him that ordinarly speaking the matter should be left as it is and the court be left to draw any adverse inference which may justifiably be drawn from such refusal. If the party, however, insists on examining the opposite party as his own witness the court should not allow him to cross-examine his own witness."[15]

5. POWER OF COURT TO ORDER A WITNESS TO BE OUTSIDE COURT

Neither the Evidence Act nor the Codes of Civil and Criminal Procedure contain any section or rule for ordering witnesses out of court. However, the court has power to order unexamined witnesses out of court at any time during the trial on the application of either party.

Under Section 135, the order in which witness are to be produced and examined shall be regulated by the law and practice for the time being relating to the civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court. Since, the court has the power to prescribe the order in which witnesses are to be examined, where a party is also a witness, the court can require him to give evidence before he examines his other witnesses. If he is not willing to do so, the court can order him out of court hall, when his other witnesses are giving evidence. When a party himself is conducting a case without the aid of the counsel, he can examine himself first and then examine his witnesses. It is undoubtedly true that a party to the litigation has got the right to remain in court while the trial of the suit is going on. And it is equally well-established that the court has got inherent power to order any person, who has given evidence, out of the court hall when other witnesses are being examined, until that person is called to give evidence. The court has to consider whether the claim made by one party to exclude the other party from the court is well-founded and also to consider the objections of the other party.[16]

Where a witness disobeys the order to be out of the court hall, he is guilty of contempt[17]; but his evidence cannot be excluded though the weight to be attached to his testimony will be a matter for consideration.[18]

If the witness is present in court, he should be asked to go out when the evidence of other witnesses is being recorded. If this could not be done, because his presence was not noticed, the court should examine him and record his statement with a note that he was present in court when other witnesses were being examined. But, there is no justification in law for cancellation of his evidence; the court should consider what value should be attached to the testimony of such a witness, who was present when the other witnesses were examined.[19]

But this practice of excluding the presence of witnesses from the court when other witnesses are being examined need not be rigidly applied in the case of the investigating police officer, though the criminal court has always the power to direct that a witness who is to be examined in the case should not be in court, till he is examined, when the evidence of other witnesses is being recorded.[20]

6. CRIMINAL PROCEEDINGS

In criminal proceedings, the complainant or the prosecutor, as the case may be, has the right to begin and, if necessary, the accused is asked to adduce his evidence in defence. The trial before a Magistrate may be (a) in summons cases (Criminal Procedure Code, Ss. 251-258), or (b) in warrant cases instituted by the Police, S. 238; otherwise than on Police report (Ss. 244-249) or (c) summary (S. 260). Where a trial takes place before a Court of Session, or High Court, the procedure is laid down in Section 226, *et seq* of the Criminal Procedure Code is followed. Where the evidence on record was sufficient to prove the case beyond doubt, mere non-examination of one or some of the witnesses was held be not fatal.[21]

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15. FIELD ON EVIDENCE 11th Edn. p. 4765. citing *Puran Singh* v. *Mathra Das*, AIR 1934 Lah 126.
16. *Pitchaiah Sarma* v. *Chinna*, AIR 1961 AP 420. **See also** *Dr. Kasi Ayyar* v. *State of Kerala*, AIR 1996 Ker 316 (in a ciminal case); *Nathu Singh* v. *Crown*, AIR 1925 Nag 296; *Lalmani* v. *Bejai Ram*, AIR 1934 All 840; *Subh Karan Singh* v. *Kedarnath*, AIR 1941 All 314.
17. *Cobbet* v. *Hudson*, 1 E&B 14.
18. *Subh Karan* v. *Kedarnath*, AIR 1941 All 314; **relying** on *Chandler* v. *Horne*, (1842) 2 M & Rob 423.
19. *State* v. *Sohan Singh*, 1955 Cr LJ 814 : AIR 1955 MB 78.
20. *Tata Tea Ltd.* v. *State of Kerala*, 1984 Ker LJ 402.
21. *Niranjan Shil* v. *State of Tripura*, 1999 Cr LJ 4498 (para 25) (Gau).

7. MATERIAL WITNESS

Material witnesses are to be examined unless allegations are made that they will not speak truth. Thus where in a murder case, according to the prosecution story, a villager who came on the murder spot hearing cries of the son of the deceased and helped him in pulling out the weapon of offence from the chest of the deceased and further carried him to his house was not examined in view of the evidence of the son of the deceased stating that the said villager had joined hands with the accused persons and had taken oath not to depose against, failure to examine him would not vitiate the prosecution.[22]

Judge to decide as to admissibility of evidence.

S. 136. When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and, the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

ILLUSTRATIONS

(a) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under Section 32.

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement.

(b) It is proposed to prove, by a copy, the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.

(c) *A* is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of the possession, to be proved before the property is identified.

(d) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (B, C and D) which must be shown to exist before the fact (A) can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C and D is proved, or may require proof of B, C and D before permitting proof of A.

COMMENTS

This section embodies three cardinal rules as to the admissibility of evidence.

Though proper time for objecting to the admissibility of a document is when it is tendered, mere omission to so object does not constitute an inadmissible document, evidence. Party seeking to put a document in evidence must show under which section it is admissible. Improper admission or rejection of evidence will not by itself form a ground for a new trial or reversal of a decision, if, in view of the other evidence in the case, the decision would be the same even if there had been no such improper admission or rejection.[23]

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22. *Bishu Sethi* v. *State of Orissa*, 1994 Cr LJ NOC 246 (Ori).
23. *Dwijesh Chandra Ray Chaudhuri* v. *Naresh Chandra Gupta*, ILR (1946) 1 Cal 149

Illus. (c) & (d) under this section explain para 3 of this section, under which the court may, in its discretion, allow the first fact to be proved before the second fact and *vice versa*, when the relevancy of the two facts is interdependent.

What are relevant facts are given in Sections 5 to 26 under this Act. Admissibility is the rule and exclusion is the exception. The circumstances under which other rules might operate to exclude the admissibility under the Act have to be taken into consideration only in judging of the value to be attached to the evidence, when admitted.[24]

When a court entertains a doubt as to the admissibility of a document, it is better to admit than to exclude the document, as the admissibility is a question of law and is determinable by the Court, and its decision is open to appeal.[25]

However doubtful inadmissible evidence might not to be admitted in a criminal trial.[26]

The relevancy would be determined by logic whereas admissibility is governed by the rules of law. What evidence is to be admitted, or not to be admitted, should not be decided under the cover of framing the issues, but has to be determined in accordance with this section as and when the evidence is tendered before the court.[27] An objection to the admissibility should be taken when the evidence is tendered, and not before.[28] When an objection is raised as to the admissibility, it has to be decided then and there, without reserving the question till the end of the trial.[29] The Supreme Court held that, when no objection was taken as to the admissibility of a document in the trial court, it was not necessary to consider whether the document was admissible under law.[30] There is difference between raising an objection to the proof of a document, and admissibility of a document. Proof can be waived by a party or his counsel; and it does not mean that he has admitted the contents of the document. The mode of proof is only a question of procedure, and once it is waived he cannot subsequently raise any objection.[31] In criminal cases the rule of waiver is not applicable. It is the duty of the criminal courts to follow the procedure prescribed by law, and the consent of the accused cannot be invoked against irregularity in procedure.[32] The court shall exclude inadmissible evidence though there is no objection by the party in the proceedings. It was held that an erroneous omission to object to the evidence, which was not admissible or relevant under the Act, would not make it admissible. It is the duty of the court to exclude all irrelevant or inadmissible evidence, though no objection was taken by the parties to its admissibility.[33]

A judgement based upon evidence not relevant under the Act must be set aside even though the parties consented to its being treated as the sole evidence.[34] Under Order XXVI, Rule 17, C.P.C. the commissioner has no power to disallow questions he considers irrelevant.[35] When a question was put to one's own witness, namely whether it was in the public interest to allow the State Transport Unit to operate the routes exclusively, to the total exclusion of private bus operators with a view to obtain his opinion and not to elicit any fact or information, it was held that such question was rightly disallowed by the authority.[36] Where evidence is procured by an illegal search, the illegality of the search, does not

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24. *R.* v. *Mona Puna*, ILR 16 Bom 661, 668.
25. *Collector of Gorakhpur* v. *Palakdhari*, ILR 12 All 1, 26 (FB); *Kali Kishore* v. *Bhushan*, ILR 18 Cal 201; *Madhavrao* v. *Deonak*, ILR 21 Bom 695.
26. *Laijam Singh* v. *R.*, AIR 1925 All 405.
27. *Dandi Swamy* v. *Srijib*, 48 Cal WN 635.
28. *R* v. *Patel*, (1951) 2 All ER 29; *R.* v. *Hammond*, (1941) 3 All ER 318; *Gopal Das* v. *Sri Takurji*, AIR 1943 PC 83; *Bhagwan Dass* v. *Khemchand*, AIR 1973 P&H 477.
29. *Srirama* v. *Lakshmidevamma*, AIR 1957 AP 60; *Devasikhamani* v. *Andamuthu*, (1955) 1 MLJ 457; *Jadu Rai* v. *Bhubataran Nundy*, ILR (1889) 17 Cal 173; *Ramjibun* v. *Oghore*, ILR (1897) 25 Cal 401.
30. *Purushothama* v. *Perumal*, AIR 1972 SC 608; **following** the decision in *Bhagat* v. *Khetu*, AIR 1929 PC 110.
31. *Jainab Bibi* v. *Haiderally Saheb*, ILR 43 Mad 609 (FB); *Ayyavar* v. *Secretary of State*, AIR 1942 mad 528..
32. *Deputy Legal Rememberancer* v. *Upendra*, 12 Cal WN 140; *Kottam* v. *Umar*, ILR 46 Mad 117; **See** commentary under Section 58.
33. *Narhari* v. *Ambabai*, ILR 44 Bom 192; *Miller* v. *Madho Das*, (1890) 19 All 192 PC; *Nanak Chand* v. *Mian Md.*, AIR 1936 lah 114; *Dwijen* v. *Naresh*, AIR 1845 Cal 492; *Prakasaravanum* v. *Venkata*, ILR 38 Mad 160.
34. *Ponnuswami* v. *Singaram*, ILR 41 Mad 731.
35. *Ramkishna Dalmia* v. *Firoze Chand*, AIR 1960 Punj 430.
36. *Rajbahadur Lal* v. *State of U.P.*, AIR 1972 All 308.

make the evidence of seizure of articles inadmissible, though the Court may be circumspect and closely scrutinize the evidence of seizure.[37]

A judge is not only a judge of law but also of fact. He has to form his own estimate of the evidence produced before him, and he should not be haunted by the idea that there was no ruling or precedent to guide him.[38] If there is anything in a statement of a witness which is disputed, and the opponent avoids asking questions on that matter in cross-examination, it was held that the evidence in-chief examination must be accepted, unless of course there are inherent improbabilities.[39] Where the names of the witnesses were not mentioned in the first information report, and they were examined by the police not on the day of occurrence but on the next day, it was held that there was no ground for discarding their evidence.[40]

Examination-in-chief.

S. 137. The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination.

The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination.

The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

Order of examination.

S. 138. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.

The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

SYNOPSIS

1. *General* ... 1251
2. *Examination-in-Chief* ... 1252
3. *Cross-examination* ... 1253
4. *Who can cross-examine ?* ... 1254
5. *No opportunity to cross-examine—effect* ... 1255
6. *Range of cross-examination* ... 1255
7. *Cross-examination—General* ... 1256
8. *Cross-examination where there are several accused-defendants* ... 1257
9. *Cross-examination of witnesses of co-accused or co-defendants* ... 1258
10. *Cross-examination of witness called by Court* ... 1258
11. *Omission to cross examine* ... 1258
12. *Tendering witness for cross-examination* ... 1259
13. *Tendering a witness who was declared hostile in the commital court for cross-examination* ... 1260
14. *No right to cross-examination* ... 1260
15. *Re-examination* ... 1260
16. *Scope of Re-examination* ... 1261
17. *Recalling a witness* ... 1261
18. *Examination by court* ... 1261
19. *Power of the court to put questions* ... 1262
20. *Time for examination—Power of court to limit the time for examination* ... 1262
21. *Delayed Cross-examination* ... 1263
22. *S. 138 of Evidence Act and S. 311 of Cr.P.C.* ... 1263

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37. *State* v. *Satyanarayan Mallik*, (1965) 2 Cr LJ 112 : 1965 Ori 136; **following** *Radhakishan* v. *State of U.P.*, AIR 1963 SC 822; *Kochan Velayudham* v. *State of Kerala*, 1961 Ker 8 (FB). **See also** the commentary under Section 5 regarding objection to proof and admissibility, waiver of proof and of admissibility etc.
38. *Ramdeo* v. *State of Rajasthan*, 1964 Ra LW 264.
39. *Jayalakshmi Devamma* v. *Janardhan Reddy*, AIR 1959 AP 272.
40. In *Re, Ratna Reddy*, AIR 1963 AP 252.

COMMENTS

1. GENERAL

The examination of witnesses is *viva voce* (Order XVIII, R. 4). It is always in the form of questions and answers. The deposition is usually taken down in the form of a narrative out of the answers (Order XVIII, R. 5). Where a question is objected to and yet allowed by the Court to be put, the question and its answer are taken down verbatim (Order XVIII, R. 10). At the end of the deposition, it is read out to the witness and signed by the Presiding Officer (Order XVII, R. 5).

The *viva voce* examination consists generally of three stages: first of all, the witness is examined by the party who calls him; this is called examination-in-chief (S. 137). He is next examined by the adverse party; this is called cross-examination (S. 137). Finally he is examined again by the party who called him; this is called re-examination (S. 137).

Section 246 of the Criminal Procedure Code, 1973 giving the accused a right in a warrant case to cross-examine the witnesses for the prosecution after a charge has been framed, is an exception to the general rule. In the exercise of the inherent power of the Court, the Magistrate in an inquiry under Chapter XIX of the Code of Criminal Procedure may allow the accused to reserve cross-examination for a future occasion in the special circumstances of a case.[41]

Section 138 states that a witness must first be examined in-chief; then the opposite party cross-examines him and, if the party calling him so desires, may re-examine him. It also states that the examination and cross-examination must relate to relevant facts only. But, in the cross-examination, the opposite party has a right to put other questions and need not be confined to the facts stated by the witness in the examination-in-chief. The third paragraph in Section 138 states that re-examination should be confined only to explain matters referred to in the cross-examination. If any new matter is brought out during the re-examination then, with the permission of the court, the opposite party may further cross-examine the witness.

Section 138 deals only with the order in which the proceedings of the court are to be conducted.[42]

Dealing with Section 137 and 154 of the Evidence Act, the Supreme Court, in *Dahyabhai* v. *State of Gujarat*[43], observed: "Section 137 gives only the three stages in the examination of a witness, namely, examination-in-chief, cross-examination and re-examination. This is a routine sequence in the examination of a witness. This has no relevance to the question when a party calling a witness can be permitted to put to him questions under Section 154 of the Evidence Act which confers a discretionary power on the court to permit a person who calls a witness to put any question to him which might be put in cross-examination by the adverse party.

The examination of a witness means, as laid down in Section 137, his examination-in-chief and his cross-examination. No examination of a witness is complete if the adverse party is illegally refused permission to cross-examine him, or the party calling him is refused permission to re-examine him. Section 138 also regulates the order in which a witness can be examined in-chief, cross-examined and re-examined. This is because the rights of the parties to examine in-chief, cross-examine, and re-examine a witness accrue in a certain order and a provision conferring the rights must, at the same time, regulate the order in which they are to be exercised.[44]

The examination of the witness has to be done in accordance with Section 137, unless the statute otherwise provides. Placing carbon copies of testimony of a witness recorded in another case is no examination of the witness.[45]

The provisions of Section 137 and 138 are applicable to proceedings under Section 145, Cr. P.C. in the absence of any provision to the contrary.[46]

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41. *G.V. Raman* v. *Emperor*, (1929) 57 Cal 44.
42. *R.* v. *Mathews*, AIR 1929 Cal 822.
43. AIR 1964 SC 1563.
44. *Banwarilal* v. *State*, AIR 1956 All 385; *Sawatan Daw* v. *Dasarathi Tah*, AIR 1959 Cal 677.
45. *Mohinder Singh* v. *Judicial Magistrate1st Class Ludhiana*, (1976) 78 Punj LR 904.
46. *Dwarka Dass* v. *State of J&K*, 1979 Cr LJ 550 (J&K).

2. EXAMINATION-IN-CHIEF

This will ordinarily be in the form of a connected narrative, brought out by questions put to the witness by the party calling him. It must relate to relevant facts (S. 138). No leading questions can be asked (S. 142).

"Unless evidence of reputation be admissible, witnesses, must, in general merely speak to facts within their own knowledge, and they will not be permitted...to express their own belief or opinion...Though a witness, in general, must depose to such facts only as are within his own knowledge, the law does not require him to speak with such expression of certainty as to exclude all doubt. For, whatever may be the nature of the subject, if the witness has any personal recollection of the fact under investigation, he may state what he remembers concerning it, and leave the jury to judge the weight of his testimony. If the impression on his mind be so slight as to justify the belief that it may have been derived from others, or may be some unwarrantable deduction of his own dull understanding or lively imagination, it will be rejected."[47]

On some particular subjects, positive and direct testimony may often be unattainable, and, in such cases, a witness is allowed to testify to his belief or opinion, or even to draw inferences respecting the fact in question from other facts, provided these last facts be within his personal knowledge.[48] This mode of examination, however, chiefly prevails on questions of science or trade, where, from the difficulty, and occasional impossibility, of obtaining more direct and positive evidence, persons of skill, sometimes called experts, are allowed, not only to testify to facts, but to give their opinions in evidence.[49]

"On the other hand...the opinions of skilled witnesses cannot be received when the inquiry relates to a subject which does not require any peculiar habits or course of study to qualify a man to understand it. Thus, evidence is inadmissible to prove that one name, or one trade mark, so nearly resembles another as to be calculated to deceive, or that the make-up of one tin of coffee is so like another as to be calculated to deceive purchasers. Witnesses are not permitted to state their views on matters of moral or legal obligation, or on the manner in which other persons would probably have been influenced had the parties acted in one way rather than another...To put it briefly, a witness may not, on other than scientific subjects, be asked to state his opinion upon a question of fact which is the very issue for the jury, as, for instance, whether a driver is careful; a road dangerous; or an assault or homicide justifiable. Nor may be asked whether a clause in a contract restricting trade is reasonable or unreasonable, for this is a question for the Judge."[50]

"The opinions of scientific witness are admissible in evidence, not only where they rest on the personal observation of the witness himself, and on facts within his own knowledge, but even where they are merely founded on the case as proved by other witnesses at the trial. But here the witness cannot in strictness be asked his opinion respecting the very point which the jury are to determine."[51]

It is the duty of counsel to bring out clearly and in proper chronological order every relevant fact in support of his client's case to which the witness can depose. This task is more difficult than may at first sight appear. The timid witness must be encouraged; the talkative witness repressed; the witness who is too strong a partisan must be kept in check. And yet counsel must not suggest to the witness what he is to say. An honest witness, however, should be left to tell his tale in his own way with as little interruption from counsel as possible.[52]

However, the statements made in examination-in-chief, lose much of their credibility and weight unless they are put into the crucible of cross-examination and emerge unscathed from the test.

All the witnesses named in the complaint need not be examined. The complainant may examine the witnesses he chooses to examine.[53]

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47. TAYLOR, 12th Edn., Ss. 1414-15, pp. 898-99.
48. *Ibid.*, S. 1416, p. 899.
49. *Ibid.*, S. 1417, p. 900.
50. *Ibid.*, S. 1419, pp. 902, 903.
51. TAYLOR, 12th Edn., S. 1421, p. 904.
52. POWELL, 10th Edn., p. 458.
53. *Sk. Siraj* v. *State of Orissa*, 1994 Cr LJ 2410 (para 3) (Ori).

3. CROSS-EXAMINATION

"The exercise of this right cross-examination is justly regarded as one of the most efficacious tests which the law has devised for the discovery of truth. By means of it, the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his character, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description, are all fully investigated, ascertained, and submitted to the consideration of the jury, who have an opportunity of observing his demeanour, and of determining the just value of his testimony. It is not easy for a witness, subjected to this test, to impose on a Court or jury, for however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which cross-examination may be extended."[54]

The right of cross-examination is a statutory right which vests in a party to the proceedings. There may be circumstances where one of the parties himself is being examined as a witness, as is seen in this case. Then a question will arise as to what are the contentions of the parties to the main dispute involved in the case, in order to find out the interest of the parties as to whether it is adverse to the party who is examined in-chief or not. In such context pleadings of the parties can be made use to find out the adversity between the witness and other parties. But another question also may arise. Apart from the pleadings there may be stages during the trial that a party may become adverse to the interest of the other. Even a witness in his answer may speak adversely to a party who was always sailing with the party, going by the pleadings, is liable to be cross-examined. The scheme of the Evidence Act sufficiently amplifies this principle. A right to cross-examine a witness even can arise when a witness speaks against one's interest who calls him. The provisions of the Evidence Act to declare a witness hostile *i.e.* Section 154 will clearly signify the intention of the Legislature that whenever a party pleads or whenever a party speaks against the interest of another party, the party against whom he speaks will get an opportunity to cross-examine him. Even the tone and tenor of the deposition of the witness sometimes may decide the right of the party to cross-examine a witness. It is a right given to a party to a legal proceedings in consonance with the principles of natural justice and cannot be decided merely on pleadings.[55]

The objects of cross-examination are to impeach the accuracy, credibility, and general value of the evidence given in-chief; to shift the facts already stated by the witness, to detect and expose discrepancies, or to elicit suppressed facts which will support the case of the cross-examining party.[56]

PHIPSON ON EVIDENCE (15th Ed. (2000), para 11-17, page 249) its states: "The object of cross-examination is two fold—to weaken, qualify, or destroy the case of the opponent; and to establish the party's own case by means of his opponent's witnesses."

In HALSBURY (4th Ed., Vol. 17, para 278, page: 194) it is stated: "Cross-examination is directed to:— (1) The credibility of the witness: (2) The facts to which he had deposed in-chief, including the cross-examiner's version thereof; and (3) The facts which the witness had not deposed but to which the cross-examiner thinks he is able to depose."

The right of cross-examination not only is referable to Section 138 but is one of the principles of natural justice that evidence may not be read against a party until the same has not been subjected to cross-examination, or at least an opportunity has not been given for cross-examination. Section 138 impliedly lays down that the statement of a witness would be read as evidence against a party only if it had been tested on the anvil of cross-examination or opportunity was afforded for the purpose.[57] The Privy Council, observed: "Cross-examination is one of the most important processes for the elucidation of the facts of a case."[58] The provision for cross-examination is not merely a technical rule of evidence; it is a rule of essential justice. It serves to prevent surprise at the trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party, on

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54. TAYLOR, 12th Edn., S. 1428, p. 910.

55. *Shrikant R. Shirdokar* v. *Xabirabi Shaik Kadar*, 1997 AIHC 1363 (para 3) (Bom), **relying on** *Des Raj Chopra* v. *Puran Maol*, AIR 1975 Del 109.

56. POWELL, 10th Edn., p. 463.

57. *Dwaraka Dass* v. *State of J&K*, 1979 Cr LJ 550 (j&K).

58. *Vassiliades* v. *Vassiliades*, AIR 1945 PC 38.

whose behalf the cross-examination is being made, comes to give and lead evidence by producing witnesses.[59] The party must be given a fair chance to cross-examine the witness. Here the tenant was allowed to cross-examine the original landlady, who was very old, provided he made suitable arrangement for conveyance.[60] Failure to give an opportunity to cross-examine a witness would amount to an illegal assumption of jurisdiction not vested in the court, besides being an error of procedure in the course of the trial. Such evidence must be excluded from consideration.[61] No evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination.[62] The testimony of a witness is not legal evidence unless it is subject to cross-examination; and where no opportunity has been given to the appellant's counsel to test the veracity of the principal prosecution witness or where owing to the refractory attitude of the witness, the Court is constrained to terminate all of a sudden and prematurely the cross-examination of the witness, the evidence of such a witness is not legal testimony and cannot be the basis of a judicial pronouncement.[63] If a witness has been interrogated during the course of investigation and if his evidence is material in judging the innocence or guilt of the accused, the accused is entitled to examine him as a defence witness, even though the prosecution decides to drop him or not to examine him as a prosecution witness. Such an opportunity cannot be denied by giving a lame excuse of inability to summon the said witness.[64]

Where the cross-examination of a witness before a committing Magistrate was deferred to the next date as the Court's time was over at the conclusion of the examination-in-chief of the witness but the witness breathed his last before the date fixed in the case and could not be cross-examined, it was held that it could not be said that the accused was given the opportunity to cross-examine the witness and had failed to avail of the opportunity, therefore the statement of such a witness could not be received in evidence at the trial.[65] It is the duty of the court to frame issues in a suit. Where the defendant's counsel fails to take part while framing the issues, the right to cross-examine cannot be denied on the ground of his failure to take part in framing the issues.[66] Under Section 540, (old) Cr. P.C. (now Section 313), the court has discretion to call any witness. When the court calls a witness, both parties will have the right to cross-examine the witness.[67] In the proceedings under Section 145, Cr. P.C., when the witness was allowed to prove documents, the opposite party is entitled to cross-examine the witness, as to relevant matters, even if they were not covered in the examination-in-chief.[68]

Accused has a right to cross-examine prosecution witnesses before any charge is framed in warrant cases not instituted on police report.[69]

4. WHO CAN CROSS-EXAMINE ?

The party who has a right to take part in any enquiry or trial, can cross-examine the witness or witnesses.[70] Where one of the Managing Directors of a firm had borrowed money on behalf of the firm in that capacity without the consent of the other Managing Director, the later, being an adverse party, had the right to cross-examine the former.[71]

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59. *A.E.G. Carapiet* v. *Derderian*, AIR 1961 Cal 359; **following** the observations of LORD HERSCHELL in *Browne* v. *Dunn*, (1894) 6 R 67, and also the observations of LORD HALSBURY in the same case, at P. 76.
60. *Pyarelal Sakseria* v. *Devishankar Parashar*, AIR 1994 MP 115 (paras 9 and 11).
61. *Neminath Appayya* v. *Jamboorao*, AIR 1966 Mys 154; *Onkar Bhikaram* v. *Balmukund Javerchand*, AIR 1957 MB 135; *Chandra Mani Naik* v. *Binapani Dei*, AIR 1968 Ori 17.
62. *Manganlal* v. *King-Emperor*, ILR (1946) Nag 126 : AIR 1946 Nag 173.
63. *Ram Kumar* v. *King-Emperor*, ILR (1936) 12 Luck 553.
64. *Ikrar Ahmad* v. *State of Madhya Pradesh*, 1999 Cr LJ 429, at p. 430 (MP).
65. *State* v. *Huzura Singh*, ILR (1952) Patiala 48. **Contra :** *Nandram Khemraj* v. *State of M.P.*, 1995 Cr LJ 1270 (paras 16 and 17) (MP).
66. *Haridas Mundhra* v. *Indian Cable Co., Ltd.*, AIR 1965 Cal 369.
67. *Mohammad Shafi* v. *State*, AIR 1953 All 667.
68. *Chandra Mani Naik* v. *Binapani Dei*, AIR 1968 Ori 17.
69. *State of Sikkim* v. *Pemba Sherpa*, 1981 Cr LJ 856 (SK)(DB).
70. *Kishori Lal* v. *State of Rajasthan*, 1999 Cr LJ 840 (para 9) (Raj).
71. *B.S. Balaji* v. *T. Govindaraju*, 1996 AIHC 2484 (para 8) (Kant).

5. NO OPPORTUNITY TO CROSS-EXAMINE—EFFECT

From the fact that it was not recorded in the depositions of the witnesses that there was no cross-examination, it can be said that, in fact, there was no cross-examination, or that the request of the party to cross-examin was disallowed.[72]

If the pleaders do not turn up in court at the right moment to cross-examine the opposite party's witnesses, it cannot be made a ground of attack against the orders passed as the court is not bound to wait for any length of time and waste public time waiting for the pleader's arrival.[73]

When the accused was denied the opportunity to cross-examine the witness; the conviction based on the statement of the witness cannot be upheld; and such evidence must be excluded from consideration.[74] Refusal of permission to cross-examine the prosecution witness is not proper and against all principles of justice.[75]

Summary procedure cannot take away the right to cross-examine.[76] The direction by the Land Tribunal to the petitioner-tenants to cross-examine the respondent-owners on their written statement and that too without administering them oath, was a procedure *prima facie* illegal.[77]

6. RANGE OF CROSS-EXAMINATION

The range of cross-examination is unlimited, the only circumscribing limits being that it must 'relate to relevant facts' (S. 138).

By Ss. 146 to 150 the Legislature has tried to give very wide powers to the cross-examiner to help him in finding out the truth in oral depositions laid out before the Court. But the Legislature protects the witness (i) from consequences which he might incur from speaking the truth; and (ii) from needless questions, for the cross-examiner has to see that the imputations he makes against the witness are well-founded.

In the course of cross-examination, a witness may be asked questions:

(1) to test his veracity;

(2) to discover who he is and what his position in life is;

(3) to shake his credit by injuring his character, although his answer might criminate him or expose him to penalty or forfeiture (S. 146).

The cross-examiner is treading on safe ground so far as (1) and (2) are concerned. As regards (3), complex set of considerations present themselves.

If the questions refer to a relevant matter the provisions of S. 132 are applicable (S. 147). If, however, the questions refer to an irrelevant matter, they are proper—

> if the truth or imputation coveyed by them would seriously affect the opinion of the Court as to the credibility of the witness.

They are improper—

(1) if the imputatiuon conveyed by them relates to matters so remote in time or of such a character that they would not affect the credibility of the witness;

(2) if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence (S. 148).

Before such questions are asked, the person putting them must have reasonable grounds for thinking that the imputation was well-founded (S. 149). If any lawyer asks such questions without reasonable

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72. *Union of India* v. *T.R. Verma*, AIR 1957 SC 882.
73. *Dwarkabai* v. *Ukharda Ganpat*, AIR 1954 Nag 252.
74. *Nami Nath Appayya* v. *Jamboorao*, AIR 1966 Mys 154.
75. *Janakdhari Sharma* v. *Jhapsi Singh*, ILR (1958) 37 Pat 1006.
76. *Kalpanaben M. Shah* v. *Navinchandra Jeevanlal Acharya*, AIR 1995 Guj 176 (para 2).
77. *Yallappa* v. *Murahari*, 1998 AIHC 1652 (paras 7 and 8) (Kant).

grounds, the Court may report the case to the High Court or other authority to which he is subject (S. 150).

All questions or inquiries which are indecent or scandalous, unless they relate to facts in issue, are to be avoided (S. 151); so also all questions which are calculated to insult or annoy or couched in a needlessly offensive form (S. 152).

Cross-examination is in almost all cases undertaken by the adverse party; but the Court may permit a party to cross-examine his own witness if he proves to be a hostile witness (S. 154).

In criminal cases (warrant cases) tried by Magistrates, the accused person can, after the charge has been framed and he has given his plea, re-call and cross-examine any witness for the prosecution [Criminal Procedure Code, S. 246(5)].

In cross-examination, a party can ask questions on every issue to establish his case. There is no rule of procedure which deproves a party of his right to cross-examine a witness in respect of the whole case, on the ground that evidence with regard to some issues has already been tendered. The questions, however, must relate to relevant facts.[78] General and vague questions shall not be put in the cross-examination as they would serve no purpose.[79] Suggestions in the cross-examination can be put to indicate the case put forward by the party on whose behalf the cross-examination is being conducted. But suggestions cannot be a substitute for evidence, if it is repudiated by the witness to whom it is made.[80] It is open to any cross-examiner to put questions with a view to extract the real truth in regard to the accusation levelled against the accused person. While putting questions, the cross-examiner should keep certain standard of decency and decorum. Without any proof or cogent reason the cross-examiner would not be justified in putting a suggestion which is not relevant, like a question to the daughter of the deceased that the deceased was having illicit intimacy with one person.[81]

Irrelevant topics sometimes pursued at great length, and persistence shown in going over the same ground again and again in the hope of making the witnesses give discrepant statements must not be endured or permitted. Exercise of great vigilance and control over the court proceedings by judges and magistrates will save waste of public time and money.[82]

Once a party, even by mistake comes to the witness box and takes the oath and is examined about a document, he would become a witness and would be liable to be cross-examined by his opponent. Under Section 138 cross-examination need not be confined to the facts to which the witness testifies in his examination-in-chief; he can be cross-examined as to the whole of the case.[83] Hearsay evidence is not admissible in cross-examination, unless it be admissible under the provisions of Section 146.[84] Mere suggestions during cross-examination, not supported by specific statements by the accused and defence evidence, have no evidentiary value in a criminal trial.[85] A defendant admitting the plaintiff's claim cannot be permitted to cross-examine the plaintiff.[86]

Opportunity of cross-examination involves two elements:—(1) Notice to the opponent that the deposition is to be taken at the time and place specified; and (2) A sufficient interval of time to reach the place.[87]

7. CROSS-EXAMINATION—GENERAL

When the examination-in-chief has resulted in clear, conclusive or unimpeachable evidence, it may be prudent for the adverse party not to cross-examine; for, in such a case, he may be so doing, instead of weakening the evidence, merely strengthen and confirm it. So, too, he will generally not cross-examine a

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78. *Cambier* v. *Fr. E. Vanni Archbishop*, AIR 1951 MB 86.
79. *Baga Bharti* v. *Sarkar*, AIR 1950 Raj 10.
80. 1969 All WR (HC) 369.
81. *Patel Jasmat Virji* v. *State of Gujarat*, (1980) 21 Guj LR 684.
82. *Public Prosecutor* v. *R. Ramadoss*, (1977) 2 An WR 195.
83. *Onkar Bhikaram* v. *Balmukund Javerchand*, AIR 1957 MB 135.
84. *Ganauri Laldas* v. *Queen Empress*, ILR 16 Cal 211.
85. *State* v. *Md. Misir Ali*, AIR 1963 Assam 151.
86. *K. Subba Rao* v. *Y. Venkatappayya*, AIR 1978 AP 193.
87. 1985 Mad LW (Cri) 186.

witness, whose evidence he admits or which cannot possibly injure his case. Reckless cross-examination, moreover, often lets in evidence which before was not admissible.[88]

Cross-examination, though a very powerful, is also a very dangerous engine. It is a double edged weapon and as often wounds him who wields it, as him at whom it is aimed. To wield it to advantage requires great practice and natural tact. In the hands of the raw and inexperienced advocate, we frequently see it do more injury than good to his cause. Yet it is in this branch of forensic practice that the youthful advocate is most eager for display. The old and wary pleader remembers that the witness is hostile to him, and is perhaps on the watch to inflict damage on his cause. Every question is likely to give such a witness an opportunity of clinching the nail he has driven before, if not of starting new matter, which the examination-in-chief may not have elicited, but which may be further pursued on re-examination. Therefore unless there is some very good ground for believing that the witness can be broken down, or convicted of falsehood, it is rarely good policy to submit him to a severe cross-examination. Sometimes a cross-examination is little more than affectation, in order that the pleader may not seem to let the witness go without question, as if he were totally impregnable; and a few questions are asked to shake his credit, or show the weakness of his memory. Sometimes too, a cross-examination may have the fishing object of eliciting some haphazard reply, which will open up matter favourable to the examiner on further pursuit. But generally speaking, cross-examination is to be warily approached, and the way carefully felt. Its use should be sparing; yet in mofussil practice the cross-examinations are scarcely less remarkable for their length than the utter irrelevancy and futility of their character.[89]

The trend of the cross-examination is in most cases determined by the line of narrative unfolded in the examination-in-chief. It is usual to take each important item so deposed to and to cross-examine the witness upon it. Its purpose is two-fold. First of all, the cross-examiner tries to discover if the story told by the witness in examination-in-chief is tainted by exaggerations or falsehoods. Secondly, the adverse party can in some cases construct his line of defence from out of the mouth of the witness.

The essence of cross-examination is, that it is the interrogation by the advocate of one party of a witness called by his adversary with the object either to obtain from such witness admissions favourable to his cause, or to discredit him. Cross-examina-tion is the most effective of all means for extracting truth and exposing falsehood.[90]

A skilful cross-examination is the highest attainment of an advocate's art. It is, difficult to frame any rules governing it; its technique can be acquired only by natural instinct or by long practice. The Act has, however, laid down some rules of guidance.

8. CROSS-EXAMINATION WHERE THERE ARE SEVERAL ACCUSED-DEFENDANTS

The accused is entitled in law to put further questions to a prosecution witness by way of cross-examination in respect of what he had stated in reply to questions put to him in cross-examination by the other accused. Each accused is entitled in law to test the evidence given against him by a prosecution witness, by cross-examination. And such cross-examination need not be limited only to what has been stated by him in examination in chief. Though Section 137 and Section 138 do not in words speak of a further round of cross-examination, there is neither in theses sections nor any where else in the Evidence Act anything to bar the accused from exercising his right of cross-examination afresh if and when the prosecution witness makes a further statement of facts prejudicial to him.[91]

An accused person may cross-examine a witness called by a co-accused for his defence when the case of the second accused is adverse to that of the first.[92]

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88. POWELL, 10th Edn., p. 463.
89. NORTON ON EVIDENCE, 3rd Edn., S. 418, p. 222.
90. *Sajad Ali* v. *Kashenath Doss*, (1866) 6 WR (Civil) 181, 182. See *P* v. *P*., AIR 1982 Bom 498 which explains the range of cross-examination. The Court permitted questions as to the social conditions of family life and the degree to which mixing with other people would give rise to inference of adultery.
91. *Muniappan* v. *State of Madras*, AIR 1961 SC 175.
92. *Ram Chand Chatterjee* v. *Hanif Sheikh*, ILR (1893) 21 Cal 401.

9. CROSS-EXAMINATION OF WITNESSES OF CO-ACCUSED OR CO-DEFENDANTS

Where two prisoners are tried together and one gives evidence affecting the other, the other prisoner has a right to cross-examine.[1] Evidence of witnesses examined in defence on behalf of one accused and cross-examined on behalf of another accused is admissible as against the latter. It may be otherwise where that other accused had no opportunity of cross-examining them or where he has not been given an opportunity by the Magistrate or the Judge to explain the circumstances appearing in such evidence.[2] Where the parties arrayed as defendants in a suit have taken contradictory stands on a relevant and material issue, they shall be adversary to each other and are entitled to exercise their right of cross-examination against each other.[3] Where evidence produced by a partner defendant was found admissible against other co-defendant partners, it was held that the co-defendants have a right of cross-examination of such defendant partner.[4] A defendant who is not interested in an issue between the plaintiff and his co-defendant, is not entitled to cross-examine such co-defendants.[5] But if the co-defendant gave evidence against him then he may cross-examine the co-defendant though there is no issue connecting both of them[6] and also if the conflict of interest between the two is apparent.[7] Where the defences of a co-respondent or a co-defendant and the respondnet or the defendant are identical, neither is entitled to cross-examine the other. It is only where the evidence of a co-defendant or a co-respondent is adverse to the defendant or the respondent that the defendant or respondent has the right to cross-examine.[8]

It was held that when the evidence of a witness produced by an alleged sub-tenant would be inadmissible in evidence, the other alleged sub-tenant could be refused permission to cross-examine such a witness. But, when such evidence is admissible, the other alleged sub-tenant cannot be refused permission to cross-examine such witness solely on the ground that both the sub-tenants had a common defence.[9]

10. CROSS-EXAMINATION OF WITNESS CALLED BY COURT

If the witness called by the Court gives evidence against the complainant, he would have right to cross-examine such a witness.[10]

11. OMISSION TO CROSS-EXAMINE

In HALSBURY 4th Ed., Vol. 17, Para 278, Page 194 it is observed: "Failure to cross-examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence."[11]

It is a well-established rule of evidence that a party should put to each of his opponents' witnesses so much of his case as concerns that particular witness; if no such questions are put, the courts presume that the witnesses' account has been accepted. If it is intended to suggest that a witness was not speaking the truth upon a particular point, his attention must first be directed to the fact by cross-examination so that the witness may have an opportunity of giving an explanation.[12]

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1. *R.* v. *Hawden*, (1902) 1 K.B. 882.
2. *Nandgopal* v. *State*, ILR (1951) Nag 172.
3. *Sadhu Singh* v. *Sant Narain Singh*, AIR 1978 Punj 319.
4. *Sohanlal* v. *Gulabchand*, AIR 1966 Raj 229.
5. *Re, Wagstaff*, 96 LT 605 : (1907) 2 Ch 35.
6. *Dryden* v. *Surrey C.C.*, (1936) 2 All ER 535.
7. *Mohamed Ziaulla* v. *Sorgra Begum*, 1997 AIHC 2628 (paras 8-10) (Kant).
8. *Ghadiali* v. *Ghadiali*, (1946) 48 Bom LR 36.
9. *Des Raj Chopra (Mrs.)* v. *Puran Mal*, AIR 1975 Del 109.
10. *Pradeep Kumar Agarwal* v. *State*, 1995 Cr LJ 76 (para 4) (Ori).
11. *Browne* v. *Dunn*, (1894) 6 R 67 (HL); *R.* v. *Hart*, (1932) 23 Cr App Rep 202 (CCA).
12. *Chunilal* v. *Hartford Fire Insurance Co., Ltd.*, AIR 1958 Punj 440; *Chithalan* v. *C. Ammo Amma*, 1968 Ker LJ 123; *Ibadat Ali* v. *Baldia Co-op. Bank*, (1968) 2 An LT 124; *Commissioner of I.T. and C.T.* v. *M. Avvavaravva*, (1966) 2 An LT 280; *Babulall* v. *Caltex India Ltd.*, AIR 1967 Cal 205; *Bansilal Madanlal* v. *East Bengal River Steam Service*, ILR (1972) 2 Cal 380; *Carapiet* v. *Derderian*, AIR 1961 Cal 359; *Atul Chandra* v. *Sonatan Daw*, AIR 1962 Cal 78; *Balkishan* v. *State*, 1977 Cr LJ 410 (Del); *Jayalakshmi Devamma* v. *Janardhan Reddy*, AIR 1959 AP 272; *Karmdan*

When a party has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed. This is not merely a technical rule of evidence. It is a rule of essential justice.[13] Where the first informant was not cross-examined on his explanation about delay in lodging the F.I.R., his evidence remained unchallenged and must be believed.[14] Where witnesses are not tested by cross-examination, their evidence may be accepted unless there are any inherent improbabilities, affecting the credibility.[15] It was however held by the Supreme Court that the failure to cross-examine a witness would not mean that the testimony of the witness is true and acceptable, and it may be discarded if his testimony is on the fall of it unacceptable.[16] When the accused did not suggest to prosecution witnesses in cross-examination indicating his defence, it was held that the defence version may be rejected as an after thought.[17] When an accused declined to cross-examine the witness it was held that he having foregone his right to cross-examine the witnesses, cannot subsequently make a grivance about it.[18] When the doctor gave evidence that death was due to poisoning and the accused did not cross-examine him or the investigating officer, as to the safe and proper custody of the poison which was said to have been administered to the deceased, it was held that the evidence of the doctor must be accepted.[19]

12. TENDERING WITNESS FOR CROSS-EXAMINATION

The practice of tendering witnesses for cross-examination is inconsistent with this section. It ought never to be employed in the case of a witness whose evidence is not merely formal. The practice leads only to confusion and does not induce to the discovery of the truth.[20] The Punjab High Court held that, when a witness has not given statement in examination-in-chief, there is nothing in relation to which he is to be cross-examined. Tendering a witness for the cross-examination only is tantamount to giving up a witness. There is nothing in law that justifies such a course.[21]

The practice of tendering a witness for cross-examination at the Sessions Trial, without examination-in-chief, on the ground that he was declared hostile by the prosecution in the commital court, is inconsistent with the provisions of Section 138. Inference of hostility is a matter for the court to decide, and can only be drawn from the answers given by the witness. Where neither the answers of the witness given before the commital court have been transferred under Section 288, (old) Cr PC (now omitted), nor does the prosecution examine him with the permission of the court under Section 154 of the Evidence Act, there would be nothing before the Sessions Court from which it could draw an inference as to the hostility of the witness. The hostility of a witness can not be presumed merely on the word of the prosecution.[22]

Sarda v. *Sailaja Kanta*, AIR 1940 Pat 683; *State of Rajasthan* v. *Bhola Singh*, AIR 1969 Raj 219; *Shyamsingh* v. *Deputy Inspector General of Police*, AIR 1965 Raj 140.

13. *Carapiet* v. *Derderian*, AIR 1961 Cal 359; *State of Rajasthan* v. *Bhola Singh*, AIR 1969 Raj 219; *Ramanand* v. *State*, ILR 1974 HP 509; *State of H.P.* v. *Thakurdas*, 1983 Cr LJ 1694.
14. *State of U.P.* v. *Nahar Singh*, AIR 1998 SC 1328 : 1998 Cr LJ 2006, **approving** *Browne* v. *Dunn*, (1893) 6 R 67.
15. *Kanst Ram* v. *Jai Ram*, AIR 1956 HP 4; *Bijai Ram* v. *Jai Ram Ganga Ram*, AIR 1955 HP 57; *Ganpat Ram Khosla* v. *Kishenlal*, (1958) 60 Punj LR 349; *Karnidan Sarda* v. *Sailaja Kanta*, AIR 1940 Pat 683; *Vellupillai* v. *Paramanandam*, AIR 1954 Tra. Co. 152; *Ramanand* v. *State*, ILR 1974 HP 509; *Sachindranath* v. *Nilima Chetterji*, AIR 1970 Cal 38; *Rani Bala* v. *Ram Krishna*, (1969) 73 Cal WN 751; *Sukharji Bhuj* v. *Calcutta State Road Transport Corpn.*, AIR 1966 Cal 620; *Kanika Bewa* v. *State*, (1975) 41 Cut LT 798; *Kanika Bewa* v. *State of Orissa*, 1976 Cr LJ 418 (Ori); *Dulari Kuer* v. *Shivanandan Prasad Singh*, 1977 BLJR 280; *Mahant Mela Ram Chela* v. *SGP Committee*, AIR 1992 P&H 252 (Amritsar).
16. ***Juwar Singh* v. *State of M.P.***, AIR 1981 SC 373.
17. *Mehra* v. *State of Rajasthan*, AIR 1957 SC 369; *Yusuff Ali* v. *State of Maharashtra*, AIR 1968 SC 147.
18. ***Shyam Singh* v. *Dy. Inspector General of Police***, AIR 1965 Raj 140.
19. ***State of Orissa* v. *Kaushalya Dei***, AIR 1965 Ori 38.
20. *Emperor* v. *Kasamalli Murzalli*, (1941) 44 Bom LR 27 : ILR (1942) Bom 384 (FB) : AIR 1942 Bom 71; *Emperor* v. *Sadeppa Gireppa Mutgi*, (1941) 43 Bom LR 946 : ILR (1942) Bom 115; *Veera Koravan, In re*, (1929) 53 Mad 69; ***Jogindra Singh* v. *State of Haryana***, 194 Cr LJ 117
21. *Kesar Singh* v. *State of Punjab*, AIR 1952 Punj 286; *Chhota Singh* v. *State of Punjab*, AIR 1964 Punj 120; *Sukhwant Singh* v. *State of Punjab*, AIR 1995 SC 1601 : 1995 AIR SCW 2521 : 1995 (2) Scale 482 (paras 9, 17 and 19 of AIR), **distinguishing** *State of U.P.* v. *Jaggo alias Jagdish*, AIR 1971 SC 1586; *Tej Prakash* v. *State of Haryana*, 1996 Cr LJ 394 (para 18) (SC).
22. ***Shailendra Kumar* v. *Territory of Tripura***, AIR 1959 Tri 11.

13. TENDERING A WITNESS WHO WAS DECLARED HOSTILE IN THE COMMITAL COURT FOR CROSS-EXAMINATION

A witness declared hostile in the commital court, must be examined in the Sessions Court. The practice of tendering such witness only for purpose of cross-examination was deprecated.[23]

When a witness has been tendered by the prosecution, and oath has been administered to him, it is the prosecution which should technically be deemed to have called him, although it did not put a single question to him; therefore it would not be improper for the court to allow the opposite party to cross-examine him under Section 154 of the Act. It would be more proper for the prosecution, while tendering the witness, to ask atleast whether his evidence in the lower court was true and, if the witness gave a general answer as to the truth of his evidence in the lower court, he could then be cross-examined by the opposite party.[24]

Where the prosecution declines to call in the Court of Session a witness for the Crown who has been examined in the Magistrate's Court, and such witness is thereupon placed in the witness-box by counsel for the defence, the counsel for the defence is not entitled to commence his examination of the witness by questioning him as to what he had deposed in the Magistrate's Court. Questions as to his previous deposition are, under the circumstances, only admissible by way of cross-examination, with the permission of the Court, if the witness proves himself a hostile witness.[25]

14. NO RIGHT TO CROSS-EXAMINATION

In a case instituted on a private complaint, the accused have no right to cross-examine the witnesses before the framing of the charge.[26]

15. RE-EXAMINATION

The third para of Section 337 means, "where a witness has been cross-examined, and is then examined by the party who called him, such subsequent examination shall be called his re-examination."[27]

The object of re-examination is to afford the party calling a witness an opportunity of filling in the lacuna or explaining the inconsistencies which the cross-examination has discovered in the examination-in-chief of the witness. It is accordingly limited to the explanation of matters referred to in cross-examination (S. 138). It partakes of the nature of examination-in-chief inasmuch as no leading questions can be asked (S. 142).

The party who calls a witness has the right to re-examine him on all matters arising out of the cross-examination for the purpose of reconciling any discrepancies that may exist between the evidence in examination-in-chief and that which has been given in cross-examination; or for the purpose of removing or diminishing any suspicion that the cross-examination may have cast on the evidence-in-chief; or to enable the witness to state the whole truth as to matters which have only been partially dealt with in cross-examination.[28]

In re-examination the party has a right to ask all questions which may be proper to draw forth an explanation of the meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive, or provocation, which induced the witness to those expressions, but he has not right to go further, and to introduce matter new in itself and not suited to explain either the expressions or the motives of the witness. If the counsel chooses to cross-examine the witness as to facts which were not admissible in evidence, the other party has a right to re-examine him as to the evidence so given. If a question has been omitted in the examination-in-chief, and cannot, in

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23. 1956 M.B.L.J. (Bhopal) 159; *Thazhathethil Hamsa* v. *State of Kerala*, AIR 1967 Ker 16; *Velayudhan* v. *State*, ILR (1966) 2 Ker 361; *Veera Koravan* v. *Emperor*, AIR 1929 Mad 906; *Queen Empress* v. *Ram Sahai Lall*, ILR (1885) 10 Cal 1070.
24. *Manzurul Haque* v. *State of Bihar*, AIR 1958 Pat 422.
25. *Queen-Empress* v. *Zawar Husen*, ILR (1897) 20 All 155.
26. *Nandram Khemraj* v. *State of M.P.*, 1995 Cr LJ 1270 (para 15) (MP).
27. STOKES, Vol. II p. 925 f.n. 1.
28. POWELL, 10 Edn., p. 469.

strictness, be asked on re-examination as not arising out of the cross-examination. it is usual for counsel to request the Judge to make inquiry and such a request is generally granted.[29]

The purpose of re-examination is to give an opportunity to the party who called the witness, to explain any part of the cross-examination which is capable of being construed unfavourably to the party who called him. However, new matters cannot be allowed to be introduced in evidence, in re-examination, without taking the court's permission.[30] Where applicant sought re-examination of a witness, rejection of the application merely on the ground that the question that would be put to the witness during such re-examination was not precisely specified, was held to be improper.[31]

16. SCOPE OF RE-EXAMINATION

SUBBARAO J., observed: "A clever witness in his examination-in-chief faithfully conforms to what he stated earlier to the police or in the committing court; but, in the cross-examination, introduces statements in a subtle way contradicting in effect what he stated in the examination-in-chief. If his design is obvious, the court can, during the course of his re-examination, permit the person calling him as a witness to put questions to him which might be put in cross-examination by the adverse party. It cannot be said that, if a party calling a witness is permitted to put such questions to the witness after he has been cross-examined by the adverse party, the adverse party will not have any opportunity to further cross-examine the witness on the answers elicited by putting such questions. In such an event the court certainly, in exercise of its discretion, will permit the adverse party to cross-examine the witness on the answers elicited by such questions."[32]

The questions cannot be confined to ambiguities alone which arose in cross-examination. Questions can be put to obtain explanation required for any matter referred in the cross-examination.[33]

17. RECALLING A WITNESS

Re-calling of a witness already cross-examined by defence counsel, can be done for the purpose of a just decision, but the prosecution cannot have such a witness recalled for the purpose of examining him in-chief.[34]

Where the cross-examination of the prosecution witnesses was adjourned and the counsel for the accused failed to appear on the adjourned date, the accused was entitled to recall of the witnesses.[35] In a case of murder the accused engaged no private counsel and *Amicus Curiae* was provided to him at a later stage. Thereafter, he engaged a private counsel and wanted to recall the already cross-examined witnesses for further cross-examination. It was held that in a case like this where it was a question of life and death for the accused, he should be given abundant opportunity to cross-examine the witnesses and recall should have been allowed in the interest of justice.[36] Right of the Court to recall the plaintiff for re-cross-examination can be exercised by it on the application of the defendant and is not restricted to action of its own motion.[37] However, this section does not restrict the powers of the Court to recall the witness for further examination for non-fulfilment of the condition of re-examination as mentioned in it.[38]

18. EXAMINATION BY COURT

It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the

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29. TAYLOR, 12th Edn., Ss. 1474, 1475, 1477, pp. 939, 940, 942.
30. *Charan Singh* v. *State*, AIR 1971 SC (Cr) 714.
31. *State of W.B.* v. *Arunesh Pathak*, 2000 Cr LJ 1039 (para 7) (Cal).
32. *Dahya Bhai* v. *State of Gujarat*, AIR 1964 SC 1563. **See also** *Daulat Ram* v. *Bharat Insurance Co.*, AIR 1973 Del 180.
33. *Rammi* v. *State of M.P.*, 1999 Cr LJ 4561 (paras 16-19) (SC) : AIR 1999 SC 3544.
34. (1985) 3 A.P.L.J. 72.
35. *Hazari Ram* v. *State of Rajasthan*, 1994 Cr LJ 3758 (para 5) (Raj).
36. *Ramshanker* v. *State of U.P.*, 1997 Cr LJ 1102 (All).
37. *S.S.S. Durai Pandian* v. *S.A. Samuthira Pandian*, AIR 1998 Mad 323 (para 24).
38. *Laxmi Kant Upadhyaya* v. *Deo Narain Misra*, 2001 AIHC 3059 (para 3) (All).

witnesses to the pleaders to be dealt with as laid down in this section.[39] The Court can put questions to a witness to elicit truth during cross-examination even if he is a bit confused.[40]

19. POWER OF THE COURT TO PUT QUESTIONS

The court has however power to put questions at any stage during the trial. When the court finds that the witnesses were not sticking to the statement made by them under Section 161 or 164, Cr. P.C., and were probably giving false evidence, they should not be rebuked and threatened that they would be prosecuted for perjury; the Judges should always adopt the principle of fair trial.[41] Where a witness is asked certain questions about a matter, and he is not a person who could say anything about it, such questions should be disallowed by the Court.[42] The judge's right to question is circumscribed by the adversary system. Where the judge rebuked a witness and threatened him with prosecution for perjury, the whole trial was held to be vitiated.[43]

The practice of Judges and Magistrates questioning the witnesses as if they were cross-examining counsel must be deprecated. It is opposed to the provisions of Section 138, and is not fair to the prisoners. It is not the province of the court to examine the witnesses unless the pleaders on either side have omitted to put some material questions. And, as a general rule, the witnesses must be left to the pleaders to be dealt with, as laid down in Section 138. It would be embarrassing to the counsel examining a witness when the judge interferes during the course of either examination-in-chief or of cross-examination and it would take away the trend of the examining counsel.[44] No doubt it is true that the court can put any question to the witness at any stage of the examination, but this power should not be carried to the extent of the court itself examining the witness.[45] Propriety demands that the court should only put questions at the end of the deposition, after the examination-in-chief, cross-examination and re-examination, if any, is over though the questions can be put by the court at any stage of recording evidence of the witness.[46] If any ambiguity has arisen during cross-examination of a witness, a judge cannot sit as a mere spectator of the scene and mechanically record the evidence; he should get the ambiguity clarified by putting necessary questions to a witness.[47]

WIGMORE (3rd Vol. Section 781, P. 137) states: "An intimidating manner in putting questions may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject. So also questions which in form or subject cause embrassment, shame or anger in the witness, may unfairly lead him to such demeanour and utterance that the impression produced by his statements does not do justice to his real testimonial value."

20. TIME FOR EXAMINATION—POWER OF COURT TO LIMIT THE TIME FOR EXAMINATION

The Privy Council held that the Judge has always a discretion as to how far the cross-examination may go and how long it may continue; a fair and reasonable exercise of his discretion will not generally be questioned by an appellate court.[48]

It was held by LORD SANKEY: "A protracted and irrelevant cross-examination not only adds to the cost of litigation but it is a waste of public time. The court has to check irrelevant cross-examination."[49]

In another case, the Privy Council has gone to the extent of stating that the High Courts are to direct an enquiry with a view to disciplinary action against the lawyers indulging flagrant abuse of that court's time. It observed: "Abuse in the matter of cross-examination which enormously increases the costs of litigation, without any corresponding benefits to the parties, should be checked and it would appear to be

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39. Per GARTH, C.J. in *Noor Bux Kazi* v. *Empress*, ILR (1880) 6 Cal 279, 283.
40. *State of Rajasthan* v. *Ani*, AIR 1997 SC 1023 : 1997 Cr LJ 1529, **following** *Chander* v. *State of Haryana*, AIR 1981 SC 1036 : 1981 Cr LJ 609.
41. *Ram Chander* v. *State of Haryana*, AIR 1981 SC 1036.
42. *Tan Bug Taim* v. *Collector of Bombay*, AIR 1946 Bom 216.
43. *Ram Chander* v. *Haryana*, AIR 1981 SC 1036.
44. *Nanjappa* v. *Periakkal*, AIR 1951 Mad 772.
45. *State of Basudeb Senapati*, (1957) 23 Cut LT 449.
46. *Noormohmed* v. *State*, (1970) 11 Guj LR 846.
47. *State* v. *Beda Digal*, ILR (1977) 1 Cut 111, 116.
48. *Vassiliades* v. *Vassiliades*, AIR 1945 PC 38.
49. *Mechanical & G.I. Co. Ltd.* v. *Austin and Austin Motor Co. Ltd.*, (1935) AC 346.

clearly within the powers of the High Courts to direct an enquiry with a view to disciplinary action about the lawyers in flagrant cases."[50]

The court has undoubted control and discretion in the matter of controlling the cross-examination of a party by the counsel of the opposite party. It is true that neither the Evidence Act nor the Code of Criminal Procedure contains anything which would justify a court of law in imposing a particular time limit, but if the court has the discretion and has control over the proceedings, surely the court must be presumed to have such a power apart from the Evidence Act or the Code of Criminal Procedure.[51]

It is no doubt true that cross-examination is one of the most important processes for the elucidation of facts and testing the veracity of a witness and accuracy of the story unfolded by him. So, all reasonable lattitude must be shown. But, the judge has the discretion in regard to how far and how long the cross-examination can go. Prolix examination and cross-examination must be checked. Irrelevant topics sometime pursued at great length, and persistence shown in going over the same ground again and again in the hope of making the witness discrepant, must not be endured or permitted. Exercise of great vigilence and control over the court proceedings by judges and magistrates will not only save waste of public time and money but also help clear the backlog of arrears.[52]

21. DELAYED CROSS-EXAMINATION

Delayed cross-examination does not affect the credibility of the witnesses when earlier version of such witnesses was found to be consistent with other evidence and conviction could be based on such evidence.[53]

22. S. 138 OF EVIDENCE ACT AND S. 311 OF Cr.P.C.

Provisions of Section 138 of the Evidence Act and Section 311 that of the Cr.P.C. are complementary and not conflicting with one another.[54]

Cross-examination of person called to produce a document.

S. 139. A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

COMMENTS

1. PRINCIPLE AND SCOPE

According to this section, a person who has been summoned to produce a document will not become a witness by the mere fact that he produces it, and he cannot be cross-examined unless and until he is called as a witness.

Order XVI, Rules 6 and 15, Civil Procedure Code, and Section 94 (old) Cr. P.C., (corresponding to Section 91(1)(2) New Cr. P.C.) provide for the summoning of a person to produce a document.

Where a lady was summoned to produce a document under Section 94 (old) Cr. P.C., expressed that she was not having the document in question and, as she was a *pardanashin* lady, she need not be summoned to the Court, the Supreme Court held that Section 94(2) states that a person required merely to produce a document shall be deemed to have complied with the order if he causes that such document to be produced, instead of attending personally to produce the same; that there is nothing in the Chapter to provide that the person who appears in the Court, in pursuance of its summons under Section 94(1) of Cr. P.C., thereby becomes a witness and can be examined and cross-examined by the Court, although he has not been cited as a witness in the proceedings; and that even if a person produces a document for which a summons has been issued to him, Section 139 clearly provides that he does not thereby become

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50. *Rajkumar Sen* v. *Ramasunder*, AIR 1932 PC 69. **See also** *Emperor* v. *Rahimatalli*, AIR 1920 Bom 402.
51. *Yeshpal* v. *Rasiklal*, AIR 1955 Bom 318: **referring** to AIR 1945 SC 38; 1935 AC 346; AIR 1932 PC 69; *Supra*.
52. *Public Prosecutor* v. *R. Ramdoss*, (1977) 2 An WR 195.
53. *P. Satyanarayana* v. *State of A.P.*, 1995 Cr LJ 1738 (paras 6 and 7) (AP).
54. *G.H. Iyer* v. *State*, 1998 Cr LJ 1821 (para 4) (Ori).

a witness by the mere fact that he produces it and he cannot therefore be cross-examined unless and until he is called as a witness.[55]

The rule contained in this section is in accordance with the practice under the English Law, namely, that a person who merely produces a document need not be sworn and, unless sworn, he cannot be cross-examined.

The summons to produce a document is in English law called a *subpoena duces tecum*.

This section has to be read along with Section 162 of this Act, which says, that, when a witness is summoned to produce a document, he shall bring it to the Court, if it is in his possession or power, notwithstanding any objection to its production or to its admissibility. If once summons are issued and the person fail to produce the document, it would be an offence under Section 175, I.P.C., or Section 480, Cr. P.C. (old) corresponding to Section 345 (New Cr.P.C. of 1973).

2. WITNESS SWORN BY MISTAKE

The expression "unless and until he is called as a witness" means until he is summoned to depose, and he is sworn. When a witness is sworn, it gives the opponent a right of cross-examination, although he may not be examined in-chief after administration of oath. But, a witness called and sworn under a mistake, and whose evidence is not substantially begun, is not liable to be cross-examined. However, the mistake must arise from an erroneous belief that the witness knew something of the transaction when, as a matter of fact, he knew nothing about it.[56]

WIGMORE ON EVIDENCE (1940) 3rd Ed., Vol. 6, Art. 1893, P. 563 observed "I. A person who has been sworn by mistake, as sometimes happens under the practice of swearing in a group, and has not yet been put on the stand, is not yet the witness of the party for whom he has sworn.

II. A person sworn, but not yet asked any question, is not the witness of the party swearing him: morever, he cannot be cross-examined even to discredit him, for there is as yet no testimonial assertion to be discredited.

III. A person sworn and asked questions, where he gives no answer or where the facts in his answer are irrelevant to the case, has not yet become his party's witness.

IV. A person who is questioned and answers merely to prove a document does become a witness of the party thus using him." ..... "A person producing a document and answering questions tending to prove it does become the questioner's witness." (p. 565).

Where a witness denies, that he has the possession or means of producing a particular document, he can, if he has been guilty of falsehood, be prosecuted for giving false evidence in a judicial proceeding.[57]

3. TO BE A WITNESS

It was held by the Supreme Court that this section is only to regulate the right of cross-examination, and it is not a guide to the word 'witness', which must be understood in its material sense, *i.e.*, as a referring to a person who furnishes evidence.[58] The Supreme Court observed by the majority, that "to be a witness" in its ordinary grammatical sense means giving oral testimony in court, and the case law has gone beyond the strict literal interpretation of the expression, which may now bear a wider meaning *viz.* bearing testimony in court, or out of court, by a person accused of an offence orally or in writing.[59]

Section 139, has nothing to do with the proper custody mentioned in Section 90 of the Evidence Act. The former provides a machinary for the production of the documents summoned, whereas the latter section deals with proper custody of the document, which has to be decided on the evidence adduced.[60]

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55. *Parmeshwari Devi (Smt.)* v. *State*, AIR 1977 SC 403.
56. *Wood* v. *Mackinson*, (1940) 2 M&R 273.
57. PER WEST J., in *In re, Premchand Dowlatram*, ILR (1887) 12 Bom 63, 65.
58. *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300.
59. *State of Bombay* v. *Kathi Kalu*, AIR 1961 SC 1808.
60. *Ravjappa* v. *Nilakanta Rao*, AIR 1962 Mys 53.

Mere production of documents or giving some information about the document by the accused cannot be interpreted as "to be a witness" within Art. 20 of the Constitution.[61]

Witnesses to character.

S. 140. Witnesses to character may be cross-examined and re-examined.

COMMENTS

1. SCOPE AND PRINCIPLE

This section states that witnesses who give evidence as to character may be cross-examined and re-examined.

Sections 53 and 54, Section 146(3) of the Evidence Act would be relevant in this connection. In Section 53, it is said that, in criminal proceedings, the fact that the person accused is of good character is relevant, whereas Section 54 says that in criminal proceedings, the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant. Section 146 Cl. (3) states that, when a witness is cross-examined to shake his credit, questioning about his character is permissible.

BEST ON EVIDENCE (8th Ed., Section 262, ps. 248, 249) has observed: "Witnesses to the character of parties are in general treated with great indulgence,—perhaps too much. Thus, it is not the practice of the bar to cross-examine such witnesses, unless there is some specific charge on which to found a cross-examination, or at least without giving notice of an intention to cross-examine them, if they are put in the box. The Judges also discourage the exercise of the undoubted right of prosecuting counsel to rely on their testimony, and the most obvious perjury in giving false characters for honesty *etc.*, is everyday either overlooked or dismissed with a slight reprimand. But surely this is mercy out of place. If mendacity in this shape is not discouraged, a tribunal will naturally be induced either to look on all character evidence with suspicion, or to attach little weight to it. Now, there are many cases in which the most innocent man has no answer to oppose to a criminal charge but his reputation; and to deprive this of any portion of the weight legitimately due to it, is to rob the honest and upright citizen of the rightful reward of his good character.....The use of character evidence is to assist the jury in estimating the value of the evidence brought against the accused and we cannot dismiss this subject without directing attention to the shrewd observations of HOLT C.J.[62]; "A man is not born a knave, there must be time to make him so, nor is he presently discovered after he become one. A man may be reputed an able man this year, yet be a beggar the next."

Character lies in the man; it is the mark of what he is; it shows itself on all occasions. Reputation depends upon others; and it is what they think of him. According to Oxford Dictionary, 'character' means: "collective peculiarities, sort, style, reputation, good-reputation, description of person's qualities, testimonial, status." The Model Code of Evidence defines 'character' as the "aggregate of person's traits including those relating to care and skill and their opposites." Just as cause of action means a bundle of facts, character is an expression of very wide import, which takes in all the traits, special and particular qualities impressed by nature or habit which serve as an index to the essential intrinsic nature of a person. Character and reputation are not synonymous.[63]

Leading questions.

S. 141. Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

When they must not be asked.

S. 142. Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

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61. *State of Bombay* v. *Kathi Kalu*, AIR 1961 SC 1808; **reversing** *Farid Ahmed* v. *State*, AIR 1960 Cal 32 and **overruling**; *State of Kerala* v. *Sankaran Nair*, AIR 1960 Ker 392 FB; *State of Gujarat* v. *Shyamlal Mohanlal*, AIR 1963 Guj 178.
62. *R.* v. *Swendson*, (1702) 14 How St Tr 496.
63. **See** *Ramasubba Reddy* v. *P.V.S. Rama Das*, 1970 Cr LJ 83 (AP).

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

When they may be asked.

S. 143. Leading question may be asked in cross-examination.

SYNOPSIS

1. *Principle and Scope* ... 1266
2. *Prohibition not absolute* ... 1267
3. *Criminal Cases* ... 1268
4. *Sections 142 & 154 of the Evidence Act* ... 1268

COMMENTS

1. PRINCIPLE AND SCOPE

Section 141 defines a leading question. Section 142 says that leading questions must not be asked in examination-in-chief, if objected to by adverse party. Section 143, permits leading questions in cross-examination of a witness.

STEPHEN in his DIGEST OF LAW OF EVIDENCE (12th Ed., art. 140) states: "A leading question is one which either (a) suggests the answer desired, or (b) assumes the existence of disputed facts as to which the witness is to testify."

BEST ON EVIDENCE (8th Ed., Section 641, p. 591) observes: that the exclusion of leading questions at the stage of Examination-in-Chief is based on two reasons:—"First, and principally, on the supposition that the witness has a bias in favour of the party bringing him forward, and hostile to his opponent. Secondly, the party calling a witness has an advantage over his adversary, in knowing before hand what the witness will prove, or at least is expected to prove; and that, consequently, if he were allowed to lead, he might interrogate in such a manner as to extract only so much of the knowledge of the witness as would be favourable to his side or even put a false gloss upon the whole."

"A question is objectionable as leading when it suggests the answers, not when it merely directs the attention of the witness to the subject respecting which he is questioned. *e.g.*, on a question whether A and B were partners, it has been held not a leading question to ask if A has interfered in the business of B.....It should never be forgotten that leading is a relative not an absolute term. There is no such thing as "leading" in the abstract, for the identical form of questions which would be leading of the grossest kind in one case or state of facts, might not only be unobjectionable, but the very fittest mode of interrogation in another."[64]

"'Is your name so and so? Do you not reside in such a place? Are you not in the service of such and such a person? Have you not lived so many years with him?—' Under this form every sort of information may be conveyed to the witness in disguise. It may be used to prepare him to give the desired answers to the questions about to be put to him; the examiner, while he pretends ignorance and is asking for information which is in reality giving instead of receiving it. This kind of leading question has been otherwise described as a question which embodies material fact which may or may not have been before known to the witness, and admits of a conclusive answer by a simple negative or affirmative."[65]

"A question depends for its suggestion more in the tone of voice than in the form of words. The particle 'not' as in, 'then, did you not say that you refused the offer?' does indeed convey in itself the suggestion that an affirmative answer is desired; but the opposite form 'did you say that you refused the offer? by no means betrays in form such a suggestion, and depends almost wholly upon the intonation for suggestion; in other words it may or may not be leading.[66]

LORD ELLEN-BOROUGH observed that a leading question is a question framed in such a manner that it throws a hint as to, or suggests directly or indirectly, the answer which the examiner desires to elicit from the witness, *e.g.*, when a witness called to testify to an alleged assault on A by B was asked: "did you see B take a stick and strike A?" or "Did you not hear him say this?", they would be leading

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64. BEST ON EVIDENCE, 8th Edition p. 592.
65. BENTHAM ON RATIONALE OF JUDICIAL EVIDENCE.
66. FIELD ON EVIDENCE, 1967 Ed., Vol. 6, P. 4820.

questions which suggest the witness the answer desired or which, embodying a material fact, admit of a conclusive answer by a simple negative or affirmative. But a question that calls for a simple 'yes' or 'no' answer is not leading....Where 'yes' or 'no' would be conclusive on any part of the issue, it would be equally objectionable: a question is objectionable as leading when it suggests the answer, not when it merely directs the attention of the witness to the subject; respecting which he is questioned.[67]

BELL C.J., observed: "A question is leading where the question assumes any fact which is in controversy, so that the answer may really or apparently admit that fact. Such are the forked questions habitually put by some counsel if unchecked; as, 'what was the plaintiff doing when the defendant struck him?', the controversy being whether the defendant did strike. A dull or a forward witness may answer the first part of the question and neglect the last."[68]

2. PROHIBITION NOT ABSOLUTE

The prohibition of putting leading questions in-chief examination and re-examination is not absolute; the court may allow such questions under Order XVIII, Rule 11, C.P.C., though objected to as leading question. Discretion of the court largely rests with the trial court and depends on the circumstances, as demeanour of witnesses, the tenor of the preceding questions *etc.*[69]

PHIPSON states that the rule is relaxed in the following cases:

"As the rule is merely intended to prevent the examination from being conducted unfairly, the judge has a discretion, which is not open to review, to relax it when he considers it necessary in the interests of justice.[70] It is always relaxed in three cases : introductory or undisputed matter; assisting memory; contradiction.

To shorten proceedings, and bring the witness as quickly as possible to the material points of the case, it is not only permissible, but proper, to lead him as to matters which are introductory, or not really in dispute. Frequently one counsel will indicate to opposing counsel that the witness may be led up to a particular point.

A question which merely directs the attention of the witness to a particular topic, without suggesting the answer required, is not objectionable. An old example from a civil case of slander that "A was a bankrupt whose name was on the Bankruptcy List, and would appear in the next *Gazette*", a witness who had spoken of only the first two statements was allowed to be asked "Was anything said about the *Gazette?*"[71]

Where one witness is called to contradict another as to expressions used by the other, the witness may be asked not merely what was said, but whether the particular expressions were used, since otherwise a contradiction might never be arrived at.[72] Where, however, the conversation is not proved merely for the purpose of contradiction, the latter question is improper.[73] It is sometimes appropriate to ask the witness for their version of a conversation before asking whether particular expressions were used."[74]

Prof. CROSS says that such exceptions are not exhaustive and there are bound to be cases which do not fall within the list of exceptions.[75]

BEST ON EVIDENCE (10th Edn. Section 642) observes: "The rule will be relaxed where the inability of a witness to answer questions put in the regular way, obviously arises from defective memory, on account of illness, illiteracy, old age or failing memory." "..... The object of putting leading questions to such a witness is to revive or refresh his memory by drawing his attention to a particular topic, without suggesting any answer."[76]

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67. *Nicholas* v. *Dowding*, (1815) 1 Stark 81.
68. *Steer* v. *Little*, 44 NH 616.
69. *Howrah Trading Co. (P) Ltd.* v. *4th Industrial Tribunal*, (1966) 2 Lab LJ 282; *Exp. Bottomley*, (1909) 2 KB 14.
70. *Ex p. Bottomley*, (1909) 2 KB 14 at 16; *Lawder* v. *Lawder*, (1855) 5 Ir CL R 27.
71. *Rivers* v. *Hague*, (1837) MS cited Best, S. 641.
72. *Edmonds* v. *Walter*, (1920) 3 Stark 7; *Courteen* v. *Touse*, (1807) 1 Camp 43.
73. *Hallett* v. *Cousens*, (1839) 2 M & M 238.
74. PHIPSON ON EVIDENCE, 15th Edn. (2000), P. 247 (para 11-12).
75. CROSS EVIDENCE, 6th Edn., page 247.
76. Lord ELLENBOROUGH *in Acerro* v. *Petroni*, 1 Stark 100.

The objection to leading questions is not that they are absolutely illegal, but only that they are unfair. The court may, in its discretion, allow leading questions in proper cases.[77]

The court has to determine, and not the counsel, whether a leading question should be permitted, and the responsibility for the permission rests with the court.[78]

The answers to a leading question are not inadmissible though the method by which they were obtained may rob them of all or most of their significance.[79]

3. CRIMINAL CASES

In a criminal case, leading questions to prosecution witnesses, in order to elicit suitable answers, should not be allowed.[80] The prosecutor cannot put leading questions on the material part of the evidence which he intends that the witness should give against the accused. Such leading questions offend the right of the accused to fair trial enshrined under Article 21 of the Constitution. It is not a curable irregularity.[81]

An answer in the affirmative to a leading question put by a person in authority renders the confession unacceptable, as such confession was given out of fear and threat, and so inadmissible in view of Section 24 of the Evidence Act. [82]

When an objection is taken, it would be advisable for the court to note the objection and the opinion of the court in disallowing the objection and permitting the leading question, so that the higher courts can appreciate the evidence recorded on such leading questions.

4. SECTIONS 142 & 154 OF THE EVIDENCE ACT

In considering whether the person calling a witness can cross-examine his own witness by putting leading questions, Sections 142 and 154 will have to be read together. The question would be whether such a witness should be treated as hostile, before permission is granted to put leading questions to or cross-examine his own witness. Section 142, simply states that leading questions must not be put in the examination-in-chief, except with the permission of the court. Section 154 states that the court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

A question put in a leading form would not necessarily amount to cross-examination. But most of the questions in cross-examination would be leading questions.[83]

The Calcutta High Court held that, even without granting permission under Section 154 to cross-examine the witness, the court can permit leading questions to be put under Section 142 to his witness who turns hostile.[84]

To put leading questions and to get a witness declared as hostile are two different things. The concept of the basic requirement for putting a leading question is to lead him to an undisputed point with the permission of the court and, if need be, with the permission of the adversary. This is just to save the time, or not to repeat what has been already conceded to, or to skip over the undisputed facts. But while declaring a witness hostile the object is to impress upon the court that the witness either from his demeanour or from his previous statement is suppressing the truth.[85]

Leading questions can be freely asked in cross-examination: "First, and principally, on the supposition that the witness has a bias in favour of the party bringing him forward, and hostile to his

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77. *R* v. *Abdulla*, ILR 7 All 385, 397; **see also** *Exparte Bottemley*, (1909) 2 K.B. 14, 16.
78. *Barindra* v. *R*, ILR 37 Cal 467.
79. *Moor* v. *Moor*, (1954) 2 All ER 458.
80. *Kesavan* v. *State of Kerala*, 1960 Ker LJ 546; *Chakrapani* v. *Chandoo*, AIR 1959 MP 84.
81. *Varkey Joseph* v. *State of Kerala*, 1993 Cr LJ 2010 (para 11) : AIR 1993 SC 1892.
82. *Ismail Ibrahim* v. *State of Goa*, 1975 Cr LJ 1335 (Goa, Daman & Diu).
83. *Ammathayarammal* v. *Official Assignee H.C., Madras*, AIR 1933 Mad 137.
84. *Profulla Kumar* v. *Emperor*, AIR 1931 Cal 401 (FB), disagreeing with the view expressed in *Bikram Ali* v. *Emperor*, AIR 1930 Cal 139. **See also** *Shivha Murthy Swamy* v. *Agodi Songanno*, AIR 1969 Mys 12 and *Dadabuddappa Gouli* v. *Kalu Kanu Gouli*, AIR 2000 Kant 158 (paras 5-8 and 14).
85. *Prabhu* v. *State of Maharashtra*, ILR 1977 Bom 1505.

opponent. Secondly, that the party calling a witness has an advantage over his adversary, in knowing before hand what the witness will prove, or at least is expected to prove, and that, consequently, if he were allowed to lead, he might interrogate in such a manner as to extract only so much of the knowledge of the witness as would be favourable to his side, or even put a false gloss upon the whole."[86]

The reason why leading questions are allowed to be put to an adverse witness in cross-examination is that the purpose of a cross-examination being to test the accuracy, credibility and general value of the evidence given, and to shift the facts already stated by the witness, it sometimes becomes necessary for a party to put leading questions in order to elicit facts in support of his case, even though the facts so elicited may be entirely unconnected with facts testified to in an examination-in-chief. Where a general order is made that no leading questions shall be allowed in cross-examination, the order is illegal and vitiates the trial.[87]

With respect to the mode of conducting a cross-examination, it is admitted on all hands that leading questions may in general be asked, but this does not mean that the counsel may go to the length of putting the very words into the mouth of the witness which he is to echo back again. Neither does it sanction the putting of a question assuming that facts have been proved which have not been proved, or that particular answers have been given contrary to the fact. The rule ought also to receive some further qualification where the witness is evidently hostile to the party calling him, for although it appears in one case to have been laid down that leading questions may always be put in cross-examination, whether a witness be unwilling or not, some restriction should surely be imposed where the witness betrays a vehement desire to serve the cross-examination party. It is no answer to say that the party, who originally called the witness, has brought the evil on his own head, for a fraudulent witness might purposely conceal his bias in favour of one party, and thus induce the other to call him, or he might be an attesting witness, or other person whom it was necessary to examine to establish some technical part of the case. To allow such a witness to have the most favourable answers suggested to him through the medium of leading questions would be obviously unjust.[88]

WIGMORE (3rd Ed., Vol. 3, Section 773) observes: "As the purpose of the cross-examination is to sift testimony and weaken its force, in short to weaken the direct testimony, it is well-settled that, on cross-examination of oponent's witness, ordinarily no question can be improper as leading. Yet, where the reason ceases, the rule ceases also; thus, where an opponent's witness proves to be in fact biased in favour of the cross-examiner, the danger of leading questions arises and they may be forbidden."

The Supreme Court has held that questions in cross-examination, which would appear to the court vexatious, or misleading and not relevant, can be disallowed by the court; the cross-examination in the garb of putting leading questions shall not actually mislead the witness. It would be travesty of justice if the presiding judge remains a silent spectator or a mere recording machine; when occasion arises he should evince active interest, by putting questions to witnesses who could not understand the question, or is misled in such a way that it has become difficult to follow the question, so that he may answer properly if he understands it in a proper way, but the judge should not unduly trespass upon the functions of a cross-examiner.[89]

Evidence as to matters in writing.

S. 144. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

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86. BEST, 12th Edn., S. 641, p. 561.
87. *Sri L.P.* v. *Inspector General of Police*, (1954) All LJ 316.
88. TAYLOR, 12th Edn., S. 1431, pp. 912-913.
89. *Ram Chandra* v. *State of Haryana*, AIR 1981 SC 1036.

***Explanation.*—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.**

COMMENTS

1. PRINCIPLE AND SCOPE

This section is meant to enable parties to carry out the provisions of Ss. 91 and 92. It should be read along with those sections. It refes both to the examination-in-chief and cross-examination. A party can compel the opposite party to produce a document (or to make out a case for letting in its secondary evidence)—

(1) When a witness is about to give evidence as to any (a) contract, (b) grant, or (c) other disposition of property, which is contained in a document; or

(2) When he is about to make any statement as to the contents of any document.

This rule does not forbid a witness to give oral evidence of statements as to relevant facts, made by other persons, about the contents of documents.

Cross-examination as to previous statements in writing.

S. 145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

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COMMENTS

1. PRINCIPLE AND SCOPE

This section indicates one of the modes in which the credit of a witness may be impeached.[1]

A witness may be cross-examined as to any statements as to relevant facts made by him on a former occasion, in writing or reduced to writing, without showing the writing to him or proving the same. But if it is intended to contradict him by the writing, his attention must be called to the writing. The object of this provision is either to test the memory of a witness or to contradict him by previous statements in writing. Such writing may be documents, letters, depositions, police diaries, *etc*. It must be noted that the previous record should be in writing. The witness may also be contradicted by his previous verbal statements (S. 153, Exception 2).

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1. *Queen Empress* v. *Mannu*, ILR (1897) 19 All 390, 421 (FB).

The Privy Council observed: "On general principle it would appear to be sound that, if a witness is under cross-examination on oath, he should be given the opportunity, if documents are to be used against him, to tender his explanation and to clear up the particular point of ambiguity or dispute. This is a general, salutary and intelligible rule. Fortunately, the law of India pronounces no uncertain sound upon the same matter."[2]

HALSBURY'S LAW OF ENGLAND (4th Ed., Vol. 17, Para 284, Page 198): "A witness may also be cross-examined as to a previous statement made by him in writing, without the writing being shown to him.[3] But if it is intended to contradict him by such writing, his attention must be called to those parts of the writing which are to be used for that purpose,[4] and the judge may, at any time during the trial, require production of the writing for his own inspection, and he may thereupon make use of it for the purposes of the trial as he thinks fit."

A witness may be cross-examined as to previous statements made by him in writing, or reduced to writing and relevant to the matter in question, without such writing being shown to him or being proved; but, if it is intended to contradict him by the writing, his attention must before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. A witness cannot be allowed to refresh his memory with his prior statement recorded under S. 161, Cr.P.C.[5] Section 145 applies also to a hostile witness examined by the party who calls him under Section 154.[6] One of the modes in which, according to the Evidence Act, the credit of a witness may be impeached, is by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted; and Section 145 gives the right to cross-examine a witness on previous statements made by him and reduced to writing, when these previous statements are relevant to the matter in issue.[7]

In a way this section is an exception to the general rule forbidding all use of the contents of a written document until the document itself be produced.

Resort to this section is necessary only if a witness denies that he made the former statement.[8] A witness can be contradicted only when the denies his statement and not when he admits it.[9]

It is clear that the first part of this section deals with cross-examination other than by way of contradiction, and the second part by way of contradiction only. It is not possible to invoke the second part without putting questions under the first.[10]

A witness may be questioned as to his previous written statements for two purposes; it may be to test his memory; and the very object would be defeated if the writing were placed in his hand before the questions were asked, or it may be to contradict him; and here it would be obviously unfair not to give him every opportunity of seeing how the matter really stands.

The question whether there has been a compliance with the provisions of Section 145, is not one of form but of substance. If there has been substantial compliance, that is sufficient in law.[11]

2. PREVIOUS STATEMENTS

Previous statement of a witness cannot be used as substantive evidence. It can only be used by the defence to contradict or discredit any witness.[12] Statements which are not fully recorded or statements which are recorded in the form of memorandum are statements falling within the ambit of this section. The statement may be either written by the witness himself or which was reduced into writing by

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2. *Bal Gangadhar Tilak* v. *Srinivas Pandit*, AIR 1915 PC 75 : 42 IA 135. **See also** *Venkatlal* v. *Kanhayalal*, AIR 1963 MP 155.
3. *North Australian Co.* v. *Goldsborough & Co.*, (1893) 2 Ch 381 CA.
4. **See** *R.* v. *Yousry*, (1914) 11 Cr App R 13, 18.
5. *Simon* v. *State of Kerala*, 1996 Cr LJ 3368 (paras 11 and 12) (Ker).
6. WHITLEY STOKES Vol. 2, Page 926.
7. *Queen-Empress* v. *Mannu*, ILR (1897) 19 All 390 (42 1-2) (FB).
8. *Bhagwan Singh* v. *State of Punjab*, (1952) SCR 812 : AIR 1952 SC 214.
9. *Dhanabal* v. *State of T.N.*, AIR 1980 SC 628; *State of Rajasthan* v. *Kartar Singh*, (1971) 1 SCR 56 : AIR 1970 SC 1305.
10. *Kanu Ambu Vish* v. *State of Maharashtra*, AIR 1971 SC 2256.
11. *Kalluri Vema Reddy* v. *Reddi Gangi Reddi*, AIR 1958 AP 571 (DB); *Bhagwan Singh* v. *State of Punjab*, AIR 1952 SC 214.
12. *Chinnammal* v. *State of T.N.*, (1997) 1 SCC 145 : 1997 SCC (Cri) 51.

someone else.[13] The word 'statement' is used in its primary meaning as something that is stated. A witness may be contradicted by statements in a diary kept by him, though there is no question of any communication of those statements to another person.[14] Where the previous statement was recorded by an order of a court having no jurisdiction, it was held that such a statement can be made use for the purpose of Section 145, 155 and 157.[15] Former statement of witness to a person not legally competent to investigate, though not admissible under Section 157 of the Evidence Act can be used for contradiction under Section 145.[16] Statement of a prosecution witness, recorded by a doctor as a dying declaration, is a 'previous statement' of the prosecution witness, and the accused has a right under Section 145 to cross-examine the prosecution witness with regard to it.[17] Where a person making a dying declaration survived, his declaration can be used as a previous statement, either to corroborate or to contradict his subsequent version.[18] Statement though not admissible as a dying declaration under Section 32, can be used for contradiction under Section 145 and for impeaching credit of witness under Section 155.[19]

In a suit for ejectment alleging monthly tenancy, it was held that the defendant, in support of his plea that the tenancy was for a fixed period of 20 years, can use the previous statement in a document, though unregistered and unstamped, for the purpose of the first part of Section 145 without bringing into play Section 91 of Evidence Act and Section 49 of the Registration Act, as under the first part, it is not necessary to show the document to him. If the second part of Section 145, is to be used, Section 49 of the Registration Act would come into play as the document has to be shown to the witness.[20]

3. MADE BY HIM

The section is attracted only when two contradictory statements are made by the same witness and not when the statement of one is contradicted by the other.[21]

A and M gave two separate complaints in respect of the same incident, with divergent versions, and those complaints were registered as two F.I.R.s. B was questioned during investigation: Police prosecuted B and M; it was held that no portion of B's statement could be used to contradict the statement of M in his complaint either under Section 157 or Section 145; and B not being examined as a witness in the case, his previous statement could not be used either to contradict his evidence or corroborate it.[22]

A witness can be confronted with the statements made in writing in his account-books; but a clerk who writes the accounts at the mere dictation of his employer cannot be so confronted. In a case, A was employed by B, at intervals of a week or fortnight, to write up B's account-books. B furnishing him with the necessary information either orally or from loose memoranda. It was held that the entries so made could not be given in evidence to contradict A under this section, as previous statements made by him in writing. The statements were really made, not by A but by B, under whose instructions A had written them.[23]

4. IN WRITING OR REDUCED TO WRITING

Section 145 in express terms applies to previous statements in writing, or reduced to writing only. Where the Magistrate, who exhibited the former statement of the witness, admitted that the exhibit bore no signature or seal of his office, the said exhibit thus was not proved to be the former statement of the witness.[24]

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13. *President, S.V.B. Mandal* v. *Yellaiah*, AIR 1969 AP 148; *Emperor* v. *Najibudin*, AIR 1933 Pat 589.
14. *Bhogilal Chunilal Pandya* v. *State of Bombay*, AIR 1959 SC 356.
15. *State of Punjab* v. *Vishwajit Singh*, AIR 1987 P&H 126; *Ram Krishun* v. *R.*, 1946 Pat 82.
16. *State* v. *Pareswar Ghasi*, AIR 1968 Ori 20.
17. *Ranjit Singh* v. *State*, 1971 Cr LJ 1225 (All).
18. *Siddu* v. *State of M.P.*, 1978 Cr LJ (NOC) 255 (DB) (MP).
19. *King Behara* v. *State*, ILR (1968) Cut 660.
20. *Remington R.* v. *Lilawati*, 1974 Punj 350.
21. *Mohanlal Gangaram Gehani* v. *Maharashtra*, AIR 1982 SC 839; *Biswanath Prasad* v. *Dwarka Prasad*, AIR 1974 SC 117; *B. Bhavamma* v. *B. Ramamma*, AIR 1924 Mad 537; *Mahar Rai, Bharat Rai* v. *State of Bihar*, AIR 1968 SC 128.
22. *Mahar Rai, Bharat Rai* v. *State of Bihar*, AIR 1968 SC 128.
23. *Munchershaw Bezonji* v. *New Dhurumsey S. & W. Company*, ILR (1880) 4 Bom 576.
24. *Rajendra Singh* v. *State of Bihar*, 2000 Cr LJ 2199 (para 4) (SC) : AIR 2000 SC 1779.

The English Law places statements in writing and oral statements at par when such statements are used for the purpose of contradicting a witness in cross-examination. The law as laid down by the Indian Evidence Act, is different from the English Law on this point and the principles of English Law cannot be followed when they are inconsistent with the express text of the law as contained in the Indian Evidence Act.[25]

Statements recorded on tape recorder are statements within Section 145.[26]

There is nothing in the Evidence Act to show that the document with reference to which a witness is going to be contradicted should come from proper custody.[27]

5. ORAL STATEMENTS

There is no provision in the Evidence Act regarding the procedure to be adopted for contradicting a witness by his previous oral statement. Though the Evidence Act was intended to be a complete code of the law of evidence in respect of matters expressly provided for in it, there are some matters in respect of which, in the absence of any provisions in the Act, the wholesome principle in the English Law of Evidence, as enacted in Section 145 of that Act, may be applied.[28]

6. RELEVANT MATTERS IN QUESTION

It is no part of the court's duty to enter upon a roving enquiry in the middle of a trial on matters which are collateral to the main issue, such as whether a statement is made under threats and duress of the police. If the previous statements are alleged to have been made under police threats and duress, then court is not bound to make an enquiry.[29]

7. TO CONTRADICT

Section 145 of the Evidence Act applies only to contradiction, but if there are omissions in previous statements, which do not amount to contradictions but throw some doubt on the veracity of what was omitted, the uncertainity or doubt may be capable of removal by questions in re-examination.[30] In order to see when there is a contradiction by omission, it is necessary to find out whether the two statements cannot stand together. It is also necessary to see whether the statement which the witness has made in the witness box should have been made by him while reporting the matter soon after the incident.[31] Every omission does not amount to a contradiction; omissions which by necessary implication lead to conflicting versions between the statements made before the police and the court would amount to contradiction.[32]

The witness in their statements before the police attributed a clear intention to the accused to commit murder but before the Court they stated that the accused was insane and, therefore, he committed the murder. It was held that in the circumstances it was necessarily implied in the previous statements of the witness before the police that the accused was not insane at the time he committed the murder. In this view, the previous statements of the witnesses before the police could be used to contradict their version in the court.[33]

All omissions found in the statements made to the police are not contradictions; hence it is not open to the court to make use of such omissions to show that the witness has said in the court something which

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25. *Ram Ratan* v. *State*, AIR 1956 Raj 196 **relying on** *Muktawandas Ajab Das* v. *Emperor*, AIR 1939 Nag 13.
26. *Pratap* v. *State of Punjab*, AIR 1964 SC 72; *Rama Reddy* v. *V.V. Giri*, AIR 1971 SC 162.
27. *R.* v. *Raja Ram*, AIR 1934 Nag 35.
28. *State* v. *Minaketan*, AIR 1952 Ori 267; **explaining** *Muktawandas Ajab Das* v. *Emperor*, AIR 1939 Nag 13; **See CONTRA** *Ram Ratan* v. *State*, AIR 1956 Raj 196.
29. *Bhagwan Singh* v. *State of Punjab*, AIR 1952 SC 214.
30. *Laxman* v. *State of Maharashtra*, AIR 1974 SC 308.
31. *Dasu* v. *State of Maharashtra*, 1985 Cr LJ 1933.
32. *State of Hadibanelu*, ILR (1973) Cut 601 (DB); *Tahsildar Singh* v. *State of U.P.*, AIR 1959 SC 1012; *State of Assam* v. *Rameshwar Sarma*, ILR (1963) 15 Assam 552; *Dandapani Samanta Rai* v. *Duryodhan Pradhan*, AIR 1968 Ori 167; *Dharam Vir* v. *State of U.P.*, 1990 Cr LJ 839; **See also** *State* v. *Md. Misor Ali*, 1965 Assam 151; *Dama alias Damodar Jena* v. *State*, ILR (1969) Cut 265.
33. *Dahyabhai Chhaganbhai Thakkar* v. *State of Gujarat*, AIR 1964 SC 1563.

he did not say before the police.[34] Variations or omissions in the evidence of a witness of trivial details, would not amount to contradicting and cannot make any dent in the testimony of the witness.[35] Omission in police statements, or statements not recorded by police officer could not be used to contradict witnesses.[36]

The purpose of contradicting a witness is only to attack his veracity. The duty of the court is to find out if a witness, who had made a contradictory statement earlier, is telling the truth in court. It is not the duty of the court to find out whether the previous statement made by the witness was true or not.[37]

Merely by putting suggestions to the witness and the witness denying the same, will not amount to putting contradiction to the witness.[38]

8. OPPORTUNITY TO EXPLAIN CONTRADICTION

There can be no hard and fast rule as regards compliance with the requirements of Section 145. All that is required is that the witness must be treated fairly and be afforded a reasonable opportunity of explaining his contradictions, after his attention has been drawn to them in a fair and reasonable manner. The matter is one of substance and not of mere form.[39]

There is a cardinal distinction between a party to the proceeding who is the author of a prior statement and a witness who is examined and is sought to be discredited by use of his prior statement. In the former case, an admission by a party is substantive evidence, if it fulfils the requirements of Section 21; in the latter case a prior statement is used to discredit a witness, and it does not become substance evidence. In the former case, there is no requirement that the statement containing the admission has to be put to the party, because it is evidence *proprio vigore,* whereas in the latter case, the court cannot be invited to disbelieve a witness on the strength of a prior contradictory statement made by him, unless it has been put to him as required by Section 145.[40]

A witness cannot be disbelieved without his attention being drawn to the documents inconsistent with his deposition, even if the documents are produced after the examination. In such a case, he should be recalled for further cross-examination.[41] A previous statement recorded under Section 164, Cr.P.C. should be put to the witness during his cross-examination before the tribunal or Magistrate, giving him an opportunity to explain contradiction between his evidence and statement.[42] Where A stated that he was told something by B who was examined earlier, the statement of A is not admissible as it is hearsay, unless B is recalled and given an opportunity to explain it.[43] In an application by the husband under Section 9 of the Hindu Marriage Act, the statements of the wife in proceedings under Section 100, (old) Cr.P.C. (now Section 99) before a Magistrate, are inadmissible unless those statements are put to the wife to contradict her under Section 145.[44]

Where statements of witnesses recorded were brought on record on admission of the witness in cross-examination that they had made those statements, but in a subsequent trial, they were not put to the

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34. *Vema Reddy* v. *Gangireddi,* AIR 1958 AP 571 (DB); *Dukhi Dei* v. *State,* AIR 1965 Ori 33 (DB).
35. *Kishan Chand* v. *State of Rajasthan,* AIR 1982 SC 1511.
36. *Krushna Chandra Pail* v. *State,* AIR 1968 Ori 172.
37. *State* v. *Harish Kumar,* ILR (1975) 1 Delhi 182.
38. *Shaik Subhani* v. *State of A.P.,* 2000 Cr LJ 321 (para 24) (AP).
39. *Bhagwan Singh* v. *State of Punjab,* AIR 1952 SC 214; *Kavuri Vbrtaateswarlu* v. *State of A.P.,* 1981 Cr LJ (NOC) 133 (AP)(DB); *Poolyani Joga* v. *State of M.P.,* 1964 (1) Cr LJ 455 (DB).
40. *Tapan Dass* v. *Sosti Dass,* AIR 1986 Cal 390; *Biswanath Prasad* v. *Dwarka Prasad,* AIR 1974 SC 117; *Bhagrat Singh* v. *Bhairathi,* AIR 1966 Sc 405; *Shrilal* v. *State,* AIR 1963 M.P. 155; *Kali Pada Das* v. *State,* AIR 1058 Cal 186; *Ganakanta Das* v. *State of Assam,* 1990 Cr LJ 219 (Gau)(DB); *Chanhoo Mahto* v. *Jang Bahadur Singh,* AIR 1957 Pat 293 (DB); *Arjun Mahto* v. *Monda Mahatan,* AIR 1971 Pat 215; *Veeraiah* v. *Sonde Mall,* ILR 1963 AP 754; *Lal Singh* v. *Guru Granth Saheb,* AIR 1957 Pepsu 101 (DB); *Veerbasavaadhya* v. *Devotees of Lingadagudi Mutt,* AIR 1973 Mys 280; *Durga Prasad* v. *Anandi Kuer,* ILR (1960) 2 All 277; *University of Punjab* v. *P.C. Handa,* 1971 Punj 177; *Abdul Majid* v. *King,* AIR 1950 Cal 165; *Bejoy Chand Patra* v. *State,* AIR 1950 Cal 363.
41. *Naba Kumar Das* v. *Rudra Narayan,* AIR 1923 PC 95; *Goli Ramaswami* v. *Narla Jagnnadha Rao,* AIR 1962 A.P. 94.
42. *Bidya Bhushan Moha Patra* v. *State of Orissa,* AIR 1960 Ori 68 (DB); *State of Orissa* v. *Bidya Bhushan Mohapatra,* AIR 1963 SC 779; *In re, Saibanna Tippanna,* AIR 1966 Mys 248; *Tahsildar Singh* v. *State of U.P.,* AIR 1959 SC 1012 : 1959 Cr LJ 1231; *K.K. Sharma* v. *State of Rajasthan,* 1998 Cr LJ 2609 (para 16) (Raj).
43. *Avadh Behari Sharma* v. *State of M.P.,* AIR 1956 SC 738.
44. *Gurdev Kaur* v. *Sarwan Singh,* AIR 1959 Punj 162.

witnesses and no opportunity was given to explain them, these statements are not to be relied on for contradiction as the provisions of Section 145 are not complied with.[45] Where the witness, having more than one opportunity to explain his statement in a previous suit, does not avail himself of it, his deposition in the previous suit is admissible to prove an admission made by him.[46]

Where a witness is not contradicted by his attention being called to particular parts of his previous report, it cannot be said that the statement made by him on matters other than those which were put to him was unreliable merely because the details referred to by him in court are different from those mentioned by him in his previous report.[47] Where documents are used for the purpose of contradicting a witness, without calling his attention to the portions of the documents so used, no reliance can be placed on such documents.[48] Statement of a witness made in a previous case can be used in subsequent case, to contradict him or to impeach his character; but the witness's attention should be drawn to his previous statements.[49] It is necessary to call the attention of the witness to those parts of the two statements separately to point out the omissions when they are sought to be used for contradiction.[50]

Where the purpose of the production of the document at the time of cross-examination of a witness seemed to have been well understood by him, and from the record of his deposition it was manifest that after being shown the document, he was directly asked whether it was not a fact that he was not at a particular place on the alleged date as was clear from the document, and where on re-examination no attempt was made to elicit any explanation, it was held the witness was properly contradicted.[51]

When the witness is contradicted by his previous statement, then that part of the statement which has been put to the witness will be considered along with the evidence to assess the veracity of the witness. The whole of the previous statement, however, cannot be treated as substantive evidence.[52]

In order to attract the applicability of Section 145, it is essential that the attention of the witness is invited to only those passages in his previous statement which clearly contradict some portions of the testimony of the witness before the court.[53] When the witness in the Sessions Court who was confronted with his earlier statement in the committal court, admitted that his earlier statement was false, as it was made under police pressure, it was held that there was sufficient compliance with Section 145 though earlier statement was read over *in extenso* and his attention was not drawn to each sentence.[54] When the prosecution cross-examines a witness and asks him, if he made certain statements before the police during investigation or before a Magistrate under Section 164, Cr.P.C. and the witness denies it, it is the duty of the prosecution to confront him with those statements or get them marked as exhibits, so that the witness might be afforded an opportunity either to explain the contradiction or deny them.[55] Under Section 145 of Evidence Act, it is necessary that witness should be confronted if his evidence is to be attacked by a previous statement, but it is not necessary where a person is prosecuted under Section 193, I.P.C. for perjury; the fact that in the judicial proceeding in which he is alleged to have given his false evidence he was not confronted with the previous statement, will not vitiate his prosecution.[56] Where a complainant examined in court, was not confronted with his previous inconsistent statements, the defence cannot take advantage of the inconsistency, if any, in revision, as he had no opportunity to explain at the trial.[57]

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45. *Salig Ram* v. *State of U.P.*, AIR 1956 All 138. **See also** *Rajendra Singh* v. *State of Bihar*, 2000 Cr LJ 2199 (para 4) (SC) : AIR 2000 SC 1779.
46. *Venkat Lal* v. *Kanhiyalal*, AIR 1963 MP 155; *Pannalal* v. *Union of India*, AIR 1956 VP 26.
47. *Baga Bharti* v. *Sarkar*, AIR 1950 Raj 10.
48. *Veeraiah* v. *Sonde Mall*, ILR 1963 AP 754; *Chunilal* v. *Hartford Fire Insurance Co. Ltd.*, AIR 1958 Punj 440; *Jayalakshmi Devamma* v. *Janardhan Reddy*, AIR 1959 AP 272; *Bal Gangadhar Tilak* v. *Srinivas Pandit*, AIR 1915 PC 7; *Ajodhia Prasad Bhargava* v. *Bhawani Shankar Bhargava*, AIR 1957 All 1.
49. *Doman Mahton* v. *Surajdeo Prasad*, AIR 1970 Pat 95.
50. *Ghanshyam* v. *State of M.P.*, 1990 Cr LJ 1017 (MP).
51. *Baikuntha Nath Chattoraj* v. *Prasanna Moyi Debya*, AIR 1922 PC 409.
52. *Som Nath* v. *Union of India*, AIR 1971 SC 1910; *Kanu, Ambu Vish* v. *State of Maharashtra*, AIR 1971 SC 2256; *Melappa* v. *Guramma*, AIR 1956 Bom 129.
53. 1975 (2) Cr LT 285 (HP); *Bhagwan Singh* v. *State of Punjab*, AIR 1952 SC 214; *Emperor* v. *Zawar Rahman*, ILR 31 Cal 142 (FB); *Emperor* v. *Rahenudda Mondal*, AIR 1944 Cal 323.
54. *State of Rajasthan* v. *Kartar Singh*, AIR 1970 SC 1305.
55. *In re, Saibanna Tippanna*, AIR 1968 Mys 248.
56. *Ishar Chand* v. *State*, AIR 1951 Punj 131.
57. *Narasingo Maharana* v. *Chaitanya Sahu*, AIR 1969 Ori 59.

If the statement of the witness is too long and only one or two statements in it are to be used for contradiction, mere reading the whole lengthy statement may confuse the witness and it would not be a fair method of drawing attention of the witness. So, it would be proper to put fact by fact in such statement so as to give a fair opportunity to the witness to explain.[58]

Where copies of the approver's statement and confession recorded, were not supplied to the accused for cross-examination, it was held that, though the trial could not be said to be illegal the accused had been considerably prejudiced by being deprived of valuable materials for cross-examination of the approver, for the purpose of testing his reliability.[59]

9. PARTY'S ADMISSION

Where a party appearing as defendant in a suit who had made an admission in a plaint in a prior suit was not examined as witness, Section 145 cannot be invoked but previous statement can be proved as admission against such party under Section 21.[60]

Where the party had referred to some of the documents in his examination-in-chief, it could not be said that his attention was not drawn to the contradictions contained in those documents.[61]

Document contrary to previous admission cannot be used against the party unless opportunity to explain is given.[62] When a document is admitted by the opponent's counsel to question the opponent on the admission, when the opponent is in the witness box, the admission need not be put to him before using it against him for contradiction.[63]

10. INQUEST REPORT

An inquest report is admissible except under Section 145 of the Evidence Act for contradiction.[64] It is not a substantive piece of evidence and can be used only for corroboration for evidence of the *panch* witness and not for convicting the accused.[65] Inquest report cannot be used to contradict the prosecution witnesses to whom the dying declaration was made.[66]

Statement in *panchanama* can be used in evidence only for contradicting witness whose statement is contained in the *panchanama*. But his attention must, before if can be so used, be called to parts sought to be used for contradicting him.[67]

11. F.I.R.

The first information report (FIR) is not substantive evidence. It is an information of a cognizable offence given under Section 154, Cr.P.C. statements made in it can be used for contradicting and discrediting a witness under Section 145.[68] Where the person who lodged the F.I.R. was not examined as he had died during the trial, the contents of the F.I.R. could not be used as substantive piece of evidence.

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58. *Bhagwan Singh* v. *State of Punjab*, AIR 1952 SC 214; *Ramaswami* v. *Jagannadha Rao*, 1962 AP 94; *Jatindra* v. *Sushilendra*, AIR 1965 Cal 328; *Inder Deo* v. *State*, AIR 1959 All 238.
59. *State of Kerala* v. *Thomas Cherian*, 1982 Cr LJ 2303 (DB) Ker.
60. *Harihar* v. *Nabakishore*, AIR 1963 Ori 45 (DB).
61. *Shiv Ram* v. *Shiv Charan Singh*, AIR 1964 Raj 126 (DB); *Lal Singh* v. *Guru Granth Saheb*, AIR 1951 Pepsu 101; *Ram Kishun* v. *Kausal Kishore*, AIR 1958 Pat 294; *Narayan* v. *Gopal*, AIR 1960 SC 100; *Bal Gangadhar Tilak* v. *Srinivas Pandit*, AIR 1915 PC 7.
62. *Jatindra Nath* v. *Sushilendra Nath*, AIR 1965 Cal 328; *A H. Abdulla* v. *State of Kerala*, 1981 Cr LJ (NOC) 55 (Ker).
63. *Ajodya Prasad* v. *Bhavani Shankar*, AIR 1957 All 1 (FB); *Makhea Kumbhar* v. *Jaguli Kumbhar*, ILR 1966 Cut 483.
64. *Pandurang* v. *State of Hyderabad*, AIR 1955 SC 216; **See also** *Ramanand* v. *State of H.P.*, ILR 1974 HP 509 (DB).
65. *Guggillasanthosh Reddy* v. *State of A.P.*, 2001 Cr LJ NOC 110 (AP) : (2001) 1 Andh LT (Cri) 76.
66. ***George* v. *State of Kerala*, AIR 1998 SC 1376 : 1998 Cr LJ 2034.**
67. ***Kanu Ambu Vish* v. *State of Maharashtra*, AIR 1971 SC 2256.**
68. *Nankhu Singh* v. *Bihar*, AIR 1973 SC 491; *Shankar* v. *State of U.P.*, AIR 1975 SC 757; *Hasib* v. *State of Bihar*, AIR 1972 SC 283; *Gunandhi Sundara* v. *State of Orissa*, 1984 Cr LJ 1215 (Ori); *Pundalik* v. *State*, AIR 1957 MB 72; *Bhagirathi Burhia* v. *State*, AIR 1965 Ori 99 (DB); *In re. Kalu Singh Motisingh*, AIR 1964 MP 30 (DB); *Bir Singh* v. *State of H.P.*, ILR 1974 HP 948; *Chaat Ram* v. *State of Haryana*, ILR (1975) 1 Punj 327; *State* v. *B.K. Mishra Commissioner of Hindu Relation Endoments, Orissa*, ILR 1970 Cut 1130.

it could only be used to corroborate or contradict the maker, if he had been examined.[69] The first information report recorded under Section 154, Criminal Procedure Code, may be used to contradict the informant under this section.[70] It is essential that the attention of the witness should be drawn to those parts of the document, which it is intended to use for the purpose of contradicting him, in order that he may be given an opportunity to furnish a suitable explanation with regard to the alleged contradictions. Statements in the first information report cannot be used for the purpose of discrediting any witness, other than the first informant, for such use is in effect to treat the first information report as substantive evidence in the case.[71]

F.I.R. in case of dacoity has little value.[72]

12. POLICE DIARIES

"It is the absolute duty of Judges and Magistrates to entirely disregard all statements and entries in special diaries as being in any sense legal evidence for any purpose, except for one solitary purpose of contradicting the Police Officer who made the special diary when they do afford such a contradiction; and even in that case they are not evidence of anything except that such Police Officer made the particular entry which is at variance with his subsequently given evidence, they are not evidence that what is stated in the entry was true or correctly represents what was said or done.[73]

"Where the Police Officer who made the special diary is allowed to refresh his memory and does look at an entry in the diary for the purpose of refreshing his memory, the provisions of Section 161 of the Indian Evidence Act ... apply, and the accused or his agent is entitled to see such entry in the special diary and to cross-examine such Police Officer thereupon. There is no provision in Section 172 of the Code of Criminal Procedure, 1973 enabling any person other than the Police Officer who made the special diary to refresh his memory by looking at the special diary and the necessary implication is that a special diary cannot be used to enable any witness other than the Police Officer who made the special diary to refresh his memory by looking at it. This is in truth a general principle of law. The Criminal Court, but not an accused person or his agent unless the Police Officer has been allowed to look at the diary in order to refresh his memory, can use the special diary for the purpose of contradicting the Police Officer who made it, but before doing so the Court must comply with the specific enactment of Section 145 of the Indian Evidence Act.....and call the attention of the Police Officer to such parts of the special diary as are to be used for the purpose of contradicting him, otherwise such a use of the special diary would be illegal. There is no provison in Section 172 of the Code of Criminal Procedure enabling the Court, the prosecution or the accused to use the special diary for the purpose of contradicting any witness other than the Police Officer who made it, and the necessary implication is that the special diary cannot be used to contradict any witness other than the Police Officer who made it. Section 145 of the Indian Evidence Act ..... does not either extend or control the provisons of Section 172 of the Code of Criminal Procedure. It is only if the Court uses the special diary for the purpose of contradicting the Police Officer who made it that S. 145 of the Indian Evidence Act.....applies, and in such case it applies for that purpose only, and not for the purpose of enabling the Court or a party to contradict any other witness in the case, or to show it or any part of its contents to any other witness. No reading of S. 172 of the Code of Criminal Procedure consistent with the rules construction and a knowledge of the English language is possible by which the special diary is to be used to contradict any person except the Police Officer who made it. It is not enacted in S. 172 of the Code of Criminal Procedure by reference to S. 145 of the Indian Evidence Act..... or otherwise that if the special diary is used by the Court to contradict the Police Officer who made it, it may thereupon or thereafter be used to contradict any other witness in the case.[74] The Privy Council has approved of this ruling in a criminal appeal from the judgment of the Court of the Judicial Commissioner of the Central Provinces. The Judicial Commissioner admitted in a murder trial statements made by witnesses to the police and entered in the police diary. The Judicial Committee observed that the Judicial Commissioner went wrong in doing so and held that a diary made by the Police Officer, under S. 172 of the Code of Criminal Procedure, might be used under that section to

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69. ***Harkirat Singh*** **v.** ***State of Punjab,*** **AIR 1997 SC 3231.**
70. ***Mani Mohan Ghose*** **v.** ***Emperor,*** **ILR (1931) 58 Cal 1312.**
71. *Emperor* v. *Rahemuddin Mondal,* ILR (1943) 2 Cal 381; *Visar Ali* v. *State,* (1957) 1 All 361 (SC) : AIR 1957 SC 366.
72. ***Ram Rao Ekoba*** **v.** ***Crown,*** **AIR 1957 Nag 237.**
73. PER EDGE, C.J., in *Queen-Empress* v. *Mannu,* ILR (1897) 19 All 390, 412 (FB); *Dadan Gazi* v. *Emperor,* (1906) 33 Cal 1023, 1026, 1027.
74. PER EDGE, C.J. in *Queen-Empress* **v.** ***Mannu,*** **ILR (1897) 19 All 390, 393, 394 (FB).**

assist the Court which tried the case by suggesting means of further elucidating points which need clearing up, and which were material for the purpose of doing justice between the Crown and the accused, but not containing entries which would by themselves be taken to be evidence of any date, fact, or statement contained in the diary, and that the Police Officer who made the diary entry might be confronted with it, but not any other witness.[75]

Once the diary is used, where statements under Section 161 were recorded, the accused will have a right to inspect and obtain copies of such portions of the diary, for using under Section 145 and 159 of this Act.[76]

The only use to which any part of the statement made by the witness to the police and recorded in the police diary can be put, is to contradict the witness.[77] It was held by the Allahabad High Court that the entries of a case diary could not be relied upon by the prosecution as substantive evidence. It can only be used for contradicting prosecution witnesses.[78]

In trials arising within the then Presidency Town of Calcutta, it was held that the accused cannot get copies of statements of witnesses recorded in police diaries as a matter of course; but in suitable cases the Magistrate can order the granting of such copies under the provisions of Section 145 read with Section 165 of the Evidence Act, without making the accused go through the formalities of Section 163 of the Act. In this view of the matter, the practice referred to in the order of the Presidency Magistrate that, in the Presidency Town of Calcutta, applications for copies of statements in police diaries were rejected were held not to be a correct practice and that the practice required modifications.[79]

13. STATEMENTS TO POLICE

As regards the contradiction of a witness by a previous statement, S. 162 of the Code of Criminal Procedure, 1973 sanctions a very extraordinary procedure. This section in its ordinary application is intended for the purpose of such contradiction by a written previous statement for which the witness is responsible. This cannot in terms apply to a statement recorded under S. 161 of the Code of Criminal Procedure, for the record of which he cannot be held to be directly responsible and which he does not sign. The Legislature, however, intended that the principle of this section should apply and that attention of the witness should be called to those parts of diary entries by which it is intended to contradict him by proving that they represent the actual statement of the witness to the police. In many cases the investigating officer may be able to prove that the writing is an accurate record or at any rate, a correct summary of the statements made to him by the witness during the course of the investigation. In that event, the writing comes on the record as proof of the statement of the witness.[80]

This section, which has to be read with S. 162 of the Code of Criminal Procedure, quite clearly indicates that the attention of a witness is to be called to the previous statement before the writing can be proved. If the witness admits the previous statement, or explains any discrepancy or contradiction, it becomes unnecessary for the statement thereafter to be proved. On the other hand, if the statement still requires to be proved that can be done by calling the person before whom the statement was made[81] A statement made by a witness to a Police Officer in the course of an investigation can be used only to contradict him in the manner provided by this section and for no other purpose.[82] The attention of the witness must be drawn to those parts of his statement before the police by which it is sought to contradict him and he must be given a clear opportunity to explain the inconsistency. The whole of his statement

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75. *Dal Singh* v. *Emperor*, AIR 1917 PC 25 : (1917) 19 Bom LR 510 : 44 IA 137 : 44 Cal 876; *King-Emperor* v. *Ngu Lun Thoung*, ILR (1935) 13 Ran 570 (FB); *Ahmed Miya* v. *Emperor*, ILR (1944) 1 Cal 133.
76. **See** Commentary under Section 159 and 160 of this Act.
77. *State of M.P.* v. *Kalu*, AIR 1959 MP 391; *Ram Bali* v. *State*, AIR 1952 All 289; *Sakha Wat Imami* v. *Emperor*, AIR 1937 Nag 50.
78. *Bandhu* v. *State of U.P.*, 1997 Cr LJ 3010 (All), **distinguishing** *Kanu Ambu Vish* v. *State of Maharashtra*, 1971 SCC (Cri) 211 : AIR 1971 SC 2256 and *Malkiyat Singh* v. *State of Punjab*, 1991 SCC (Cri) 976. **See also** *State of Kerala* v. *Babu*, 1999 Cr LJ 3491 (paras 5 and 12) (SC) : AIR 1999 SC 2161.
79. *Natabar Jana* v. *State*, AIR 1955 Cal 138 (DB).
80. *Heramba Lal Ghosh* v. *Emperor*, ILR (1945) 1 Cal 326.
81. *Muzaffar Khan* v. *Crown*, ILR (1939) 20 Lah 509 : AIR 1939 Lah 268.
82. *Prakash Chand* v. *State (Delhi Admn.)*, 1979 Cr LJ 329 : AIR 1979 SC 400; *Santha Veerappa Aradhya* v. *State*, ILR (1966) Mys. 1222; *Punjab State* v. *Ramji Dass*, (1969) 72 Punj LR 137.

before the police does not become admissible in evidence, but only that part of it to which his attention has been called and, therefore, that part alone should be exhibited or admitted into evidence.[83]

Section 162 of the Criminal Procedure Code, 1973 provides that the accused may be furnished with a copy of the statement of a witness, "in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872." The words "if duly proved" clearly show that the record of the statement cannot be admitted in evidence straightway but that the officer before whom the statement was made should ordinarily be examined as to any alleged statement or omitted statement that is relied upon by the accused for the purpose of contradicting the witness. The provisions of Section 67 of the Evidence Act apply to this case, as well as to any other similar case. Under S. 162 of the Criminal Procedure Code it is not permissible for statements to the police, whether oral or written, to be put in evidence, except with leave of the Court in order to corroborate a prosecution witness, or to contradict a defence witness. A statement to the police can only be used for one purpose, and that is, by the accused to contradict a prosecution witness in the manner provided by this section.[84] The only way a witness can be contradicted by a statement made to the police, under the provisions of S. 162 of the Criminal Procedure Code, is to prove that portion of his statement to the police which contradicts his evidence and to put it to him under this section so that the witness may be given an opportunity of explaining the contradiction; statements made to the police cannot be used at a trial in any other way.[85]

When a witness admits having signed his previous statements that is enough to prove that some statement of his was recorded and he had appended his signature thereto. Such statements can at best be used to contradict him in the cross-examination of such a witness under Section 145 when he gives evidence at the trial of the accused. When the witness is contradicted by his previous statement, then that part of the statement which has been put to the witness will be considered along with the evidence to determine his veracity. The whole of the previous statement, however, cannot be treated as substantive evidence.[86]

14. STATEMENT CAN BE USED ONLY TO CONTRADICT

Statements of witness made during investigation can be used only for contradicting witness and cannot be used for seeking assurance for prosecution story.[87]

When the court did not allow cross-examination of witness by defence, with reference to the statement made by the witness to the police, then such statement cannot be accepted as corroborating the evidence of another witness.[88]

The witnesses, in their statements before the police, attributed a clear intention to the accused to commit murder, but before the Court they stated that the accused was insane and therefore, he committed the murder. It has held that in the circumstances, it was necessarily implied in the previous statements of the witnesses before the police that the accused was not insane at the time he committed the murder. In this view, the previous statements of the witnesses before the police could be used to contradict their version in the Court.[89]

Cross-examination of defence witness on his previous statement to the police is not permissible. It is unfortunate that our laws do not admit of cross-examination of such a witness in respect of statements made before the police.[90]

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83. *Balak Ram* v. *State*, ILR (1953) 1 All 197.

84. *Emperor* v. *Vithu Balu*, (1924) 26 Bom LR 965 : AIR 1924 Bom 510; *Emperor* v. *Shaikh Usman*, (1927) 52 Bom 195 : 29 Bom LR 1581 : AIR 1928 Bom 23; *Azimuddy* v. *Emperor*, (1926) 34 Cal 237 : AIR 1927 Cal 17; *Emperor* v. *Nga Tha Din*, AIR 1926 Rangoon 166; **dissented from** *Venkatasubbaiah* v. *King Emperor*, AIR 1925 Mad 579; *State* v. *Rajendra Singh*, ILR (1971) Cut 752; *Bai Nanda* v. *Patel Shivabhai*, ILR (1966) Guj 500; *Madhav Rao* v. *Md Abdul Matin*, ILR (1977) 2 Kant 1403 : 1978 Cr LJ 295; *In re, Kalu Singh Moti Singh*, AIR 1964 MP 30 (DB); *State of Hyderabad* v. *Annantha Reddy*, AIR 1953 Hyd 133 (DB); *Satish Kumar* v. *State*, 1996 Cr LJ 265 (paras 21 and 22) (Del).

85. *Crown* v. *Ibrahim*, ILR 8 Lah 605; *Gopi Chand* v. *Crown*, ILR (1930) 11 Lah 460; *Narayana* v. *King-Emperor*, ILR (1932) 56 mad 231.

86. *Som Nath* v. *Union of India*, AIR 1971 SC 1910.

87. *Sat Paul* v. *Delhi Administration*, AIR 1976 SC 294.

88. *Badri* v. *State of Rajasthan*, AIR 1976 SC 560; *Sagar Chandra Saha* v. *State*, AIR 1962 Cal 85 (DB).

89. *Dahyabhai* v. *State of Gujarat*, AIR 1964 SC 1563; **relying on** *Tahsildar Singh* v. *State of U.P.*, AIR 1959 SC 1012.

90. *Laxman Kalu Nikalje* v. *State of Maharashtra*, AIR 1968 SC 1390; *Iqbal Singh* v. *State*, 1981 Cr LJ 512 (Del); *Narayanan* v. *Krishnan*, 1981 Cr LJ 563 (Ker).

15. STATEMENTS UNDER SECTION 162, Cr.P.C.

Statement of court witnesses made to the police under Section 162, Cr. P.C. cannot be used by the prosecution to contradict them even though they were cited as prosecution witnesses.[1] In view of the special mention in the proviso to Section 162(1), Cr. P.C. a statement under that section cannot be used for corroboration of a prosecution or defence witness or even a court witness.[2]

A statement under Section 162, Cr. P.C. can be used by the accused and, with the permission of the court, by the prosecution only for the purpose of contradicting the witness who has made such a statement in the manner provided by Section 145 of the Evidence Act; when any part of such statement is so used, any part thereof may also be used in the re-examination of such a witness, but only for the purpose of explaining any matter referred to in the cross-examination. The question whether the statements were honestly and faithfully recorded by the Police Officer is entirely irrelevant.[3] It is permissible to use the statements made under Section 162(1), Cr. P.C. to the police, when the prosecution witness turns hostile, for the purpose of contradicting the witness with reference to the statements.[4]

Marking of the whole statement given to the police by the hostile witness, is not contemplated by Section 145. It is only such statements as are proved to be contradictory to his evidence are to be marked as provided by the proviso to Section 162(1), Cr.P.C.[5] Witness need not be declared hostile when the prosecution seeks permission to cross-examine its own witness. The prosecution can be allowed to contradict him under Section 162(1), Cr.P.C.[6] The contradiction found in the evidence of hostile witness shall not be used for corroborating the evidence of other witnesses.[7]

The statement recorded by a Police Officer under Section 162, Cr.P.C. could be used in a Civil Proceeding under Section 145 of the Act. The witnesses can be confronted with the statements and if need be, the officers who took down the statements may be summoned to prove those statements.[8] Notes on which site plan was prepared by Investigating Officer in accordane with the various situations pointed out to him by witnesses can be used only to contradict a witness under Section 162, Cr.P.C.[9] Statement made during investigation may be used to contradict the maker thereof.[10] The portions of unsigned statement recorded by the investigating agency under Section 162, Cr.P.C. can be used during the course of examination of the witness either for the purpose of contradiction or for corroboration.[11] Cross complaint by accused to police can be used to corroborate or contradict the accused, if the accused gives evidence in court.[12]

There is no presumption in law that a statement recorded by the Investigating Officer under Section 161, Cr.P.C. is truthful. The purpose of contradictions between the evidence of a witness before the court and the statement recorded under Section 161, Cr.P.C. is primarily to shake the credit of the witness, it is only to put the court on guard, to scrutinise the evidence with greater care.[13]

Section 145 does not help the accused to obtain copies of the statements of witnesses made during investigation of an offence, though it enables him to make use of the statements if he happens to be in possession of them.[14] After a final report by police finding no case against accused, there was trial on the

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1. *In re, Vajrala Kota Reddi*, AIR 1960 AP 76. **See also** *Kemparaju* v. *State*, 2000 Cr LJ 4734 (para 25) (Kant).
2. *Tahsildar Singh* v. *State of U.P.*, AIR 1959 SC 1012; **See also** *Surya Rao* v. *Janakamma*, AIR 1964 AP 198. *In re, Jogindham*, (1962) 2 Cr LJ 523.
3. *Prakash Sen* v. *State*, 1988 Cr LJ 1275.
4. *Prakash Chand* v. *State (Delhi Admn.)*, AIR 1979 SC 400.
5. *Annasab Malappa* v. *State of Karnataka*, 1982 Cr LJ 1 553 (Karn)(DB); *Koli Nana Bhama* v. *State of Gujarat*, 1986 Cr. L. J. 571 (DB); *Punya Prasad* v. *Balvadra Daeal*, 1985 Cr LJ 159; *Velayudhan Pillai* v. *State of Kerala*, ILR (1970) 2 Ker 175; *Aheibam Ningol* v. *State of Manipur*, AIR 1967 Mani 11.
6. *State* v. *Mohan Hira*, AIR 1960 Guj 9; **See contra** *In Re, Kalu Singh Moti Singh*, AIR 1964 MP 30.
7. *Karuppanna Thevar* v. *State of Tamil Nadu*, AIR 1976 SC 980.
8. *Surya Rao* v. *Janakamma*, AIR 1964 AP 198.
9. *Jit Singh* v. *State of Punjab*, AIR 1976 SC 1421.
10. *Vijender* v. *State of Delhi*, (1997) 6 SCC 171 : 1997 SCC (Cri) 857.
11. *Peethambaran Prasad* v. *State of Kerala*, 1998 Cr LJ 2122 (para 9) (Ker).
12. *Lal Pratap Sing* v. *State*, 1963 (1) Cr LJ 355 (Guj).
13. *Koli Nana Bhama* v. *State of Gujarat*, 1986 Cr LJ 571 (Guj) **relying on**: *State of Gujarat* v. *Raghunath*, 1985 Cr LJ 1357 (SC) : AIR 1985 SC 1092.
14. *Purshottam* v. *State of Kutch*, AIR 1954 SC 700; *Jhumarlal* v. *State*, AIR 1957 Raj 185.

basis of a subsequent private complaint. It was held that Section 162, Cr.P.C. still applies and the accused can get copies of statement made to police by prosecution witness for contradicting them.[15] If the evidence of the witness is liable to be contradicted by the statement made by him to the Police Officer, it is the duty of the Police Officer to provide such a statement for the proper administration of justice.[16] If the previous statements of prosecution witnesses, which are reduced into writing are not in the possession of prosecution but are with a third party, the accused has right to summon them from the third party.[17]

In view of the provisions of Section 162, Cr.P.C. and Section 145 of the Evidence Act, it is absolutely clear that the Court should faithfully record the contradictions brought out in the evidence of the witnesses, and there is no question of recording the gist of the statement.[18]

Any other procedure is not countenanced by the Evidence Act, more so as this rule of confronting a witness with a portion of the proved statement recorded by the Police Officer finds special mention in the proviso to sub-Section 1 of Section 162, Cr.P.C.[19] Contradictions and omissions, which were not proved in the manner laid down in Section 145, cannot be made use of by the defence. Any other construction on the express language of Section 162, Cr.P.C. and Section 145, Evidence Act, is not permissible and would be fraught with a risk of miscarriage of justice.[20] Written report made by the witness to police was read out to him during his examination-in-chief. Parts of the report which are relied upon by defence should be duly proved, as required under proviso to Section 162(1), Cr.P.C. before they could be used for contradicting the witness.[21] If it is brought out that the statement which is given in the court is totally absurd, having regard to his police statement, a person is required to be given a chance of explaining as to what he wanted to say or what was his explanation is regard to the contradiction. Section 162 of the Cr.P.C. requires that the contradiction is to be elicited in the manner laid down by Section 145 of Evidence Act.[22] When the statement of a witness made to police under Section 161, Cr.P.C. is not put to him according to the provisions of Section 145 Evidence Act during the trial, it cannot be taken into consideration.[23] Contradictions and omissions which are not proved in the manner laid down in Section 145 cannot be permitted to be made use of by the defence.[24]

16. STATEMENTS UNDER SECTION 164, Cr.P.C.

A previous statement of a witness recorded under Section 164 of the Criminal Procedure Code can be used as provided for by this section and Section 155, but it cannot be used as substantive evidence of the facts deposed to therein.[25]

17. COMMITTING COURT STATEMENTS

Evidence recorded in criminal proceeding was transferred to the sessions trial for the purpose of contradicting a witness. That becomes substantive evidence.[26] Where such statements have not been transferred to the Sessions Judge, they cannot be used as substantive evidence.[27] Admissions should be tested by cross-examination.[28]

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15. *Daitari Das* v. *Kulamani Panda*, AIR 1965 Ori 21.
16. *State of Bombay* v. *Seikh Kadar*, AIR 1960 Bom 476.
17. *Manilal Sahu* v. *State*, AIR 1969 Ori 176.
18. *Malik Abdul Salem* v. *State of Orissa*, 1985 Cr LJ 1871 (DB).
19. *In Re, Joginadham*, 1962 (2) Cr LJ 523 (AP); *Tahsildar Singh* v. *State of U.P.*, AIR 1959 SC 1012; *In Re, Sambasiva Rao*, (1958) 2 An WR 627.
20. *Abdul Hamid* v. *State of Tripura*, AIR 1958 Tri 1.
21. *Pangi Jogi Naik* v. *State*, AIR 1965 Ori 205 (DB).
22. *N.K. Tandel* v. *State of Gujarat*, 1986 Cr LJ 457 (Guj)(DB); *Tahsildar Singh* v. *State of U.P.*, AIR 1959 SC 1012.
23. *State* v. *Hadibandhu*, ILR 1973 Cut 601.
24. *Abdul Hamid* v. *State of Tripura*, AIR 1958 Tri 1; *Bombay Agarwal Co. Akola* v. *Ram Chand Diwan Chand*, AIR 1953 Nag 154 (DB).
25. *Emperor* v. *Bishun Datt*, ILR (1927) 50 All 242; *Bisipati Padhan* v. *State*, AIR 1969 Ori 289. **See also** *Guggillasanthosh Reddy* v. *State of A.P.*, 2001 Cr LJ NOC 110 (AP) : (2001) 1 Andh LJ (Cri) 76.
26. *Ashok Kumar* v. *State (Delhi Admn.)*, AIR 1977 SC 1304.
27. *Jit Singh* v. *State of Punjab*, AIR 1976 SC 1421.
28. *Sita Ram* v. *Ram Chandra*, AIR 1977 SC 1712.

In a trial before a Court of Session, counsel for the accused is not entitled to refer to the depositions given before the committing Magistrate for the purpose of contradicting the witnesses before the Sessions Court, without drawing their attention to the alleged contradictions in their previous depositions and giving them an opportunity of explaining the same.[29]

The previous contradictory statements of a witness can be used only to contradict and discredit him. It cannot be used to impeach or undermine the credit of other witnesses. Further, where the previous statement of such a witness made in the committal court had not been transferred to the sessions record under Section 288, it could not be used as substantive evidence in the case.[30]

A witness in Sessions Court, when confronted with his statement in committed court, while admitting that the record was true, deposed that the statement was false, having been made under police pressure, there is sufficient compliance with Section 145, and it would be pointless to draw his attention to each sentence and ask for his explanation.[31]

It is highly desirable that the court should, before the transfer of the earlier statement to be record of the sessions case under Section 288, (old Cr.P.C., now omitted), indicate in a brief order why the earlier deposition was being transferred to the record of the sessions trial. This will make quite clear to the accused that this earlier statement is likely to be used as substantive evidence against him. Although the technical requirement of the session namely, that an order should be passed to indicate that the statement is transferred so as to be read as substantive evidence is not complied with, there is no substantive departure from the requirements of the law. There is no likelihood of any prejudice to the accused, since he is informed, while he is being examined that the statement is being used under Section 288, (old) Cr.P.C. (now omitted) and he is invited to say what he wished to say in defence.[32] If the prosecution witnesses turned hostile in the Sessions Court, and their evidence in the committal court was not put to them and their attention has not drawn to those parts, evidence in the committal court is not admissible as the proceedure followed will be contrary to the general principle of fair play and to the specific provisions of Section 145.[33]

Section 288 of (old) Cr. P.C. (now omitted) stated that the previous statements were to be subject to the provisions of the Indian Evidence Act. Section 145 falls fairly and squarely within the plain meaning of these words. More than that, this is a fair and proper provision and is in accord with the sense of fairplay to which courts are accustomed. If the prosecution wished to use the previous testimony to the contrary as substantive evidence, then it must confront the witness with those parts of it which were to be used for the purpose of contradicting him. Then only it could be brought in as substantive evidence under Section 288 of (old) Cr.P.C. (now omitted).[34] Where some of the statements were admitted by witnesses but they hastened to point out that the facts stated therein were not correct, those statements have to be treated as denials and not admissions. When parts of statements were not put to the witnesses at all, they cannot be said to have been contradicted by their prior statements.[35]

The subject dealing with the statements recorded by the committing court under Section 288 of (old) Cr.P.C. (now omitted) with reference to Section 145 has become of academic interest, as the present Cr.P.C. of 1973 has dispensed with the recording of evidence by the committing court.

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29. *Emperor* v. *Zawar Rahman*, ILR (1902) 31 Cal 142 (FB); *Queen-Empress* v. *Dan Sahai*, ILR (1885) 7 All 862; *Reg.* v. *Arjun Megha*, (1874) 10 Bom HCR 281; *Emperor* v. *Lakshman*, (1915) 17 Bom LR 590; *Bal Gangadhar Tilak* v. *Shriniwas Pandit*, (1915) 17 Bom LR 527 : 42 IA 135 : ILR 39 Bom 441 : AIR 1915 PC 7.
30. *Jit Singh* v. *State of Punjab*, AIR 1976 SC 1421; **See also** *Ashok Kumar* v. *State*, AIR 1977 SC 1304.
31. *State of Rajasthan* v. *Kartar Singh*, 1970 SC 1305; *In re, Dhanabal*, 1976 Cr LJ 1969 (Mad).
32. *Periyasami* v. *State of Madras*, AIR 1967 SC 1027.
33. *Basappa Ramappa Naik* v. *State*, 1963 (1) Cr LJ 698 (Mys) (DB); *Tara Singh* v. *State*, AIR 1957 SC 441; *Bal Gangadhar Tilak* v. *Shrinivas Pandit*, ILR 39 Bom 441; *Upendra* v. *Bhupendra*, 21 Cal WN 280; *Muharram* v. *Barkat*, AIR 1930 Lah 695; *Pangi Jogi Naik* v. *State*, AIR 1965 Ori 205; *State* v. *Hotey Khan*, AIR 1960 All 521.
34. *Tara Singh* v. *State*, AIR 1951 SC 441; *S. Ibochouba Singh* v. *Manipur Administration*, 1972 CR LJ 395 (Manipur); *Anna* v. *State of Hyderabad*, AIR 1956 Hyd 99; *Jagar Singh* v. *State*, AIR 1954 Pepsu 6 (DB); *Mer Kala Veman* v. *State*, 1954 Sau 142 (DB); *Jit* v. *State*, (1960) 62 Punj LR 123; *Nazar Md.* v. *Mehta Kirpa Ram*, AIR 1946 Lah 64 (FB); *Paramananda Mahakud* v. *State of Orissa*, AIR 1970 Cr LJ 931 (Ori).
35. *Narayana Pillai* v. *State*, 1971 Cr LJ 168 (DB) Ker; **relying on** *Tahsildar Singh* v. *State of U.P.*, AIR 1959 SC 1012.

18. PLEADINGS—DEPOSITIONS

A witness can be confronted under Section 145 with statements made in previous suits, whether contained in pleadings, petitions, affidavits or evidence.[36]

Where a successor court orders a *de novo* trial, the statements of prosecution witnesses recorded by the predecessor court can be used for contradicting these witnesses. Their previous statements do not become inadmissible or non-existent on account of the *de novo* trial.[37] Where notes of evidence were recorded by a Presiding Officer of the Small Causes Court and the witness was again examined by a succeeding officer, the statement of the witnesses recorded by the earlier Presiding Officer falls under Section 145 and can be used in cross-examination for contradicting the witness.[38] Even if the evidence taken on commission is not read as evidence in a suit, it would be available as a previous statement for the purposes of Section 145.[39] The deposition in a prior criminal case between the same parties, is not admissible but the attention of plaintiff may be drawn to the deposition made by him as required by Section 145.[40]

Where a report was made by an official on the direction of the court in an earlier proceeding, the contents of the report cannot be used in subsequent suit, unless the official is produced and party against whom it is to be used is given opportunity to cross-examine him.[41] In the case of a departmental enquiry against a government servant, where statements were recorded during the preliminary inquiry, the petitioner can demand copies of the statements of only those witnesses who are examined in the departmental enquiry for the purpose of discrediting them. Section 145 Evidence Act, does not confine the right of contradiction only to previous statements recorded on oath.[42]

19. OTHER STATEMENTS

A post-mortem report is not substantive evidence. It can be used to corroborate under Section 157, or to contradict, under Section 145, the evidence of the doctor.[43] Where the writer of a letter appears as a witness in court, the contents of that letter would amount to a previous statement of a witness, and can be used for the purpose of corroborating his testimony in court under Section 157, or to discredit his evidence during cross-examination.[44]

20. SECTIONS 145, 146, 155 AND 157

A perusal of Sections 145, 155 and 157 of the Evidence Act clearly indicates that there are two purposes for which a previous statement can be used. One is for cross-examination and contradiction, and the other is for corroboration. When the defence wants to use the previous statement of a witness, it could be only to contradict and not to corroborate. However, considering the restrictions contained in Section 6 of the Commission of Enquiry Act, the statement made by a witness before a Commission could not be used in a criminal trial either for the purpose of cross-examination or to contradict the witness or to impeach his credit.[45]

Section 155, Evidence Act, lays down that the credit of a witness may be impeached *inter alia* by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted, but it does not lay down the manner in which his former statement is to be proved. The mode of proof of such a statement in writing, when it is sought to be tendered in evidence for contradicting a witness, is provided in Section 145 and is not independent of it.[46] By virtue of Section 155 proof of former statements inconsistent with any part of the evidence given by a witness, can be given and it is not required by Section 155 that the attention of the witness must be drawn to such previous statements in the course of his examination. It is obvious, therefore, that Section 145 does not control the provisions of

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36. *Mahammed Seraj* v. *Adibar Rahaman Sheikh*, AIR 1968 Cal 550.
37. *Brahma Naik* v. *Ram Kumar Agarwal*, 1974 Cr LJ 567; *Rajindar Singh* v. *State*, ILR (1974) 1 Delhi 277.
38. *President, Sishu Bihar Bhabini Vihar Mandal, Hyderabad* v. *Yellaiah*, AIR 1969 AP 148.
39. *Mir Abdul Sovan* v. *Rafi Kan Bibi*, AIR 1972 Cri 213; *Sohanlal* v. *State*, AIR 1965 Bom.
40. *Venkatappa* v. *Brahmayya*, AIR 1953 Mad 1000.
41. 1967 All WR (HC) 827.
42. *Sharmanand* v. *Superintendent Gun Carriage Factory, Jabalpur*, AIR 1960 MP 178 (DB).
43. *Hadi Kirsani* v. *State*, AIR 1966 Ori 21 (DB); *State of Rajasthan* v. *Mathura Lal*, 1971 Cr LJ 1816 (Raj).
44. *Balabhadra Misra* v. *Nirmala Sundari Devi*, AIR 1954 Ori 23.
45. *Kehar Singh* v. *State (Delhi Admn)*, AIR 1988 SC 1883.
46. 1958 Mad LJ (Cri) 942 (AP)

Section 155 which is much wider and the evidence of a witness 'A' cannot be regarded as inadmissible for the reason that the attention of witness 'B' was not drawn to the statement attributed to him by the witness 'A'.[47]

Sections 145, 146 and 155(3) are complementary to each other. When they are read together, a cross-examiner cannot be restricted from putting questions except to the extent indicated in Section 148 to 152.[48]

21. RECALLING A WITNESS

If the witnesses are recalled subsequent to the conclusion of their evidence in the Court at the behest of the accused on the basis of affidavits subsequently filed by them contradicting their previous statements made in the Court, it would be in violation of the provisions contained in S. 145 of the Evidence Act. If permitted, there shall be no end of trial.[49]

Questions lawful in cross-examination.

S. 146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

(1) to test his veracity,

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

[Provided that in a prosecution for rape or attempt to commit rape, it shall not be permissible to put questions in the cross-examination of the prosecutirx as to her general immoral character.]

SYNOPSIS

1. *General*	... 1284	4. *Shaking the credit by injuring the character*	... 1286
2. *To test his veracity*	... 1284	5. *Indecent and scandalous questions*	... 1287
3. *To discover who he is etc.*	... 1285	6. *Tape Record*	... 1287

COMMENTS

1. GENERAL

This section enables the cross-examiner to put certain questions, in additions to the questions referred to in the earlier Sections, to test the veracity, discover who the witness is and what his position is in life, or to shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him. This section gives very wide powers to the cross-examiner in addition to those given by Section 138. This section extends the power of cross-examination far beyond the limits of Section 138, paragraph 2, which confines, the cross-examination to relevant facts, including of course the facts in issue.[50]

2. TO TEST HIS VERACITY

A witness may be examined not only as to the relevant facts but also as to all facts which reasonably tend to affect the credibility of his testimony. This is generally spoken of as cross-examination to credit, inasmuch as a large part at any rate of the facts which are relied on for the purpose are facts which touch the credit and good name of the witness. But no such cross-examination can be legitimate unless it has

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47. *Ram Ratan* v. *State*, AIR 1956 Raj 196.
48. *Surendran* v. *State*, 1994 Cr LJ 464 (para 8) (Ker).
49. *Tahir* v. *State of U.P.*, 2000 Cr LJ 1342 (paras 9 and 10) (All).

* **Ins. by the Indian Evidence (Amendment) Act, 2002 (4 of 2003), s. 2, w.e.f. 31-12-2002.**

50. MARKBY, p. 107.

some reasonable bearing on his credibility. Cross-examination to credit is necessarily irrelevant to any issue in an action, its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for or against the relevant issue is untrustworthy. It is most relevant in a case where everything depends on the judge's belief or disbelief in the witness's story.[51] A witness is compellable to answer questions relevant merely as affecting credit, but the judge has a discretion to excuse any answer when the truth of the matter suggested would not, in his opinion, affect the credibility of the witness as to the subject matter of his testimony.

Where the veracity of a witness is in question, Section 146 applies. And the witness can be cross-examined to shake his character, though it may not be an issue in a case. Sections 155 and 146 are not in conflict with each other. Sections 138, 140, 145,148 and 154 provide for impeaching the credit of a witness by cross-examination.[52]

The Supreme Court observed: "The statement that Section 146 must be read along with Section 153 cannot be accepted in its entirety. It may be that clause (3) of Section 146 may have to be read along with the main Section 153, but clause (1) of Section 146 and exception (2) to Section 153 deal with different aspects. Under Section 146(1), questions may be put to a witness in cross-examination, to test his veracity and under exception (2) to Section 153, a witness may be contradicted when he denies any question tending to impeach his impartiality."[53]

LORD HERSCHELL at page 70 observed: "My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity to making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witness." LORD HALSBURY at page 76 observed: "To my mind nothing would be more absolutely unjust than not to cross-examine witness upon evidence which they have given, so as to give them notice and to give them an opportunity of explanation and an opportunity very often to defend their own character."[54]

As a general rule, and in view of Section 145, whenever it is intended to impeach the evidence of a witness, his attention must be called to the discrediting facts, so that he may have an opportunity to explain them. In *Carapeit* v. *Derderian*[55], following the observations of LORD HERSCHELL and LORD HALSBURY, quoted above, it was held that the attention of the witness should be drawn to such facts as are intended to impeach the credit of his evidence.

Any question touching on the character and conduct of a witness should be asked only when there is some material to substantiate the same.[56]

The veracity of a witness is to be tested with reference to the answers given in the cross-examination which is aimed at obtaining some admissions favourable to the cross-examining party, or at discrediting the witness.[57]

Sections 133, 114, (Ill. b) and Section 146 are to be read together, in respect of evidence of an accomplice witness, as an accomplice is unworthy of credit, under Section 114, Illu. (b), as a rule of prudence corroboration in material particulars is required. Section 146 can properly be invoked to test his veracity and also discover who is and what is his position in life and shake his credit by injuring his character, as conduct of the accused may also be capable of supplying corroboration.[58]

3. TO DISCOVER WHO HE IS *ETC.*

As preliminary to the cross-examination of a witness as to facts in the case, it is common practice to make inquiry into his relations with the party on whose behalf he was called—business, social and family; also to enquire as to his feelings towards the party against whom his testimony has been given.

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51. *Bombay Cotton Co* v. *Raja Bahadur Shivlal Motilal*, (1915) 17 Bom LR 455 : 42 IA 110 : ILR 39 Bom 386 : AIR 1915 PC 1.
52. *G. Hussenaiah* v. *B. Yerraiah*, AIR 1954 Andhra 39.
53. *Rama Reddy* v. *V.V. Giri*, AIR 1971 SC 1162.
54. *Browne* v. *Dunn*, (1894) 6 R 67.
55. AIR 1961 Cal 359.
56. *Jagtu* v. *Badri*, AIR 1978 J&K 50.
57. *Rajanna Rajulli* v. *State of A.P.*, (1979) 2 An LT 215.
58. *Ibrahim Husen* v. *State of Goa*, 1969 Cr LJ 739.

This is permissible in order to place his testimony in a proper light with reference to bias in favour of the one party or prejudice against the other.[59]

Credibility of a witness does not depend on the status of a witness. So questions relating to the low status of a witness would not be of any help to discredit a witness.[60]

Sections 145, 148 and 155 indicate that the credit of a witness can be said to have been shaken only if it can be shown that he is not a man of veracity, and not that he is a of bad moral character. A black-marketeer is not necessarily untruthful nor a non-black-marketeer necessarily a man of veracity. There is no reason for rejecting the evidence of a witness on the ground alone that he is a black-marketeer.[61]

4. SHAKING THE CREDIT BY INJURING THE CHARACTER

This clause enables the cross-examiner to put questions injuring the character of a witness, to shake his credit.

Sections 146 to 152 deal with questions which can be put to a witness with a view to shake his credit by damaging his character. These sections along with S. 132 embrace the entire range of questions which can possibly be put to a witness.

Section 152 of the Act, says that the court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the court needlessly offensive in form.

Section 153 states that questions can be put to shake the witness's credit by injuring his character. But, no evidence shall be given to contradict the answers given by the witness, if he answers falsely he may be charged with giving false evidence. This rule has got two exceptions, *viz.*, where a witness denies his previous conviction, or denies the fact suggested to impeach his impartiality; then evidence may be given to contradict those denials of the witness.

STEPHEN in his digest (pp. 196-197) has observed: "I shall not believe, unless and until it is so decided upon solemn agreement, that by the law of England a person who is called to prove a minor fact not really disputed, in a case of little importance, thereby exposes himself to having every transaction in his past life, however, private, inquired into by persons who may wish to serve the basest purposes of fraud or revenge by doing so. Suppose for instance, a medical man were to prove the fact that a slight wound had been inflicted and been attended to by him, would it be lawful under pretence of testing his credit, to compel him to answer upon oath a series of questions as to his private affairs extending over many years and tending to expose transactions of the most delicate and secret kind, in which the fortune and character of other persons might be involved? If this is the law, it should be altered."

In Cl. (3) of Section 146, the expression "injuring his character" is used; in Sections 52, 53, 54 and 55 of this Act, it is stated when character would be relevant. Character includes both general reputation and disposition. (See Sections 52 to 55).

Generally, character evidence is not relevant to decide any issue in a case, except to the extent given in Sections 52 to 55. But under Section 146(3), the cross-examinor is entitled to put questions regarding character of the witness for the purpose of discrediting his evidence.[62]

As long as the cross-examiner confines his questions to the points of testing the veracity of a witness or discovering his status in life, there seem to be no limits to his power of putting questions. But when he undertakes the difficult vet delicate task of impeaching the character of witness, the following sections (Ss. 147 to 150) give ample protection to a witness in speaking the truth, and impose wholesome restraints upon groundless assertions levelled against him. If any such question relates to a matter relevant to the suit or proceeding....the provisions of S. 132 are by S. 147 declared applicable to it. If the question is as to a matter relevant only so far as affects the credit of the witness by injuring his character, the Court is by S. 148 directed to decide whether or not the witness is to be compelled to answer, and may ..... warn the witness that he is not obliged to answer it....When there is a question asked to which

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59. MAKELVEY, S. 259.
60. (1959) 2 An WR 375.
61. *Chari* v. *State*, AIR 1959 All 149.
62. *G. Husseiaiah* v. *B. Yerraiah*, AIR 1954 AP 39; *Baburao Patel* v. *Bal Thackrey*, 1977 Cr LJ 1637 (Bom).

the answer may tend to criminate a witness, he may object that it is not as to a matter relevant to a matter in issue, or that, if relevant, it is relevant only as affecting his credit by injuring his character.[63]

It is not permissible to have recourse to Section 146(3) to ask all sorts of questions which are not necessary to shake the credibility of the witness. The assault on the character of a witness, permitted by Section 146(3), must be directed only for the purpose of shaking the credit of the witness and not for any other purpose.[64]

5. INDECENT AND SCANDALOUS QUESTIONS

The provisions of Section 146(3) permit cross-examiner to put questions which will not only shake the credit of a witness, but which will also expose his ethical and moral behaviour, which may ultimately weigh with the court, while evaluating that testimonial evidence. By its every nature, questions on *mala fides* as opposed to *bona fides*, immorality, as opposed to good morality, dishonesty as against honesty, falsehood as against truthfulness, can all conceivably be put, provided there is necessity and foundation for the same. Section 155 expressly permits, by indicating the mode and manner, to bring in evidence upon the credit of a witness, so as to impeach such testimony. Indecent and scandalous questions can be put if they directly relate to the facts in issue and also if it is necessary in order to determine whether or not the facts in issue existed; these exceptions are vital; and, if in any given case, the court is satisfied that even an indecent and scandalous question may have a bearing upon a fact in issue, the same cannot be forbidden. If a question is merely intended to insult or annoy, and is offensive in form, the court has power to forbid the same.[65]

The Madras High Court held that where a witness is put questions *per se* defamatory, the remedies open to him in law are threefold, *namely*: (a) protection by the court; (b) self-help in the shape of setting the criminal law in motion; or (c) filing a suit for damages. The extensive powers which have been granted to the court for protecting witnesses from questions not lawful in cross-examination are set out in Sections 146 to 153 of the Evidence Act.[66]

In a case, the advocate put a question to the witness as to who supplied the bricks for the drain; the witness replied that he supplied them. When the court asked the lawyer about the relevancy of that question, he said that he is going to prove that the witness is an unscrupulous vice-chairman of the Municipality. When the lawyer was charged with defamation it was held that the question put by the lawyer fell within the purview of Section 146, to test the credit of the witness.[67]

6. TAPE RECORD

The Supreme Court observed: "The tape recorded statement itself is primary and direct evidence admissible as to what has been said and picked up by the recorder. A previous statement made by a witness and recorded on tape can be used not only to corroborate the evidence given by the witness in court, but also to contradict the evidence given before the court, as well as to test the veracity of the witness and also to impeach his impartiality. Thus, apart from being used for corroboration, the evidence is admissible in respect of other three matters, *viz.* (1) under Section 146(1) to test the veracity of the witness; (2) under exception (2) to Section 153, *i.e.*, if a witness is asked any question tending to impeach his impartiality and answers it by denying the fact suggested, he may be contradicted; and (3) under Section 155(3), *i.e.*, by giving proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. The weight to be given to such evidence is however distinct and separate from the question of its admissibility."[68]

When witness to be compelled to answer.

S. 147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of Section 132 shall apply thereto.

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63. Per TURNER, C.J., in *The Queen* v. *Gopal Doss*, ILR (1881) 3 Mad 271, 278 (FB).
64. *Babu Rao Patel* v. *Bal Thackrey*, 1977 Cr LJ 1637 (Bom); *Govardhansing* v. *Chandanmal*, (1982) 1 Bom CR 591.
65. *Prakash Raja Ram* v. *State of Maharashtra*, 1975 Cr LJ 1297 (Bom).
66. *Ayeasha Bi* v. *Peer Khan Sahib*, AIR 1954 Mad 741.
67. *Jyothish* v. *Haridas*, 24 Cal WN 23.
68. *Ramareddy* v. *V.V. Giri*, AIR 1971 SC 1162; *Rupchand* v. *Mahabir Prasad*, AIR 1956 Punj 173; *Manindranath* v. *Bishwanath*, 67 Cal WN 191; *Malkani R.M.* v. *State of Maharashtra*, AIR 1973 SC 157; *Partapsingh* v. *State of Punjab*, AIR 1964 SC 72.

COMMENTS

This section says that, if any such question relates to a matter relevant to the suit or proceeding, the provisions of Section 132 shall apply thereto. "Such question" refers to a question referred to in clause (3) of Section 146, *viz.*, a question which tends to shake the credit of a witness by injuring his character *etc.*

Section 132 states that the witness shall not be excused from giving the answer on the ground that any answer to such a question will criminate or may tend directly or indirectly to criminate such a witness, or expose him to any penalty or forfeiture of any kind. But, if the court compels him to give an answer to any such question he is protected from arrest or prosecution. In case he gives false evidence in answer to a question put to him, he can be charged with the offence of giving false evidence. All questions which would fall under Section 132 can be put under Section 146.

The witness cannot be compelled to give an answer if he can claim privilege under Sections 122, 126, 127, 128 or 131. Again under Sections 123 and 125 as a matter of public policy a witness referred to in these sections cannot be compelled to answer. Barring the above provisions whereunder he need not answer questions, in other circumstances, he has to answer questions under Section 132 of the Act.

Section 147 empowers a court to compel a witness to reply to a relevant question. If he refuses to answer a question, immediate action should be taken against him in the interest of fair trial. If the court fails in its duty, it hampers the course of justice and brings it into disrepute.[69]

A witness is compellable to answer every question put to him in cross-examination which is relevant to the issue, unless protected by public policy, or privilege, or unless the case is one in which oral evidence is excluded by documentary. All cross-examination must be relevant to the issues or to the witness's credit.[70]

Court to decide when question shall be asked and when witness compelled to answer.

S. 148. If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:—

(1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies;

(2) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies;

(3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence;

(4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

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69. *Shive Sharnagat* v. *State of Bhopal*, AIR 1953 Bhopal 21.
70. PHIPSON ON EVIDENCE, 15th Edn. (2000), para 11-17, page 249.

SYNOPSIS

1. *Principle and Scope* ... 1289
2. *"Any such question"* ... 1290
3. *Proper questions [Clause (1)]* ... 1290
4. *Improper questions [Clauses (2) and (3)]* ... 1290
5. *Adverse inference [Clause (4)]* ... 1291

COMMENTS

1. PRINCIPLE AND SCOPE

This section deals mainly with the exercise of discretion by the court, while deciding whether a witness should be compelled to answer a question in cross-examination or not. It states that, if any such question relates to a matter not relevant to the suit or proceeding, except the questions put to discredit the witness by injuring his character, the court shall decide whether the witness is to be compelled to answer or not. If the court thinks that it is not relevant, then the court can warn the witness that he is not obliged to answer the question. Before exercising that discretion, the court must have regard to the considerations mentioned in clause 1 to 4 of the section.

The purpose of enacting Sections 149 to 153 is to prevent abuse of the right to cross-examination of a witness.

Sections 148-152 are intended to protect a witness against improper cross-examination—a protection which is often very much required. But the protection offered by Section 148 is not very effectual, because an innocent man will be eager to answer the question, and one who is guilty will by a claim for protection merely confess his guilt. Nor does the threat contained in Section 149 and this section carry the matter much further.[71]

The object of this section is to prevent the unnecessary raking up of the past history of a witness, when it throws no light whatsoever on the questions at issue in a case. It protects a witness from the evils of a reckless and unjustifiable cross-examination under the guise of impeaching his credit. In the course of cross-examination, the temptation is always too great to run down a witness's character; the Legislature has, therefore, wisely provided ample safeguards for the unfortunate witness and placed wholesome checks on the willy cross-examiner. It would seem that under this section a witness cannot be compelled to answer irrelevant questions; but if he chooses to answer them, he cannot be contradicted by other evidence (Section 153).

"In connection with this subject, we may refer to some provisions which we have inserted in order to prevent the abuse of the power of cross-examination to credit. We believe the existence of that power to be essential to the administration of justice, and we believe it to be liable to great abuse. The need for the power and danger of its abuse are proved by English experience, but in this country litigation of various kinds, and criminal prosecution in particular, are the great engines of malignity, and it is accordingly even more necessary here than in England, both to permit the exposure of corrupt motives and to prevent the use of the power of exposure as a means of gratifying malice. We have accordingly provided as follows:

"Such questions may relate either to matters relevant to the case, or to matters not relevant to the case. If they relate to matters relevant to the case, we think the witness ought to be compellable to answer, but that his answer should not afterwards be used against him.

"If they relate to matters not relevant to the case except insofar as they affect the credit of the witness, we think that the witness ought not to be compelled to answer. His refusal to do so would, in most cases, serve the purpose of discrediting him, as well as an express admission that the imputation conveyed by the question was true."[72]

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71. MARK BY, 107.
72. Proceedings of the Legislative Council.

2. "ANY SUCH QUESTION"

When any such question, that is, the question referred to in Section 146, is not relevant to the suit or proceeding, the court must decide whether or not the witness should be compelled to answer it and may warn the witness that he is not obliged to answer it.

Such questions are proper—

(1) if they are of such a nature that the truth of the imputation made touches the credibility of the witness.

They are improper—

(1) if the imputation refers to matters (a) so remote in time, or (b) of such a character, that its truth does not affect the credibility of the witness; or

(2) If there is a great disproportion between the importance of the imputation and the importance of the evidence.

If the witness refuses to answer any question it is open to the court to draw the inference that the answer if given would be unfavourable. (cf. S. 114, ill. (b)).

3. PROPER QUESTIONS [CLAUSE (1)]

On an indictment for rape, or attempt to rape, or for an indecent assault, the prosecutrix cannot be asked in cross-examination whether she had had connection with another person not the accused; and if she denies it, evidence cannot be called to contradict her.[73] But she can be asked whether she had on previous occasions connection with the accused,[74] or whether she was a common prostitute.[75]

The considerations referred to in sub-sections 2 and 3 of Section 148, and Section 151 and 152 indicate, more distinctly, than is to be found in English law, the principle on which the court should proceed in protecting witnesses from reckless and unjustifiable interrogations. A witness is not to have his whole past life raked up and dragged into publicity, merely because he comes forward in obedience to the law, to give evidence in court. So serious an interference with ones private life can be justified only by a real necessity and cannot be justified when the injury to the witnesses' character is very serious, while the importance of the evidence is relatively insignificant.[76]

4. IMPROPER QUESTIONS [CLAUSES (2) AND (3)]

This second clause says that such questions are improper if the imputation which they convey relate to matters remote in time.

WIGMORE ON EVIDENCE (Section 928) observes: "The correct solution seems to be that prior character at any time may be admitted as being relevant to show present character, and therefore, indirectly, to whow the probability as to truth speaking. The only limitation to be applied is that the character must not be so distant in time as to be void of real probative value in showing present character, this limitation is to be applied in the discretion of the trial court."

SIR JAMES STEPHEN in his General View of the Criminal Law of England observes: "If a woman prosecuted a man for picking her pocket, it would be monstrous to inquire whether she had not had an illegitimate child 10 years before, though circumstances might exist which might render such an inquiry necessary. For instance, she might owe a grudge to the person against whom the charge was brought on account of circumstances connected with such a transaction, and have invented the charge for that reason."[77]

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73. Per KELLY, C.B. in *Queen* v. *Holmes*, (1871) LR 1 CCR 334, 336; *Hodgson's* case, (1812) R&R CC 211; *Rex* v. *Clarke*, (1817) 2 Stark 41.
74. *Rex* v. *Martin*, (1834) 6 C&P 562; *Reg* v. *Cockcroft*, (1870) 11 Cox 410.
75. *Rex* v. *Barker*, (1829) 3 C&P 589.
76. *Ayeasha Bi* v. *Peer Khan Sahib*, AIR 1954 Mad 741.
77. **See also** *Ayesha Bi* v. *Peer Khan Sahib*, AIR 1954 Mad 741.

"No doubt, cases may arise, when the judge, in exercise of his discretion, would properly interpose to protect the witness from unnecessary and unbecoming annoyance, for instance, all inquiries into discreditable transactions of a remote date, might, in general, be rightly suppressed; for the interests of Justice can seldom require that the errors of a man's life, long since repented of, and forgiven by the community, should be recalled to re-rememberance at the pleasure of any future litigant. So, questions respecting alleged improprieties of conduct which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, might very fairly be checked."[78]

The accused offered himself as a surety for a person who had been ordered to find security for good behaviour. The Magistrate examined him on oath with a view to ascertain his fitness as a surety. He was asked if he had ever been previously convicted of any offence; and he replied in the negative. A previous conviction which was thirty years old having been proved against him, he was tried for an offence under Section 193 of the Indian Penal Code. The High Court upheld the conviction but modified the sentence on the ground that the Magistrate should have refused to allow the question to be put on the ground that it related to a matter which had happened thirty years before and was so remote in time that it ought not to influence his decision as to the fitness of the surety.[79]

Under this clause, questions would be improper if there is a great disproportion between the importance of the imputation made against the witness's character and importance of his evidence.

5. ADVERSE INFERENCE [CLAUSE (4)]

This clause states that the court may presume or draw inference, when the witness refuses to answer, that the answer, if given, would be unfavourable to him. Section 114, Illus. (h), says that if a man refuses to answer questions which he is not compelled to answer by law, the Court may presume that the answer if given would be unfavourable to him. In cl. (4) of this section and also in Section 114, the expression "may" is used. So, the discretion is with the court whether to draw, or not, such an inference depending upon the facts of each case.

"The law, after much debate, is still somewhat unsettled as to whether a witness is bound to answer any question, the direct and immediate effect of answering which might be to degrade his character. It, however, seems clear that, where the transaction as to which the witness is interrogated, forms any material part of the issue, he will be obliged to give evidence, however strongly it may reflect on his own conduct. Indeed, it would be alike unjust and impolitic to protect a witness from answering a question, merely because it would have the effect of degrading him, when his testimony is required either for the due administration of public justice, or to protect the property, the reputation, the liberty, or the life of a fellow subject. Were such a protection to prevail, a man already convicted and punished for a crime, would, if called as a witness against an accomplice, be excused from testifying to any of the transactions in which he had participated with the accused, and thus the guilty might escape."[80]

"It has been stated more than once, that, if the witness declines to answer, no inference of the truth of the fact can be drawn from that circumstance; but the soundness of this rule is very questionable; and although it would be going too far to say that the guilt of the witness must be implied from his silence, it would seem that, in accordance with justice and reason, the jury should be at full liberty to consider that circumstance, as well as every other, when they come to decide on the credit due to the witness. A perfectly honourable but excitable man may occasionally repudiate a question which he regards as an insult, and to infer dishonour from his conduct would, of course, be unjust; but, generally speaking, an honest man will be eager to rescue his character from suspicion and will at once deny the imputation, rather than rely on his legal rights, and refuse to answer the offensive interrogatory."[81]

A reading of the provisions in Sections 146, 148 and 155 would disclose that the credit of a witness can be said to have been shaken only if it can be shown that he is not a man of veracity, and not that he is of bad immoral character. A black-marketeer is not necessarily untruthful nor a non-black-marketeer necessarily a man of veracity.[82]

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78. FIELD ON EVIDENCE, 1967 Ed. Vol. 6, page 487.
79. *Emperor* v. *Ghulam Mustafa*, ILR (1904) 26 All 371, 374.
80. TAYLOR ON EVIDENCE, 10th Edn. Sections 146 to 148.
81. TAYLOR 8th Edn., Sections 1321 and 1467.
82. *Chari* v. *State*, AIR 1959 All 149.

Question not to be asked without reasonable grounds.

S. 149. No such question as is referred to in Section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

ILLUSTRATIONS

(a) A barrister is instructed by an attorney or vakil that an important witness is a dakait. This is a reasonable ground for asking the witness whether he is a dakait.

(b) A pleader is informed by a person in Court that an important witness is a dakait. The informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dakait.

(c) A witness, of whom nothing whatever is known, is asked at random whether he is a dakait. There are here no reasonable grounds for the question.

(d) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dakait.

COMMENTS

This section states that questions which are contemplated under Section 148, ought not to be asked unless the person asking the question has reasonable ground for thinking that the imputation which it conveys is well-founded.

The cross-examiner must have reasonable grounds to believe that the imputation made against the witness is well-founded. As to what are reasonable grounds which justify such question, see the illustrations.

The trial judge has a duty not to permit questions which are scandalous, vexatious or even cantankerous, which elicit irrelevant or inadmissible answers, or even those which do not advance the trial but are calculated to hinder or delay its progress. Where the interest of justice clearly requires it, the trying judge himself has to put questions to clarify matters which are vague. But, beyond such and other clear situations, the trial judge does not himself enter the arena of combat.[83]

1. WHETHER THE CROSS-EXAMINER IS PROTECTED WHEN PUTTING DEFAMATORY QUESTIONS

Under Section 340(1) Cr.P.C. (old), there is a right of the accused to consult and to be defended by a legal practitioner of his own choice, to protect his interest. The same right is conferred by Art. 22(1) of the Constitution as a fundamental right. Section 499, I.P.C., deals with defamation and the 9th Exception to the section affords protection to the person making a defamatory statement, provided it was made in good faith.

While appearing for a party, the advocates have some responsibility and they shall not abuse their privileges. They should exercise their own discretion before putting any offensive question, and they shall not put questions in a manner without verifying the truth of the imputations, conveyed by such questions.[84]

There is a presumption that the advocate puts questions to the witness on the instruction of the client.[85] But when after raising the presumption in favour of the advocate the contrary is proved, the court can come to a finding that those questions were put by the advocate without instruction.[86] If the advocate puts questions which are defamatory on the instructions of the client he is protected under 9th Exception to Section 499, I.P.C.[87]

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83. *Mohinder Singh* v. *State*, ILR, (1970) 2 Del 854; *In re, Shanmugham*, 1983 Mad LJ (Cri) 347.
84. *M. Banarjee* v. *Emperor*, AIR 1927 Cal 823; *Fakir Prasad* v. *Kripa Sindhu*, AIR 1927 Cal 303.
85. *Anwaruddin* v. *Fathim Bai*, AIR 1927 Mad 379; *Seshagiri Rao* v. *Sadulla*, 1937 Mad WN (Cri) 243.
86. *Satish Chandra* v. *Ram Doyal*, AIR 1921 Cal 1 (SB); *Genden Lal* v. *R*, AIR 1948 All 409; *Md. Taqi* v. *M.A. Ghani*, AIR 1945 Lah 97; *U. Pike* v. *Ma Khien Thein*, AIR 1940 Rang 77.
87. *Narayan Chandra Ganguli* v. *Harish Chandra*, AIR 1933 Cal 185; *Tulsidas* v. *Billimoria*, AIR 1932 Bom 490.

When defamatory questions were put by the lawyer to a witness in cross-examination, on his client's instructions, and the imputation conveyed by those questions was *per se* defamatory, and when there was no reasonable basis for putting those questions, it was held that the client was liable under Section 500 I.P.C., though the lawyer could take protection under the 9th Exception to Section 499, I.P.C.[88] Where a pleader is charged with the offence of defamation punishable under Section 500, I.P.C., alleging that, he unnecessarily in cross-examination put to the complainant who was a witness in a criminal case, certain questions which imputed immoral character and there is no allegation, and much less proof, that the pleader in putting the questions was actuated by any motive of private malice and was not acting in the interest of his client, the pleader is entitled to the benefit under Exception to Section 499, I.P.C., and the charge which imputes no ill faith but merely refers to the questions as having been put unnecessarily cannot stand.[89]

In the case of a party on whose behalf defamatory questions were put, he has to prove that he made the imputation in good faith when he claims benefit of Exception 9 to Section 499, I.P.C., and it would be determined by the circumstances in which the questions was put, the social status and the level of education of the person making the imputation.[90]

But the truth of the imputation need not be proved beyound doubt.[91]

2. REMEDIES OPEN TO THE WITNESS

Where a witness is put questions *per se* defamatory, the remedies open to him in law are threefold, *viz.*: (a) protection by court; (b) setting the criminal law in motion; or (c) filing a suit for damages.[92]

Procedure of Court in case of question being asked without reasonable grounds.

S. 150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

COMMENTS

1. PRINCIPLE AND SCOPE

This section provides the procedure to be followed by the court in regard to the advocate in cases where questions are asked by him without reasonable grounds. A report has to be sent by the court to the High Court, or other authority to which such barrister, pleader, or vakil or attorney is subject in the exercise of his profession, giving the circumstances of the case in which such questions (defamatory questions) were asked without reasonable grounds. The scope of the section is limited to such questions as were asked under the circumstances mentioned in Section 148.[93]

"The object of these sections [Sections 149, 150, 151, 152] is to lay down, in the most distinct manner, the duty of counsel of all grades in examining witnesses with a view to shaking their credit by damaging their character. I trust that this explicit statement of the principles, according to which such questions ought or ought not to be asked, will be found sufficient to prevent the growth, in this country, of that which in England has on many occasions been a grave scandal. I think that the sections, as far as their substance is concerned, speak for themselves, and that they will be admitted to be sound by all honourable advocates and by the public..."[94]

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88. *Deepchand* v. *Sampathraj*, 1970 Cr LJ 26 0 : AIR 1970 Mys 34; *Gajanan Laxman* v. *Rangarao Amrutr ao*, 1980 Bom CR 675 (Bom)(DB).
89. *Bhashyam Iyengar* v. *Andal Ammal*, 1934 Mad WN (Cri) 81.
90. Per RAJAMANNAR J., *Anthoni Udayar* v. *Velusami Thevar*, AIR 1948 Mad 469.
91. *Karuppanna Goundan* v. *Kuppuswamy Mudaliar*, (1935) Mad WN (Cri) 69; *Rebecca Mondal* v. *R*, AIR 1947 Cal 278.
92. *Ayeasha Bi* v. *Peer Khan Sahib*, 1954 Cr LJ 1239 : AIR 1954 Mad 741.
93. *Sullivan* v. *Norton*, ILR 10 Mad 28 (FB).
94. Abstract of Proceedings of the Council of the Governor General of India, Vol. XI (1872) p. 133.

"In order to protect witnesses against needless questions of this kind, we enact that any advocate who asks such questions without written instructions (which the Court may call upon him to produce, and may impound when produced) shall be guilty of Contempt of Court, and that the court may record any such question, if asked by a party to the proceedings. The records of the question in the written instructions are to be admissible as evidence of the publication of an imputation intended to harm the reputation of the person affected, and such imputations are not to be regarded as privileged communications, or as falling under any of the exceptions to Section 499 of the Indian Penal Code, merely because they were made in the manner stated. Upon a trial for defamation, it would, of course, be open to the person accused to show, either that the imputation was true, and that it was for the public good that the imputation should be made (Exception 1, Section 499, Indian Penal Code), or that it was made in good faith for the protection of the interest of the person making it or of any other person (Exception 9). This is the only method which occurs to us of providing at once for the interests of a *bona fide* questioner and an innocent witness."[1]

In PHIPSON'S EVIDENCE 13th Edn. para 33.71 at page 807 reference is made to the code of conduct for the Bar of England and Wales which came into force on 1-1-1981. Though applicable to barristers the principles apply to all advocates. Some of them are given below:

"In all cases it is the duty of a barrister to guard against being made the channel for questions or statements which are only intended to insult or annoy either the witness or any other person or otherwise are in abuse of the counsel's function, and to exercise his own judgement both as to the substance and the form of the questions put or statements made."

"In cross-examination which goes to a matter in issue, a barrister may put questions suggesting fraud, misconduct or the commission of a crime if he is satisfied that the matters suggested are part of his client's case and he has no reason to believe that they are only put forward for the purpose of impugning the witness's character."

"(a) Questions which affect the credibility of a witness attacking his character, but which are otherwise not relevant to the actual inquiry, may not be put in cross-examination unless there are reasonable grounds to support the imputation conveyed by the questions.

(b) A barrister may regard instructions from his solicitor that the imputation is well-founded as reasonable grounds to support an imputation conveyed by such questions; but he may not rely on a statement from any other person unless he has ascertained so far as is practicable that the person can give satisfactory reasons for his statement."

"A protracted and irrelevant cross-examination not only adds to the cost of litigation but is a waste of public time. Cross-examination becomes indefensible when it is conducted without restraint and without the courtesy and consideration which a witness is entitled to except in a court of law."

"The Court may disallow cross-examination used simply to oppress and not for the purposes of justice. The Code of Conduct of the Bar affirms similar principles.[2] In particular suggestions of crime, fraud or misconduct may not be made unless they are both material and supported on reasonable grounds.[3] Moreover, protracted and irrelevant cross-examination adds to the cost of litigation and wastes public time. Cross-examination becomes indefensible when it is conduct without restraint and without the courtesy and consideration which a witness is entitled to expect in a Court of law."[4] (PHIPSON ON EVIDENCE, 15th Edn. (2000), page 250 (para 11-21)).

2. RIGHT AND RESPONSIBILITY OF COUNSEL

LORD ESHER in *Munster* v. *Lamb*[5] observed: "The advocate speaks from instruction; he reasons from facts, sometimes true, sometimes false. He does not express his own inferences, his own opinion or his own sentiments, but those which he desires the Tribunal before which he appears, to adopt. This duty the law allows, almost compels him to perform." Where express malice is absent (and it ought not to be

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1. Proceedings of the Supreme Legislative Council, Gazette of India, pp. 237, 238, of the Supplement, dated March 30, 1872.
2. (5th ed., 1990) (paras 610(e), (g)).
3. *Ibid.*, (para 610(h)). **See also** *R.* v. *Neil & Ackers*, (1950) 34 Cr App R 108.
4. *R.* v. *Flynn*, (1972) Crim LR 428.
5. 11 QBD 588, 603.

presumed), the court having due regard to public policy would be extremely cautious before it deprived the advocate of his protection of Exception 9 to Section 499, I.P.C."[6]

When the legal practitioner, by way of suggestions in the cross-examination, puts questions attacking the public prosecutor, or a witness, involving dishonourable conduct, he would be guilty of professional misconduct unless he assures that he has good ground for making those suggestions, if he does not give such assurance, the cross-examination on those lines should be stopped promptly. If it is found, at the termination of the trial, that no such ground has existed, for his assurance, then the tribunal (court) should bring the conduct of the advocate to the notice of the High Court.[7]

It is not sufficient for a lawyer to plead instructions from the client, as the lawyers have a responsibility in the matter and are not justified in making charges of fraud and crime unless they are personally satisfied that there are reasonable grounds for putting them forward.[8]

The counsel pleading is entitled to present the evidence on the record in the best light possible and for that purpose to argue that the complainant and the witnesses are unreliable. He will not be justified in making a personal attack upon the complainant or witnesses on matters not borne out by the record, nor in using language which is abusive or obscene or in making obscene or vulgar gestures in Court. Initiation of contempt proceeding against an advocate arguing the case of a person charged with committing a serious offence will not be justified merely because he said something during the hearing which appears to overstep the limits of fair advocacy.[9]

Indecent and scandalous questions.

S. 151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

COMMENTS

1. PRINCIPLE AND SCOPE

This section empowers the court to forbid any questions which are indecent or scandalous, unless they relate to the fact in issue, or to matters necessary to be known, in order to determine whether or nor the facts in issue existed, though such questions may have some bearing on the questions before the court. What is relevant cannot be said to be scandalous.[10] Where the fact is issue was not concerning the paternity of a child rather it was concerned with the issue whether the child/son was kidnapped by the accused and murdered, the Court should not have allowed indecent and scandalous imputations on the moral character of the witness, the mother of the victim.[11] Under Section 151, the court has discretion to forbid any question which it regards as indecent and scandalous, although such questions may have some bearing on the question before the court. But, such a discretion cannot be exercised if such questions relate to the facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.[12] A trial judge shall not permit questions which are scandalous, vexations or even cantankerous, which elicit irrelevant or inadmissible answers, or even those which do not advane the trial, but are calculated to hinder or delay its progress. He can put questions in the interest of justice, to clarify matters which are left vague, by either of the parties.[13] Questions touching upon a witness's moral character should not be put to him/her in cross-examination, without any material to substantiate the suggestions.[14]

In a proceeding to recover maintenance by a married woman for her illegitimate children, under Section 125 of the Criminal Procedure Code, she "can be examined to prove non-access of her husband

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6. *In re, Nagraj Trikumji,* ILR 19 Bom 340; *Upendranath* v. *Emperor*, ILR 36 Cal 375.
7. *Bans Lochan Lal* v. *Emperor*, AIR 1930 Pat 195; *Ayeasha Bi* v. *Peer Khan Sahib,* AIR 1954 Mad 741.
8. *Lveston* v. *Peary Mohan Dass*, ILR 40 Cal 898 : AIR 1914 Cal 396.
9. *Harbans Kaur* v. *P.C. Chaturvedi*, (1969) 3 SCC 712.
10. *Zamindhar of Tuni* v. *Bennayya*, ILR 22 Mad 155, 159; *In re G. Vasantha Pai,* AIR 1960 Mad 73.
11. *State of U.P.* v. *Raghubir Singh,* (1997) 3 SCC 775 : 1997 SCC (Cri) 499, **approving** *Mohd. Mian* v. *Emperor*, 52 IC 54 : (1919) 20 Cr LJ 566 (Pat) and *Subala Dasi* v. *Indra Kumar Hazzva,* AIR 1923 Cal 315.
12. *K. Saraswati Alias R. Kalpana* v. *P.S.S. Somasundaram Chettiar,* (1970) 2 MLJ 119.
13. *Mohinder Singh* v. *State*, ILR (1970) 2 Del 854.
14. 1984 Guj LH 1055; 1984 Guj LH 473.

during their married life, without independent evidence being first offered to prove the illegitimacy of the children."[15]

A counsel is entitled to present the evidence on the record in the best light possible and, to argue, that the complainant and the witnesses are unreliable; he should not however make a personal attack upon the complainant or witnesses on matters not borne out by the record, nor use langauge which is abusive or obscene.[16]

TAYLOR ON LAW OF EVIDENCE (10th Edn., Section 949, p. 675) observes: "There is a fifth kind of evidence which the law excludes, on public grounds, *namely,* that which involves the unnecessary disclosure of matter that is indecent, or offensive to public morals, or injurious to the feelings of third persons. A disclosure is for this purpose "unnecessary" whenever the parties themselves have no interest in the matter, except what they have impertinently created. The mere indecency of disclosures will not exclude them, where the evidence is necessary for the purpose of civil or criminal justice, as on an indictment for a rape; or on a question upon the sex of one claiming an estate tail, as heir male or for female; or upon the legitimacy of one claiming as lawful heir; or on a petition for dissolution of marriage, for judicial separation, or for damages on the ground of adultery."

RAMASWAMY J., of the Madras High Court, in his book "Magesterial and Police Guide" mentioned the opinions of Indian Lawyers, Mahatma Gandhiji, Motilal Nehru and President Rajendra Prasad which is as follows: "It is unfortunate, however, in this country, owing very often to the timidity of courts and a desire not to become unpopular with the Bar, cross-examination is allowed to be carried on to the extent which can only be described as scandalous, with the result that the courts are avoided by respectable people and the administration of justice suffers thereby, and the Bar gets into greater and greater disrepute and becomes unpopular with the public and the judges become objects of contempt."

Indecent and scandalous questions can be allowed if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the credibility of the witness on the matter to which the witness testifies, but there must be necessity and foundation for such questions.[17]

There may be cases in which the counsel can put questions which may appear to be scandalous.[18]

A counsel should not act to the dictates or wishes of his client in putting defamatory questions to a witness. He must consider whether there was material to substantiate such imputations; otherwise he takes the risk of being run down for defamation.[19]

Questions intended to insult or annoy

S. 152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

COMMENTS

1. PRINCIPLE AND SCOPE

This section empowers the court to forbid questions intended to insult, or annoy or which, proper in itself, appears to the court needlessly offensive in form. It may be noted that under Section 151, the court *may* forbid any question which is indecent or scandalous, whereas this section says the court *shall* forbid questions intended to insult, or annoy, or are offensive in form.

Under Section 151, the court cannot forbid indecent and scandalous questions if they relate to the facts in issue. But under Section 152, though it appears to the court that the question is proper in itself. but if it is offensive in form, the court shall have to forbid it.

In a suit for dissolution of marriage by the husband on the ground of desertion by the wife, a letter written by his wife to a friend of his was relied as a good ground for suspecting her fidelity. The counsel for the plaintiff in the cross-examination put questions suggesting sexual intercourse of the wife with the plaintiff's friend. The contents of the letter justified the husband of her suspecting his wife's fidelity.

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15. *Roxario* v. *Ingles*, ILR (1893) 18 Bom 468, 472.
16. *Harbans Kaur (Smt.)* v. *P.C. Chaturvedi*, (1969) 3 SCC 712; *Bans Lochan Lal* v. *Emperor*, AIR 1930 Pat 195.
17. *Prakash Raja Ram* v. *State of Maharashtra*, 1975 Cr LJ 1297 (Bom).
18. *In Re, Vasantha Pai*, AIR 1960 Mad 73.
19. 1969 Kesh LJ 27.

The High Court castigated the counsel for putting these questions. The Supreme Court held that as the discovery of the letter containing some mysterious sentences was the occasion for the wife to desert her husband, the questions to the defendant in cross-examination were not unjustified.[20]

Exclusion of evidence to contradict answers to questions testing veracity.

S. 153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with giving false evidence.

***Exception 1.*—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.**

***Exception 2.*—If a witness is asked any question tending to impeach his impartiality, and answers it by denying the facts suggested, he may be contradicted.**

ILLUSTRATIONS

(a) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(b) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(c) *A* affirms that on a certain day he saw *B* at Lahore.

A is asked whether he himself was not on that day at Calcutta. He denies it.

Evidence is offered to show that *A* was on that day at Calcutta.

The evidence is admissible, not as contradicting *A* on a fact which affects his credit, but as contradicting the alleged fact that *B* was seen on the day in question in Lahore.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(d) *A* is asked whether his family has not had a bloodfeud with the family of *B* against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

SYNOPSIS

1. *Object, Principle, Scope* ... 1297
2. *If he answers falsely, he may afterwards be charged with giving false evidence* ... 1299
3. *Witness denying his previous conviction [Exception (1)]* ... 1299
4. *Witness denying suggestions to impeach his impartiality [Exception (2)]* ... 1299

COMMENTS

1. OBJECT, PRINCIPLE, SCOPE

This section states that, when a witness is asked a question which is relevant to the enquiry, insofar as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him, whether he denies or gives any reply. It follows that whatever answer is given by the witness, it will be conclusive. The illustrations (a) & (b) explain the above rule. If he answers falsely, he may be charged with giving false evidence.

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20. *Bipin Chandra Shaw* v. *Prabhavati*, AIR 1957 SC 176.

The object of the section is to prevent trials being spun out to an unreasonable length. If every answer given by a witness upon the additional facts mentioned in S. 146 could be made the subject of fresh inquiry, a trial might never end. These matters are after all not of the first importance, beyond what is comprised in the exceptions.[21]

The section provides two exceptions, when evidence can be given to contradict the denial, when a question is denied by the witness. Exception (1) states that when a witness is asked whether he was convicted previously and he denies it, evidence may be given of his previous conviction. Exception (2) says that when a question is put tending to impeach his impartiality and it is denied, then evidence can be given to contradict that denial.

Illus. (c) and (d) explain Exception No. (2).

This is a salutary rule and is meant to curtail every inquiry. If contradictory evidence be allowed on side issues for instance, as shaking the witness's credit by injuring his character, there can be no limit to an enquiry. The main issue in the case is almost always likely to be fogged by subsidiary inquiries which are profitless as well as perplexing. The two exceptions engrafted on the section are capable of easy proof and are material in assessing the weight to be attached to the testimony of an individual witness.

When a question affects only the credit of the witness and is not relevant to the matters in issue the answer of the witness cannot be contradicted by other evidence except in exceptional cases.[22] The evidence of a witness cannot be contradicted by citing other witness saying anything relating to him.[23]

If the credit of the witness is sought to be impeached under Section 153, then whatever answers given by the witness have to be taken, and further evidence cannot be allowed. The credit of the witness can also be impeached under Section 155; but, Section 155 does not allow evidence of general bad character of the witness.[24]

The Privy Council observed: "Sections 153 and 155, Indian Evidence Act, must be strictly construed and narrowly interpreted if the courts governed by that statute ought to be spared the task in many suits of prosecuting, on most imperfect material, issues which have no bearing upon that really in contest between the parties. Section 153 does not go far beyond, if it goes at all beyond, the case of *A.G.* v. *Hitchocock,* (1847) 1 Ex. 91".[25]

The Supreme Court also held that Section 153 and 155 must be strictly construed; that Section 146 shall not be read with Section 153 in its entirety; that under exception (2) of Section 153, a witness may be contradicted by evidence when he denies any question tending to impeach his impartiality.[26]

It was observed: "The rule is founded on two reasons:—first, that a witness cannot be expected to come prepared to defend, by independent proof, all the actions of his life; and next, that to admit contradictory evidence on such points would of necessity lead to inextricable confusion, by raising an almost endless series of collateral issues. The rejection of the contradictory testimony may indeed sometimes exclude the truth; but this evil, acknowledged though it be, is nothing compared with the inconveniences that must arise were a contrary rule is to prevail."[27]

POLLOCK, C.B., said that a witness may be contradicted as to anything he denies having said, provided it be "connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which, if answered in a particular way, would contradict a part of the witness's testimony; and if it is neither the one nor the other of these, it is collateral to, though in some sense it may be considered as connected with, the subject of inquiry. A distinction should be observed between those matters which may be given in evidence by way of contradiction, as directly affecting the story of the witness touching the issue before the jury, and those matters which affect the motives, temper, and character of the witness, not with respect to his credit but with reference to his feelings towards one party or the other."

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21. MARKBY, 108.
22. *Ram Bali* v. *State,* AIR 1952 All 289, 292.
23. *State of Karnataka* v. *K. Yarappa Reddy,* 2000 Cr LJ 400 (paras 31-33) (SC) : AIR 2000 SC 185.
24. *Maung San Myin* v. *Emperor,* AIR 1930 Rang 49.
25. *Bhogilal Bhikachand* v. *Royal Insurance Co.,* AIR 1928 PC 54, 63.
26. *Ramareddy* v. *V.V. Giri,* AIR 1971 SC 1162.
27. *Attorney General* v. *Hitchcock,* (1847) 1 Ex. 91.

TAYLOR (8th Ed., Section 1295 & 1438) states: "With respect to all questions put to a witness on cross-examination for the purpose of directly testing his credit, it may be broadly laid down, that if the questions relate to relevant facts, the answers may be contradicted by independent evidence, if not irrelevant, they cannot."

In FIELD ON EVIDENCE (11th Edn., Vol. 5, P. 4854) it is observed: "The Indian Evidence Act adopts the same principle. The exceptions to the rule are taken from English law — the first from the 25th section of the Common Law Procedure Act, 1854, the second, being in accordance with a strongly intimated opinion of the Baron of the Exchequer in the case of the *Attorney-General* v. *Hitchcock*.[28]

Except in the case of exceptions mentioned in Section 153, a witness's answer to the questions tending to shake his credit cannot be contradicted, nor by Section 153 can former contradictory statements be proved, unless that part of the witness's evidence, which they contradicted, was itself liable to be contradicted.[29]

Where the prosecution and the defence side gave divergent versions of the incident of murder and the defence witness deposed that the prosecution witness was along with him at a different place in connection with the sale of a lorry, it was held that the evidence of the defence witness was admissible and the sale receipt bearing the signature of the prosecution witness was not unreliable merely because the prosecution witness was noted as present in the inquest report. Hence the presence of the prosecution at the place of occurrence was doubtful.[30]

2. IF HE ANSWERS FALSELY, HE MAY AFTERWARDS BE CHARGED WITH GIVING FALSE EVIDENCE

These words were apparently inserted in forgetfulness of the fact that the Indian law as to false evidence differs from the English law as to perjury in not requiring that the matter charged as false should have been material to the issue.[31]

3. WITNESS DENYING HIS PREVIOUS CONVICTION [EXCEPTION (1)]

Under the first exception when a witness denies the suggestion that he was previously convicted of an offence, then evidence can be given of his previous conviction, by producing a certified copy of the order of conviction from the officer-in-charge of a jail or from the court, as per the provisions of Section 298 of (old) Cr.P.C. (now Section 294).

Where a witness who was questioned as to whether he was not an active criminal and whether he was not under police surveillance, denied the suggestions, the evidence given to contradict him had nothing to do with his previous conviction or with the impeachment of his impartiality, but was only intended to impeach his character. Therefore, the evidence to contradict the denial was held not admissible under Section 153. But proof of previous conviction is admissible.[32]

4. WITNESS DENYING SUGGESTIONS TO IMPEACH HIS IMPARTIALITY [EXCEPTION (2)]

The Supreme Court held that under Exception (2) to Section 153 a witness may be contradicted by evidence when he denies any question tending to impeach his impartiality.[33]

Questions by party to his own witness.

S. 154. The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

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28. (1847) 1 Ex 91 100.
29. *Ayeasha Bi* v. *Peer Khan Sahib*, AIR 1954 Mad 741.
30. *Vijayan* v. *State*, AIR 1999 SC 1311.
31. STOKES, Vol. II, p. 929, f.n. 2.
32. *Kamala Kanto Das* v. *State*, AIR 1959 Cal 342.
33. *Rama Reddy* v. *V.V. Giri*, AIR 1971 SC 1162.

SYNOPSIS

1. *Principle and Scope* ... 1300
2. *The court may in its discretion* ... 1301
3. *Hostile witness* ... 1303
4. *When a witness can be treated as hostile* ... 1303
5. *Procedure* ... 1305
6. *Evidentiary value* ... 1306
7. *Statements under Section 162 and 164, Cr.P.C.* ... 1308

COMMENTS

1. PRINCIPLE AND SCOPE

This section states that the court in its discretion can allow a party to put any questions to its own witness which might be put in cross-examination by the opposite party. The court is expected to find out the truth of the case put forward by both the parties. With that object this provision is made empowering the court to use its discretion to allow a party to put questions to his own witness which might be put in the cross-examination by the opposite party. The witness can be asked (1) leading questions u/Section 143, (2) questions relating to his previous statements in writing under Section 145, and (3) questions which tend to test his veracity under Section 146. Thus the ordinary rule that a party calling a witness is not to be allowed to ask such questions, is relaxed in this section. This relaxation is made with the sole purpose of finding out whether the witness is one of truth for the purpose of relying on his evidence.

Where a party calling a witness and examining him discovers that he is either hostile or unwilling to answer questions put to him, he can obtain permission of the Court to put questions to him which may be put to him by way of cross-examination. The section does not say that a person who calls a witness may cross-examine him in certain circumstances, but he might put questions to him which might be put in cross-examination by the adverse party. That is not the same as cross-examination.[1]

Under this section, before a party calling a witness can cross-examine him, it is not necessary that the witness should first be declared to be hostile to the party calling him, and the Court has unfettered discretion to allow a counsel to put questions of a cross-examination nature to his own witness even though he did not show himself hostile to the party calling him, but the Court ought not to exercise its discretion unless during the examination-in-chief something happens which makes it necessary for the facts to be got from that witness by cross-examination; it is necessary before the procedure under this section can be adopted that leave of the Court should be asked for and obtained or permission given by the Court *suo motu* for the said purpose before such questions are put to a witness though the section may not make such a procedure imperative and the permission contemplated by the section should be signified, if not in words, by some other action of the Court indicating its permission during the cross-examination of the witness by the party calling him.[2]

It was held by the Madras High Court that the reason why courts in India are given a much wider discretion than that of in England is in all probability to avoid the conflict which had existed in England over the words "hostile" and "adverse".[3]

This section does not speak about declaring a witness as a hostile witness but allows the party with the permission of the court to cross-examine his own witness; in the same manner as the opposite party does.[4]

RANKIN C.J., in *Profulla Kumar Sarkar* v. *Emperor*[5] while considering the observations made in *Bikram Ali* v. *Emperor*,[6] observed: "Upon this I would make two observations: first, the reason why

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1. *Bikram Ali Pramanik* v. *Emperor*, ILR (1929) 57 Cal 801; *Luchi Ram Motilal Boid* v. *Radha Charan Poddar*, ILR (1921) 49 Cal 93; *Khijiruddin Sonar* v. *Emperor*, ILR (1925) 53 Cal 372; *Dadabuddappa Gouli* v. *Kalu Kanu Gouli*, AIR 2000 Kant 158 (paras 5-8 and 14).
2. *Ammathayarammal* v. *Official Assignee, Madras*, ILR (1932) 56 Mad 7 : AIR 1933 Mad 137; *Mohan Banjari* v. *King-Emperor*, (1933) 30 NLR 55 : AIR 1933 Nag 384.
3. *Ammathayarammal* v. *Official Assignee, High Court*, AIR 1933 Mad 137.
4. *Baikuntha* v. *Prasannamoyi*, AIR 1922 PC 409; *State* v. *Mohan Hira*, AIR 1960 Guj 9; *Tulasi Ram Shaw* v. *R C Pal Ltd.*, AIR 1953 Cal 160.
5. AIR 1931 Cal 401, 404 (FB).
6. AIR 1930 Cal 139.

Section 154 does not say that with the permission of the court a party may cross-examine his own witness is simply that this would in strictness be a contradiction in terms. Cross-examination means examination by the opposite party as distinct from the party who calls the witness (Section 137) this is I think the whole explanation of the use of the phrase "put any questions to him which might be put in cross-examination by the adverse party". The second observation is that while the mere putting of a question in a leading form is not necessarily tantamount to cross-examination, there is no doubt as to the power of the judge to give leave to put a leading question to one's own witness. This is plain from Section 142, the second part of which goes further than English Law and requires the Judge to give permission in certain cases."

The utility of cross-examination under Section 154 is supposed to be that it is a means whereby the court can more readily get the truth out of the witness, as the party's own witness unexpectedly makes statements adverse to the party calling him.[7]

2. THE COURT MAY IN ITS DISCRETION

The law has advisedly left the matter entirely at the discretion of the trial judge who has the benefit of watching the witness in the box and hearing him giving the evidence. Such discretion vested in a court has to be exercised judicially. The appellate court can interfere with discretion exercised by the trial court in case of improper exercise on the material available.[8]

When the appellate court holds that permission to cross-examine the witness should have been given by the trial court, the proper thing to do would be to send back the case to the trial court to take the evidence of the said witness further after granting permission to the prosecution to cross-examine its witness. Without doing that the appellate court cannot straight-away proceed to reject the evidence of the said witness as if he was hostile and had been won over by the defence.[9]

Order allowing party to cross-examine its own witness is purely discretionary and will not be interfered with in revision.[10]

A party who calls on opponent as a witness has no right to cross-examine him, however hostile he may be, without the leave of the Judge. Whether a witness is a litigant or not, it is a matter of discretion in the Judge whether he shows himself so hostile as to justify his cross-examination by the party calling him.[11]

The Supreme Court in *Dayabhai Chahaganbhai Thakkar* v. *State of Gujarat*[12] observed: "Section 137 gives only the three stages in the examination of a witness, namely, examination-in-chief, cross-examination and re-examination. This has no relevance to the question when a party calling a witness can be permitted to put to him questions under Section 154; that is governed by the provisions of Section 154 which confers a discretionary power on the court to permit a person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. Section 154 does not in terms, or by necessary implication, confine the exercise of the power by the court before the examination-in-chief is concluded or to any particular stage of the examination of the witness. The discretion is entirely left to the court to exercise the power when the circumstances demand. The court, therefore, can permit a person, who calls a witness, to put questions to him which might be put in the cross-examination at any stage of the examination of the witness, provided it takes care to give an opportunity to the accused (opposite party) to cross-examine him on the answers elicited which do not find place in the examination-in-chief. Section 154 cannot be invoked after chief examination, cross-examination and re-examination are over.[13]

The Supreme Court observed: "The discretion conferred by Section 154 on the court is unqualified and untrammelled and is apart from any question of hostility. It is to be liberally exercised whenever the

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7. *Maharani Knirod Kumari Devi* v. *Ghasi Kuar*, ILR 1962 Cut 767 **dissenting from** *Krutibas Sahu* v. *Madhab Das*, AIR 1961 Ori 48.
8. *State of Mysore* v. *Sobhappa*, (1961) 2 Cr LJ 653 (Mys).
9. *Muhsan Ali* v. *Union Territory of Tripusa Lall*, AIR 1964 Tri 45.
10. 1971 All Cr R 354.
11. *Price* v. *Manning*, (1889) 42 Ch D 372.
12. AIR 1964 SC 1563.
13. *Rabindra Kumar Dey* v. *State of Orissa*, AIR 1977 SC 170 **followed in reversing** (1971) 1 Cut WR 510; **See also** *Pran Krishna Das* v. *State*, ILR (1971) 2 Cal 392.

court from the witness's demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the court as to the veracity of the witness. Therefore, in the order granting such permission, it is preferrable to avoid the use of such expression, such as, "declared hostile", "declared unfavourable", the significance of which is not still free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English Courts..... The evidence of such a witness cannot, as a matter of law, be treated as washed off out of the record. The Judge has to consider whether it could still be believed in regard to a part of his testimony."[14]

The discretion of the court must be exercised judicially. It should not be exercised without reason and the reason must be stated. The witness should exhibit an element of hostility or resile from a material statement made before an earlier authority or not be speaking the truth. There must be some material to show that the witness is not speaking the truth. Merely because a witness in an unguarded moment speaks the truth which may not suit the prosecution or which may be favourable to the accused, the discretion to allow cross-examination of ones own witness cannot be exercised. In *R.K. Dey* v. *Orissa*,[15] the witnesses in their statements before the police attributed a clear intention to the accused to commit murder but before the Court they stated that the accused was insane. The right to cross-examine them was upheld. But this does not make him an unreliable witness so as to exclude his evidence from consideration altogether.[16] The Court has the discretion under this section, to permit the prosecution to test, by way of cross-examination, the veracity of their own witnesses with regard to the (unconnected) matters elicited by the defence in cross-examination.[17]

Leading questions are allowed to be put to a party's own witness when such witness appears to be not only adverse but also hositle to the party, or if the witness tries to defeat the party's case by suppressing the truth.[18] The fact that a witness was permitted to be cross-examined under Section 154 by the Committing Magistrate would be of no avail in the Sessions Court, as the Sessions Court has to independently decide whether or not to give permission to cross-examine one's own witness, as required under Section 154.[19]

Merely because permission was given under Section 154 the nature of the examination of a witness by the party who calls him, is not changed from the examination-in-chief to cross-examination.[20]

It is not necessary to make a formal declaration that a witness in hostile before permission is granted under Section 154. The discretion in granting permission is a judicial discretion which should be exercised in a judicious way. For the purpose of discovering the truth, it is open to the court to act either under Section 154 to a limited extent or under Section 142 which allows leading questions to be put in examination-in-chief, even if objected to, with the permission of the court.[21]

Permitting the public prosecutor to put questions to his own witness without declaring the witness as hostile is illegal.[22]

Refusal by the court to allow a witness to be cross-examined does not necessarily imply that he considered him to be a truthful witness.[23]

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14. *Sat Paul* v. *Delhi Administration*, AIR 1976 SC 294. **See also** *Janardan* v. *State of Kerala*, 1979 Mad LJ (Cri) 49 (Ker); *State of Orissa* v. *Surendra Paramanik*, (1962) 28 Cut LT 625.
15. AIR 1949 Pat 415.
16. *Bhagwan Singh* v. *State of Haryana*, AIR 1976 SC 202, 203; *Rabindra Kumar Dey* v. *State of Orissa*, AIR 1977 SC 170; *State* v. *Subhappa*, (1961) 2 Cr LJ 653 (Mys); *State of Mysore* v. *Subhappa*, ILR 1960 Mys 742.
17. *Amrita Lal Hagara* v. *Emperor*, ILR (1915) 42 Cal 957.
18. *Kala Chand Sahai* v. *Queen Empress*, 13 Cal 53.
19. *Sailendra Kumar* v. *State of Tripura*, AIR 1959 Tripura 11, 15.
20. *State* v. *Mohan Hira*, AIR 1960 Guj 9; *Banshilal* v. *State*, 1981 JLJ 143 (DB).
21. *Sivhamurthy Swamy* v. *Agodi Songonna*, AIR 1969 Mys 12; *State* v. *Ramesh Chandra*, ILR (1974) 1 Del 129.
22. *Koli Nana Bhana* v. *State of Gujarat*, 1986 Cr LJ 571 (Guj).
23. *State* v. *Genda Lal*, AIR 1950 MB 89.

3. HOSTILE WITNESS

Hostile witnesses are those who are trying to defeat the prosecution by suppressing the truth. A witness who is unfavourable is not necessarily hostile, because a hostile witness is one who from the way in which he gives evidence would show that he is not desirous of telling the truth to the court.[24]

A witness who states the truth cannot be dubbed as "hostile" just because his statement does not suit the party producing him.[25]

A witness who is gained over by the opposite party is a hostile witness.

4. WHEN A WITNESS CAN BE TREATED AS HOSTILE

When a prosecution witness states something which is destructive of the prosecution case, the prosecution is entitled to pray that the witness be treated as hostile; in such a case the trial court must allow the public prosecutor to treat the witness as hostile.[26]

The mere fact that the evidence of a witness tends to be favourable to the accused as elicited by the defence in cross-examination would not be a valid ground to declare such a witness as a hostile.[27] Merely because a witness speaks about the truth which may not suit the party on whose behalf he is deposing and the same is favourable to the other side, the Court can not exercise its discretion to allow that party to cross-examine its own witness by declaring him hostile[28] unless such a witness is suppressing the truth and exhibits hostile *animus* which has to be judged on the basis of the answers given by him.[29] There must be some material to show that the witness has given back his earlier statement or is not speaking the truth or has exhibited an element of hostility or has changed sides.[30]

In PHIPSON ON EVIDENCE 15th Ed. (2000), para 11-58, page 276 it is observed: "Adverse" means "hostile",[31] that is, when in the opinion of the judge[32], he bears a hostile animus to the party calling him and so does not give his evidence fairly and with a desire to tell the truth to the court. He is not adverse in the statutory sense when his testimony merely contradicts his proof or because it is unfavourable to the party calling him.[33] A witness who is not compellable but chooses to give evidence may be treated as hostile.[34] The Court of Appeal has said that an application to treat a witness as hostile must be made at the instant it is obvious that he is showing unmistakable signs of hostility.[35]

The expression "hostile witness" has been avoided because of the confusion caused by it in English Law. The section confers a simple discretion upon the Court to allow a party to cross-examine his own witness.[36] In short, the rule prohibiting a party to put questions to his own witness in the manner of cross-examination or in a leading form is relaxed not because the witness has already forfeited all right to credit but because of his antipathetic attitude or otherwise the Court feels that for doing justice, his evidence will be more fully given, the truth more effectively extracted and credit more adequately tested

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24. *Kalachand Sahai* v. *Queen Empress*, ILR 13 Cal 53; *Luchiram* v. *Radha Charan*, ILR 49 Cal 93; *Yusuf* v. *State of U.P.*, 1973 Cr LJ 1220; *Dhruba Padhan* v. *State*, (1983) 56 Cut LT 251; *Panchanan Gogai* v. *Emperor*, (1930) 57 Cal 1266.
25. *Durga Dutt* v. *Chandanu*, AIR 1956 HP 58; *P.C. Pai* v. *Agricultural I.T. Officer*, AIR 1970 Mys 168; *State* v. *Nilam Das*, 1952 HP 74; *Shanker Nath* v. *Jagat Ram*, ILR 1975 HP 46.
26. *G.S. Baksh* v. *State (Delhi Administration)*, AIR 1979 SC 569.
27. *Yusuf* v. *State of U.P.*, 1973 Cr LJ 1220.
28. *S. Murugesan* v. *S. Pethaperumal*, AIR 1999 Mad 76 (paras 7 and 12).
29. *K.Kusuma Kumari* v. *G. Surya Bhagwan*, 1996 AIHC 2627 (para 17) (AP).
30. *Shanmuganathan* v. *Vallaiswamy*, 1997 AIHC 2716 (paras 6 and 11) (Mad).
31. *Greenough* v. *Eccles*, (1859) 5 C.B. (N.S.) 786. The witness is described in the specimen direction to the jury suggested by the Judicial Studies Board as a witness who has "changed sides".
32. Which is final: *Rice* v. *Howard*, (1886) 16 QBD 681; *R.* v. *Williams*, (1913) 29 TLR 188; *R* v. *Manning*, (1968) Crim LR 675.
33. *Greenough* v. *Eccles*, (1859) 5 C.B. (NS) 786; *R* v. *Smith*, (1909) 2 Cr App R 86, 106, per JELF J., disapproving the decision of Coleridge J. at the trial; Cf. *R* v. *Little*, (1883) 15 Cox 319, *R* v. *Williams*, (1913) 8 Cr. App. R. 113.
34. *R.* v. *Pitt*, (1983) QB 25.
35. *R.* v. *Pestano*, (1981) Crim LR 397.
36. *Sat Paul* v. *Delhi Admn.*, AIR 1976 SC 294. (The Court explains at this stage the purpoose of cross- examination and the validity of some of the Calcutta High Court decisions to the effect that once a witness is declared hostile his testimony cannot be used at all).

by questions put in a more pointed, penetrating and searching way. The expression "any questions that may be asked by the adverse party in cross-examination" shows that neither party is excluded from relying on his testimony.

This section does not warrant an inference that, only when any previous statement of the witness is available and if he is alleged to have departed from that, the Court can declare that witness hostile.[37] Inconsistent and contradictory statements are not enough. The witness must appear to be not desirous of telling the truth and it is necessary to regard him hostile for eliciting the truth.[38] Mere presentation of an application by the prosecution or representation that a certain witness had been won over is not conclusive of the allegation. In such a case the witness can be produced for cross-examination by the accused which would elicit correct facts. Inference of hostility of a witness should be drawn only from the answers given by him and to some extent from the demeanour.[39] Where the earliest information of the occurrence as given by the witness was recorded by the police constable who was not shown not to have cordial relations with the witness, nor the witness at any point of time complained about recording of version as told by him, the grant of permission to the prosecution to treat the constable as a hostile witness and to put the questions to him in cross-examination simply because the prosecution itself had given a different version to suit its convenience, was not warranted.[40] The prosecution witness cannot be declared hostile merely on the ground that he did not concur with the suggestion made by the public prosecutor only on a post event detail.[41] When a witness was not confronted with any contradiction in the trial court he cannot be treated as a hostile.[42]

When a witness gives answers fatal to the case of the prosecution, it would be wrong for the prosecutor not to exercise its right to seek permission to put leading question by treating him as hostile.[43] Eye-witnesses were declared hostile for the reason that they did not state specifically at the trial that they had seen the accused firing.[44]

The party who seeks permission of the court must lay a foundation for cross-examining his own witness. The court has to look into the previous statements of a witness, if any, whether the witness was actually resiling from the position taken during investigation, before declaring him as hostile.[45] Where there was no material to show that the prosecution witness had resiled from his statement made during investigation, the prosecution could not be permitted to cross-examine him.[46] Where the witness does not exhibit an element of hostility to the party for whom he is deposing, permission to cross-examine him can not be granted[47] but permission can be granted to recall and cross-examine one's own witness where the witness has resiled from his original statement on a material aspect.[48] When the witness makes two contradictory statements he can be permitted to be cross-examined for eliciting the truth under Section 154.[49]

A witness need not be declared hostile for allowing the prosecution to cross-examine his own witness under the proviso to Section 162 (1), Cr. P.C.[50]; so also where the public prosecutor after

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37. *Sahdeo Tanti* v. *Gipti*, AIR 1969 Pat 415.
38. *Phanindra Nath* v. *Bholanath Banerjee*, AIR 1982 Cal 397.
39. *State of U.P.* v. *Jaggo*, AIR 1971 SC 1586; *In re Vengala Reddy*, AIR 1956 AP 26, 29; *Sat Paul* v. *Delhi Administration*, AIR 1976 SC 294; *In re Vengata Reddy*, 1956 Andhra 26; *P.P.* v. *Subramanaya Odayar*, 1937 Mad WN 557 (FB); *Indra Mohan Brahma* v. *State of Assam*, 1982 Cr LJ (NOC) 127 (Gau); *Madhusudan Prasad Agarwal* v. *State of Bihar*, 1973 Cr LJ 1582 (Pat); *Ashim Das* v. *State of Assam*, 1987 Cr LJ 1533 (Gau)(DB); *Gura Singh* v. *State of Rajasthan*, 2001 Cr LJ 487 (para 12) (SC) : AIR 2001 SC 330.
40. *Mahalingam* v. *State*, 1995 Cr LJ 1991 (para 13) (Mad).
41. *Gura Singh* v. *State of Rajasthan*, 2001 Cr LJ 487 (para 13) (SC) : AIR 2001 SC 330.
42. *Bir Singh Majhi* v. *State of Assam*, 1977 Cr LJ 1349 (Gau).
43. *Food Inspector* v. *A.K. Ahammad Haji*, 1983 Mad LJ (Cri) 280 : 1984 Cr LJ (NOC) 82.
44. *Dagdu* v. *State of M.P.*, AIR 1999 SC 2639 (para 3).
45. *Lalu* v. *State*, AIR 1960 Cal 776; *Saraswathamma* v. *Bhadramma*, AIR 1970 Mys 157; *Ranjith Singh* v. *State*, AIR 1952 HP 81.
46. *Samir Das* v. *State of Tripura*, 1999 Cr LJ 953 at p. 955 (Gau).
47. *Public Prosecutor, A.P. High Court* v. *Thummala Janardhana Rao*, 1998 Cr LJ 4450 (para 12) (AP).
48. *Shanmuganathan* v. *Vallaiswamy*, 1997 AIHC 2716 (paras 11 and 12) (Mad).
49. ILR 1975 HP 46.
50. *State* v. *Mohan Hira*, AIR 1960 Guj 9; *State* v. *Balchand*, AIR 1960 Raj 101; *Krutibas Sahu* v. *Madhab Das*, AIR 1961 Ori 48; *Tulsiram Shaw* v. *R.C. Pal, Ltd.*, AIR 1953 Cal 160.

obtaining the permission had asked a question to a prosecution witness with regard to the role played by two of the accused persons on the basis of his police statement.[51]

Even if a party calling a witness, wants to treat him as hostile his opinion as to the hostility is not final, and binding on the court. When the witness deposes in favour of the party calling him the court still is entitled to either believe or dis-believe him.[52]

The mere fact that at a Sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference to be drawn from contradictions going to the whole texture of the story is not that the witness is hostile to this side or to that, but that the witness is one who ought not to be believed unless supported by other satisfactory evidence.[53]

5. PROCEDURE

The Court can permit a person, who calls a witness, to put questions to him which might be put in the cross-examination at any stage of the examination of the witness, provided it takes care to give an opportunity to the adverse party to cross-examine him on the answers elicited which do not find place in examination-in-chief.[54]

The proper stage for allowing the party to cross-examine his own witness is when he was being examined in-chief or in re-examination. And there is no scope for allowing the party when the witness was in the charge of the adversry for the purpose of cross-examination.[55]

Where a witness who is a competent witness has been tendered by the prosecution and oath has been administered by him, it is the prosecution which should technically be deemed to have called him although it did not put a single question to him. And the court cannot be said to act illegally in allowing him to be cross-examined under Section 154.[56]

Where the prosecution dropped a witness without declaring him as hostile, the defence applied for cross-examination of the said witness. It was held that the prosecution cannot object to take into consideration evidence of the said witness who was cross-examined by the defence only because he was not examined by the prosecution.[57]

Where while being cross-examined by the plaintiff's counsel, a letter was produced by the defence witness whereby the defendant was taken by surprise, it was held that the court was right in allowing the defendant to cross-examine his witness, that the cross-examination is permitted only in regard to the genuineness and content of the letter.[58]

Under Section 154 the maker of the statement alone and none else can be contradicted with his previous statement.[59]

A witness examined by the prosecution in the committing Magistrate's court, was tendered in the Sessions Court for cross-examination by defence, without his previous statement in the Commital court being brought on the record. After the cross-examination the prosectuion again cross-examined the witness without obtaining the leave of the court as required by Section 154. It was held that so much of the evidence elicited from the witness by cross-examination of the prosecution was not properly and legally obtained, and to that extent the accused must be held to be prejudiced.[60]

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51. *K. Naga Subba Reddy* v. *Public Prosecutor, A.P. High Court,* 2000 Cr LJ 3452 (para 16) (SC) : AIR 2000 SC 3480.
52. *State of Mysore* v. *Raju Shetty,* AIR 1961 Mys 74.
53. *Kalachand Sircar* v. *Queen-Empress,* ILR (1886) 13 Cal 53; *Nga Nyein* v. *King-Emperor,* ILR (1932) 11 Ran 4.
54. *Dahyabhai* v. *State of Gujarat,* AIR 1964 SC 1563.
55. *Kailas Bais* v. *State,* 1982 Jab LR 823 (MP).
56. *Manzurul Haque* v. *State of Bihar,* AIR 1958 Pat 422; *Sahdeo Tanti* v. *Gipto Pasan,* AIR 1969 Pat 415.
57. 1979 Cr LR 531 (Guj).
58. *Malappa* v. *Guramma,* AIR 1956 Bom 129; **reversed** on another point in *Guramma* v. *Mallapa,* AIR 1964 SC 510; *Chummilal Ojha* v. *Mulsmkar Ojha,* ILR 1961 Cut 635 (rejection of permission to cross-examine his own witness was held wrong); *Ranjit Singh* v. *State,* AIR 1952 HP 81 (refusal of permission held wrong) **relying on** *Amritlal Hazra* v. *Emperor,* AIR 1916 Cal 188.
59. *State of Bihar* v. *S.K. Mehta,* 1966 Cr LJ 343, 349 (Pat).
60. *Dhirendra Nath* v. *State,* AIR 1952 Cal 621, 627.

6. EVIDENTIARY VALUE

The Court should always be slow in acting on the evidence of a hostile witness. It should require corroboration by other reliable evidence. But the evidence may not be rejected outright because he makes different statement at different times.[61] It is not quite strange that some witnesses do turn hostile but that by itself would not prevent the Court from finding an accused guilty if there is otherwise acceptable evidence in support of the prosecution.[62] When a witness is declared hostile and when his testimony is not shaken on material points in the cross-examination, there is no ground to reject his testimony in toto.[63] The Court is not precluded from taking into account the statement of a hostile witness altogether and it is not necessary to discard that same *in toto* and can be relied upon partly.[64] If some portion of the statement of the hostile witness inspires confidence, it can be relied upon. He can not be termed as wholly unreliable.[65] Where a witness supported the prosecution case against his nephew in the Committal Court, but was declared later as hositle, his statement cannot be disbelieved.[66] Hostile witness is not necessarily a false witness.[67] Granting of a permission by the court to cross-examine his own witness does not amount to an adjudication by the court as to the veracity of a witness. It only means a declaration that the witness is adverse or unfriendly to the party calling him, and not that the witness is untruthful.[68] Cross-examination of a witness by the party calling him, does not make him unreliable witness so as to exclude his evidence from consideration altogether.[69] Merely because a witness becomes hostil it would not result in throwing out the prosecution case, but the Court must see the relative effect of his testimony.[70] Merely because the prosecution obtains permission to cross-examine the witness by treating him as a hostile it would not efface the value of the evidence of the hostile witness. If such evidence is corroborated by other evidence, there is no legal bar to convict the accused. On the basis of that evidence of the hositle witness.[71] Testimony of a hostile witness is

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61. *Karuppana Thevar* v. *State of T.N.*, AIR 1976 SC 980.

62. *Sheikh Zakir* v. *State of Bihar*, AIR 1983 SC 911. **See also** *State of Gujarat* v. *Balubhai Madhabhai Zala*, 1995 Cr LJ 2588 (para 6.1) (Guj).

63. *Syed Akbar* v. *State of Karnataka*, AIR 1979 SC 1848 **reversing** the judgement of the Karn H.C.; *Khujji* v. *State of M.P.*, AIR 1991 SC 1853; *Dulal Chandra Ghosh* v. *State*, 1988 Cr LJ 1835 (Cal); *Subhas Debnath* v. *State*, 1985 Cr LJ 1373 (Cal); *Asokan* v. *State of Kerala*, 1982 Cr LJ 173 (Ker); *Shankarlal* v. *State of M.P.*, 1982 Cr LJ 254 (DB); *Arogyanadham* v. *State A.P.*, (1985) 1 Andhra WR 124; *Gurbax Singh* v. *State of H.P.*, 1977 Cr LJ 1676; *Harpal Singh* v. *State of H.P.*, 1976 Cr LJ 162 (HP); (though his earlier statement was under Section 164 Cr. P.C.); *Shyama* v. *State of Rajasthan*, 1977 Raj LW 146 : 1978 Cr LJ (NOC) 79; *In re Saibana Thipanna*, AIR 1966 Mys 248; *Santlal* v. *State of Rajasthan*, 1975 Raj LW 350; *Zamir Ali* v. *State*, 1982 All LJ 66 (DB); *Bir Singh* v. *State*, ILR 1974 HP 948; **relied** on *Rema Naik* v. *State*, AIR 1965 Ori 31; *Deodhari Koeri* v. *Emperor*, AIR 1937 Pat 34; *Chandrawati* v. *State*, 1996 Cr LJ 975 (para 19) (Del); *Zamir Ahmad* v. *State*, 1996 Cr LJ 2354 (para 12) (Del); *Raj Bahadur* v. *State*, 1996 Cr LJ 2364 (paras 27 and 28) (Del).

64. *Gulshan Kumar* v. *State*, 1993 Cr LJ 1525 (paras 19 and 20) (Del); *Kunwar* v. *State of U.P.*,1993 Cr LJ 3421 (Paras 77 and 78) (All). **Also see** *Haneefa* v. *State*, 1993 Cr LJ 2125 (para 10) (Ker).

65. *Ashokkumar Uttamchand Shah* v. *P.M.A. Chanchad*, AIR 1999 Guj 108 (para 17). **See also** *Madhukar Damu Patil* v. *State of Maharashtra*, 1996 Cr LJ 1062 (para 11) (Bom), **relying on** *State of U.P.* v. *Chetram*, AIR 1989 SC 1543 : 1989 Cr LJ 1785.

66. *Ananta Mohanto* v. *State of Orissa*, AIR 1979 SC 1433; **See also** (1971) 2 Cut WR 121; *Lutai* v. *State*, 1976 Cr LT 869 (All).

67. *Shatrughan* v. *State of M.P.*, 1993 Cr LJ 120.

68. *Sat Paul* v. *Delhi Administration*, AIR 1976 SC 294; *Sarjug Prasad* v. *State*, AIR 1959 Pat 66; *Emperor* v. *Haradhan*, AIR 1933 Pat 517; *Sahdeo Tanti* v. *Gipti Pasan*, AIR 1969 Pat 415; *Syed Akbar* v. *State of Karnataka*, AIR 1979 SC 1848; *State of U.P.* v. *Girija Shanker Misra*, 1985 Cr LJ (NOC) 79 (Delhi); *Azhar* v. *State*, 1985 All LJ 384; *Madho Ram Shakya* v. *State*, 1984 All LJ 275; *Rajaram* v. *State*, 1978 Cr LJ 196 (All); *Shankarlal* v. *State of M.P.*, 1982 Cr LJ 254 (MP); *Badrinath* v. *State*, AIR 1953 J&K 41; *Jay Prakash* v. *State of Sikkim*, 1982 Cr LJ (NOC) 196 (Cal); *Kalimuddin* v. *State*, 1977 Cr LJ (NOC) 261 (Cal); *Babulal* v. *State of Rajasthan*, 1977 Cr LJ 59; *Agasti Mahananda* v. *Ramaprasad Padhi*, (1969) 35 Cut LT 794; *Ashique Khan* v. *State*, 1974 Cr LJ 724 (Pat); *Bholanath* v. *State*, 1976 Cr LJ 1409 (Del); *Ashok Kumar* v. *State*, ILR (1976) 1 Delhi 359; *Bir Singh Majhi* v. *State of Assam*, 1977 Cr LJ 1349; *Mazahar Ali* v. *State*, 1976 Cr LJ 1629; *Bhagatram* v. *State of M.P.*, 1990 Cr LJ 2407; *Laxman Sahu* v. *State of Orissa*, 1990 Cr LJ 821; *Bhagaban Barik* v. *State of Orissa*, ILR (1978) 1 Cut 202. *Shyama* v. *State of Rajasthan* 1978 Cr LJ (NOC) 79 : 1977 Raj LW 146; *Bholanath* v. *State*, 1976 Cr LJ 1409 (Del).

69. *Dhanu* v. *State of Tripura*, 1999 Cr LJ 1231, at p. 1239 (Gau).

70. *Suresh Chand* v. *State of Haryana*, 1976 Cr LJ 452.

71. *Bhagwan Singh* v. *State of Haryana*, AIR 1976 SC 202; **See also** *Rabindra Kumar Dav* v. *State of Orissa*, AIR 1977 SC 170.

acceptable to the extent it is corroborated by that of a reliable witness.[72] The evidence of a hostile witness is not necessarily to be rejected either in whole or in part. It is also not to be rejected so far as it is in favour of the party who called the witness, nor is it to be rejected so far as it is in favour of the opposite party. The whole of the evidence so far as it affects both parties favourably and unfavourably must be considered for whatever it is worth.[73]

Lapse of time may however be considered in examining the discrepancies.[74]

Where a party is allowed to cross-examine his own witness, the effect of that cross-examination must be to discredit that witness altogether and not merely to get rid of part of his testimony, and hence that witness's evidence must be excluded altogether. In the case of a witness for the prosecution, this means so far as it supports the case for the prosecution, for obviously the defence is entitled to rely on so much of his evidence as supports their case; otherwise a party who found that his witness had given evidence which supported his adversary's case could get rid of the evidence by declaring him hostile.[75] The defence is entitled to rely on so much of the evidence of the hostile witness as is depended upon by the prosecution.[76]

If a witness, on the ground that he is suspected to have turned hostile, is permitted by the Court to be cross-examined by the party who called him, the whole of the evidence of that witness does not become worthless. It is open to the Court to consider the evidence, and there is no objection to a part of that evidence being made use of in support of the prosecution or in support of the accused.[77] Where a number of witnesses who had induced belief in the prosecution by their statements in the course of investigation that they could be used as eye-witnesses staged a complete volte-face in examination-in-chief or cross-examination and acted as an echo of the defence lawyer., it was quite permissible for the trial Court to find out what portion of evidence was true and believable.[78] In a rape case when some witnesses turned hostile it would not be sufficient to discard evidence of other witnesses and the evidence of hostile witness has to be considered independently on its own merit and if any of their statements were corroborated by the evidence of other witnesses.[79] Where, a hostile witness was contradicted with reference to his earlier statement before the committing magistrate, the Supreme Court held the court was right in using the earlier statement of the hostile witness as substantive evidence.[80] The Court must carefully analyse the evidence of a hostile witness and see whether that part of the evidence which is

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72. *State of Maharashtra* v. *Harishchandra Tukaram Awatade*, 1997 Cr LJ 612 (Bom). Evidence of hostile witness not to be totally rejected, trustworthy and corroborated part can be relied upon, *Pandappa Hanumappa Hanamar* v. *State of Karnataka*, 1997 Cr LJ 2493 (SC). **Also see** *Rajendra Singh* v. *State*, 1997 Cr LJ 2668 (All); *Meena Gopalkrishna Mudaliyar* v. *State of Maharashtra*, 1993 Cr LJ 3634 (para 6) (Bom); *Om Prakash* v. *State of Haryana*, 1994 Cr LJ 3351 (para 16) (P&H); conviction can be based on his corroborated testimony, *Anil Rai* v. *State of Bihar*, 2001 Cr LJ 3969 (para 37) (SC).

73. *Rema Naik* v. *State*, AIR 1965 Ori 31; **relying** on *Sohrai Sao* v. *Emperor*, AIR 1930 Pat 247; *Profulla Kumar Sarkar* v. *Emperor*, AIR 1931 Cal 401 (FB); *State* v. *Sashi Bhusan Hari Chandan*, (1963) 1 Cr LJ 550 (Ori); *Nebti Mandal* v. *Emperor*, AIR 1940 Pat 289; *Purusotam Naik* v. *Chakradhar Das*, AIR 1959 Ori 19; *Emperor* v. *Haradhan*, AIR 1933 Pat 517; *Sarjug Prasad* v. *State*, AIR 1959 Pat 66; *State* v. *Naginder Singh*, AIR 1953 Pepsu 97; *Shridhar Mahadeo* v. *Emperor*, AIR 1935 Bom 36; *Gangadharam Pillai* v. *State*, ILR 1951 Tra/Co 447; *Emperor* v. *Jehangir*, AIR 1927 Bom 501; *Ammathayammal* v. *Official Assignee*, AIR 1933 Mad 137; *Upendar Mahakud* v. *State*, 1985 Cr LJ 1767 (Ori); *Debi Prasad Padhi* v. *State*, 1982 Cr LJ 2214 (Ori)(DB); *Gobinda Chandra* v. *Haru Chandra*, 1968 Cr LJ 1352 (Cal); *Chakradhar Mohanty* v. *Nityananda Patra*, ILR 1976 Cut 540; *Chamara Pradhani* v. *State of Orissa*, 1983 Cr LJ 1706 (Ori)(DB).

74. *Gurbax Singh* v. *State of H.P.*, 1977 Cr LJ 1676; *State of Orissa* v. *Dileshwar Bhai*, ILR 1977 Cut 160; *Golak Baliarsingh* v. *Purna Chandra Baliarsingh*, ILR 1976 Cut 823.

75. *Emperor* v. *Mokbul Khan*, ILR (1928) 56 Cal 145; *Sohrai Sao* v. *King Emperor*, ILR (1929) 9 Pat 474, *Jagir Singh* v. *State*, AIR 1975 SC 1400. Prosecution case cannot be judged on the basis of testimony of hostile witnesses; *Keshoram Bora* v. *State of Assam*, AIR 1978 SC 1096 : (1978) 2 SCR 788; *Khijruddin* v. *Emperor*, AIR 1926 Cal 136; *Babu Nath Gond* v. *State*, 1975 Mah LJ 779; *Chandrika Prasad* v. *State*, 1975 Rajadhani LR 551; *State* v. *Ramesh Chandra*, ILR (1974) 1 Del 129; *Bal Kari* v. *State of Rajasthan*, 1976 Crl LJ 828 : 1975 Raj LW 435; *Dharan* v. *State*, 1975 WLN 371 (Raj).

76. *In re Madhukar Dasarath Mendekar*, 1972 Cr LJ 978 (Mys); **relied** on In *re Saibanna Tipanna*, AIR 1966 Mys 248; *Profulla Kumar Sarkar* v. *Emperor*, AIR 1931 Cal 401; *Purustam Naik* v. *Chakradhar Das*, AIR 1959 Ori 19; *State of Mysore* v. *Ramaji Ramappa Malagi*, (1972) 2 Mys. LJ 6.

77. *Gangadharan Pillai* v. *State*, ILR (1951) TC 447.

78. *Balshiram Rambhau awate* v. *State of Maharashtra*, 1978 Cr LJ 821.

79. *State of Karnataka* v. *Mehaboob*, 1987 Cr LJ 940 (Kant)(DB).

80. *Periyasami* v. *State of Madras*, AIR 1967 SC 1027.

consistent with the prosecution case is acceptable or not. His evidence cannot be rejected entirely merely because he has turned hostile.[81]

It is not right to proceed on the basis that whatever is stated by a hostile witness which is not in favour of the party calling him should necessarily be believed as if it were an admission made and binding upon the party calling him.[82]

Where the witness completely turned hostile his evidence cannot at all be relied upon for any purpose.[83] Where the hostile witness did not speak anything about the occurrence and there was no other direct evidence, the evidence of the hostile witness was of no use.[84]

It would be wrong to rely on the evidence of a hostile witness as corroborative piece of the plea of defence of the accused[85] but the evidence of a hostile witness cannot be rejected only on that count and can be used for the purpose of corroboration to the extent it corroborates the prosecution version.[86]

7. STATEMENTS UNDER SECTIONS 162 AND 164, Cr.P.C.

Under the Amended Section 162 Cr. P.C. (same under new code), proviso which came into effect on 1-1-1956, when the witness resiled from the statement made during investigation under Section 162 Cr P.C., with the permission of the court it can be used for cross-examining the witness.[87] Where the witnesses resiled from their earlier statements to police as to the motive for commission of murder of the wife by the husband, they were treated as hostile wholesale and their testimony was of no use.[88]

The court would not give leave until it is satisfied that there is hostility or adverseness displayed by the witness to the very party on whose behalf he has come to give evidence. The witness cannot be cross-examined with the help of the statements made by him to the police unless he is declared hostile.[89]

The Public Prosecutor while cross-examining the hostile witness should not ask as to whether he had stated before the police as per the whole of the statement, as marking of the whole statement as an exhibit is not contemplated under Section 145. He should point out such statements which are contradictory to the present statements in the witness-box.[90] Though an investigation by the Dy. S.P. under the prevention of corruption Act is illegal the statement recorded are not illegal and can be regarded as statement under Section 161, 162, Cr.P.C. In a subsequent legal investigation by the Superintendent of Police, it was held that the previous statements can be used for cross-examination, if the witness resiled from the statements.[91]

Statements recorded under Section 164 Cr. P.C., though not substantive piece of evidence, can be used to corroborate or contradict its maker.[92]

Impeaching credit of witness.

S. 155. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him:—

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81. *State of Gujarat* v. *Anirudhsing*, AIR 1997 SC 2780 : 1997 Cr LJ 3397, **following** *Khujji* v. *State of M.P.*, (1991) 3 SCC 627 : 1991 SCC (Cri) 916; *State of U.P.* v. *Ramesh Prasad Misra*, (1996) 10 SCC 360 : 1996 SCC (Cri) 1278. Evidence of hostile witness is to be scrutinised carefully, *State of Rajasthan* v. *Bhera*, 1997 Cr LJ 1237 (Raj); *Mohomed Bachhu Miah* v. *State of Tripura*, 1994 Cr LJ NOC 197 (Gau); not to be excluded entirely or rendered unworthy of consideration, *Gura Singh* v. *State of Rajasthan*, 2001 Cr LJ 487 (para 11) : AIR 2001 SC 330.

82. *State of Mysore* v. *Raju Shetty*, AIR 1961 Mys 74; *Nand Kishore* v. *Brij Bihari*, AIR 1955 Raj 65.

83. *Sait* v. *State*, 1989 Cr LJ 2050 (Mad).

84. *Kathi Odhabhai Bhimabhai* v. *State of Gujarat*, 1993 Cr LJ 187 (para 5) (SC) : AIR 1993 SC 1193.

85. *Administrator Municipal Board, Gangapur* v. *Omprakash*, 1982 Cr LJ 1398 (Raj).

86. *Chhotu Ram* v. *State of Rajasthan*, 1995 Cr LJ 819 (para 7) (Raj). **See also** *Yogendra Kumar* v. *State of U.P.*, 1999 Cr LJ 4685 (paras 9 and 10) (All); *Koli Lakhmanbhai Chanabhai* v. *State of Gujarat*, 2000 Cr LJ 408 (para 5) (SC) : AIR 2000 SC 210.

87. *State* v. *Balchand*, AIR 1960 Raj 101; *State* v. *Mohan Hira*, AIR 1960 Guj 9; (witness need not declared hostile).

88. *Subbiramani* v. *State*, 1995 Cr LJ 3382 (paras 11 and 12) (Mad).

89. *In re Kalu Singh Moti Singh*, AIR 1964 MP 30; *Babulal* v. *State*, 1977 Cr LJ 2008 (All).

90. *Annasab Melappa* v. *State*, 1982 Cr LJ 1553 (Kant).

91. *Bhanu Prasad* v. *State of Gujarat*, AIR 1968 SC 1323.

92. *Harbans Lal* v. *State*, AIR 1967 HP 10.

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

***[(4) * * * *].**

***Explanation.*—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.**

ILLUSTRATIONS

(a) *A* sues *B* for the price of goods sold and delivered to *B*.

C says that *A* delivered the goods to *B*.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to *B*.

The evidence is admissible.

(b) *A* is indicted for the murder of *B*.

C says that *B*, when dying, declared that *A* had given *B* the wound of which he died.

Evidence is offered to show that, on a previous occasion, *C* said that the wound was not given by *A* or in his presence.

The evidence is admissible.

SYNOPSIS

1. *Principle and Scope* ... 1309
2. *Witness believed to be unworthy of credit [Clause (1)]* ... 1310
3. *Witness accepted bribe etc. [Clause (2)]* ... 1311
4. *Witness's inconsistent statements [Clause (3)]* ... 1312
5. *Liable to be contradicted* ... 1312
6. *Sections 155 and 145* ... 1313
7. *Tape-Record* ... 1314
8. *F.I.R.* ... 1314
9. *Section 162, Cr. P.C.* ... 1315
10. *Section 164, Cr. P.C.* ... 1315
11. *Immoral character of victim of rape [Clause (4)]* ... 1316
12. *Reasons for believing a witness unworthy of credit [Explanation]* ... 1316

COMMENTS

1. PRINCIPLE AND SCOPE

This section enables the parties to give independent testimony as to the character of a witness in order to indicate that he is unworthy of belief by the Court. Its provisions apply to both criminal and civil cases.

The section indicates four ways in which the credit of a witness may be impeached (a) by the adverse party, or (b) with the consent of the Court by the party who calls him. They are:—

(1) evidence of persons that the witness is unworthy of credit;

(2) proof that the witness (i) has been bribed; (ii) has accepted the offer of a bribe; or (iii) has received any other corrupt inducement.

(3) former statements inconsistent with the present evidence; and

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* **Cl. (4) omitted by the Indian Evidence (Amendment) Act, 2002, s. 3, w.e.f. 13-12-2002, prior to its omission it stood as under :**

"(4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character."

(4) general immoral character of the prosecutrix in cases of rape or attempt to ravish.

The Sub-clause (1) has an explanation, which is a re-echo of S. 153. Witnesses deposing to character can be asked in cross-examination to give reasons for their opinion. They are not liable to be contradicted in those reasons; but, if they are false, they can be charged with giving false evidence.

The first three grounds are general. They indicate that the credit of a witness may be impeached, first of all, by the best of evidence, that is, his own former statements to the contrary; secondly, he can be shown to be unworthy of credit by the oral testimony of other persons; and, lastly, his credit can be completely overthrown by proving that he had accepted (a) a bribe, or (b) an offer of a bribe, or (c) any other corrupt inducement. The fourth ground is a special one. If the woman complaining of rape or attempt to ravish is proved to be a woman generally of immoral character, her story in the complaint will necessitate strong proof.

This section should be strictly construed and narrowly interpreted, otherwise Courts would have to investigate, on most imperfect materials, questions which have no bearing upon the matter really in contest.[1] The provisions of Section 155 have to be strictly construed.[2]

This section is in addition to other provisions contained in Sections 138, 140, 145, 148 & 154 for impeaching the credit of a witness by cross-examination.

Section 52 of the Act deals with relevancy of character evidence whereas this section prescribes the manner of impeaching the credit of a witness. Therefore, Section 155 cannot be construed as an exception to Section 52. Further Sections 155 and 146 are not in conflict with each other, as Section 146 deals with methods of impeaching the credit of a witness in a different way. Sections 138, 140, 145, 148 and 154 provide for impeaching a credit of a witness by cross-examination.[3]

This section mainly deals with the modes of evidence for impeaching the credit of a witness other than by cross-examination in the witness-box and must be exercised immediately after examination-in-chief.[4] When a statement was recorded by the order of a court having no jurisdiction, still such a statement can be made use of for purposes of Sections 145, 155 & 157 of the Evidence Act, as it was recorded by an official under the orders of the Court. The statement of a person does not cease to be his statement merely because it was written in the afore-mentioned circumstances. Even if the court has not passed an order for recording the statement, and the statement has been recorded such a statement would be made use of for purposes of Sections 145, 155 and 157.[5]

An inquest report is not a substantive piece of evidence; it could only be considered as a previous statement of the investigating officer and his credit could be impeached with respect to that statement.[6]

2. WITNESS BELIEVED TO BE UNWORTHY OF CREDIT [CLAUSE (1)]

Clause (1) says that the credit of a witness may be impeached by the evidence of persons who from their knowledge of the witness believe the witness to be untrustworthy of credit. Sections 146 to 153 deal with how a witness's veracity can be tested by cross-examination. Section 155 does not allow evidence of bad character of a witness to be spoken to.[7]

In order to impeach the character of a witness for veracity, witnesses may be called to prove that his general reputation is such that they would not believe him upon his oath. Such evidence can be given, and the practice is ancient and undoubted.[8]

Where the general reputation of a witness has been thus impeached, the party calling him may re-establish his credit by cross-examining the witnesses who have spoken against him as to their means of knowledge and the grounds of their opinion, or as to their hostile feelings towards the person whose testimony they have discredited, or as to their own character and conduct, or by calling other witnesses.

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1. *Bhogilal* v. *Royal Insurance Co. Ltd.*, (1927) 30 Bom LR 818 : ILR 6 Ran 142 PC : AIR 1928 PC 54.
2. *Rama Reddy* v. *V.V. Giri*, AIR 1971 SC 1162.
3. *G. Hussenaiah* v. *B. Yerraiah*, AIR 1954 Andhra 39.
4. *Kiranchandra Pal* v. *Bhondu*, 1970 MPLJ 263.
5. *State of Punjab* v. *Vishwajit Singh*, AIR 1987 P&H 126.
6. *Ramanand* v. *State*, ILR 1974 HP 509.
7. *Maung San Myin* v. *Emperor*, AIR 1930 Rang 49.
8. *R* v. *Brown and Hedley*, (1867) LR 1 CC 70.

either to support the character of the first witness or to attack in their turn the general reputation of the impeaching witnesses. How far this plan of recrimination may be carried is not yet formally determined, though the practice is said by some lawyers to be in conformity with the general rule of the civil law, *in testem tets, et in hos, sed non datur ultra*, that is, a discrediting witness may himself be discredited by other witnesses, but no further witnesses can be called to attack the characters of these last.[9]

The evidence that is to be adduced to discredit the witness should be confined to general reputation for truthfulness or general moral character and should not be given of particular acts of falsehood or immorality or any wrong doing. Explanation under Section 55 of this Act states that in Sections 52, 53, 54 & 55, the word 'character' includes both reputation and disposition; but except as provided in Section 54 evidence may be given only of general reputation and general disposition and not of particular acts by which reputation or disposition were shown.[10]

"The impeaching witness cannot in direct examination give particular instances of other falsehood or dishonesty, since no man is supposed to come prepared to defend all the acts of his wife. But, in cross-examination he may be asked as to his means of knowledge of the other witness, his feelings of hostility towards him, or whether inspite of bad character in other respects, the impeached witness has not preserved his reputation for truth; and the answers to these questions cannot be contradicted. It has been said that the impeaching witness should come from the locality of the other, and not be a stranger sent expressly to learn the latter's reputation.

The impeaching witness cannot, of course, be asked his opinion whether the witness is in fact speaking the truth about the issue before the Court."[11]

Opinion evidence is, as a general rule not admissible, and Section 155(1) is an exception to that rule. To draw an inference against the credibility of a witness without anybody going into the witness-box in the manner contemplated by Section 155(1) would not be legitimate.[12]

The testimony of a trap-witness and persons of shady character should not be rejected as tainted evidence without scrutiny. A conviction can be based on such testimony.[13]

3. WITNESS ACCEPTED BRIBE ETC. [CLAUSE (2)]

It says that the credit of a witness may be impeached by proof that the witness has been bribed or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence.

The credit of a witness may be impeached on the ground that his evidence was obtained by corrupt inducement, and it was open to the defendant to contend that the application of a third degree method by the persistent questioning in the investigation constituted a form of unfair evil, the avoidance of which was a corrupt inducement to witness to say what was required of him. It would be open to the defendant also to attempt to establish this by evidence, and it was clear that an important witness for this purpose would be the counsel. There was also the possibility of certain contingencies in which the counsel's association with the enquiry may be unseemly.[14]

Section 153 exception (2) says that if a witness is asked any question tending to impeach impartiality and answers it by denying the fact suggested, he may be contradicted. So when a witness denies a suggestion that he accepted the offer of a bribe, then such statement can be contradicted. The Privy Council held that when the offer of a bribe was not shown to have been accepted, it would be no ground for impeaching the impartiality of a witness, but the fact that the witness accepted the bribe or the promise of a bribe would be a ground to impeach the credit of that witness and the second clause embodies that view.[15]

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9. TAYLOR, 12th Edn., S. 1473, p. 939; ADRIAN KEANE IN MODERN LAW OF EVIDENCE (2nd Edn.) Considers this an anomalous albict long established rule and opines that it is difficult to find a convincing justification for this rule.
10. **See** *R* v. *Gunewardene*, (1951) 2 KB 600 : (1951) 2 All ER 290.
11. PHIPSON ON EVIDENCE, 15th Edn. (2000), P. 265 (para 11-41).
12. *Dinkar Bandhu Deshmukh* v. *State*, AIR 1970 Bom 438.
13. *Ramsarup* v. *State*, AIR 1967 Del 26.
14. *Hussain Khan of Mamdot* v. *Iftikhar Hussain Khan of Mamdot*, ILR (1949) 2 Lah 844.
15. *Bhoolal* v. *Royal Insurance Co. Ltd.*, AIR 1928 PC 54.

Sections 146, 148 & 155 would show that the credit of the witness can be said to have shaken if it can be shown that he is not a man of veracity, and not that he is of bad moral character. A black-marketeer is not necessarily untruthful, nor a non-black-marketeer necessarily a man of veracity.[16]

A witness may be discredited as pointed out in exceptions 1 & 2 of Section 153, in regard to the proof of previous conviction when denied by the witness, or by evidence when the witness denied impartiality.

For impeaching the credit of a witness, indecent and scandalous questions can be allowed in cross-examination provided there is necessity and foundation for the same.[17]

4. WITNESS'S INCONSISTENT STATEMENTS [CLAUSE (3)]

This clause states that the witness may be impeached by proof of former statement inconsistent with any part of his evidence *which is liable to be contradicted*[18]; but the mode of using such former statement for the purposes of contradicting the witness is prescribed in Section 145 of the Evidence Act.[19] If a witness disowns having made any statement which is inconsistent with his present stand, his testimony in the Court on that score would not be vitiated until the cross-examiner calls his attention to those parts of his statement which are to be used for contradicting him.[20] A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of the inconsistent statements which is liable to be "contradicted" would affect the credit of the witness. Mere variations falling in narration of the incident by the witnesses, is not sufficient to discredit their testimony.[21]

TAYLOR (8th Ed., Section 1324) states: "It may be important to distinguish between contradicting a witness and impeaching the credit of a witness—expressions which are sometimes used as synonymous but between which a distinction appears to be made by the Evidence Act. The first of the modes in which the credit of a witness may be impeached is, that witnesses may be called to *disprove* such of the facts stated by him, whether in his direct or cross-examination as are material to the issue. The omission of this mode in the above section of the Evidence Act appears to have suggested doubts as to whether Indian Legislature did or did not intend to allow the testimony of a witness to be contradicted by other evidence disproving the facts stated by him. It has been shown that where these facts are relevant the Evidence Act assumes that evidence may be given to contradict and while declaring generally that evidence may not be given to contradict the answers to questions, which are relevant to the enquiry only insofar as they tend to shake the credit of a witness by injuring his character, the Act makes two exceptions; to this rule (exceptions 1 & 2 of Section 153)."[22]

This clause deals with previous inconsistent statements of a witness whose evidence is sought to be discredited under this clause. The previous statements may be of several types, like, statements given to the Police Officer coming under Section 162, Cr. P.C., statements recorded under Section 164, Cr. P.C., statements made during conversation which were recorded on tape. Section 145 of this Act deals with contradicting a witness by earlier statements in writing.

5. LIABLE TO BE CONTRADICTED

The words "which is liable to be contradicted" mean "which is relevant to the issue".[23]

The Supreme Court held that the above statement in ILR 17 Cal 344 was too broadly laid down and the expression "which is liable to be contradicted" does not mean merely "which is relevant to the issue."[24]

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16. *Chari* v. *State*, AIR 1959 All 149.
17. *Prakash Raja Ram* v. *State of Maharashtra*, 1975 Cr LJ 1297 (Bom).
18. *Narayanan* v. *Krishnan*, 1981 Crl LJ 563 (Ker). **See also** *Binay Kumar Singh* v. *State of Bihar*, 1997 Cr LJ 362 : AIR 1997 SC 322.
19. *State of Rajasthan* v. *Teja Ram*, 1999 Cr LJ 2588 (para 32) (SC) : AIR 1999 SC 1776.
20. *Binay Kumar Singh* v. *State of Bihar*, AIR 1997 SC 322 : 1997 Cr LJ 362, *Bhagwan Singh* v. *State of Punjab*, AIR 1952 SC 214 : (1952) 1 MLJ 816 (SC).
21. *Rammi* v. *State of M.P.*, 1999 Cr LJ 4561 (paras 23-28) (SC) : AIR 1999 SC 3544.
22. *R.* v. *Sakaram Mukundji*, (1874) 11 Bom HCR 169.
23. *Khadijah Khanum* v. *Adool Kazim Shirazi*, ILR (1899) 17 Cal 344 @ p. 347.
24. *N. Sri Ramreddy* v. *V.V. Giri*, AIR 1971 SC 1162.

6. SECTIONS 155 AND 145

The Supreme Court held that a perusal of Sections 145, 155 and 157 clearly indicates that there are two purposes for which a previous statement can be used (1) for cross-examination and contradiction and (2) for corroboration. When the defence wants to use the previous statement of a witness it could be only to contradict a witness and not to corroborate.[25]

A statement made by a witness before a commission appointed under the Commission of Enquiry Act of 1952 cannot be permitted to be used to contradict the maker or impeach his credit.[26]

Section 155 does not lay down the mode of proof of a former statement, that is provided in Section 145 when the prior statement is sought to be tendered in evidence for impeaching the credit of the witness.[27]

Under this section though it is stated that a witness can be impeached by proof of former statements inconsistent with any part of his evidence, it does not lay down how the former statement is to be proved. While Section 145 refers to former statements in writing or reduced into writing, this section would also apply to oral statements.

Where a party wants to rely on a previous statement of a person who is giving evidence, in order to contradict him, it is the duty of the cross-examiner to put the document to him so as to give him an opportunity to explain it. Thus Section 155 is controlled by Section 145 and it is not independent of it.[28] However, it was held that as Section 145 makes no mention of oral statements it cannot control Section 155. When former oral statements were put to the witness showing some inconsistency, the court may refuse to place any reliance on such inconsistency, when those persons to whom such oral statements were made were not examined and such questions were not put to those witness for explanation.[29] It is a legitimate right of the accused to prove that the previous statements made by the witness were different and they should be made available to him for his defence for impeaching the credit of the witness as he has to draw the attention of the witness to his previous statements.[30] If the evidence is intended to suggest that the witness was not speaking the truth upon a particular point his attention must first be directed to the fact by cross-examination so that he may have an opportunity of giving an explanation.[31] In the absence of any inherent incredibility (vice) no presumption adverse to a witness should be drawn on any matter unless it is put to him and he is given an opportunity to explain it.[32]

The previous deposition in an earlier proceeding can be used to contradict or corroborate his present statement in the court under Section 155 and Section 157 of the Evidence Act.[33] Even a former statement made by an informant to a person not legally competent to investigate, can be used for contradiction under Section 145 and for impeaching his credit under Section 155.[34]

The fact that a particular witness was not believed in another case would not impeach the credit of a witness as such earlier judgement cannot be given in evidence for the purpose of discrediting the witness in the present proceedings.[35]

In a *de novo* trial before a successor Magistrate on the request of the accused, the statements of witnesses recorded by the predecessor were brought on record. On the admission of those witnesses in

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25. *Kehar Singh* v. *State*, AIR 1988 SC 1883.
26. **See also** *Mohammad Sarwar* v. *Emperor*, AIR 1942 Lah 215.
27. *Dama alias Damodar Jena* v. *State*, ILR 1969 Cut 265.
28. *Bal Gangadhar Tilak* v. *Srinivas Pandit*, AIR 1915 PC 7; *Jagrani Kunwar* v. *Durga Prasad*, ILR 36 All 93 (PC); *Rani Amrit Kunwar* v. *Gur Charan Singh*, AIR 1934 All 226; *State* v. *Minaketan Patnaik*, AIR 1952 Ori 267; *Gopichand* v. *Emperor*, AIR 1930 Lah 491; *Arnup* v. *Kedar*, AIR 30 Cal WN 835; *Dama alias Damodar Jena* v. *State*, ILR 1969 Cut 265.
29. *Muktawandas Ajab Das* v. *R*, AIR 1939 Nag 13; *Ramratan* v. *State*, AIR 1956 Raj 196.
30. *Manilal Sahu* v. *State*, AIR 1969 Ori 176; *Doman Mahton* v. *Suraj Deo Prasad*, AIR 1970 Pat 95.
31. *Chunilal* v. *Hart Ford Fire Insurance Co.*, AIR 1958 Punj 440.
32. *Sachindranath Chatterjee* v. *Nilima*, AIR 1970 Cal 38.
33. *Ponnuswami* v. *Kalyana Sundara*, AIR 1930 Mad 770.
34. *State* v. *Pareswar Ghasi*, AIR 1968 Ori 20; *State of Punjab* v. *Vishwajit Singh*, AIR 1987 P&H 126; *Ramkishun Sao* v. *R.*, AIR 1946 Pat 82.
35. *Chandreshwar Prasad* v. *Bisheshwar*, AIR 1927 Pat 61; In the matter of Juggappa, 4 Cal WN 684.

cross-examination that they had made those statements, it was held that the evidence previously givey b those witnesses was not brought on record in strict conformity with the provisions of the Evidence Act The provisions of Sections 145 and 155 not having been complied with, it was not open to the Magistrat to act upon those statements and to get them on the record as evidence in a criminal case.[36]

It was held that a recital as to the boundary in documents between third parties is not ordinarily admissible to prove possession or title as against a person who is not a party to the document, but thi rule is subject to exception which can be classified under four heads, namely, if these documents com within the relevancy and admissibility contemplated under (a) Sections 155 and 157; (b) Section 32(3) (c) under Section 13; and (d) under Section 11 of the Evidence Act. If the recital of the document i deposed to by the executant of the document it becomes admissible under Section 157 to corroborate th evidence of the executant or under Section 155 to contradict such evidence.[37]

It was held by the Privy Council that a letter written by a witness is no evidence of the fact contained therein, but it can be put to use in cross-examination for discrediting him showing that what h had written was inconsistent with his evidence.[38] The handwritting of a witness cannot be used fo impeaching the credit of the witness, as the handwriting is not a "former statement" of the witness.[39] Th Supreme Court held that a statement said to have been made by a witness who refused to affix his thum impression could not be used for contradicting that witness.[40]

When a witness denied having made a statement, his previous statement admitting that fact, in previous deposition can be taken in evidence though its value is weak and it is unsafe to act upon without corroboration.[41]

7. TAPE-RECORD

The Supreme Court in *Pratap Singh* v. *State of Punjab*[42] reversing the decision in *Pratap Sing (Dr.)* v. *State of Punjab*[43] held that the tape-recorded statements can be admitted to discredit the witnes in the witness box with his former inconsistent statement recorded on the tape; it is to be noted that AI 1963 Punj 298 overruled a prior decision in *Rupchand* v. *Mahabir Prasad*[44] must be held to be good la wherein it was stated following the decision *Andrews* v. *United States*[45] a case of electro-telephoni communication, that a defendant who is endeavouring to shake the credit of a witness by proof of former inconsistent statement, can depose that while he was engaged in coversation with the witness, tape-record was in operation or can produce the said tape-recorder in support of the assertion that certain statement was made in his presence.

The Supreme Court held that a tape-recorded statement is admissible under Section 155(3), thoug the weight to be given to such evidence is however distinct and separate from the question o admissibility.[46] It was held by the Supreme Court, that the conversation between the accused and th complainant which was recorded even by a Police Officer without their knowledge can be relied upon a such conversation would not attract the applicability of Section 162 Cr. P.C.[47]

8. F.I.R.

The F.I.R. can be made use of by the defence to impeach the informant's credit who had given th information to the police for recording the F.I.R. It can be tendered under any provision of Chapter II o the Evidence Act, such as Section 32(1) or Section 8 and it can be used only for purpose o corroborating, contradicting or discrediting the maker under the provisions of Sections 145, 155 & 15

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36. *Saligram* v. *State of U.P.*, AIR 1956 All 138.
37. *Rangayyan* v. *Innasimuthu Mudali*, AIR 1956 Mad 226.
38. *Judah* v. *Isolyne Sarojbashini Bose*, AIR 1945 PC 174.
39. *Kiranchandra Pal* v. *Bhondu*, 1970 MPLJ 263.
40. *State of Haryana* v. *Harpal Singh*, AIR 1978 SC 1530.
41. *Homeshwar Singh* v. *Kameshwar*, AIR 1935 PC 146.
42. AIR 1962 SC 72.
43. AIR 1963 Punj 298.
44. AIR 1956 Punj 173.
45. 105 Am LR 322.
46. *Rama Reddy* v. *V.V. Giri*, AIR 1971 SC 1162.
47. *Yusufalli* v. *State of Maharashtra*, AIR 1968 SC 147.

provided he is examined in court and it cannot be used for any purpose with reference to other witnesses.[48]

Where the first informant did not mention the name of one of the accused in the F.I.R. though the said accused was known to him, evidence of the first informant would not come in aid of prosecution to prove the complicity of such accused in crime.[49]

9. SECTION 162, Cr. P.C.

Any statement made to a police officer during investigation when it is reduced to writing cannot be used as evidence, but it may be used for the purpose of refreshing the memory under Section 159 of the Evidence Act. The person making the statement can be questioned with a view to impeach his credit, but the Police Officer who recorded it or any other person in whose hearing the statement was made has to be examined under Section 155 on that part of the statement which was used as contradiction.[50]

Section 162(1), Cr. P.C. permits the prosecution to impeach the credit of his own witness by proof of his former statements made to the investigating officer. The defence also can use it in view of the proviso to Section 162 (1), Cr. P.C.[51]

It was held by the Supreme Court that Section 162, Cr. P.C., prohibits the use of statements of witness made before the police during investigation; but for a limited purpose of contradiction of a prosecution witness it can be used; it cannot be used for corroboration of a prosecution witness or for contradiction of a defence witness.[52]

The statement made by an identifier before a Magistrate contained in a identification memo is a former statement of the identifier and can be used for contradicting him under Section 145 or 155 and for corroborating him under Section 157, unless it is made in the presence of the police in which case it would be hit by Section 162, Cr. P.C. and would therefore be not admissible, for contradiction.[53]

Where the material statement of the eye-witness that he had seen the accused setting fire to the shed was omitted by him in the police statement, it amounted to contradiction.[54]

10. SECTION 164, Cr. P.C.

A previous statement of a witness recorded u/Section 164, Cr. P.C. can be used for impeaching the credit of a witness though it may not be used as substantive evidence.[55]

Where a person made a dying declaration but later survived, it was held that the statement though not admissible as a dying declaration under Section 32 of the Evidence Act such statement can be used for contradiction under Section 145 and for impeaching the credit of the witness under Section 155.[56]

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48. *Shankar* v. *State of U.P.*, AIR 1975 SC 757; *Azimuddy* v. *R.*, ILR 54 Cal 237; *Man Mohan Ghosh* v. *Emperor*, ILR (1931) 58 Cal 1312; *Ramnaresh* v. *R.*, AIR 1939 All 242; *Nisar Ali* v. *State*, AIR 1957 SC 366; *Aghnoo* v. *State*, AIR 1966 SC 119; *Nankhu Singh* v. *State*, AIR 1973 SC 491; *Hasib* v. *State of Bihar*, AIR 1972 SC 283; *Khan* v. *State*, AIR 1962 Cal 641; *Bhagirathi* v. *State*, AIR 1965 Ori 99; *Tikaram* v. *State*, AIR 1957 All 755; *Emperor* v. *Aftab Mohammad*, AIR 1940 All 291.

49. *Raju* v. *State of Maharashtra*, AIR 1998 SC 275 : 1998 Cr LJ 493.

50. *R.* v. *Uttamchand*, (1874) 11 Bom HCR 120; *R* v. *Tajkhan*, ILR 17 All 57.

51. *R.* v. *Najibuddin*, AIR 1933 Pat 589.

52. *Sat Paul* v. *Delhi Administration*, AIR 1976 SC 294. **See also** *Madari Sikdar* v. *R.*, ILR 54 Cal 307; *In re Packirswami*, AIR 1942 Mad 288; *In re Saibanna Tipanna*, AIR 1966 Mys 248; *R.* v. *Vithu*, AIR 1924 Bom 510; *Tahsildhar Singh* v. *State*, AIR 1959 SC 1012; *Laxman Kalu* v. *State*, AIR 1968 SC 1390; *Prakash Chand* v. *State*, AIR 1979 SC 406; *Kehar Singh* v. *State (Delhi Administration)*, AIR 1988 SC 1883.

53. *Asharfi* v. *State*, AIR 1961 All 153; *In re Saibanna Tipanna*, AIR 1966 Mys. 248.

54. *Guz Pedro Pacheco* v. *State*, 1998 Cr LJ 4628 (paras 12, 14 and 15) (Bom).

55. *Bishen* v. *R.*, ILR 50 All 242; *R.* v. *Cherath*, (1902) ILR 26 Mad 191; *Niamat Khar* v. *R.*, AIR 1930 Lah 409; *Bishen* v. *R.*, AIR 1927 All 705 : ILR 50 All 242; *R.* v. *Sekander Ali Shah*, AIR 1941 Cal 406; *Mamand* v. *R.*, AIR 1946 PC 45; *Brijbushan Singh* v. *R.*, AIR 1946 PC 38; *Bhuboni Sahu* v. *R.*, AIR 1949 PC 257; *Bisipati Padhan* v. *State*, AIR 1969 Ori 289; *Manik Gazi* v. *R.*, AIR 1942 Cal 36; *Abdul Hakim* v. *State*, 1957 Cr LJ 117 (All).

56. *Kina Behara* v. *State*, ILR 1968 Cut 660.

11. IMMORAL CHARACTER OF VICTIM OF RAPE [CLAUSE (4)]

When a man is prosecuted for rape or any attempt to ravish evidence can be given to impeach the credit of the prosecutrix about her general immoral character. But is is not permissible to prove specific immoral acts either with the accused person or with others and she may decline to answer such questions but if she answers them in the negative, further evidence can be adduced to contradict her.[57] It was held that as the expression "generally immoral character" used in Cl. (4) pre-supposes that evidence showing general reputation of the woman as that of a prostitute, or that she had general reputation of going about and committing immoral acts with a number of men is admissible.[58]

In HALSBURY'S LAWS OF ENGLAND (4th Ed., Vol. 11, Para 374, page 274) it is stated: "On charges of rape, attempted rape, assault with intent to rape and indecent assault, the character of the complainant is relevant to the issue of consent, and she may therefore be cross-examined (I) to show that she is of general bad character, for example that she is a common prostitute, or is of loose morals, or is in the habit of having intercourse on first acquaintance whether for money or not, or (2) that she has had intercourse with the defendant, on previous occasions, and witness may be called to give evidence in support of such imputations[59]. She may also be cross-examined as to acts of intercourse with other men, but since this goes to credibility rather than to the issue, the defendant is bound by her answers, and if such acts are denied, evidence may not be called to prove them.[60]

In a case of rape the general immoral character of the complainant is relevant. The non-consent of the complainant is a material element; and the character of the woman as to chastity is of considerable probative value in judging of the likelihood of that consent.[61]

12. REASONS FOR BELIEVING A WITNESS UNWORTHY OF CREDIT [EXPLANATION]

In the examination-in-chief a witness cannot be asked the reasons for his belief that another witness is unworthy of credit. Such questions can only be asked in cross-examination. But it is very dangerous in cross-examination to ask a witness his reasons for believing a witness to be untrustworthy. He is, by such a question, enabled to state any unfavourable fact without fear of contradiction.[62]

Questions tending to corroborate evidence of relevant fact, admissible.

S. 156. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

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57. **See** TAILOR ON EVIDENCE, 8th Ed., Section 363.

58. *Wahid Ali* v. *Emperor*, AIR 1932 Cal 523; *Keramat* v. *R.*, AIR 1926 Cal 320.

59. *R.* v. *Clarke*, (1817) 2 Stark 241; *R.* v. *Barker*, (1829) 3 C&P 589; *R.* v. *Martin*, (1834) 6 C&P 562; *R.* v. *Tissington* (1843) 1 Cox CC 48; *R.* v. *Clay*, (1851) 5 Cox CC 146; *R.* v. *Cockcroft*, (1870) 11 Cox CC 410; *R* v. *Holmes*, (1871) LR 1 CCR 344; *R.* v. *Riley*, (1887) 18 QBD 481, CCR; *R.* v. *Gretbanks*, (1959) Crim LR 450; A witness for the defence is entitled to give reasons for his opinion; *R.* v. *Bashir and Manzur*, (1969) 3 All ER 692 : (1969) 1 WLR 1303; *R.* v. *Krausz*, (1973) 57 Cr App Rep 466, CA. **See also** *R.* v. *Thompson*, (1951) SASR 135 (S. Aust. FC).

60. *R.* v. *Hodgson*, (1812) Russ & Ry 211, CCR; *R.* v. *Cockcroft*, (1870) 11 Cox CC 410; *R.* v. *Holmes*, (1871); LR 1 CCR 334; *R.* v. *Riley*, (1887) 18 QBD 481, CCR; *R.* v. *Cargill*, (1913) 2 KB 271, CCA. **See also** *R.* v. *Bashir and Manzur*, (1969) 3 All ER 692 : (1969) 1 WLR 1303. As to questioning the complainant about specific acts, see *R.* v. *Hodgson, supra; R.* v. *Mercer*, (1842) 6 Jur 243.

61. Cunnigham, 360.

62. Cunnigham, 360.

ILLUSTRATION

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

COMMENTS

1. PRINCIPLE AND SCOPE

This section states that questions tending to corroborate any relevant fact can be put in respect of circumstances which the witness observed at or near the time or place at which such relevant fact occurred. There is a condition imposed that such questions can be put only when the court is of the opinion that the circumstances, if proved would corroborate the testimony of the witness as to the relevant fact which he testifies. The illustration given explains the intendment of the section.

The frame of the section indicates what questions are to be asked in examination-in-chief. In most cases, it paves the way for cross-examination, which, if successful, brings out contradiction; but which, if unsuccessful, must inevitably result in corroboration. Like contradiction, corroboration is meant to test the truthfulness of a witness.

The Legislature has indicated how and when a witness may be contradicted (Ss. 145, 153 and 158). We have now to see in what circumstances a witness may be corroborated. First of all, he may be asked questions tending to corroborate evidence of a relevant fact (S. 156); secondly, former statements made by him may be proved to corroborate later testimony to the same fact (S. 157); thirdly, when any statement relevant under S. 32 or S. 33 is proved, all matters may be proved either to contradict or corroborate it. (S. 158).

Under Section 11(2), of this Act facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. This section is not intended to prove relevant facts, but to corroborate the evidence of a witness.

MARKBY ON EVIDENCE (P. 109-110) observes: "This section, in effect, declares evidence of certain facts to be admissible. If this section had not been inserted, the judge would have had to determine the relevancy of these facts by reference to Section 7 and 11; and he might perhaps have been influenced by the practice in England, which has been against the admission of such evidence."[63]

When the court is not inclined to reject the evidence of a witness to be false but has some doubts, it may find it necessary to have corroboration and in order to enable it to act on that evidence, it may seek corroboration from other independent evidence or circumstance.[64] Evidence of similar facts though not admissible to prove a main fact, may be received for purpose of corroboration.[65] Corroboration, in order to be of any value, must be on material particulars and the facts relied on for corroboration must be established by reliable and independent evidence. Those facts must be such as to lend assurance to the crucial issue which is in question.[66]

In a corruption case, no conviction can be based even on the complainants' quite credible evidence, unless it is corroborated by independent material.[67]

Former statements of witness may be proved to corroborate later testimony as to same fact.

S. 157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

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63. See the commentary on Cl. (2) of Section 11.
64. *Yudhishtir* v. *State of M.P.*, AIR 1971 SCC (Cr.) 684.
65. *R.* v. *Kennaway*, (1917) 1 KB 25; *R.* v. *Chitson*, (1909) 2 KB 945.
66. *Sarla Devi* v. *Birendra Singh*, AIR 1961 MP 127.
67. *M.G. Thatte* v. *State of Maharashtra*, 1993 Cr LJ 2878 (para 8) (Bom).

SYNOPSIS

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2. *Previous statements should have been made by the same witness* ... 1319
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COMMENTS

1. PRINCIPLE AND SCOPE

This section states that in order to corroborate the testimony of a witness in respect of a fact h former statement which was made at or about the time when the fact took place can be given in evidenc or the former statement given before any authority legally competent to investigate the fact may also b given and proved. Section 145 and 155(3) deal with the former statement of a witness which can be use for purpose of contradicting him. Normally, a witness cannot corroborate himself.[68]

The expression "legally competent to investigate the fact" is used in the latter part of the sectio According to this section two classes of former statement may be proved in order to corroborate th testimony of the witness. The first part relates to former statements made by such witness relating to th same fact at or about the time when the fact took place. The second class of former statements must hav been made before any authority legally competent to investigate the fact.

Generally, the statements made immediately on the occurrence of an event contain truth, for no tim has elapsed for concoctions to creep in. Similarly, statements solemnly made in the presence of a legal competent authority bear the impress of truth. Statements like these are, therefore, a legitimate means c corroboration. They support the credibility of the person whose evidence is corroborated.

Corroboration should as a general rule come from an independent source but under this section former statement of a witness which is contemporaneous in point of time between the occurrence of fact and the making of the statement can be given for purpose of corroboration of his testimony. In th regard illustrations (a) to Section 6 and illustrations (f) & (k) to Section 8 have to be looked into. Sectio 6 illustration (a) says "A is accused of the murder of B by beating him. Whatever was said or done by or B or the bystanders at the beating shortly before or after it as to form part of the transaction is relevant fact". Section 8 Ills. (f) says "The question is whether A robbed B. The facts that, after B w robbed, C said in A's presence—"The police are coming to look for the man who robbed B" and th immediately afterwards A ran away are relevant. Section 8 Illus. (k) says "The question is whether A w robbed. The fact that soon after the alleged robbery he made a complaint relating to the offence, th circumstances under which, and the terms in which, the complaint was made, are relevant."

In all the above illustrations the former statements made by a witness at about the same point of tim can be used under this section to corroborate his testimony.

The Supreme Court observed: "There are only two things which are essential for Section 157 apply. The first is that a witness should have given testimony with respect to some fact. The second that he should have made a statement earlier with respect to the same fact at or about the time when t fact took place or before any authority legally competent to investigate the fact. If the witness to corroborated also says in his testimony that he had made the former statement to some one that wou

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68. *R.* v. *Nga Myo*, AIR 1938 Rang 177 (FB); *R.* v. *Christie*, (1914) AC 545; *Lim Yam Hong & Co* v. *Lam Choon & C* AIR 1928 PC 127.

add to the weight of the evidence of the person who gives evidence in corroboration, just as—if the witness to be corroborated says to any body, that makes the statements of any witness appearing as a corroborating witness as to the former statement of little value. But in order to make the former statement admissible under 157 it is not necessary that the witness to be corroborated must also, besides making the former statements at or about the time the fact took place, says in court in his testimony that he had made the former statement.[69]

A previous statement of a witness is admissible in evidence in certain specified circumstances and for certain specified purposes. It may be admissible as part of *res gestae* under Section 6, 7, 8, 9 & 14 or under Section 33 or under Section 145 or under Section 157 or as an admission.[70]

Though the narration of a complainant about the incident to some of her colleagues is not *res gestae* and hence not admissible under Section 6 of the Evidence Act, if the same was corroborated by her colleagues, it is admissible under Section 157.[71]

2. PREVIOUS STATEMENTS SHOULD HAVE BEEN MADE BY THE SAME WITNESS

This section cannot be invoked for making use of statements made by some body else.[72] The F.I.R. cannot be utilised to contradict or corroborate any witness other than the maker under Section 145 or 157.[73]

Where A made a statement to B earlier and A was not asked when he was examined earlier about that statement, but B in his evidence stated about A's statement to him, it was held that A should have been given an opportunity to explain that statement and in the absence of such opportunity the statement of A which was said to have been made to B is inadmissible in evidence.[74]

It was held in a case of perjury under Section 193, I.P.C., a false confession is not false evidence. The accused is not a witness for the purpose of the definition of "evidence" in Section 3 of the Evidence Act. Section 157, has no application in such a case. This section applies where a witness is sought to be examined with reference to his earlier statement.[75]

When a statement of a witness in court is not believed, his former statement cannot be used in support of the evidence of other prosecution witnesses.[76] Where the evidence of the complaint was not free from blemishes, the former statement though admissible cannot be put as corroboration of an untruthful witness.[77]

Where a dispute between A & B was whether A had agreed to make a purchase from B on a certain date, a statement in support of A's allegation in a letter written by B to a third party was held inadmissible for purpose of corroboration.[78]

The force of any corroboration by means of previous consistent statements must evidently depend upon the truth of the proposition that he who is consistent deserves to be believed. If that proposition be not universally true, what becomes of the virtue of previous consistent statements? One may persistently adhere to falsehood once uttered, if there is a motive for it and should the value of such a corroboration ever come to be rated higher than it now is, nothing would be easier than for designing an unscrupulous persons to procure the conviction of any innocent men, who might be obnoxious to them by first

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69. *Ram Ratan* v. *State of Rajasthan*, AIR 1962 SC 424, **overruling** *Misri (Mst.)* v. *Emperor*, AIR 1934 Sind 100; *Nazar Singh* v. *State*, AIR 1951 Pepsu 66; **see also** *Dwaraka Nath* v. *Lal Chand*, AIR (1965) SC 1549, *Lakhoo* v. *State of M.P.*, 1985 Cr LJ 569 MP.
70. ***Kamaeswar Prasad Singh* v. *Rex***, 1951 All LJ 149.
71. ***Chander Kala (Smt.)* v. *Ramkishen***, AIR 1985 SC 1268.
72. ***Ambika Charan* v. *Kumed***, ILR (1928) Cal 893.
73. *Nisar Ali* v. *State*, AIR 1957 SC 366; *Balagangadhar Tilak* v. *Shrinivas Pandit*, AIR 1915 PC 7; *Tara Singh* v. *State*, AIR 1951 SC 441; *State of Gujarat* v. *Hiralal Devji*, AIR 1964 Guj 261; *Bhagirathi* v. *State of Orissa*, AIR 1965 Ori 99.
74. ***Awadh Behari* v. *State of M.P.***, AIR 1956 SC 738.
75. *Public Prosecutor* v. *K. Sanjeevamma*, AIR 1959 AP 567.
76. *Moti Singh* v. ***State of U.P.***, AIR (1964) SC 900.
77. *Gauranga Charan Mohanty* v. *State of Orissa*, (1968) 1 SCWR 23 : 1968 SCD 175.
78. ***Gillie* v. *Posho Ltd.***, (1939) 2 All ER 196.

committing offence, and afterwards making statements, to different people and at different times an places implicating those innocent men.[79]

3. TESTIMONY OF APPROVER

"From the position occupied by an approver witness, his evidence is necessarily regarded with ver great suspicion as being tainted, and that although he may on the main facts connected with th commission of the offence be truthful and reliable, it is when he comes to implicate any particular perso that his evidence should be accepted with the greatest caution. Nothing is easier for a man than to narrat events with accuracy, and yet more so when coming to describe the acts of a particular person, to chang his personality so as to exculpate a guilty friend, and to implicate an innocent person or an enemy".[80]

Hence, it is a rule that corroboration to the evidence of an accomplice must proceed from a independent and reliable source; and that previous statements made by the accomplice himself, thoug consistent with the statements made by him at the trial, are insufficient for such corroboration.[81] Previou statements of anaccomplice may be proved under this section, and may be corroborative.[82]

4. STATEMENT

A statement may be written or verbal, on oath or in ordinary conversation. A witness's accoun books duly kept in the ordinary course of business, may be used under this section.[83]

The Supreme Court observed: "The word 'Statement' used in Section 157 of the Evidence Act i used in its primary meaning and there is nothing in the section which in any way requires that an element of communication to another person should be imported into the meaning of the wor "statement" used therein..... A 'Statement' under Section 157 of the Evidence Act means onl "something that is stated" and the element of communication to another person is not necessary befor "something that is stated" becomes a "statement" under that section. Notes of attendance made by solicitor at a conversation would be statements within the meaning of Section 157 and would b admissible to corroborate the solicitor's evidence under Section 157. Refreshing memory under Sectio 159 of the Evidence Act is confined to statements in writing made under the conditions mentioned in tha section while corroborating under Section 157 may be by statements in writing or even by ora statements. That is why there is difference in the language between Section 157 and 159. But tha difference does not lead to any conclusion which would cut down the meaning of the word "statement under Section 157 to those statements only which are communicated to another person."[84]

Tape recorded statement is also a statement which can be corroborated.[85] The Privy Council hel that where a sale deed recited circumstances leading to the same including the fact that a year before partition was asked for but was refused, the saledeed would be admissible under Section 157 though no for proving refusal of partition yet as corroborating evidence given by the vendor and his witnesses upon other material matters.[86] Where a writer of a letter was examined as a witness, the contents of tha letter would amount to a previous statement of the witness and can be used under Section 157 though cannot be used as a substantive evidence.[87] Entries in a diary in a solicitor's office are admissible a corroborative evidence.[88]

5. EFFECT OF SECTION 162, CRIMINAL PROCEDURE CODE

The general rule laid down in Section 157 is controlled by the special provisions of Section 16 Criminal Procedure Code so far as statements to the police taken under Section 161, Criminal Procedu Code, are concerned. Section 162 prohibits the use of the record containing the statement of a witness

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79. *Rey* v. *Malapabinkapana*, (1874) 11 BHC 196, 198.
80. *Queen Empress* v. *Bepin Biswas*, ILR (1984) 10 Cal 970, 973.
81. *Reg* v. *Malapa bin Kapana*, (1874) 11 BHC 196.
82. *Barkat Ali* v. *Crown*, (1916) PR No. 2 of 1917 (Cr).
83. STOKES Vol. II, p. 931, fn1.
84. *Bhogilal Chunilal* v. *State of Bombay*, AIR 1959 SC 356.
85. *Rama Reddy* v. *V.V. Giri*, AIR 1971 SC 1162.
86. *Radhoga Baloba* v. *Abu Rao Bhagwant Rao*, AIR (1929) PC 231.
87. *Balabhadra* v. *Nirmala Sundari Devi*, AIR (1954) Ori 23.
88. *Md. Yusuff* v. *D*, AIR 1968 Bom 112.

the police as evidence against the accused as well as proof of such statement by oral evidence.[89] Such statements cannot be used as corroboration under this section.[90] Cases which laid down that the record was inadmissible but oral evidence as to the nature of those statements could be given to corroborate the testimony of a witness are no longer of any authority in virtue of the amended Section 162, Criminal Procedure Code.[91]

The general provisions of the Evidence Act contained in Section 157 are controlled by the special provisions of Section 162, Cr.P.C. which is a special enactment. Therefore, it is important to determine whether an information is really first information and therefore can be used under Section 157 or it is hit by the Section 162. If it falls under Section 157 or it is hit by the Section 162. If it falls Section 162, Cr.P.C. it cannot be used except for the limited purpose mentioned there in that is for contradicting the witness.[92] After the amendment of Section 162, Cr.P.C. any statement if it falls under Section 162, unless it comes within its proviso, it would prevail over Section 157 and 145 Evidence Act.[93]

Where the witness, who is sought to be corroborate by the former statement, had the opportunity of seeing and knowing the facts prior to her giving evidence still they would be admissible to corroborate her evidence.[94] The Allahabad High Court held that a statement made to one person would connote the idea that the narration is addressed to that person and implies an *animus* or intention to communicate the subject matter of the statement to such a person, that is the meaning for the expression 'statement' used in Section 162, Cr.P.C. The expression 'statement' in Section 157 has a wider connotation than it has in Section 162, Cr.P.C.[95]

A statement of a witness recorded by the investigating officer during the inquest would come under Section 162, Cr.P.C. It can be admitted for purposes of contradiction under Section 145 of the Evidence Act, but how far it would be admissible for corroboration under Section 157 is a doubtful question.[96]

The Supreme Court held that a *Panchanama* cannot be treated as a statement made to the *Panch* witnesses and not to the police officers, as otherwise it would be easy for the police officers to circumvent the provisions of Section 162, Cr.P.C. by formerly asking *Panch* witnesses to be present and contending that the statements were made to the *Panch* witnesses and not to themselves.[97] The Bombay High Court held that the previous statements of the *panchas* which are to be found in the pre-trap and post-trap *Panchanamas* in a corruption case do not fall within the Phrase 'statement made to the police officer' as contemplated by Section 162, Cr. P.C. and that the contents of such *Panchanamas* would not come within the ban of that section and such previous statements could be legitimately used for corroboration under Section 157, Evidence Act.[98] If *Panchanama* was drawn, not during the course of police investigation, it would not be hit by the provisions of Section 162, Cr.P.C. if it was made during investigation it would be hit by Section 162, Cr.P.C.[99]

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89. *Rakha* v. *Crown*, ILR (1925) 6 Lan 171, **disproving** *Mam Chand* v. *Crown*, ILR (1924) 5 Lah 324.
90. *Jagwa Dhanuk* v. *King Emperor*, ILR (1925) 5 Pat 63; *King Emperor* v. *Manung The Division*, ILR (1926) 4 Ran 72 FB. *Rakha* v. *Crown*, (1925) 6 Lah 171, **disapproving** *Mam Chand* v. *Crown*, ILR (1924) 5 Lah 324; *King Emperor* v. *Nga Lun Thoung*, ILR (1935) 13 Ran 570 FB.
91. The following cases are no longer of any authority *Emperor* v. *Hanmaraddi*, (1914) 16 Bom LR 603 : ILR 39 Bom 58; *Fanindra Nath Banerjee* v. *Emperor*, ILR (1908) 36 Cal 281; *Muthujumaraswami Pillai* v. *King Emperor*, ILR (1912) 35 Mad 397, FB.
92. *In re Rangarajulu*, AIR 1958 Mad 368; *Naginlal Nandlal* v. *State of Gujarat*, (1962) 1 Cr LJ 142 (Guj)(DB); *Rakha* v. *Crown*, AIR 1925 Lah 399; *Emperor* v. *Najibuddin*, AIR 1933 Pat 589; *Valibhai Omarji* v. *State of Gujarat*, AIR 1963 Guj 145, *R* v. *Akbar*, ILR 34 Bom 599; *R.* v. *Narayan*, ILR 32 Bom 111 (FB); *Nikha Singh* v. *State*, AIR 1952 Punb 186. **See CONTRA** *Bashir Hussain* v. *Gulam Mohamed*, AIR 1966 Bom 253; *Fanandra* v. *R*, 36 Cal 281; *Muthukumaraswamy Pillai* v. *R*, ILR (1912) 35 Mad 397; *R.* v. *Hanmaraddi*, ILR 39 Bom 58; *Baldeo* v. *R*, 61 IC 785.
93. *V.K. Belurkar* v. *State of Maharashtra*, 1975 Cr LJ 517 (Bom) (FB).
94. *State* v. *Dukhi Dei*, AIR (1963) Ori 144; **relying on** *Hem Raj Devilal* v. *State of Azmer*, AIR 1954 SC 462.
95. *Shyamlal Sharma* v. *King Emperor*, AIR (1949) All 483 (FB). **See also** *V.K. Belurkar* v. *State of Maharashtra*, 1975 Cr LJ 517 (FB) (Bom).
96. *Pandurang* v. *State of Hyderabad*, AIR (1955) SC 216.
97. *Ramakishan* v. *Bombay State*, AIR 1955 SC 104.
98. *Belurkar* v. *State of Maharashtra*, 1975 Cr LJ 517 (Bom)(FB) **overruling** *Dilip Sadashiv Apte* v. *State*, ILR 1974 Bom 613. **See also** *Vali Bhai Omarji* v. *State*, AIR 1963 Guj 145; *V.A. Abraham* v. *Superintendent of Police*, 1988 Cr LJ 1144 (Ker).
99. *R.C. Lam* v. *State of Emperor*, AIR 1932 Bom 181; *Mohanlal Badadhai* v. *Emperor*, 1941 Guj 149; *Valibhai Omarji* v. *State of Gujarat*, AIR 1963 Guj 145; *Hamidulla* v. *State of Gujarat*, 1988 Cr LJ 981 (Guj)(DB); *Pritam Singh* v. *State*, AIR 1972 All 744; *Miyabhai Pirbhai* v. *State of Gujarat*, AIR 1963 Guj 188.

6. STATEMENTS IN DOCUMENTS AND DEPOSITIONS

Where the document contained recitals and it is not between the parties to a suit, if the executent of the document is examined as a witness, the recitals contained therein may be used to corroborate his testimony under Section 157.[1]

7. PREVIOUS DEPOSITIONS

Where the plaintiffs wanted to establish their pedigree showing that A and B were brothers, it was held that a statement to that effect made by one of the plaintiffs in a deposition long before the present suit was admissible in evidence.[2]

In a suit for damages for malicious prosecution the depositions recorded in the criminal court can be made use of only under Section 157 and 158 of the Evidence Act.[3]

8. PLEADINGS

Plaint in a previous suit can be described as a previous statement of a witness. When the plaintiff comes to give evidence in court in another matter, he can be corroborated with the statements in plaint in the previous suit.[4]

9. INQUEST REPORT

The Supreme Court held that any statement by any witness during investigation is hit by Section 162 but an inquest report is not a statement of a witness at all but is only a memo of what the investigating officer had himself found and observed at the spot and so, Section 162 would have no application and there is no reason to disbelieve such a statement in an inquest report.[5]

10. POST MORTEM CERTIFICATE

The Post Mortem (Certificate) Report can be used only for corroboration of his evidence under Section 157 or to contradict him under Section 145.[6] Before the Post Mortem Report can be used to corroborate there must be evidence in the deposition of a witness which can be corroborated under Section 157.[7] The operation notes dictated by the surgeon to his junior doctor soon after the operation was performed can be used as corroborative piece of evidence to the doctor's evidence under Section 157 or can be used for refreshing his memory under Section 159.[8]

11. KIDNAPPING

Where the informant resiled from his statement made to the father of the victim of kidnapping as to the names of kidnappers and the number of the vehicle used in the offence, it was held to be hearsay but would be admissible under Section 157 as corroborative evidence to the testimony of the father that the informant told him that his son was kidnapped.[9]

12. SEXUAL OFFENCES

A statement made by the victim prosecutrix to her husband immediately after the incident is admissible as a former statement of the witness under Section 157 to corroborate her testimony latter as

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1. *Kunda Singh* v. *Rangi Ram*, AIR (1950) Pepsu 7; *Rangayyan* v. *Innasimuthu Mudali*, AIR 1956 Mad 226.
2. *Jadu Nath Sarkar* v. *Mahendra Nathrar*, 12 Cal WN 266.
3. *B.S. Wabhusan* v. *State*, AIR 1952 Ori 289; *Jamal Momin* v. *R.*, AIR 1925 Pat 381.
4. *Firm Ralla Vam Raj Kumar* v. *Union of India*, AIR 1952 Punj 340.
5. *Rameswar Dayal* v. *State of U.P.*, AIR 1978 SC 1558. **See also** *Adi Bhumiant* v. *State*, AIR 1957 Ori 216.
6. *Rangappa Goundan* v. *Emperor*, ILR 59 Mad 349; *In re, Ramaswamy*, AIR 1938 Mad 336; *Hadi Kirsani* v. *State* AIR 1966 Ori 21; *Vidyamati* v. *State*, AIR 1951 HP 82; *Jagdeo Singh* v. *State*, 1979 Cr LJ 236 (All); *Ganpat Raoji* v *State*, 1980 Cr LJ 853 (Bom); *State of Rajasthan* v. *Jawan Singh*, 1971 Cr LJ 1656 (Raj).
7. *Govind* v. *State of Gujarat*, AIR 1967 Guj 288.
8. 1972 WLN 867 (Raj).
9. *Vijender* v. *State of Delhi*, (1997) 6 SCC 171 : 1997 SCC (Cri) 857.

to the same fact.[10] It was held that in cases of rape, evidence of the witnesses based on earlier statements made by the victim to them regarding the offence furnishes corroborative evidence, the weight to be attached to the evidence is another matter, depending upon the facts and circumstances of each case.[11] Statement by a girl victim of an unnatural offence to her mother 16 hours after the occurrence and that too after persistent questioning, was held not admissible to corroborate her evidence at the trial.[12] Where the statement of the prosecutrix made under Section 164, Cr.P.C. supported the prosecution story, but her evidence indicated her conduct and circumstances showing that she was a consenting party of the rape, it was held that her prior statement under Section 164, Cr.P.C. would not amount to corroboration to her evidence in material particulars.[13]

13. DYING DECLARATION

Where a person made a dying declaration but later survived, that statement in the dying declaration is admissible under Section 157, though not under Section 32 of the Evidence Act. Such statement can be used for purpose of corroboration under Section 157.[14]

14. STATEMENT OPPOSED TO PUBLIC POLICY

In a letter by a Police Officer to his superior expressing that a certain person would make a certain statement if a certain sum of money is given, it was held that such a statement in the letter is not properly receivable in evidence under Section 157 or for any other purpose, as it is opposed to public policy.[15]

15. LEGALLY COMPETENT TO INVESTIGATE

As long as an authority legally competent to deal with the matter investigates, the requirement of Section 157 would be satisfied.[16]

The word 'investigate' used in Section 157 is wide in its import. The restricted meaning given to the word 'investigation' in Section 157 of the Cr.P.C. cannot be attached to it. The word 'investigation' merely means in this section a fact finding process, and is not confined to the one conducted by the police for the collection of evidence.[17]An Inspector of the Criminal Investigation Department is 'an authority legally competent to investigate' within the meaning of this section.[18]

A report of a commissioner appointed to inspect and submit a report, can be relied on as corroborative evidence of the inspection when he is examined in court, though he was not examined as a commissioner under Order XXVI, Rule 10, Cl. (2), C.P.C.[19] Statements of persons recorded under Section 9 of Railway Property (Unlawful Possession) Act of 1966 can be used for corroboration under Section 157.[20]

A Deputy Superintendent of Police is an officer legally competent to investigate the fact of a murder and dacoity within this section.[21]

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10. *Sheikh Zakhir* v. *State of Bihar*, AIR 1983 SC 911; *State* v. *Balakrishna Mahanto*, (1965) 31 Cut LT 1044 (Statement to the Mother). *Govind Rana* v. *State*, 28 Cut LT 385 (Statement to the bother); 1978 Raj Cr C 419 (Statement to her father and uncle). *Radhya Sham* v. *State of J&K*, 1988 Cr LJ 447 (J&K); *Yellappa Laxman* v. *Basavanatah Sidabasappa Patil*, (1972) 2 Mys LJ 39; *Gopi Shankar* v. *State of Rajasthan*, AIR 1967 Raj 159; *Bandu* v. *State of Maharashtra*, 1996 Cr LJ 285 (para 10) (Bom); *State of H.P.* v. *Ram Dass*, 1999 Cr LJ 2802 (para 10) (HP); *State of Karnataka* v. *Manjanna*, 2000 Cr LJ 3471 (para 7) (SC) : AIR 2000 SC 2231; *Tarachand* v. *State of Rajasthan*, 2001 Cr LJ 3604 (para 19) (Raj).
11. *P.P.* v. *Mohini Sankar Dass*, (1956) An WR 572.
12. *State* v. *Satya Pal*, ILR (1960) 10 Raj 250.
13. *Raksnit Khosla* v. *State*, ILR 1969 Del 653.
14. *Maqsoodan* v. *State of U.P.*, AIR 1983 SC 126 : 1982 All LJ 1524; *Siddu* v. *State*, 1978 Cr LJ (NOC) 255 : 1978 MPLJ 820 (DB); *Namdeo* v. *State of Maharashtra*, 1976 Cr LJ 871 (Bom). *Kina Behara* v. *State*, ILR 1968 Cut 660; *Emperror* v. *Ram Sattu*, 4 Bom LR 434; *Gentela Vijayavardhan Rao* v. *State of A.P.*, AIR 1996 SC 2791 (para 17); *Ramprasad* v. *State of Maharashtra*, 1999 Cr LJ 2889 (para 15) (SC) : AIR 1999 SC 1969.
15. *Bhogilal* v. *Royal Insurance Co. Ltd.*, AIR (1928) PC 54.
16. *Bhagwan Singh* v. *State of Punjab*, AIR 1952 SC 214; *Sarju* v. *State of W.B.*, (1961) 2 Cr LJ 71 (Cal).
17. *Sarju* v. *State of W.B.*, (1961) 2 Cr LJ 711; *State of Orissa* v. *Pareswar Ghasi*, AIR 1968 Ori 20.
18. *Muthu Kumaraswami Pillai* v. *King Emperor*, ILR (1912) 35 Mad 397 (FB).
19. *J.A. Taban* v. *Khair-ul-Nasa*, AIR 1970 Del 205.
20. *Babulal* v. *State*, 1977 Cr LJ 2008 (All).
21. *In re Thachroth*, 45 MLJ 279.

16. STATEMENT UNDER SECTION 161, Cr.P.C.

Where the witnesses filled up omissions in their statement under Section 161, Cr.P.C. while giving testimony in the Court, the same would not amount to making improvement and only the contradictions between the two can be proved and utilized by the accused and not the omissions.[22]

17. STATEMENT UNDER SECTION 164, Cr. P.C.

The privy council held that a statement under Section 164, Cr.P.C., though can never be used as substantive evidence of the facts stated, can be used to corroborate under Section 157 or to contradict under Section 145 of the statement made in court.[23] Where a statement under Section 164, Cr.P.C. was recorded by a Registrar who was deputed for that purpose, it was held that the statement was admissible under the second part of Section 157.[24] A statement of a witness under Section 164, Cr.P.C. recorded by a Magistrate was admissible in evidence to corroborate the statement made by the witness before the committing Magistrate though the witness resiled in the sessions court from the evidence given before the committing Magistrate.[25] A statement or a confession by an accused recorded under Section 164, Cr.P.C. when the accused turned an approver, can be used for corroboration under Section 157, Evidence Act and Section 24 of the Evidence Act is not a bar for using those statements for the purpose of cross examining the approver.[26]

18. FORMER STATEMENT IN COMMITTAL COURT

The Supreme Court observed "Where a witness turns hostile in cross examination, his former statement in the examination in chief could be used for corroboration of his statement in the examination in chief or for contradiction of his statement in the cross-examination if the former statement could be brought under Section 157 by transmitting it into substantive evidence by the application of Section 288 Cr.P.C. Where the witness turns hostile from the start there is no question of corroboration and his former statement can be used only for contradiction under Section 145."[27] Even where a former statement was recorded by a person or court not having jurisdiction, it can still be made use of for purposes of Section 145, 155 and 157.[28]

Statements made in an enquiry by the Court of Wards for the purpose of according consent to an adoption, the statement are not made before the authority legally competent to enquire into the fact of giving of the authority to adopt.[29] The investigation must be by a person legally competent. He must have power to investigate under some law statutory or otherwise. There being no provision of law or rule under which a *Sarpanch* is legally competent to hold the test identification parade, his report of identification parade cannot be relied upon under Section 157 as a former statement to corroborate the testimony of the informant, though it can be used for contradiction under Section 145 or for impeaching the credit of the witness under Section 155.[30] A verified application made by a guardian containing the ward's date of birth cannot be treated as a statement made before an officer legally competent to investigate nor is it a statement at or about the time of the existence of the fact of birth; and so cannot be used under this section nor to prove the age of the ward though it can be used for re-freshing the memory under Section 159.[31]

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22. *Mohd. Islam* v. *State of U.P.*, 1993 Cr LJ 1736 (para 32) (All).
23. *Bhuboni Sahu* v. *Emperor*, AIR 1949 PC 257. **See also** *Brij Bhushan Singh* v. *Emperor*, AIR 1946 PC 38; *Kanai La* v. *State*, AIR 1950 Cal 413; *Harnam Kisha* v. *Emperor*, AIR 1935 Bom 26.
24. *Kina Behara* v. *State*, ILR 1968 Cut 660.
25. *Vellaiah Kone* v. *King Emperor*, ILR 45 Mad 766 : AIR 1923 Mad 20; *Manar Ali* v. *Emperor*, AIR 1934 Cal 124 *Manik Gazi* v. *R.*, 1942 Cal 36; *Bisipati Padhan* v. *State*, AIR 1969 Ori 289; **See** *CONTRA*, *State* v. *Hotey Khan*, AIR 1960 All 521; *Emperor* v. *Akbar*, ILR 34 Bom 599.
26. *Birendra Chandra* v. *State of Assam*, AIR 1957 Assam 168.
27. *Bhagwan Singh* v. *State of Punjab*, AIR 1952 SC 214. **See also** *Biswabhushan Naik* v. *State of Orissa*, 1952 Ori 289 *State* v. *Hardial Singh*, AIR (1953) Pepsu 66; *Narayan Ganapati* v. *State*, AIR 1959 Bom 552.
28. *State of Punjab* v. *Vishwajit Singh*, AIR 1987 P&H 126.
29. **See also** *Oriental G.S.L. Insurance Co.* v. *Narasimha*, ILR 25 Mad 183.
30. *State* v. *Pareswar Ghasi*, AIR 1968 Ori 20; *Kumara Muthu* v. *Emperor*, AIR 1919 Mad 487; *Emperor* v *Ramchandra*, AIR 1928 Cal 732; *Tobarak Mondal* v. *King*, AIR (1949) Cal 629; *Thakurji* v. *Parmeshawar Daya* (Statement before collector), AIR 1960 All 339.
31. *Gopinath* v. *Satish Chandra*, AIR 1964 All 53.

19. FIRST INFORMATION REPORT

The F.I.R. is not substantive piece of evidence and can only be used to corroborate the statement of the maker under Section 157 or to contradict it under Section 145 of the Evidence Act. It cannot be used as evidence against the maker if he becomes an accused, nor to corroborate or contradict other witnesses.[32] Where the first informant had turned hostile and testified that he had made no statement to the police and had rather signed on dotted lines, it was held that such an F.I.R. could not be used to corroborate the first informant or to discredit the other prosecution witnesses before whom the deceased had made the dying declaration.[33] In certain cases where the maker of the information which was recorded as F.I.R. had died as a result of the injuries received then it would be admissible as substantive evidence under Section 32 of the Evidence Act.[34]

It was held by the Supreme Court that the fact that the F.I.R. was lodged within 35 minutes of the occurrence at a police station which is at a distance of two miles from the place of the occurrence and the fact that names of the accused and also of the witnesses were mentioned therein lends considerable corroboration to the testimony of the maker who is examined as a witness, as regards the participation of the accused in the occurrence.[35] A complaint in a corruption case is a F.I.R. and is admissible for corroboration of evidence of the maker under Section 157.[36]

When the maker of the FIR is examined in court and the report is not tendered by the prosecution in accordance with the provisions of Section 157 Evidence Act it cannot be relied on for any purpose.[37] When the prosecution has neither produced in evidence the person who made the first report in the *Thana* nor the person who wrote it out at the Thana, the first report cannot be referred to in evidence.[38] When there is delay in giving the F.I.R., unless the delay is explained it has no corroborative value at all.[39]

When the maker of the F.I.R. is alive it is admissible only under Section 157 to corroborate his statement, and if he is dead it would be admissible under Section 32 of this act.[40]

Where the information regarding the commission of an offence was given to the police on two different dates by two different persons, and one was earlier to the other it was held that the later report is not a statement made to a Police Officer in the course of investigation but it is an independent first information report and so can be used by the prosecution.[41]

20. AT OR ABOUT THE TIME WHEN THE FACT TOOK PLACE

These words mean that the statement must be made at once or at least shortly after when a reasonable opportunity for making it presents itself. What is a reasonable time is a question of fact in each case. The object of the section is to admit statements made at a time when the mind of the witness is still so connected with the events as to make it probable that his description of them would be accurate.

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32. *Nisar Ali* v. *State of U.P.*, AIR 1957 SC 366; *Aghnoo Nagesia* v. *State of Bihar*, AIR 1966 SC 119; *Emperor* v. *Nazeer Ahmed*, AIR 1945 PC 18; *Damodar Prasad* v. *State of Maharashtra*, AIR 1972 SC 622; *Pundlik* v. *State*, AIR 1951 MP 72; *Hasib* v. *State of Bihar*, AIR 1972 SC 283; *Kalu Mandal* v. *State*, AIR 1950 Cal 412; *Dhirendra Nath* v. *State*, AIR 1952 Cal 621; *Maganlal Radha Kishen* v. *Emperor*, AIR 1946 Nag 173; *Abdul Latif* v. *Emperor*, AIR 1941 Cal 533; *A W Khan* v. *State*, AIR 1962 Cal 641; *Ram Naresh* v. *Emperor*, AIR 1939 All 242; *In re Rangarajulu Naidu*, AIR 1958 Mad 368; *Suka Misra* v. *State*, AIR 1951 Ori 71; *Thommi Anthoni* v. *Sirkar Prosecutor*, AIR 1950 Tra Co 41; *Sonkarlinga Tewan* v. *Emperor*, AIR 1930 Mad 632; *Emperor* v. *Dubai*, AIR 1942 Pat 113; *Bhagirathi* v. *State*, AIR 1965 Ori 99; *State* v. *Shiv Singh*, AIR 1962 Raj 3; *Shanker* v. *State of U.P.*, AIR 1975 SC 757; *B G Singh* v. *State*, ILR 1974 HP 948; *Padan Pradhan* v. *State of Orissa*, 1982 Cr LJ 534 (Ori); *Mazidar Rahman* v. *State of Assam*, 1977 Cr LJ 1293; *State of Gujarat* v. *Hiralal Deivji*, AIR 1964 Guj 261; *Balgangadhar Tilak* v. *Srinivas Pandit*, AIR 1915 PC 7; *Tara Singh* v. *State*, AIR 1951 SC 441; *Miyana Hasan Abdulla* v. *State of Gujarat*, AIR 1962 Guj 214; *Sagar Chandra Saha* v. *State*, AIR 1962 Cal 85.

33. *George* v. *State of Kerala*, AIR 1998 SC 1376 : 1998 Cr LJ 2034.

34. *Inchan* v. *Emperor*, (1943) Cal 647.

35. *Dargahi* v. *State of U.P.*, AIR 1973 SC 2695; *Satyawir* v. *State*, AIR 1958 All 746.

36. *V.K. Belurkar* v. *State of Maharashtra*, (1975) Cr LJ 517 (Bom) FB.

37. *Damodar Prasad Chandrika Prasad* v. *State of Maharashtra*, AIR 1972 SC 622.

38. *State* v. *Gajraj*, ILR (1952) Raj 910.

39. 1974 All Cr R 21.

40. *Maqsoodan* v. *State of U.P.*, AIR 1983 SC 126.

41. *Emperor* v. *Lalji Rai*, AIR (1936) Pat 11.

In STEPHEN'S DIGEST OF LAW OF EVIDENCE (10th Ed. p. 170) it is stated that the expression "at or about the time" means reasonably soon after the alleged offence or very shortly after.[42]

The Supreme Court observed: "There can be no hard and fast rule about the "or about" condition in Section 157." The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction".[43] Any former statement made by a witness at or about the time when the incident took place becomes usable as of corroborative value. Though such statements are not part of the main transaction, they have a probative value for corroborative purpose if such statements have been made without delay. Delay restricts its utility to confronting the maker for contradicting him. Such a statement would have no corroborative value.[44] Where the witness disclosed to his brother-in-law about his version of the occurrence and there was nothing to indicate that he was either tutored or influenced by anybody during the interregnum, such a statement could be treated as corroborative piece of evidence.[45]

A child victim of rape stated to her mother shortly after the occurrence about the incident. The mother also stated what her child stated to her shortly after the incident. It was held by the Supreme Court, that the statement of the mother amounts to corroboration of the evidence of the child victim; it was further held the previous statement of an accomplice or a complainant is legally admissible as corroboration provided the conditions prescribed by Section 157 Evidence Act, *viz.*, "at or about the time *etc.*" are fulfilled; the weight to be attached to it is another matter. It may be in some cases the evidentiary value of the two statements emanating from the same tainted source may not be high, but in view of Section 118 its legal admissibility as corroboration cannot be questioned.[46] Statements by victims of rape to her husband immediately after the incident and for other cases see also under the head sexual offences.[47]

Annoyance was caused to a woman teacher by the Principal by cutting jokes in the presence of others. It was held that her conduct in narrating all that transpired to some of her colleagues is not *res gestae* under Section 6 but the same when corroborated by other witnesses is clearly admissible under Section 157.[48]

The Lahore High Court has held that the proximity of time must be established.[49] If time for reflection passes between the event and the subsequent statement, it not only can be of very little value but may be actually dangerous as such statements can be easily brought into being. Such delayed statements are inadmissible. The section says that the statement must be made "at or about the time" and not" "at any time after the event."[50] Where the occurrence took place at 7 A.M. and dying declaration was recorded at 12-30 P.M. and the person survived, it was held that his statement must be deemed to have been recorded at or about the time of occurrence, and could be used for corroboration of his testimony in court.[51] Where a statement was made more than 12 hours after the occurrence, it was held that the maker (witness) was in a precarious condition and as there was no opportunity for tutoring or concoction, it can be taken that the statement was made at about the time when the fact took place and hence admissible under Section 157.[52]

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42. *Reg* v. *Lillyman*, (1896) 2 QB 167.

43. *Rameshwar Kalyan Singh* v. *State of Rajastan*, AIR 1952 SC 54. **See also** *Mahabir Singh* v. *State of Haryana*, 200 Cr LJ 3945 (para 23) (SC) : AIR 2001 SC 2503.

44. *Nathuni Yadav* v. *State of Bihar*, AIR 1997 SC 1808.

45. *State of Tamil Nadu* v. *Suresh*, AIR 1998 SC 1044 : 1998 Cr LJ 1416 (para 29) (SC), **reversing** Cri A Nos. 782-83 o 1989, **decided on** 8.2.1991 (Mad).

46. *Sheikh Zakir* v. *State of Bihar*, AIR 1983 SC 911; *In re, Boya Chinnappa*, ILR 1951 Mad 973; *Bachu* v. *King*, ILR 1951 Cal 219.

47. *State of Rajasthan* v. *Rameshwar*, AIR 1951 Raj 30; *Bhupati Ghosh* v. *King*, (the witness came several hours after the occurrence and his statement is not admissible) AIR 1950 Cal 327; *State of Bihar* v. *Srilal Kejriwal*, AIR 196 Pat 459 (approvers statement soon after the crime); *State of Orissa* v. *Parvatisam*, AIR 1963 Ori 58; *State of Mysor* v. *Kantappa*, (1964) Mys LJ 393; *D.B. Deshmukh* v. *State*, AIR (1970) Bom 438; *Khali Sahu* v. *State*, (1975) 41 Cu LT 751; 1978 Raj Cr C 419, (Rape victim's statements to her father and uncle); 1983 Raj Cr C 363 (Rape victim' statements to her father and uncle.

48. *Chander Kala* v. *Ram Kishan*, AIR 1985 SC 1268.

49. *Manghat Rai* v. *Emperor*, AIR 1928 Lah 647.

50. *Appadurai, In re*, ILR (1945) Mad 821.

51. 1984 All Cr. R. 459.

52. *Kina Behera* v. *State*, ILR 1968 Cut 660.

Where the question arose in 1944 whether A and B were partners in a business in 1936. A deposed that he was an employer and B was an employee. In 1936 A handed over a letter to B's lawyer wherein it was stated so. It was held by the Privy council that the document of 1936 could not corroborate the evidence given 8 years later and it was a most contemporary document which correctly stated the terms agreed upon between the parties.[53] The statement of a girl victim of rape to her mother made 16 hours after the occurrence that too after persistent questioning was held not admissible to corroborate her evidence.[54]

21. CASES

In 1874 five out of six persons who were named as having committed a murder were arrested and after inquiry before a Magistrate were tried before the Court of Sessions and convicted. At the time of the inquiry before the Magistrate, the sixth person absconded, and evidence was recorded by the Magistrate in his absence. In their examination before that officer, the witnesses deposed to the absconder having been one of the participators in the crime charged against the prisoners then under trial. In 1886, the absconder was apprehended and tried before the Court of Session upon the charge of murder. Of the witnesses examined at the first trial, only one was living. He was examined and his deposition given in 1874 was also admitted. It was held that the deposition taken in 1874 of the surviving witnesses was admissible under this section as corroboration of his evidence given at the trial of the prisoner.[55]

The principle underlying the rule of corroboration is that he who is insistent deserves to be believed. Therefore previous statements of the victims who has turned hostile and does not support the case of prosecution cannot be used as corroboration under Section 157.[56]

Before corroborative evidence is admitted, evidence sought to be corroborated must be given first.[57] In order that a former statement be admissible under Section 157 it is not necessary that the witness sought to be corroborated must also say in court that he had made a former statement.[58]

Where the witness who is sought to be corroborated by the former statement, had the opportunity of seeing and knowing the faces prior to her giving evidence still they would be admissible to corroborate her evidence.[59]

What matters may be proved in connection with proved statement relevant under Section 32 or 33

S. 158. Whenever any statement, relevant under Section 32 or 33, is proved, all matters may be proved, either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

COMMENTS

1. PRINCIPLE AND SCOPE

Sections 32 and 33 of the Act permit the putting in of statements, oral or written, or statements made in a judicial proceeding, by a person who cannot be examined as a witness. The Legislature intends by this section to submit such statements to the tests of contradiction and corroboration, in the same way as if those statements were made by the witness in the box.

STEPHEN in his Digest (Art. 135) states: "The object of this section is to expose statements to every possible means of contradiction or corroboration in the same manner as that of a witness before the court

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53. *Hurberi P. James* v. *Ghulam Hussein*, AIR (1949) PC 151.
54. *State* v. *Satya Pal*, ILR (1960) 10 Raj 250.
55. *Queen Emperor* v. *Ishri Singh*, ILR (1886) 8 All 672.
56. *Pratap Singh* v. *State of M.P.*, (1972) Cr LJ 172.
57. *Kshetrimayum* v. *Union Territory of Manipur*, 1968 Cr LJ 690, 693 (Mani).
58. *Rama Ratan* v. *State*, 1962 SC 424 **Overruling** *Misri (Mst.)* v. *Emperor*, AIR (1934) Sind 100; *Nazar Singh* v. *State*, AIR 1951 Pepsu 66; *Radha Kishan* v. *State of Rajasthan*, 1973 Cr LJ 481 (Raj).
59. *State of Orissa* v. *Dukhi Dei*, AIR (1963) Ori 144 **relying on** *Hem Raj Devilal* v. *State of Azmer*, AIR (1954) SC 462.

under cross-examination, the reason being that statements admissible under Section 32 and 33 ar exceptional cases and it is but just and reasonable that such statements should as far as possible b subject to the various modes of attacking or corroborating them. No sanctity attaches to the statement simply because a person is dead; his crediblity may be impeached or confirmed in the same manner a that of a living witness."

A statement made by a widow in her gift-deed was sought to be put in evidence to contradict he earlier statement. It was held that the statement in the gift deed was relevant for purpose of contradictin her earlier statement. However on facts it was held that the statement in the gift deed did not directl contradict her earlier statement.[60] Under this section prior statements of a deceased person can b admitted both for corroboration and contradiction.[61] Where the deposition of a witness after his deat was admitted in another proceeding under Section 33, and was sought to be proved through anothe witness, and the witness was asked what information the deceased gave him soon after the occurrence, i was held that such question was admissible under this section to corroborate the deposition of th deceased witness.[62] Where the deceased person stated five years back that his vision was poor an blurred and in the present proceeding the deceased stated the names of the assialants in his dyin declaration, it was held that the previous statement five years back is admissible to contradict th statement in his dying declaration which is admissible under Section 32.[63]

In a suit for malicious prosecution the depositions recorded in a criminal court can be made use of a substantive evidence, if the parties agreed to treat those depositions as evidence in the suit or if they ar admissible under Section 33 of the Evidence Act. Otherwise the deposition in the criminal case can b made use of only under Sections 157 and 158 of the Evidence Act.[64]

Refreshing memory.

S. 159. A witness may, while under examination, refresh hi memory by referring to any writing made by himself at th time of the transaction concerning which he is questioned, or so soon afterward that the Court considers it likely that the transaction was at that time fresh in hi memory.

The witness may also refer to any such writing made by any other person, an read by the witness within the time aforesaid, if when he read it he knew it to b correct.

When witness may use copy of document to refresh memory.

Whenever a witness may refresh his memory by referenc to any document, he may, with the permission of the Court refer to a copy of such document:

Provided **the Court be satisfied that there is sufficien reason for the non-production of the original.**

An expert may refresh his memory by reference to professional treatises.

SYNOPSIS

1. *Principle and Scope*	... 1329	9. *Panchanamas*	... 133
2. *Sections 159 & 160—Compared*	... 1329	10. *Police Diaries*	... 133
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60. *Ramrati Kuer* v. *Dwarika Prasad Singh*, AIR 1967 SC 1134.
61. *Sudhershana* v. *Sitharamamma*, 1933 Mad WN 1148.
62. *Fool Kissory* v. *Nobin Chunder*, ILR 23 Cal 441.
63. *State* v. *Sheo Babu Singh*, 1964 All LJ 1134.
64. *S.T. Sahib* v. *Hasan Ghani Sahib*, AIR 1957 Mad 646.

COMMENTS

1. PRINCIPLE AND SCOPE

Section 157 states that the former statements whether oral or documentary can be proved to corroborate the testimony of the witness whereas this section allows the witness to refresh his memory by a reference to an earlier document.

TAYLOR ON EVIDENCE (Section 1406) observes: "A witness is sometimes permitted to refresh and assist his memory by the use of written instrument, memorandum or entry in a book. But this course,—except in the case of scientific witness referring to professional books as the foundation of their opinion,—can only be adopted where the writing has been made, or its accuracy recognised, at the time of the fact in question, or, at furthest, so recently afterwards, as to render it probable that the memory of the witness had not then become defective."

"A witness may refresh his memory in the witness-box by reference to any writing made or verified by himself concerning the facts to which he testifies provided that it was made or verified by him while the facts were fresh in his memory.[65] The principle is one of practice only and not part of the substantive law.[66] The reason for the rule was stated to be that a witness should not suffer from a mistake and may explain an inconsistency.[67]

If a witness has become blind, the document may be read over to him."[68] (PHIPSON ON EVIDENCE, 15th Edn. (2000), page 267 (para 11-45)).

It was held by FIELD J. that in the interests of truth it would be desirable to recognise the full benefit of recollection of the witness as to the whole of the facts; writing is a more reliable means of preserving the truth than simply memory; that to revive a faded memory, this section permits a witness to refresh his memory respecting the facts about which he speaks, by anything written by himself contemporaneously with the transaction in which he testifies or soon afterwards when the facts were fresh in memory, a witness may also refresh his memory by referring to writing made by any other person very shortly after the date on which the event in question occurred and read by him shortly after the event if, when he heard it he knew that the same was correctly stated in writing.[69]

Section 159 and 160 should be read together for a proper understanding of their scope. When a witness gives his evidence in court about the facts which might have taken place sometime before, Section 159 says he can refresh his memory by referring to the document, whereas section. 160 says that he can testify the facts contained in the document by looking into the document. The only condition under Section 160 is that he had no recollection of the facts but he is sure that whatever contained in the document was correctly recorded.

There is some distinction between Section 159 and Section 160 though the object is the same for the both the sections.

2. SECTIONS 159 & 160—COMPARED

SECTION 159	SECTION 160
1. The witness refreshes his memory by looking into document and gives his evidence in the ordinary way.	1. The memory of the witness is not refreshed with the help of the document.

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65. *R.* v. *Mills & Rose,* (1962) 46 Cr App R 336 at 342; *Groves* v. *Redbart,* (1975) Crim LR 158.
66. *R.* v. *Governor of Gloucester Prison, ex p. Miller,* (1979) 1 WLR 537.
67. *Halliday* v. *Holgate,* (1868) 17 LT 18, per MONTAGUE SMITH J.
68. *Catt* v. *Howard,* (1820) 3 Stark R 3; *Vaughan* v. *Martin,* (1796) 1 Esp 440.
69. *Emperor* v. *Jhubboo Mahton,* ILR (1882) 8 Cal 739, 742.

2. The document is not tendered in evidence. So the witness's memory or recollection is the evidence, after looking into the document.[70]

The mere handing over of a document to a witness for the purpose of refreshing his memory does not make the document a piece of evidence in the case.[71]

3. The witness can even refer to a copy of the document with the permission of the court.

4. There is no evidentiary value of the document.

2. The document is tendered in evidence. So the document is the evidence of facts contained therein and which were spoken to by the witness. The document would be tendered only when the witness states that (1) he had no specific recollection of the facts stated in the document and (2) that he is sure that the facts were correctly recorded in the document. Even if he omits to say in evidence that he had no recollection of facts and that he is sure that the facts were correctly recorded, it would not make the document inadmissible, provided he states on oath that the facts were correctly stated in the document.[72]

3. The copy of the document cannot be tendered. But see commentary under Section 160.

4. There is some evidentiary value because of its being tendered in evidence.[73]

3. MAY REFRESH HIS MEMORY

The section says that a witness may refresh his memory as stated. He is not bound to do so; and the accused cannot compel him to do it.[74]

4. ANY WRITING

In this section it is stated that the witness can refresh his memory by referring to any writing. The word "any writing" includes also printed matters.[75]

It is immaterial what the document is, whether it be a book of account, letter, tradesman's bill, notes made by the witness, or any other document which is likely to assist the memory of the witness. Where the question was whether a candidate appealed to voters on the ground of religion, short and long-hand notes made by persons who heard the speeches were permitted to be used by them for refreshing memory.[76] Their contents can also be brought on record by direct oral evidence in the manner prescribed by Section 160.

A witness may refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned.[77] Where a Commissioner's inspection report in respect of a property was cancelled and a party sought to examine witness, not in the capacity of a Commissioner but an ordinary witness, he could be allowed to refer to his report to refresh his memory as he was being examined after a long lapse of time.[78]

5. HOROSCOPE

The Privy Council in *Banwarilal* v. *Mahesh*, (1918 P.C. 118) held that a horoscope can be used to help the witness in proving the date of birth stated in it under Section 159 or Section 160.[79]

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70. *Dharma* v. *State*, AIR 1966 Raj 74.
71. *Tribhuvan Ojha* v. *Ramchandra Dube*, (1934) 14 Pat 233.
72. *Pratap Singh* v. *Emperor*, AIR 1926 Lah 310.
73. *Man Mohan Singh* v. *Bhanwarlal*, AIR 1964 MP 137, 146.
74. In the matter of the Petition of *Kali Churn Chunari*, ILR (1881) 8 Cal 154.
75. See General Clauses Act 10 of 1897 Section 3 (58); *Ram Chandra* v. *Emperor*, AIR 1930 Lah 371.
76. *Ziyaudin Burhanuddini* v. *Brij Mohan Ramdass*, AIR 1975 SC 1788.
77. *In Re Subramanian*, 1979 Mad LJ (Cri) 546.
78. *V.P. Padmanabhan Nair* v. *M/s Grasim Industries, Mavoor*, AIR 1997 Ker 356. **See also** *State of Karnataka* v. *A Yarappa Reddy*, 2000 Cr LJ 400 (paras 21-22) (SC) : AIR 2000 SC 185.
79. *Shanker Gir* v. *Chinnuji*, AIR 1923 Nag 164; *Harbahadur Lal* v. *Chandraj Bahadur*, AIR 1918 Oudh 371; *Savit Bhai* v. *Sitaram*, AIR 1986 MP 218.

6. AGE CERTIFICATE

An age certificate given by a person can be used to refresh his memory.[80]

7. ACCOUNT BOOKS

It was held by the Supreme Court that where a witness has to depose to a large number of tnasactions contained in an account book or some other documents, there is nothing wrong in allowing him to refer to the account books and documents to refresh his memory while answering the questions put to him; he cannot be expected to remember every transaction and its details, he can use it to refresh memory under Section 159, though he had no recollection of those transactions, provided he is sure that those facts are correctly recorded in the account books or documents. In such case Section 160 specifically permits him to testify to those facts.[81] Though account books produced at a late stage are not admitted in evidence, the party may be allowed to refresh his memory by reference to them and such procedure is proper.[82] In a prosecution under Section 409, I.P.C., it was held that loose sheets of accounts which are used by the auditor when he audited the accounts would be admissible under Section 63(3) or to refresh his memory under Section 159 or Section 160 of the Evidence Act.[83]

8. POST MORTEM REPORT

A medical man in giving evidnece may refresh his memory by referring to a report which he has made of his post-mortem examination, but the report itself cannot be treated as evidence.[84]

(See cases under the same head noted in Section 157, such reports can be used under Section 159 also).

9. *PANCHANAMAS*

Even if a *panchanama* contained a statement made by a witness as to the crime committed, it is not admissible in evidence, a *panch* witness can make use of it for the purpose of refreshing his memory, where the *panchanama* is made by the police but is immediately read over to the *panch* and admitted by him to be correct.[85]

When a search was conducted by the police in the presence of the witnesses which is obligatory, and a *panchanama* was prepared, it was held that it cannot be used to corroborate the evidence either of the Police Officer or of the *Panch*, and it cannot be referred by the witness *panch* to refresh his memory, as it is hit by Section 162, Cr PC, and Section 159 is not intended for that purpose.[86] However, it was held that a search witness attesting the *Mahajan* prepared immediately after the raid can be used under Section 159 by the attesting witness to refresh his memory, and can also be used as corroboration of his evidence under Section 157.[87]

See also commentary under the head Panchanama in Section 157.

10. POLICE DIARIES

Police diaries are not admissible as substantive evidence or for corroborating the Police Officer, but are admissible for the only limited purpose of contradicting him or for refreshing his memory.[88]

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80. *Venkata Rangappa* v. *Subba Raya Goundan*, 33 IC 142.
81. *State of A.P.* v. *Ganeshwara Rao*, AIR 1963 SC 1850.
82. *Jewanlal Daga* v. *Nilmani Choudhary*, AIR 1928 PC 80 : 55 IA 107.
83. *State of Orissa* v. *Harish Chandrakar Mohapatra*, AIR 1966 Ori 189.
84. *Roghuni Singh* v. *R.* ILR (1882) 9 Cal 455; *Loku Basappa Pujari* v. *State*, (1959) 61 Bom LR 1271.
85. *Emperor* v. *Mahadeo Dewoo*, (1945) 47 Bom LR 992 : AIR 1946 Bom 189.
86. *State of Gujarat* v. *Raji Bhai*, AIR 1960 Guj 24; *Mia Bhai* v. *State of Gujarat*, AIR 1963 Guj 188; *Kajaji Ramji* v. *State of Gujarat*, 1966 CrLJ 331 (Guj); *Ramdeo* v. *State*, (1963) 2 Cr LJ 198 (All)(DB); *Tanu Kayputra* v. *State*, 1977 CrLJ (NOC) 119 (Cal).
87. 1972 Mad LJ (Cri) 321 (Mys).
88. *Dalsingh* v. *King Emperor*, ILR 44 Cal 876 (PC) : AIR 1917 PC 25; *Queen Empress* v. *Mannu*, ILR 19 All 390 (FB); *Achhaibat Singh* v. *Emperor*, 22 Cr LJ 374 (Pat).

11. SPECIAL DIARY

The special diary may be used by the Police Officer who made it, and by no witness other than such officer, for the purpose of refreshing his memory.[1]

This case was approved by the Privy Council in *Dalsingh* v. *R.*[2]

12. DYING DECLARATION

The dying statement of a deceased person may be proved in the ordinary way by a person who heard it; and the writing may be used for the purpose of refreshing the witness's memory.[3]

13. AT THE TIME OF THE TRANSACTION

In PHIPSON ON EVIDENCE, 15th Ed. (2000), Para 11-49, Page 271 it is observed: "Whether a document is contemporaneous is a matter of fact and degree.[4] The document must have been written either at the time of the transaction or so shortly afterwards that the facts were fresh in witness's memory[5]. This definition was accepted by SACHS L.J., in delivering the judgment of the Court of Appeal in *R.* v. *Richardson*[6] . He added that it provided a measure of elasticity and "should not be taken to confine the witness to an over-short period." A delay of a fortnight may not be fatal[7], but an interval of four weeks[8] or three months,[9] has been held to exclude."

Where a doctor wants to refresh his memory from the slip of paper which his pleader gave him, as to the injuries on the person of the complainant, it must be shown that the writing was made by the deponent at the time when he examined the complainant, or so soon after that and the court considers it rightly that the transaction was at that time fresh in his memory.[10]

Notes containing a summary of discussions held at different times prepared by a party which do not in any manner serve his interest cannot be considered self-serving notes and are admissible to corroborate the maker under Section 157 and he can refresh his memory by looking at them under Section 159.[11]

"In *R.* v. *Da Silva,*[12] the Court of Appeal considered whether the judge has a discretion to permit a witness to refresh his memory, after commencing his evidence, from a document that is not contemporaneous. The Court said :

> "In our judgment, therefore, it should be open to the judge, in the exercise of his discretion and in the interests of justice, to permit a witness who has begun to give evidence to refresh his memory from a statement made near to the time of events in question, even though it does not come within the definition of contemporaneous, provided he is satisfied :
>
> (1) that the witness indicates that he cannot now recall the details of events because of the lapse of time since they took place;
>
> (2) that he made a statement much nearer the time of the events and that the contents of the statement represented his recollection at the time he made it;
>
> (3) that he had not read the statement before coming into the witness-box;

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1. *Queen-Empress* v. *Mannu,* ILR (1897) 19 All 390 (FB); *King-Emperor* v. *Nga Lun Thoung,* ILR (1935) 13 Ran 570 (FB).
2. AIR 1917 PC 25. **See also**: *Dadan Gazi* v. *R.* ILR (1906) 33 Cal 1023; *Experora* v. *Dharam Vir,* AIR 1933 Lah 498.
3. In the matter of the Petition of *Samiruddin,* ILR (1882) 8 Cal 211.
4. *R.* v. *Simmonds,* (1967) 51 Cr. App. R. 316 at 330.
5. *Burrough* v. *Martin,* (1809) 2 Camp. 112; *Whitefield* v. *Aland,* (1849) 2 C&K 1015; *Talbot* v. *Cusack,* (1864) 17 Ir.C.L.R. 213; *R.* v. *Mills and Rose,* (1962) 46 Cr. App. R. 336 at 342.
6. (1971) 1 WLR 889, 894.
7. *R.* v. *Langton,* (1877) 2 QBD 296.
8. *R* v. *Graham,* (1973) Crim. LR 628; *R.* v. *Kinloch,* (1795) 25 How. St. Tr. 892 (several weeks).
9. *R.* v. *Woodcock,* (1963) Cri. LR 273.
10. *Pannalal Shaw* v. *Nani Gopal Biswas,* AIR 1949 Cal 103.
11. *Hari Das Mundhra* v. *State,* ILR (1962) 1 All 451.
12. (1990) 90 Cr App R 233. *Cf.* earlier dicta in *R.* v. *Cheng,* (1976) 63 Cr App R 20 CA.

(4) that he wished to have an opportunity to read the statement before he continued to give evidence.

We do not think that it matters whether the witness withdraws from the witness-box and reads his statement, as he would do if he had the opportunity before entering the witness-box, or whether he reads it in the witness-box. What is important is that if the former course is adopted, no communication must be had with the witness, other than to see that he can read the statement in peace, Moreover, if either course is adopted, the statement must be removed from him when he comes to give his evidence and he should not be permitted to refer to it again, unlike a contemporaneous statement which may be used to refresh memory while giving evidence."[13] (PHIPSON ON EVIDENCE, 15th Edn. (2000), pages 271-272 (para 11-51)).

14. INADMISSIBLE DOCUMENTS

For the purpose of refreshing the memory under this section, it is not necessary that the document which is looked into should be legally admissible in evidence e.g., unstamped document.[14] or insufficiently stamped document.[15] or any statement falling under Section 162, Cr PC.[16] The reason being that such documents would not be tendered in evidence and no question of their admissibility would arise.

But a Court should not take cognizance of the terms of a document which is inadmissible in evidence and has been referred to by a witness merely in order to refresh his memory as to a date.[17]

In PHIPSON ON EVIDENCE, 15th Edn. (2000), Para 11-48, Page 270 it is observed: "The document need not be admissible *per se*. Thus the fact that an invalid lease,[18] or an irregular deposition,[19] may be referred to and used for this purpose does not make it evidence in the case.[20]

15. COPY OF THE DOCUMENT

Markby on Evidence (P. 111) observes: "Section 159, deals with a case in which the witness refreshes his memory. He is sure not only that the facts were correctly recorded, but of the facts themselves, and prepared to swear that they existed, and this explains why in Section 159 reference to a copy is allowed, but not in Section 160."[21]

The Act does not require that this copy shall have been made by the witness himself, or in his presence, or so as to enable him to swear to its accuracy[22]. A register which is not a secondary evidence of the contents of a bond may be referred to by a witness for the purpose of refreshing his memory.[23]

Testimony to facts stated in document mentioned in Section 159

S. 160. A witness may also testify to facts mentioned in any such document as is mentioned in Section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

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13. *Ibid.*, at 238. **See also** *R* v. *S. Ribble Magistrates' Court, ex p. Cochrane*, (1996) 2 Cr App R 544, where the Divisional Court expressed the view that the statement should not necessarily be removed from the witness.
14. *Birchall* v. *Bullough*, (1896) 1 QB 326; or an *Maugham* v. *Hubbard*, (1828) 8 B&C 14; invalid lease *Bolton* v. *Tomlin*, (1836) 5 A&E 856.
15. *Tribhuvan Ojha* v. *Ramchandra*, ILR (1934) 14 Pat 233.
16. *Bhondu* v. *R.*, AIR 1949 All 364. **See also** *Emperor* v. *Mahadeo Dewoo*, AIR 1946 Bomb 189; *Abdulla* v. *Emperor*, AIR 1933 Lah 716.
17. *Bhogilal* v. *Royal Insurance Co. Ltd.*, ILR (1927) 6 Ran 142 : 30 Bom LR 818 (PC) : AIR 1928 PC 54.
18. *Bolton* v. *Tomlin*, (1836) 5 A&E 836.
19. *R.* v. *Mann*, (1885) 49 JP 743.
20. *Alcock* v. *Royal Exchange Assurance*, (1849) 13 QB 292; *Payne* v. *Ibbotson*, (1859) 27 LJ Ex. 341.
21. **See also** *Abdul Satar* v. *Emperor*, ILR 49 Cal 573.
22. STROKES, Vol. II, p. 932, f.n.3.
23. *Taruck Nath Mullick* v. *Jeamat Nosya*, ILR (1879) 5 Cal 353.

ILLUSTRATION

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

COMMENTS

1. PRINCIPLE AND SCOPE

The principle of Section 159 is carried a step further in Section 160. A witness may refresh his memory by a document even though he has no specific recollection of the facts themselves; but he must be sure that the facts were correctly recorded in the document.

MARKBY ON EVIDENCE (p. 111) observes: "A, a grocer, sues B for the price of goods sold sometime previously, in small quantities, on a great many different occasions, in fact, on an ordinary running account. The shop-man is called, who says that, though he knows B to be a customer, he has no recollection of the particular transactions, but they are all contained in a book which he holds in his hand. The book is not admissible in evidence, but if the conditions as to the writing and so forth of the entries in the book as stated in Section 159, be satisfied, then under Section 160, the witness may look at the book and if he is prepared to state upon oath that the entries are correct, he may read them out of the book."

"It is not essential that the witness has any independent recollection of the facts recorded in the document used to "refresh" memory."[24] (PHIPSON ON EVIDENCE, 15th Edn. (2000), page 272 (para 11-52)).

That a document may be used as the refresher of memory it is by no means necessary that the witness, after having seen it, should have an independent recollection of the facts mentioned therein or connected therewith. It will suffice if he remembers that he has seen the paper before, and that, when he saw it, he knew its contents to be correct, or even if, entirely forgetting the circumstances themselves, and the fact of his having seen the paper, he can still, in consequence of recognising his signature or writing upon it, vouch for the accuracy of the memorandum, or swear to the particular fact in question.[25]

The Supreme Court, however held that the witness need not, in so many words state specifically that he has no specific recollection of the facts or that he is sure that the facts were correctly recorded; it would be sufficient if it appears from his evidence that the conditions prescribed by Section 160 are fulfilled.[26]

A witness testifying to large number of transactions contained in account books or in other documents can be permitted to testify by referring to them.[27]

The Supreme Court repelling the contention that it would be an abuse of the provisions of Section 159, if the approver was allowed to refresh his memory by referring exclusively to the account books and various documents, observed: "In our opinion, where the witness has to depose to a large number of transactions, and those transactions are referred to or mentioned either in the account books or in other documents, there is nothing wrong in allowing this witness to refer to the account books and the documents, while answering the questions put to him in his examination. He cannot be expected to remember every transaction in its details, and Section 160 specifically permits a witness to testify the facts mentioned in the documents referred to in Section 159 although he has no recollection of the facts themselves, if he is sure that the fats were correctly recorded in the documents."

Having no specific recollection of the facts he can only testify regarding the contents of the document before him and explain that he recorded correctly what the deponent said at the time.[28] A witness may refresh his memory from a writing made by another person and inspected and signed by him, at the close of the day on which it was made, when it brings to his mind neither any recollection of

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24. **See** *R.* v. *Bryant & Dickson*, (1931) Cr App R 146, 150; *Maugham* v. *Hubbard*, (1828) 8 B & C 14; *R* v. *Guinea*, (1841) Ir Cir Rep 167; *R* v. *St. Martin's*, (1834) 2 A & E 210; *Topham* v. *McGregor*, (1844) 1 C & K 320.
25. TAYLOR, 12th Edn., S. 1412, pp. 896-897.
26. *Kanti Prasad* v. *Purushottam Das*, AIR 1969 SC 851 : (1969) 3 SCR 400. **See also** *Krishnama* v. *R.*, AIR 1931 Mad 430; *Pratap Singh* v. *R.*, AIR 1926 Lah 310; *Dharma* v. *State*, AIR 1966 Raj 74.
27. *State of Andhra Pradesh* v. *Ganeswara Rao*, AIR 1963 SC 1850.
28. *Partap Singh* v. *Crown*, ILR (1925) 7 Lah 91 : AIR 1926 Lah 310.

the facts mentioned therein not of the writing itself but when it nevertheless enables him to testify to a particular fact from the conviction of his mind on seeing the writing which he knows to be genuine.[29]

If the witness had not correctly recorded the words used by the speaker but only his impression, then the notes made by him would be inadmissible to prove the words used.[30]

The notes of a speech taken at the time by a Police Officer should be proved in the following way: The Police Officer should describe his attendance at the place where the speech was made by the accused and the making of the relevant speech and give a description of its nature so as to identify his presence there and his attention to what was going on. After that it is quite enough if he says: "I wrote down that speech and this is what I took down."[31] If the police officer had not refreshed his memory under Section 159 from those notes and did not testify orally as to the speech then it would not be admissible in evidence.[32] When the transcribed notes of the police were given to the adverse party, it was held that the notes cannot be said to be inadmissible merely because they were in shorthand which the adverse party cannot decipher and they can be made use of under Section 160.[33]

The Supreme Court observed: "though these reports had not been used for the purpose of refreshing the memory of any witness under Section 159, they were used under the Section 160 of the Act. It might be implied that the witnesses had no specific recollection of the facts. The witnesses being in a position to correctly record the facts in the document, both the conditions required by Section 160 had been complied with, though the report was strictly speaking not substantive evidence as such; and the document could only be used as a part of the oral evidence sanctified by the oath."[34]

In HALSBURY 4th Ed., Vol. 17, Para: 274, Page: 191 it is stated: "The document need not have been made by the witness personally, but if it was not made by him it must have been checked by him while the facts were fresh in his memory.[35]

Documents may be used by a witness to refresh his memory even if they would not be admissible in evidence if tendered as such.[36] Documents may be read over to a witness who has become blind to refresh his memory.[37]

For cases in which the delay in making the document was held to be too long.[38]

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29. *Abdul Salim* v. *Emperor*, ILR (1921) 49 Cal 573.
30. Per WALLIS J., in *Mylapore Kirishnasami* v. *Emperor*, ILR (1909) 32 Mad 384, 395.
31. *Public Prosecutor* v. *Venkatarama Naidu*, ILR (1944) Mad 113 : AIR 1943 Mad 542.
32. *Omprakash* v. *Emperor*, AIR 1930 Lah 867; *Emperor* v. *Balaram Das*, AIR 1922 Cal 382.
33. *Lakshminarayan* v. *Returning Officer*, AIR 1974 SC 66, 80.
34. *Kantiprasad* v *Purushotham Das*. AIR 1969 SC 851 **approving** *Public Prosecutor* v. *Venkatarama Naidu*, AIR 1943 Mad 542.
35. *Rambert* v. *Cohen*, (1802) 4 Esp 213 (receipt which witness saw given money was paid); *Burrough* v. *Martin*, (1809) 2 Camp 112 (log book examined by witness from time to time shortly after events in it were recorded). **See also** *Anderson* v. *Whalley*, (1852) 3 C&K 54; *Burton* v. *Plummer*, (1834) 2 A&E 341 (entries copies daily from waste book to ledger and checked by the witness); *Lord Bolton* v. *Tomlin*, (1836) 5 A&E 856 (document assented to in witness's presence); *Smith* v. *Morgan*, (1839) 2 Mood & R 257 (deposition signed by witness after examination by bankruptcy commissioner). **following** *Vaughan* v. *Martin*, (1796) 1 Esp 439. **See also** *Wood* v. *Cooper*, (1845) 1 C&K 645; *R* v. *Mullins*, (1848) 32 Cox 526 (reports dictated by witness and afterwards read over and signed by him); *Dyer* v. *Best*, (1866) LR 1 Exch 152 (witness who had read in newspaper shortly afterwards of event at which he had been present allowed to refresh his memory from newspaper as to date of event); *Niscox* v. *Batchelor*, (1867) 15 LT 543; *R* v. *Langton*, (1877) 2 QBD 296 (time sheet used every week by witness in paying wages); *R* v *Dexter*, (1899) 19 Cox CC 360 (transcript of shorthand note made by clerk and afterwards read over to witness); *R* v. *Bass*, (1953) 1 QB 680 : (1953) 1 All ER 1964, CCA (police notes of interview made after interview); *R.* v. *Mills*, (1962) 3 All ER 298, (1962) 1 WLR 1152, CCA (notes made by police officer from tape recording of conversation which the officer heard); and *B* v. *B.*, (1962) Times, 29th May.
36. *Jacob* v. *Lindsay*, (1801) 1 East 460 (unstamped receipt); *Catt* v. *Howard*, (1820) 3 Stark 3; *Maugham* v. *Hubbard*, (1828) 8 B&C 14; *Lord Bolton* v. *Tomlin*, (1836) 5 A&E 856 (invalid lease); *Birchall* v. *Bullough*, (1896) 1 QB 325 (unstamped document).
37. *Catt* v. *Howard*, (1820) 3 Stark 3. It is uncertain whether this would be so if the document is not proved to have been made or checked by the witness while the facts were fresh in his memory.
38. See *Anon* (1753) 3 Term Rep 752; *Doe d Church and Phillips* v. *Perkins*, (1790) 3 Term Rep 749 at 752; *Jones* v. *Stroud*, (1825) 2 C&P 196 (six months too long); *Steinkeller* v. *Newton*, (1838) 9 C&P 313.

2. DISTINCTION BETWEEN SECTION 159 AND 160

It was held the M.P. High Court that the witness refreshes his memory by looking into the document under Section 159 and gives evidence in the ordinary way; under Section 160 the memory of the witness is not refreshed with the help of the document, but the document itself could be tendered and the witness testifies to the facts mentioned therein if he has no specific recollection of facts and if he is sure that the facts were correctly recorded in the document. Regarding the notes of speech taken by witness at the meeting, if he admits that the notes contain his impression of the speech delivered the notes are inadmissible to prove the words used and cannot be used as such.[39]

Where a witness merely refreshed his memory by looking into a certified copy of a document, and spoke to the various details of the dates *etc.*, such procedure was not hit by Section 159. If that document was insisted to be tendered in evidence then the conditions of Section 160 have to be complied with, then only that document can acquire some evidentiary value.[40]

See also commentary under Section 159.

3. COPY

Whether the expression "a witness may also testify to facts mentioned in any such document as is mentioned in Section 159" is wide enough to permit the witness to depose to a fact by referring to a copy of the original, is a question open to some argument.

In PHIPSON ON EVIDENCE 15th Ed. (2000), Para 11-47, Pages 269-270 it is observed: "As to the use of copies of the original writing, the result of the cases seems to be as follows :

(a) Where the copy was made or verified by the witness while the facts were fresh in his recollection, it may be used, on the footing of a duplicate or a quasi-original. Thus a sale was allowed to be proved by a clerk who refreshed his memory from a ledger, copied under his supervision from a waste-book kept by himself[41]; and a surveyor has been allowed to refer to a printed copy of a written report made by him to his employers, which report was substantially but not literally transcribed from rough notes taken by him at the time.[42] A police officer was allowed in a trial in 1975 to refer to a statement made for committal proceedings from detailed notes kept during observations in 1972; the defendant had absconded and the police officer's notebook had been lost.[43]

(b) Where the original is in existence, and the witness has no recollection of the facts otherwise than from it, a copy may not be used, and the original must be used.[44]

(c) Where the original has been lost or destroyed, a copy proved to be correct either by the witness or some third person may be used. Thus a journalist has been allowed to refresh his memory from a copy of the paper 14 years old, although he had no recollection of the facts, proof being given by the editor that the manuscript was lost, and that the paper as a copy of it and proof being given by the witness, that he had no doubt the facts stated therein were true.[45]

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39. *Manmohan Singh* v. *Banwarilal*, AIR 1964 MP 137 **relying on** *Jagan Nath* v. *Emperor*, AIR 1932 Lah 7; *Sodh Pindi Das* v. *Emperor*, AIR 1938 Lah 629; *Mylapore Krishnasami* v. *Emperor*, AIR 32 Mad 384.
40. *Ashwini Kumar* v. *Union Territory of Tripura*, 1969 Tri 26.
41. *Burton* v. *Plummer*, (1834) 2 A & E 341.
42. *Horne* v. *MacKenzie*, (1839) 6 C & F 628; **contra**, *Murray* v. *Mahon*, (1884) 18 Ir TLR 8.
43. *R.* v. *Cheng*, (1976) 63 Cr App R 20 CA. In *Att.-Gen.'s Reference No. 3 of 1979*, (1979) 69 Cr App R 411, it was held that a police officer who took jottings during the course of an interview and within a short time made a full note in his notebook incorporating and expanding the jottings should have been permitted to refresh his memory from the notebook. Such a course may fall foul of the provisions of Code of Practice C under the Police and Criminal Evidence Act 1984: *R.* v. *Chisnell*, (1992) Crim LR 507 (where the Court of Appeal upheld the exercise of discretion to permit the use of a statement made from notes which had been lost).
44. *Doe* v. *Perkins*, (1790) 3 TR 749; *Tanner* v. *Taylor*, (1756) 3 TR 754; *R.* v. *St. Martin's*, (1834) 2 A & E 210; *R.* v. *Harvey*, (1869) 11 Cox 546.
45. *Topham* v. *McGregor*, (1844) 1 C & K 320; *Burton* v. *Plummer*, *ante*, per PATTESON J.; *Talbot* v. *Cusack*, (1864) 1 Ir CLR 213. **Contra**, *Jones* v. *Stroud*, (1825) 2 C & P 196.

(d) Where the copy is either not proved to be correct,[46] or consists of an imperfect extract made by the witness,[47] or has been revised and transcribed with the help of the solicitor to the case,[48] it cannot be used to refresh memory, whether the original is in existence or not."

Under Section 159 reference to a copy is permissible only with the permission of the Court. Section 160 says nothing as to such permission; but since Section 160 refers to Section 159, it follows such permission is required to enable the witness to refer to the copy.

Right of adverse party as to writing used to refresh memory.

S. 161. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

COMMENTS

1. PRINCIPLE AND SCOPE

This section states that, whenever a witness is testifying to the documents or any writing, according to the provisions of Section 159 and 160, if the opposite party requires the document, it must be produced for the inspection of the opposite party; this is a right given to the opposite party under this section; if the opposite party wants to cross-examine the witness with reference to those documents, he can do so.

2. RIGHT TO INSPECTION AND CROSS-EXAMINATION BY OPPOSITE PARTY

FIELD. J., observed: "The opposite party may look at the writing to see what kind of writing it is, in order to check the use of improper documents; but I doubt whether he is entitled, except for this particular purpose, to question the witness as to other and independent matters contained in the same series of writings."[49] It was further held that the opposite party had a right to look into any particular writing either before or at the moment when the witness uses it for refreshing his memory, in order to answer a particular question; but if the opposite party neglects to exercise that right, he cannot continue to retain it through out the whole examination of the witness.

It was held that sometimes an inspection of the documents may be necessary to ascertain its true character; it is a check against the use of improper document, when a document is once put into the hands of the opponent, it is hardly possible to devise a method by which his vision may be restricted or confined to those portions which were referred to by the witness for the purpose of refreshing his memory.[50] In the case of police diaries, which are privileged documents, the accused is entitled to see that portion only which was referred to for refreshing the memory and no more.[51] The accused would not have a right to call for such diaries or use them, unless they are used by Police Officer to refresh his memory or the court uses them for contradicting such Police Officer.[52]

Where a defence witness uses a private notebok for refreshing his memory and deposing, the prosecution can insist on the production of that document for using it in cross-examination.[53]

In all cases where documents are used to refresh the memory of a witness, it is usual and reasonable—and if the witness has no independent recollection of the fact, it is necessary—that they should be produced at the trial, and that the opposite counsel should have an opportunity of inspecting them, that, on cross or re-examination, he may have the benefit of the witness's refreshing his memory by every part. Neither is the adverse party bound to put in the document as part of his evidence, merely because he has looked at it, or examined the witness respecting such entries as have been previously

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46. *Alcock* v. *Royal Exchange Assurance*, (1849) 13 QB 292; *Talbot* v. *Cusack*, (1864) 17 Ir CLR 213.
47. *Doe* v. *Perkins*, (1790) 3 TR 749, explained by PATTESON J. in *R.* v. *St Martin's*, (1834) 2 A & E 210.
48. *Anon.*, cited by Lord KENYON in *Doe* v. *Perkins*, (1790) 3 TR 749.
49. In re *Jhuboo Mahton*, ILR (1882) 8 Cal 739.
50. *R.* v. *Mannu*, ILR 19 All 890 (FB).
51. *Hafiz Mohammad Sani* v. *Emperor*, AIR 1931 Pat 150; *Subhash Chandra* v. *Union of India*, 1988 Crl LJ 1077.
52. *Gurcharan Singh* v. *State*, ILR (1984) 2 Del 627 : 1985 Cr LJ (NOC) 56 (Del).
53. *Republic of India* v. *G.A.N. Rajan*, AIR 1967 Ori 115; **See also**, *Hardy's trial*, 24 How ST 824.

referred, to, but, if he goes further than this, and asks questions about other parts of the memorandum, seems that he thereby makes it his own evidence.[54]

In HALSBURY 4th Edn., Vol. 17, Para 275, Page 192 it is stated: "*Production of the document at th trial*:— Where a witness uses a document in the witness box to refresh his memory, the document ma be seen by the opposing party[55]. If only part of the document is used, then all of the document which relevant to the facts in issue must be made available to the other party.[56] Thus, documents should not b fastened in such a way that other parts, besides those referred to by the witness, cannot be read.[57]

Where a witness has used a document to refresh his memory before going into the witness box. should be produced if he has no independent recollection of the facts, and it is customary, though n necessary, to produce it in all cases in order to make it available to the other party.[58] However, it is n customary to produce proof of evidence which a witness has made on a previous occasion and fro which he refreshes his memory before going into the witness box.

The other party may not see the document at all where the witness is unable to refresh his memo even with its assistance, or where it is used only for the purpose of enabling a witness to identi handwriting[59], except for the purposes of examination as to the handwriting.[60]

Production of documents.

S. 162. A witness summoned to produce a document shall, it is in his possession or power, bring it to Cour notwithstanding any objection which there may be to it production or to its admissibility. The validity of any such objection shall b decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters c State, or take other evidence to enable it to determine on its admissibility.

Translation of documents.

If for such purpose it is necessary to cause any document t be translated, the Court may, if it thinks fit, direct translator t keep the contents secret, unless the document is to be given i evidence: and, if the interpreter disobeys such direction, he shall be held to hav committed an offence under Section 166 of the Indian Penal Code (XLV of 1860).

SYNOPSIS

1. *Principle and scope* ... 1338
2. *Whether the court has right to inspect the document when privilege is claimed on ground of public interest*... 1340
3. *Admissibility* ... 134
4. *Writ of certiorari and privilege* ... 134
5. *Instances of privileged and not privileged documents* ... 134

COMMENTS

1. PRINCIPLE AND SCOPE

This section deals with the production of documents when summoned by a court. It is obligatory o the part of the person to produce when summoned by the court, the document which is in his possessio and power notwithstanding any objection he may have with regard to its production or admissibility the word "shall" is used in the section. While producing the documents he can raise his objection for

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54. TAYLOR, 12th Edn., S. 1413, p. 897.
55. See *Senat* v. *Senat*, (1965) P, 172, (1965) 2 All ER 505.
56. *Loyd* v. *Freshfield and Kaye*, (1826) 2 C&P 325.
57. *Betts* v. *Betts and Broadrick*, (1917) 33 TLR 200.
58. *Sinclair* v. *Stevenson*, (1824) 1 C&P 582; *Howard* v. *Canfield*, (1836) 5 Dowl 417; *Deputy* v. *Truman*, (1843 Y&C Ch Cas 341; *Beech* v. *Jones*, (1848) 5 CB 696.
59. *Sinclair* v. *Stevenson*, (1824) 1 C&P 582; *Russell* v. *Rider*, (1834) 6 C&P 416.
60. *Holland* v. *Reeves*, (1835) 7 C&P 36; *R* v. *Duncombe*, (1838) 8 C&P 369; *Peck* v. *Peck*, (1870) 21 LT 670.

production or admissibility. When an objection is raised, the court shall decide about the validity of the objection.

The second paragraph of the section provides that when a document, in respect of which an objection to production or admissibility is raised, refers to matters of State, the court has no power to inspect the document. With regard to other documents in respect of which privilege is claimed, the Court, if it thinks fit, may inspect the documents.

The principle underlying in this section is similar to the rule of English law, namely when a witness is served with a summons to produce documents (*Subpoena Duces Tecum*), he is bound to attend the court with the document required to be produced. If he is having any objection, the court shall decide the validity of such objection.[61] The jurisdiction of the court to decide the validity of the objections covers not only the objections raised under Section 123 and 124, but also other objections.[62] An objection to the production or admissibility of evidence specified in Section 162 of the Evidence Act, relates to all claims of privilege provided by the relevant sections of Chapter IX of part III of the Act. Section 123 is only one of such privileges, so the jurisdiction is given to the court to decide the validity not only of the objection raised under Section 123 but of all other objections as well.[63]

When a witness is summoned to produce a document which is in his possession or power, he must bring it to court, notwithstanding any objection that he may have with regard to its production or admissibility. Under the provisions of O. XVI, R. 6 of the Civil Procedure Code, a person may be summoned to produce a document without being summoned to give evidence. He may either attend the court personally or may depute another to produce it.

In neither case is he liable to be cross-examined (S. 139). If the document be in his possession or power, he is bound under this section, to bring the document with him to Court notwithstanding any objection he may have to its production or admissibility. Having brought it to court, he is entitled to raise his objection to its production or admissibility. The Court has then to decide the validity of any such objection. For the purpose of deciding on the validity of the reason that may be offered for withholding them, the court may receive evidence,[64] and in so doing it is entitled to inspect the document. If the document in question happens to be in a language not known to the Presiding Officer, he may get it translated, and call upon the translator to keep its contents secret (*vide* paragraph 3).

The court has always had the power to inquire into the objections raised for the disclosure of the documents and then decide whether or not it should call for the documents.[65]

It was at one time held that the jurisdiction of the Court is confined to the narrow limits provided by the second clause of Section 162 namely, it is open to court to take evidence to decide the character of the documents but it cannot inspect and peruse the document.[66]

The statement that the court cannot inspect and peruse the document is no longer good law in view of the decision in AIR 1982 SC 149. (See discussion *infra* under the head 'whether the court has right to inspect the document when privilege is claimed in public interest.)

A person summoned under Section 162, Evidence Act to produce a document is bound to bring it to the court or to send it through another, and a claim for privilege in respect of it can be made at the time of production of the document which will be determined by the court under Section 162, Evidence Act.[67]

Ordinarily a document is bound to be produced when summoned by the Court, unless it relates to the affairs of the State. It is the supreme duty of the court to protect the privilege when it exists, but in order to determine the validity of the objection, the court has power to inspect in the appropriate cases.[68]

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61. *Orient Papers Mills* v. *Union of India*, AIR 1979 Cal 114.
62. *Orient Papers Mills* v. *Union of India*, AIR 1979 Cal 114.
63. *Orient Papers Mills* v. *Union of India*, AIR 1979 Cal 114.
64. *Venkatachella Chettiar* v. *Sampathu Chettiar*, ILR (1908) 32 Mad 62, 64.
65. *Robinson* v. *State of South Australia*, AIR 1932 PC 254; *Conway* v. *Rimmer*, (1968) 1 All ER 874 (HC); *State of Punjab* v. *Sodhi Sukhdev Singh*, AIR 1961 SC 493; *S.P. Gupta* v. *Union of India*, AIR 1982 SC 149.
66. *State of A.P.* v. *Ramu Naidu*, (1964) 2 An LT 251.
67. *In Re Mantu Bhai Mehta*, AIR 1945 Bom 122; *Bhal Chandra* v. *Chanbasappa*, AIR 1939 Bom 237; *Haravana Swamy* v. *State*, AIR 1953 Mad 228; *Public Prosecutor* v. *M.S. Menoki*, AIR 1939 Mad 914; *Gangaram* v. *Habibulla*, ILR 58 All 364; *Chandu Bhai* v. *State*, AIR 1962 Guj 290.
68. *Iqbal Ahmad* v. *State*, AIR 1954 Bhopal 9; *Tilak* v. *State*, AIR 1959 All 543.

2. WHETHER THE COURT HAS RIGHT TO INSPECT THE DOCUMENT WHEN PRIVILEGE IS CLAIMED ON GROUND OF PUBLIC INTEREST

In regard to the question whether the court can inspect the document there is divergence of opinion

According to the first view where an officer is summoned to produce an official document he bound to produce it in court. The officer claiming privilege for a document, that he is summoned produce, must appear and produce the document in court and must satisfy the court that his claim is we founded. It is for the court to decide whether the claim should be allowed or not. But once the co holds that the document is one with regard to which privilege can be claimed, in other words, that it is communication made to a public officer in official confidence or that it is an unpublished official recc relating to affairs of State which it would not be in the public interest to disclose, the question whetl privilege should be claimed for it or not, is entirely within the discretion of the officer-in-charge of t document, The court for the purpose of deciding whether the claim to previlege is well-founded or not not entitled to look at the document. It must decide the question of the validity of the objection witho looking at the document.[69]

The view was reiterated in *State of Punjab* v. *Sodhi Sukh Deo Singh*.[70] It was held that where privilege is claimed at the Stage of inspection and the Court is required to adjudicate upon its validity t relevant provisions of the Evidence Act under which the privilege is claimed, as well as the provisions Section 162 which deal with the manner in which the said privilege has to be considered are equa applicable; if the court is precluded from inspecting the privileged document under the second clause Section 162, the said prohibition would apply as much to a privilege claimed by the State through witness at the trial as to a privilege similarly claimed by it at the stage of inspection. The provisions Order 11, Rule 19(2), C.P.C. must therefore, be read subject to Section 162 of the Evidence Act.

The second view is that the court is competent to hold a preliminary enquiry and determine t validity of the objection to the production and this necessarily involves an enquiry into the question as whether the document relates to the affairs of the State.[71] It is the duty of the court to protect t privilege when it exists, but in order to determine the validity of the objection, the court has got t power to inspect the document and then decide.[72]

It was held by the Supreme Court that the court has residual power to look into the document a decide whether the disclosure of the documents is in the interest of the public, and that the statement the head of the department that the disclosure would injure public interest is not final.[73] The House Lords held that the documents which were opposed from disclosure, should be produced for inspecti as it would not be possible to decide whether the balance of public interest lay for or against disclosure

3. ADMISSIBILITY

The word "Admissibility" involves all sorts of objections to production relevancy, and admissibil or even claiming any privilege in respect of the document.[75]

Where a copy of a document in respect of which privilege is claimed by the defendant, is filed the plaintiff, the court, without deciding the claim of privilege cannot call upon the defendant to admit deny the same.[76]

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69. *In Re Mantu Bhai Mehata*, (1943) 46 Bom LR 802: *Dinabai Petti* v. *Dominion of India*, (1950) 53 Bom LR 229.
70. AIR 1961 SC 493.
71. *Amarchand* v. *Union of India*, AIR 1964 SC 1658: *State of A P* v. *Ramu Naidu*, (1962) 2 An LT 251: *State Maharashtra* v. *O V Pawer*, 1986 Cr LJ 1467 (Bom)(DB): *Subba Rao* v. *Brahmananda Reddy*, AIR 1967 AP 1 *Choudary* v. *Chandkakati*, 1060 Assam 210: *State of U P.* v. *Raj Naram*, AIR 1975 SC 865: *S.P. Gupta* v. *Unio India*, AIR 1982 SC 149 X4 (X5) see commentary 123 and 124 of this Act.
72. *Om Prakasash Gupta* v. *State*, ILR (1967) 1 All 239.
73. *S.P. Gupta* v. *State*, AIR 1982 SC 149, para 1184 **overruling** *State of Punjab* v. *Sodhi Sukh Deo Singh*, AIR 1961 493.
74. *Burmah Oil Co.* v. *Bank of England*, 1980 AC 1090. **See also** *Lonrho Ltd* v. *Shell Petroleum Co. Ltd.*, (1980) 1 W 627.
75. *Mehta* v. *Nanevathi*, (1983) 2 Bom Court R 45.
76. *Union of India* v. *Rajkumar Gujral*, AIR 1967 Punj 387.

When the question of the conduct of a public servant is in issue, it was held that privilege cannot be claimed by the State to screen such conduct from judicial scrutiny.[77]

4. WRIT OF *CERTIORARI* AND PRIVILEGE

In an application for *certiorari* under Art. 226 of the Constitution, when notice to produce the record was issued by the Court, the respondent without producing records filed a counter affidavit and produced some document for evidence on behalf of the State. It was held that the State should have produced the records forming the subject-matter of the writ of *certiorari*; the Government cannot claim absolute privilege and withhold the production.[78]

When the court directs the production of a document subject to any objection, it might be taken that such a direction will not be interfered with in revision by the High Court.

In Criminal cases, the protection under Section 126 afforded to communications by a client to lawyers cannot be availed of against an order to produce the document, the document must be produced, and then under this section it will be for the court, after inspection of the document, if it deems fit, to consider and decide any objections regarding its production or admissibility.[79]

5. INSTANCES OF PRIVILEGED AND NOT PRIVILEGED DOCUMENTS

When a clerk of the sales tax department was summoned to produce certain documents, the Sales Tax Officer claimed privilege. It was held that, in view of the provisions of Section 25(1) of the Sales Tax Act, the Officer was justified in claiming the privilege.[80]

In regard to the transcript of public speeches, it was held that the fact, that the record was made by a Police Officer, did not render it privileged documents.[81] Statements made and documents produced by assessees before the Income-tax Officer for the purpose of showing the income of such assessees do not refer to matters of State.[82] Report of a conciliator, regarding his findings in an industrial dispute, was held not a privileged document or confidential document.[83]

This section is applicable to both official and private documents.[84]

Giving, as evidence, of document called for and produced on notice.

S. 163. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

COMMENTS

1. PRINCIPLE AND SCOPE

When a party issues notice to the other party to produce any document, the other party has to produce the same if the document is in his possession or power. When it is produced by the opposite party and it is inspected by the party calling for its production, he is bound to give it as evidence if the opposite party requires him to do so.[85]

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77. *Niranjan Das Sehgal* v. *State of Punjab*, AIR 1968 Punj 255.
78. *P. Joseph John* v. *State*, AIR 1953 Tra/Co 363 (FB); *Ramanana* v. *State of A.P.*, AIR 1971 AP 196.
79. *Gangaram* v. *Habib Ullah*, (1935) 58 All 364.
80. *Pratap* v. *State*, (1967) 69 Punj LR 222.
81. *Rama Srinivasan* v. *Shanmugan*.
82. *Venkata Chella Chettiar* v. *Sampathu Chettiar*, ILR (1908) 32 Mad 62; *Jadobram Dey* v. *Bulloram Dey*, ILR (1899) 26 Cal 281.
83. *Haralal Sadasheorao Bande* v. *State Industrial Court, Nagpur*, AIR 1967 Bom. 174.
84. *In Re Mantu Bhai Mehta*, AIR 1945 Bom. 122; *Joseph John* v. *State*, AIR 1953 Tra/Co. 363 (FB); *Balchandra Dattatraya* v. *Chanbasappa Mallappa*, AIR 1939 Bom 237.
85. *Union of India* v. *Firm Vishudh Ghee Vyapar Mandal*, AIR 1953 All 689; *Mahomed* v. *Abdul*, (1903) 5 Bom LR 380.

TAYLOR ON EVIDENECE (12th Ed. Section 1817, p. 1126) observes: "The production of papers, upo notice does not make them evidence in the cause unless the party calling for them inspects them, so as become acquainted with their contents; in which case he is obliged to use them as his evidence, at least they be in any way material to the issue. The reason for this rule is, that it would give an unconscionab advantage to a party to enable him to pry into the affairs of his adversary, without at the same tin subjecting him to the risk of making whatever he inspects evidence for both parties."

This section is applicatble, and the party is bound to give the opponents the document as evidence the case, if three conditions are fulfilled. The first condition is that the document should be required b the party to be produced in evidence. The second condition is that it should be inspected by the par who had given the notice. The third condition is that the party producing the document should require th party calling for it to put in evidence. Where only the first of these conditions has been satisfied, but th others have not been satisfied, the document cannot be treated as evidence of the party.[86] When the thr conditions are fulfilled, no further proof is necessary before its admission in evidence.[87]

However, it was held that this section does not render proof of the document which is to b exhibited, unnecessary or alter the normal incidence of the burden of proof as contained in other sectio of the document.[88]

The Privy Council dealt with a case where the defendant wanted to prove her defence from th account books of the plaintiff and so gave notice for production of the account books. After inspectio only certain extracts were taken from those books as defence evidence leaving the rest. The Priv Council observed: "It would be a monstrous thing if the party sued were allowed to call for the accoun of the plaintiff, and extract from them just such items as prove the matters of defence on her part an were not to allow those items which make in favour of the plaintiff. The High Court held that the boo must be admitted in toto. Their Lordships think that the High Court was entirely right."[89] Relying on th last observation of the Privy Council, it has been held that when the party inspects the documents, th entire document should be taken in evidence.[90] Records of statements made not on oath in the course a departmental inquiry by Government, are not public documents. But, when the defence had called f their production and they were, thereupon, produced and inspected and used for the cross-examination the prosecution witnesses, it was held that the Crown could insist on the entire statements being put under this section.[91]

It was held that in the Presidency Town of Calcutta, the accused has no right for the copies of th statements of witnesses made to police during the investigation, which have been reduced to writin But, the accused can call for the document under Section 163 which is subject to the remainin provisions of the Evidence Act. Therefore, only such portion of the record of the previous statement can be used under Section 154 or 157 of the Evidene Act will be relevant.[92]

The party inspecting the document is bound to give it as evidence only if the party producing th same requires him to do so.[93]

Objection to the mode of proof must be taken before the document is exhibited and not for the fi time in the appellate court.[94]

The High Court of Madras raised, but did not decide, the question whether S. 163 was applicable documents produced under the discovery procedure enacted in this rule or whether it only applied documents produced after the trial had begun.[95] But the Allahabad High Court has held that the notice

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86. *Liladhar Ratanlal* v. *Holkarmal Sohanlal*, AIR 1959 Bom 528.
87. *Govt. of Bengal* v. *Shanthi Ram Mondal*, 1930 Cal 370; *Kishan Ghule* v. *Puransa*, AIR 1928 Nag 119.
88. *Rajgopala Iyengar* v. *Ramanuja Iyengar*, 1923 Mad WN 292 : AIR 1923 Mad 607.
89. *Rajeshwari Kuar* v. *Rai Bal Krishan*, ILR 9 All 713 PC.
90. *Mahammad Khan* v. *Abdul Rehman*, (1903) 5 Bom LR 380; *Kisan Ghule* v. *Puransa*, AIR 1928 Nag 119; *Govt Bengal* v. *Shanti Ram Mandal*, AIR 1930 Cal 370; *Emperor* v. *Makhan Lal*, AIR 1940 Cal 167.
91. *Government of Bengal* v. *Shantiram Mandal*, ILR (1930) 58 Cal 96 : AIR 1930 Cal 370.
92. *Natabar Jana* v. *State*, AIR 1955 Cal 138.
93. *Shri Narain* v. *Chunnilal*, AIR 1957 Raj 159; *Badri Prasad* v. *Shantilal Seth*, AIR 1941 Lah 228; *Union of India Firm Vishudh Ghee Vyapar Mandal*, AIR 1953 All 689; *Calvert* v. *Flower*, (1836) 7 C&P 380; *Stroud* v. *Stro* (1963) 1 WLR 1080.
94. *State of Maharashtra* v. *Bankat Lal Murlidhar Bhatt*, ILR 1977 Bom 312.
95. *Rajgopal Iyengar* v. *Ramanuja Ayengar*, AIR 1923 Mad 607.

produce documents mentioned in Section 163 of the Evidence Act clearly referred to a notice to produce as mentioned in Order XI, which may be given by a party privately to the other party concerned, and that the applicability of Section 163 of the Evidence Act was not affected by the mere fact that due to the non-production by the other party, an order to produce the documents had to be passed by the Court.[1]

This section is applicable to both Civil and Criminal proceedings.[2]

In criminal matters, production of a document at the instance of one party or the other cannot bind the party that got it on the record, unless it is proved in accordance with the provisions of law. Mere production of a document, therefore, is not sufficient to treat it as evidence unless it is duly proved.[3]

Using, as evidence of document production of which was refused on notice.

S. 164. When a party refuses to produce a document which he has notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

ILLUSTRATION

A sues *B* on an agreement and gives *B* notice to produce it. At the trial *A* calls for the document and *B* refuses to produce it. *A* gives secondary Evidence of its contents. *B* seeks to produce the document itself to contradict the secondary evidence given by *A*, or in order to show that the agreement is not stamped. He cannot do so.

COMMENTS

1. PRINCIPLE AND SCOPE

If a party having a document in his possession refuses to produce it when called upon at the hearing to do so, he is not at liberty afterwards to give the document in evidence for any purpose without (1) the consent of the other party, or (2) the order of the court. This is meant as a penalty for unfair tactics. The Civil Procedure Code, O. XI, R. 15, makes a similar provision.

The illustration under this section makes clear the principle and the object of the section.

"The party who refused to produce the writing could not afterwards be at liberty to give it in evidence.[4]

WIGMORE ON EVIDENCE (Section 1210, Vol. 3, p. 381) observes: "This section is in one sense a proper penalty for unfair tactics; but the original refusal may also be regarded as a judicial admission, in advance, of the correctness of the first party's evidence to this extent."

This section does not contemplate the production of a document for inspection. It contemplates that one party should call upon another in Court to produce a document of which the first party has given the other notice to produce. It does not give him any right, at any stage of the case, to call upon his opponent to produce the document and, after inspecting it, use it or not as he sees fit. It is doubtful if this section applies to criminal proceedings.[5]

If a party has a document in his possession he will not be permitted to prove its contents in the cross-examination of the witness.[6]

Where a landlord could not produce the rent deed, when ordered to do so, on the ground that it was not traceable but, later, on finding it, applied for its admission for evidence, it was held that the rent deed could not be disallowed by the Rent Controller on a technical ground; that, in order to resolve the controversy between the parties, and to do full justice the Rent Controller should have allowed the

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1. *Union of India* v. *Firm Vishudh Ghee Vyapar Mandal*, AIR 1953 All 689.
2. *Govt. of Bengal* v. *Santhi Ram Mandal*, AIR 1930 Cal 370; *R.* v. *Makhan*, AIR 1940 Cal 167.
3. *State of Rajasthan* v. *Babulal*, AIR 1965 Raj 90.
4. *Doe* v. *Hodgson*, (1840) 12 A&E 135.
5. *Shyam Das Kapur* v. *Emperor*, ILR (1932 60 Cal 341 : AIR 1933 Cal 65.
6. *Sivasubramania* v. *Theerthapathi*, AIR 1933 Mad 451.

production of the rent deed, and the other side could have been compensated by ordering payment cost.[7]

2. SECTIONS 164 AND 89 OF EVIDENCE ACT

Section 89 of this Act states that the court shall presume that every document, called for, and produced after notice to produce, was attested, stamped, and executed in the manner required by la The presumption under Section 89 is based on the principle that no one shall be allowed to ta advantage of his own wrong.

Once a presumption is drawn under Section 89, it cannot be easily rebutted by the production of t document at a later stage. Section 164 provides that the party cannot use that document as eviden without the consent of the other party or the order of the court.[8]

This section has been held not to apply to criminal cases;[9] but the correctness of this view doubtful.[10]

Judge's power to put questions or order production.

S. 165. The Judge may, in order to discover or to obta proper proof of relevant facts, ask any question he pleases, any form, at any time, of any witness, or of the parties abo any fact relevant or irrelevant; and may order the productio of any document or thing; and neither the parties nor their agents shall be entitl to make any objection to any such question or order, nor, without the leave of t Court, to cross-examine any witness upon any answer given in reply to any su question:

Provided **that the judgment must be based upon facts declared by this Act to relevant, and duly proved:**

Provided also **that this section shall not authorize any Judge to compel a witness to answer any question, or to produce any document which such witne would be entitled to refuse to answer or produce under Sections 121 to 131, bo inclusive, if the question were asked or the document were called for by t adverse party; nor shall the Judge ask any question which it would be improp for any other person to ask under Section 148 or 149; nor shall he dispense wi primary evidence of any document, except in the cases hereinbefore excepted.**

SYNOPSIS

1. *Principle and Scope* ... 1344
2. *Power of judge to call witness* ... 1346
3. *Ask any question in any form* ... 1347
4. *About any fact relevant or irrelevant* ... 1348
5. *At any time* ... 1348
6. *Of any witness* ... 1349
7. *May order the production of any document or thing* ... 1350
8. *Parties not entitled to cross-examine a court witness without leave of the court* ... 1
9. *Judgement must be based on relevant and proved facts [Proviso-I]* ... 1
10. *Witness shall not be compelled to answer any question or to produce any document in certain cases [Proviso-II]* ... 1

COMMENTS

1. PRINCIPLE AND SCOPE

This section is intended to arm the Judge with the most extensive power possible for the purpose getting at the truth. The effect of this section is that in order to get to the bottom of the matter before

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7. (1971) 1 Rent LR 58 (Punj).
8. *Kashibai Mastand* v. *Vinayaka Ganesh*, AIR 1956 Bom 65.
9. *Sham Das Kapur* v. *Emperor*, AIR 1933 Cal 65.
10. *Emperor* v. *Makhan Lal*, AIR 1940 Cal 167.

the Court will be able to look at and enquire into every fact whatever.[11] Each party in a case is interested in setting up his own case and demolishing the one set up by his adversary. There is danger in some cases that the whole truth may not come out before the Court. The Judge, in order to discover, or to obtain proper proof of relevant facts, may exercise very wide powers indeed; but they all pivot upon the ascertainment of relevant facts. He may approach the case from any point of view, and is not tied down to the ruts marked out by the parties. He can ask (1) any question he pleases, (2) in any form, (3) at any time, (4) of any witness, (5) or of the parties, (6) about any fact relevant or irrelevant. No party is entitled to object to any such question or order, or to cross-examine the witness without the leave of the Court. But out of the evidence so brought out, the Judge can only use that which is relevant and duly proved. There are three exceptions to the very wide powers given to the Judge. The witness cannot be compelled to answer (1) any question or to produce any document contrary to Ss. 121 to 131; or (2) any question contrary to S. 148 or 149; and (3) the Judge shall not dispense with primary evidence of any document except as provided before.

In civil as well as in criminal proceedings the Legislature has vested ample powers in the courts to exercise this power (Civil Procedure Code, O. X, Rr. 2, 4; O. XVI, R. 14; S. 311, Criminal Procedure Code).

SIR JAMES STEPHEN, while presenting the report of the Select Committee, at the time of passing of this enactment (Indian Evidence Act) observed; "It is absolutely necessary that the judge should not only hear what is put before him by others, but that he should ascertain by his own inquiries how the facts actually stand. In order to do this, it will frequently be necessary for him to go into matters which are not themselves relevant to the matters in issue, but may lead to something that is, and it is in order to arm judges with express authority to do this that Section 165, which has been so much objected to, has been framed."

In his introduction to the Evidence Act (p. 162, 163) SIR JAMES STEPHEN stated "A judge or Magistrate in India frequently has to perform duties which in England would be performed by Police Officers or attorneys. He has to sift out the truth for himself as well as he can, and with little assistance of a professional kind. Section 165 is intended to arm the judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section is that, in order to get to the bottom of the matter before the court, he will be able to look at and enquire into every fact whatever.

BEST ON EVIDENCE (8th Ed. Section 86 p. 70) observed: "The Judge has a certain latitude allowed him with respect to the rules of forensic proof. He may ask any question in any form, and at any stage of the cause and to a certain extent even allow parties or their advocates to do so. This, however does not mean that he can receive illegal evidence at pleasure; for if such be left to the jury, a new trial may be granted even though the evidence were extracted by questions put from the Bench, but it is a power necessary to prevent justice being defeated by technicality to secure indicative evidence, and in criminal cases to assist in fixing the amount of punishment, and it should be exercised with discretion.....Discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substances, between equity and colourable glosses and pretences, and not to do according to their wills and private affections."

"In a great number of cases—probably, the vast numerical majority—the judge has to conduct the whole trial himself. In all cases he has to represent the interests of the public much more distinctly than he does in England. In many cases he has to get at the truth, or as near to it as he can, by the aid of collateral inquiries, which may incidentally tend to something relevant; and it is most unlikely that he should ever wish to push an inquiry needlessly, or to go into matters not really connected with it. We have accordingly thought it right to arm Judges with a general power to ask any questions, upon any facts of any witness, at any stage of the proceedings irrespective of the rules of evidence binding on the parties and their agents and we have inserted in the bill a distinct declaration that it is the duty of the Judge, especially in criminal cases not merely to listen to the evidence put before him, but to inquire to the utmost into the truth of the matter. We do not think, that the English theories, that the public have no interest in arriving at the truth and that even criminal proceedings ought to be regarded mainly in the light of private questions between the prosecutor and the prisoner, are at all suited to India, if indeed they are the result of any thing better than carelessness and apathy in England.

"In India, in an enormous mass of cases, it is absolutely necessary that the Judge should not only hear what is put before him by others, but that he should ascertain by his own inquiries how the facts

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11. STEPHEN, 162; *Ramachandra Reddy*, 1957 Andhra 742.

actually stand. In order to do this, it will frequently be necessary for him to go into matters which are themselves relevant to the matter in issue, but may lead to something that is, and it is in order to Judges with express authority to do this that this has section has been framed.[12]

The relative inactivity of the Judge is a feature of English proceedings going back to the mi ages. Speaking of the medieval trial, Pollock and Maitland said that it often reminds one of a cri match; "The judges sit in court, not in order that they may discover the truth, but in order that they n answer the question, "How's that?"; this passive habit seems to grow upon them as time goes on. It indeed the original method of criminal trial in all European countries, being the regularisation of primitive come back, but only in England has it survivied essentially in its original form.[13]

2. POWER OF JUDGE TO CALL WITNESS

The trial Judge has the power to call a witness not called by either the prosecution or the defen without their consent, if he considers that that course is necessary in the interests of justice[14]

Where in a suit for declaration of title to property the defended, claiming himself to be the own applied for recalling the plaintiff whom he alleged to be a labourer working on his land and receiv charges for the same so as to prove the receipts issued by him (the plaintiff), rejection of his applicat was held to be illegal.[15]

This section, and Section 540 Cr.P.C. (old), which corresponds to Section 311 of Cr.P.C. of 19 empowers the judge to call any witness or to produce any document in the interest of justice. Section 5 (old) Cr.P.C. (now 311 Cr. P.C.) and Section 165 Evidence Act, confer a wide discretion on the court act, as the exigencies of justice required.[16]

The powers under Section 540, (old) Cr.P.C. though wide enough, must not be exercised to disadvantage of the accused, particularly after his defence is over.[17] It would be an improper exercise power of the court under Section 540, (old) Cr.P.C. to do so merely because the evidence on rec supported the case of the prosecution and it would not help the accused in any way. Unless there absolute necessity for doing justice in the case, the power should not be exercised to examine a person a court witness.[18]

The power under Section 540, (old) Cr.P.C. is to be exercised to arrive at a just decision, and it d not mean a decision in favour of the accused.[19]

A liberal interpretation has to be given in favour of the court's powers under this section, and th can be exercised at any time during the proceedings.[20]

The Supreme Court held that the ban imposed by Section 162, Cr.P.C. in regard to the previ statements of the witnesses made to the police during investigation, does not operate against the pow of the court under Section 165 of Evidence Act. The language of Section 162, Cr.P.C. though wide not explicit or specific enough to extend the prohibition to the use of the wide and special powers of court to question a witness, expressly and explicitly given by Section 165 of the Act, in order to sec the ends of justice. A narrow and restrictive construction of Section 162, Cr.P.C. to confine it to the of statements to the proceedings before the court would reconcile or harmonize the two provisions also serve the end of justice.[21]

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12. Proceedings of the Legislative Council.
13. PER GLANWILLE WILLIAMS, quoted in *Ibrahim Husen* v. *State*, AIR 1969 Goa 68.
14. *R.* v. *Liddle*, (1928) 21 Cr. App Rep 3, CCA; *R.* v. *McMohan*, (1923) 24 Cr App Rep 95, CCA.
15. *Satinder Singh* v. *Sukhdev*, AIR 1999 HP 72 (para 8).
16. *Jamatraj Kewalji* v. *State of Maharashtra*, AIR 1968 SC 178, **following** *Rex* v. *Harris*, (1927) 2 KB 587; *Go Raghunath* v. *B.A. Kakade*, ILR 1975 Bom 829; *State of Sikkim* v. *Permba Sherpa*, 1981 Cr LJ 856 (Sikkim).
17. *In re, K.V.R.S. Mani*, AIR 1951 Mad 707; *Shreelal Kajaria* v. *State*, AIR (1964) Bom 165; *In re V. Mahade* (1964) 2 Mad LJ 587.
18. *In re, K.K. Narayanan Namiar*, AIR 1942 Mad 223.
19. *Kesava Pillai* v. *Emperor*, AIR (1929) Mad 837.
20. *In re, Narayanan Nambiar*, AIR 1942 Mad 223; *State* v. *Shaikh Mohamad Abdulla*, (1964) 2 Cr LJ 88 (J *Ratnakar Das* v *State*, AIR 1966 Ori 102; *Ram Jeet* v. *State*, AIR 1958 All 439.
21. *Raghunandan* v. *State of U.P.*, AIR 1964 SC 463.

Although a statement made by an accused person to a Police Officer on which the defence wished to rely is shut out by Section 162, Criminal Procedure Code a court having a case diary in its possession, at the request of the defending counsel, would be justified in putting a question to a Police Officer to elicit what the accused told him purely in the interest of the accused, within its wide powers under this section.[22] A Judge can himself look into previous statements of witnesses recorded in the police diary, even though the defence neither requested him to do so nor applied for copies of such statements and if the interests of justice demand, the Judge may himself under this section, put questions to witnesses to bring out discrepancies of a vital nature between such statements and the evidence of those witnesses in court.[23]

Under the Criminal Procedure Code, the accused has no right to get copies of the statements of witnesses made to police during investigation, which were reduced to writing and were entered in the police diary, but, the Magistrate can order the granting of such copies under the provisions of Section 145 read with Section 165 Evidence Act, without making the accused go through the formalities of Section 163 of the Evidence Act, i.e., issuing notice for production, provided the Magistrate feels that it should be granted in the interest of justice.[24]

Whenever all the facts necessary for a proper determination of the points in issue have not been elicited, inadvertently or otherwise by the Public Prosecutor or the defence counsel, it behoves the judge to exercise his, power under Section 165, and get elucidated what is left obscure or unintelligible.[25] The Court cannot cross-examine the prosecution witness beyond the extent of its powers under Section 165, as it would create, a reasonable apprehension that a fair and impartial trial may not be possible. The exercise of the power should be judicious.[26] When the accused is undefended, the only way in which the court may protect the accused in such a situation is to put necessary questions itself to the prosecution witness, on all matters requiring clarification, in exercise of its wide powers under Section 165.[27] It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions, and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in Section 138.[28]

The commentaries show clearly that the object of allowing the judge to ask irrelevant questions under this section is to obtain "indicative evidence" which may lead to the discovery of relevant evidence.[29]

The judges are not computers. In assessing the value to be attached to oral evidence, they are bound to call into aid their experience of life.[30]

A reference to this section is irrelevant in respect of judicial precedents and the binding nature of decisions of co-ordinate and superior authority.[31]

3. ASK ANY QUESTION IN ANY FORM

Under the Anglo-Saxon System of Law followed in this country, if the judge is of the opinion that the case has not been properly dealt with, he can put as many questions as he likes, relying on the provisions of Section 165 of the Evidence Act, in order to discover the truth; but, by and large, he should leave it to the parties to examine their witnesses.... The presiding judge has to be careful so as not to identify himself with any party.[32]

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22. *Molagan*, (1953) Mad 284.
23. *Emperor* v. *Lal Miya*, ILR (1943) 1 Cal 543 : AIR 1943 Cal 521.
24. *Natabar Jana* v. *State*, AIR 1955 Cal 138; *Sunil Kumar Datta* v. *State of W B.*, AIR 1963 Cal 431.
25. *Damusetti Subbanna* v. *State of A P.*, 1976 Cr LJ 1242 AP; *Mukta Kumar Ghosh* v. *State of W B.*, 1975 Cr LJ 838 (Cal). *Subbanna* v. *State*, (1975) 2 An WR 255.
26. *State of Mysore* v. *Hanmantha*, AIR 1966 Mys 231.
27. *Sessions Judge Nellore* v. *Ramana Reddy*, 1972 Cr LJ 1485 (AP).
28. *Noor Bux Kazi* v. *R.* ILR (1880) 6 Cal 279, 283.
29. *Krishna Ayyar* v. *Balakrishna Iyyar*, ILR (1933) 57 Mad 635.
30. *Chaturbhuj Panda* v. *Collector, Raigarh*, AIR 1969 SC 255.
31. *Tribhuvan Das* v. *Ratilal Motilal Patel*, AIR 1968 SC 372.
32. *Ibrahim Husen* v. *State*, AIR 1969 Gao 68; **See also** *Mohinder Singh* v. *State*, ILR (1970) 2 Del 854.

No doubt under Section 165 a court has got power to put any question it pleases in any form at an time to any of the witnesses or the parties about any fact relevant or irrelevant, but that power is to b exercised in order to discover or obtain proper proof of relevant facts.[33]

The Court while exercising powers under S. 165 of the Act should guard itself against causin prejudice to the defence or to the prosecution. But that is no reason to pre-empt the right of a party t adduce proper and relevant evidence which through any inadvertence one party would have missed o overlooked at an earlier stage.[34] It is the duty of prosecution to bring the contradiction on record b confronting the hostile witness with his previous statement made to the police and if the prosecution fai to do so, it is the duty of Court to put such questions as are necessary to ascertain the truth[35] but in th course of judgment, under Section 165 the Court cannot permit the prosecution to re-introduce evidenc to cover up obvious lacuna.[36] Section 165 confers vast and unrestricted powers on the trial Court to pu any question he pleases in any form at any time, to any witness or to the parties, about any fact, relevan or irrelevant, in order to discover relevant facts. The use of the word 'any' could only have been inspire by legislative intent to confer unbridled power on the trial Court to use the power whenever it deem necessary to elicit the truth. A trial judge is expected to actively participate in the trial. If a judge felt th a witness had committed an error or a slip, it is his duty to ascertain whether it was so, for to err is huma and the chances of erring may accelerate under stress of nervousness during cross-examination.[37] judge is expected to actively participate in the trial, elicit necessary materials from witnesses at th appropriate context which he feels necessary for reaching the correct conclusion, even during their cross examination and even when a witness in a bit of confusion.[38]

4. ABOUT ANY FACT RELEVANT OR IRRELEVANT

The Calcutta High Court observed that, while theoretically, the powers of the judge are limitless an unfettered, certain principles have to be recognised, which he must follow as to the manner in which h exercises the power. It need hardly be pointed out that he must not take sides, but he must not als "descend into the arena" and show the zeal of a combatant. If he does so, and questions witnesses in th spirit of beating them down or encouraging them to give an answer, his action may have an intimidatin or inflatory effect upon them, and their evidence may not be the evidence they would have given, if n so intimidated or encouraged..... The judge may always intervene, in the course of examination b counsel, to put a question in a clear form, or to have an obscrure answer clarified, or to prevent a witne being unfairly misled; but if he does more, and stops counsel again and again to put a long series of h own questions, he makes an effective examination or cross-examination impossible and diverts the tri from its natural course."[39]

The judge should exercise powers under Section 165 and put relevant questions for the purpose o ascertaining the truth. No duty is cast on the judge under Section 165 to put questions for the purpose o filling up the lacunae in the matter of examination and/or cross-examination of the witness. [40]

5. AT ANY TIME

In HALSBURY 4th Ed., Vol. 11, Para: 296, Page: 172 it is stated: "He should not call such a witne after the evidence for the defence is closed, except in a matter "arising *ex improviso* which no huma ingenuity could foresee.[41]

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33. *Nepal Chandra Roy* v. *Netai Chandra Das*, (1971) 3 SCC 303.
34. *Suja P. Chacko* v. *State of Kerala*, 1994 Cr LJ NOC 292 (Ker).
35. *State of Rajasthan* v. *Bhera*, 1997 Cr LJ 1237 (Raj).
36. *Omprakash Shankarlal Sharma* v. *State of Maharashtra*, 1993 Cr LJ 3175 (para 4) (Bom).
37. *State of Rajasthan* v. *Ani*, AIR 1997 SC 1023 : 1997 Cr LJ 1529, **following** *Ram Chander* v. *State of Haryana*, A 1981 SC 1036 : 1081 Cr LJ 609.
38. *State of Rajasthan* v. *Ani*, AIR 1997 SC 1023 : 1997 Cr LJ 1529, **following** *Chander* v. *State of Haryana*, AIR 19 SC 1036 : 1981 Cr LJ 609.
39. *Sunil Chandra Roy* v. *State*, AIR 1954 Cal 305 (paras 32 & 33) **relying on** *Yuill* v. *Yuill*, (1945) 1 All ER 183; *No Bux Kazi* v. *Emperor* ILR (1880) 6 Cal 279; *Yusuf H. Yusuf H. Abbas* v. *Bhagwan Dass P. Nangpal*, 1949 Bom 346
40. ILR (1977) 2 Cal 669; *Ibrahim Husen* v. *State*, AIR 1969 Goa 68.
41. *R.* v. *Harris*, (1927) 2 KB 587, CCA, applying the test laid down by Tindal CJ in *R.* v. *Frost* as reported in (1839 States Tr NS 85 at 386, for evidence in rebuttal (but **see** *R* v. *Owen*, (1952) 2 QB 362 : (1952) 1 All ER 1040, CC and para 294, note 4, *ante*. **See also** *R.* v. *Howarth*, (1918) 13 Cr App Rep 99, CCA (recall after summing up; cro

The trial judge is entitled to ask a witness, at any stage of the proceedings, questions directed to ascertaining whether he has a sense of responsibility and of the obligations imposed by an oath.[42]

This section is not intended to be used by the judge during cross-examination of a witness, as it would be embarrassing to the counsel examining a witness, and it may take the lawyer away from the trend of his examination.[43] The court has got power to allow further evidence after the closure of the prosecution case; there is no infirmity or illegality in such a procedure.[44]

It has been held that a judge had complete discretion, in regard to whether a witness should be recalled and that the court of Criminal Appeal would not interfere unless it was made to appear that injustice had been caused. It was a case where court called further evidence after completion of the defence by the accused.[45]

Rejection of an application filed by the public prosecutor, to call for a letter lying in the High Court on the ground of delay was held not proper.[46]

6. OF ANY WITNESS

In the insterest of justice, the court has got power to examine any one as a court witness.[47]

The court can, under Section 165, examine the material witnesses left over by the prosecution without assigning any reason, if the court thinks fit that they are material witnesses who can throw light in the interest of justice.[48]

Lord ESHER observed: "If there be a person whom neither party to an action chooses to call as a witness, and the judge thinks that the person is able to elucidate the truth, the judge, in my opinion, is entitled to call him; and I cannot agree that such a course has never been taken by a judge before."[49]

Under order XVI, Rule 14, C.P.C., if the court thinks it necessary to examine any person, other than a party to the proceeding and a person not named by the party as a witness in the proceeding, it may, of its own motion, summon such person to give evidence or to produce any document in his possession. Order X, Rule 2, C.P.C., enables the court to examine any party appearing in person, or present in court, or any person who will be able to answer any material question relating to the suit. Order X, Rule 4, C.P.C. enables the court to direct any party to appear in person to answer any material question relating to the suit. Under Section 540 Cr. P.C. (old) corresponding to Section 311 of Cr. P.C. of 1973, the court has got the power to summon any witness after the close of the proceedings in a criminal case, in the interest of justice. This section also enables the court to order the production of any document, or to put any question at any time during the proceeding, in order to discover, or to obtain proper proof of, relevant facts.

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examination); *R.* v. *Liddle*, (1928) 21 Cr App Rep 3, CCA (alibi); *R* v *McMahon*, (1933) 24 Cr App Rep 95, CCA (defamatory libel; questions put after defence suggesting words complained of were true); *R* v. *Day*, (1940) 1 All ER 402, CCA (forgery; evidence of handwriting expert called after defence; *R.* v. *Davis*, (1960) 44 Cr App Rep 235, CCA (communication between clerk and jury); *R.* v. *Cleghorn*, (1967) 2 QB 584 : (1967) 1 All ER 996, CA; *cf. R.* v. *Tregear*, (1967) 1 All ER 989, CA), and only where no injustice or prejudice could be caused to the defendant *R.* v. *Cleghorn*, (1967) 2 QB 584, (1967) 1 All ER 996, CA, **applying** *R* v. *Harris*, (1927) 2 KB 587, CCA). Once the summing up is concluded no further evidence ought to be introduced to the jury, *R.* v. *Owen*, (1952) 2 QB 362 : (1952) 1 All ER 1040, CCA; *R.* v. *Wilson*, (1957) 41 Cr App Rep 226, CCA; *R.* v. *Gearing*, (1968) 1 All ER 579 : (1968) 1 WLR 341 CA; *R.* v. *Corless*, (1972) 56 Cr App Rep 341 CA; *cf. R* v. *Nixon*, (1968) 2 All ER 33 : (1968) 1 WLR 577 CA. As to the right of the trial judge to recall a witness for the prosecution after a submission of no case to answer on behalf of the defence, **see** *R.* v. *Sullivan*, (1923) 1 KB 47, CCA; *R* v. *McKenna*, (1956) 40 Cr App Rep 65, CCA (except in very exceptional circumstances in favour of the defence) *R.* v. *Sanderson*, (1953) 1 All ER 485, (1953) 1 WLR 392, CCA. **See also** *R.* v. *Nixon*, (1968) 2 All ER 33 : (1968) 1 WLR 577 CA (inspection by jury after summing up at request of defence); *cf. R.* v. *Lawrence*, (1968) 1 All ER 579 : (1968) 1 WLR 341. CA (inspection by jury after summing up; conviction quashed).

42. *R.* v. *Wilson*, (1924) 18 Cr App Rep 108, CCA).
43. *Nanjappa Goundan* v. *Periakkal*, AIR 1951 Mad 772.
44. 1983 All Cr. LR 21 (P&H).
45. *John Mckenna* (1956) 40 Cri App. Rep 65. **See also** *Gurudeo Singh* v. *State of Punjab*, (1982) 2 Cr LJ 2211 (P&H).
46. *Bhagaban Behara* v. *Maaeshwar Behara*, (1980) 50 Cut LT 443.
47. *Jamatraj Kewalji Gavani* v. *State of Maharashtra*, AIR 1968 SC 178.
48. *Habeeb Mohammad* v. *State of Hyderabad*, AIR 1954 SC 51.
49. *Coulson* v. *Disborough*, (1894) 2 QB 316, 318.

The above powers given to the court should not be exercised to save the parties from trouble an expense.[50]

7. MAY ORDER THE PRODUCTION OF ANY DOCUMENT OR THING

The power of the Court to direct production of any document under this section is subject to th proviso at the beginning of that section that the direction must be "in order to discover or obtain prop proof of relevant facts."

This section empowers the court to order production of any document or thing, if it conside necessary.[51] It was held, that for fixation of liability for the accident and the claim for the compensatio when parties did not produce the required material, the court under Section 165, should get at th evidence by calling for documents, or should give further opportunity to the parties to produce necessa evidence.[52] Section 60 states that, if oral evidence refers to the existence or condition of any materi thing, other than a document, the court may, if it thinks fit, require the production of such a materi thing for its inspection.[53]

But, under the second proviso, the court has no power to compel the production of any documen for which privilege is claimed as contained in Sections 121 to 131 of the Evidence Act.

8. PARTIES NOT ENTITLED TO CROSS-EXAMINE A COURT WITNESS WITHOUT LEAVE OF THE COURT

When the court examines a person as a court witness under Section 165, the parties have no right cross-examine him except with the permission of the court; no doubt, the discretion will have to b exercised judicially, and ordinarily the judge would give the requisite permission, if the answers give are adverse to the party who seeks the said permission.[54] Cross-examination of a court witness can b permitted if the answers given by a witness in such examination are adverse to the party.[55] If what th witness has said in answer to the questions put to him by the Judge is adverse to either of the parties, th Judge ought to allow the witness to be cross-examined upon his answers. A general fishing cros examination ought not to be permitted.[56] The accused should be given an opportunity to cross-examine witness on the answers to questions put by the Court.[57]

The last part of this section says that, without the leave of the court, one cannot cross-examine an witness upon any answer given in reply to any question put by the court. This is to be considered only cases when the court puts questions during the examination of a witness in the witness box. So far as an person summoned by the court and examined is concerned, there is nothing in the section which wou debar the party from proceeding with the cross-examination of the witness summoned by the court.[58]

The granting of permission for examining the witness on the answers given to the questions put b the court would arise when a party produces a witness, and such permission would ordinarily be grant by the Court.[59]

"When the counsel for the prisoner has examined or declined to cross-examine a witness, and th Court afterwards, of its own motion, examines him, the witness cannot then, without the permission the Court, be subjected to cross-examination. When after the examination of a witness by th complainant and the defendant, the Court takes him in hand, he is put under special pressure as the Judg is empowered to ask any question he pleases, in any form about any fact relevant or irrelevant...and he

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50. *In re K.V.R.S. Mani*, AIR 1951 Mad 707.
51. *Ghurey Lal* v. *State*, AIR 1965 All 206; 1964 Mad WN 356.
52. *Rajeswari* v. *Hotel Imperiol*, AIR 1989 Mad 34.
53. *Vide* commentary under the proviso 2 of Section 60.
54. *In re Mukhesh Ramchandra Reddy*, AIR 1958 AP 165; *R.* v. *Sakharam Mukundji*, 11 BHCR 166; *Gopal Lall Manik*, ILR (1897) 24 Cal 288.
55. 1983 All Cr. LR 15 (P&H).
56. *Coulson* v. *Disborough*, (1894) 2 QB 316.
57. In the matter of the *R* v. *Girish Chunder Talukdar*, (1879) 5 Cal 614; *Mohendra Nath Das Gupta* v. *Emperor*, I (1902) 29 Cal 387.
58. *Gopal Lall* v. *Manicklall*, ILR 24 Cal 288; *R* v. *Girish Chander Talukdar*, ILR (1897) 5 Cal 614.
59. *In re Mukhesh Ramachandra Reddy*, AIR 1958 AP 165.

therefore, at the same time placed under the special protection of the Court, which may, at its discretion, allow a party to cross-examine him, but this cannot be asked for as a matter of right. This principle applies equally whether it is intended to direct the examination to the witness's statements of fact, or to circumstances touching his credibility, for any question meant to impair his credit tends (or is so designed) to get rid of the effect of all his answers, and of each of them just as much as one that may bring out an inconsistency or contradiction. It is then a cross-examination upon answers upon every answer given to the Court, and is subject to the Court's control."[60]

It is entirely in the discretion of the court to allow cross-examination of a court witness to whom questions are put under Section 165.[61]

Where a witness was called by the court, after the close of the case in exercise of the power under Section 540, (old) Cr. P.C. (now Section 311), it was held that both parties had a right to cross-examine him freely.[62]

9. JUDGEMENT MUST BE BASED ON RELEVANT AND PROVED FACTS [PROVISO - I]

This proviso says that the judgement must be based upon facts declared by this Act to be relevant (Ss. 5-55) and duly proved (Ss. 56-100).

The Privy Council held that, under the Evidence Act before the facts can be treated as relevant under some specific provisions of the Act, they must also be proved as laid down in the Act; facts which are not properly proved cannot be considered by the judge and cannot form the basis of a judgement.[63] It is only those facts which are declared to be relevant and duly proved, which can be the basis of a judgment as provided by this section.[64] It would be intolerable that the Court should decide rights upon suspicion unsupported by testimony.[65] Consent of the parties, admitting certain evidence cannot form the basis of a judgment, as it cannot take the place of determination of the facts by the Evidence Act.[66] However, it was held that when the parties consented to the admission of the evidence, it can form the basis of the judgment, and it is not vitiated even if the conditions prescribed in Section 33 of the Act were not complied with.[67]

When evidence was admitted which was inadmissible *per se*, even though there was omission to object to the admissibility, it cannot form the basis of the judgment.[68] The omission to object to the admission of irrelevant evidence cannot possibly make it relevant, and such irrelevant evidence cannot form the basis of a judgment.[69]

10. WITNESS SHALL NOT BE COMPELLED TO ANSWER ANY QUESTION OR TO PRODUCE ANY DOCUMENT IN CERTAIN CASES [PROVISO - II]

This proviso states that this section does not empower any judge to compel any witness to answer any question, or to produce any document, if such witness is entitled to refuse to answer, or to produce the document by claiming privilege; he shall also not ask any improper questions as contained in Sections 148 and 149 of this Act.[70]

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60. *R* v. *Sakharam Mukundji*, (1874) 11 BHC 166, 168.
61. *Dwarka Dass* v. *State of J&K*, 1979 Cr LJ 550 (J&K).
62. *R.* v. *Pith*, 47 All 147.
63. *Shris Chandra Nandy* v. *Rakhalannada*, AIR 1941 PC 16; *Miyana Hasan Abdulla* v. *State of Gujarath*, AIR 1962 Guj 214; *Baldeo Singh* v. *Sheoraj Kueri*, AIR 1920 Pat 116; *Modi Nathubhai* v. *Chhotubhai Manibhai*, AIR 1962 Guj 68.
64. *Miyana Hasan Abdulla* v. *State of Gujarat*, AIR 1962 Guj 214.
65. *Sreemutty Mohun Bibee* v. *Sharat Chander Mitter*, (1897) 2 CWN 18, 27.
66. *Ponnuswami Pillai* v. *Sihgaram Pillai*, AIR 1919 Mad 848.
67. *Vijayasinghji* v. *Kashikchandra*, (1978) 19 Guj LR 980; **See also** *Sri Rajah Prakasarayanim Garu* v. *Venkatrao*, ILR (1916) 38 Mad 160.
68. *Moksh Builders and Financiers Ltd.* v. *Union of India*, (1968) 70 Punj LR (D) 71.
69. *Miller* v. *Madhodas*, ILR 19 All 76 (PC); *Nanakchand* v. *Mian Mohammad Shahbaz Khan*, AIR 1936 Lah 114.
70. *Municipal Corporation of Greater Bombay* v. *Lala Pancham*, AIR 1965 SC 1008.

The proviso subjects the judge to the provisions contained in Ss. 121-131, S. 148 and S. 149. Th judge has the power of asking irrelevant questions to a witness, if he does so in order to obtain proof relevant facts, but if he asks questions with a view to criminal proceedings being taken against th witness, the witness is not bound to answer them, and cannot be punished for not answering them und Section 179, Indian Penal Code.[71] A witness should not be coerced to answer a question.[72] Where judge rebuked a witness and threatened him with prosecution for perjury if he changed his statement, th Supreme Court held that the proceeding was vitiated.[73]

Where privilege was claimed for production of the document, it was held by the Full Bench Gauhati High Court, in *Tridib Sharma* v. *State of Assam*[74], that only such documents, statements, or par thereof as are necessary for the ends of justice, be allowed to be disclosed. However, the party is n allowed to use the disclosed documents, statements or part thereof out of context or divulge them for an other purpose.

Power of jury or assessors to put questions.

S. 166. In cases tried by jury or with assessors, the jury o assessors may put any questions to the witnesses, through or b leave of the Judge, which the Judge himself might put an which he considers proper.

COMMENTS

1. PRINCIPLE AND SCOPE

This section has lost its importance as trial by jury or assessors has been abolished in this country.

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71. *Queen-Empress* v. *Hari Lakshman*, ILR (1885) 10 Bom 185.
72. *Queen-Empress* v. *Ishri Singh*, ILR (1886) 8 All 672, 675.
73. *Ram Chander* v. *Haryana*, AIR 1981 SC 1036.
74. (1985) 2 Gau LR 229 (FB).

CHAPTER XI

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE

No new trial for improper admission or rejection of evidence.

S. 167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

SYNOPSIS

1. *Principle and Scope* ... 1353
2. *Decision* ... 1354
3. *In any case* ... 1354
4. *Civil* ... 1354
5. *Letters patent, Clause 26* ... 1355
6. *Criminal* ... 1355
7. *The Court before which such objection is raised* ... 1355
8. *Omission to consider relevant evidence* ... 1357

COMMENTS

1. PRINCIPLE AND SCOPE

Principle.—The improper (a) admission, or (b) rejection of evidence is no ground for a new trial, or reversal, of any decision, if,

(i) in the case of improper admission—

there is sufficient evidence to justify the decision independently of the evidence objected to and admitted; or

(ii) in the case of improper rejection—

the decision could not be varied, if the rejected evidence had been received.

Object.—The object of the section is that the Court of appeal or revision should not disturb a decision on the ground of improper admission or rejection of evidence if in spite of such evidence, there are sufficient materials in the case to justify the decision.[1] In other words, technical objections will not be allowed to prevail, where substantial justice appears to have been done.

The main function of the court is to do substantial justice between the parties and see if there is sufficient evidence to justify its conclusion. If the evidence, after omitting such portion of the evidence which should not have been admitted, is sufficient to decide a case, then according to this section, such decision shall not be reversed nor shall a new trial ordered.[2]

The Privy Council held that it was the duty of their Lordships who were judges of the fact in such a case as this, to consider whether, throwing aside such evidence, there still remained sufficient evidence to support the decree.[3] Where there is evidence to convict the accused, besides other evidence of doubtful credibility, or improperly admitted evidence, the High Court, is competent and is entitled to convict the accused, even in an appeal against acquittal.[4] The decision on inadmissible confession would

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1. *Mohur Singh* v. *Ghuriba*, (1870) 6 Beng LR 495, 499 PC 15 WR (PC) 8; *Dwijesh Chandra Roy Choudari* v. *Naresh Chandra Gupta*, ILR (1946) 1 Cal 149.
2. *Goshain Tota* v. *Ruckminee Bullab*, 13 MIA 77 PC.
3. *Mohur Singh* v. *Ghuriba*, 6 BLR 495. **See also** *K. Sarkara Chenna* v. *K. Manappa*, AIR 1925 Mad 245; *Maharaja Koowar* v. *Nundlal*, 8 MIA 199; *Bunseedhur* v. *Govt of Bengal*, 9 BLR 341 PC; *Goshain Tota* v. *Ruckminee Bullub*, 13 MIA 77; *Womma Kant* v. *Ganga Narain*, (1973) 20 WR 384.
4. *Dhondu* v. *R*, 1950 PC 30.

not be interfered with, if other evidence on record is sufficient to sustain conviction, after excluding the inadmissible confession.[5] When no prejudice is caused to the party by reason of admission of inadmissible evidence and the case can be decided on the rest of the material on record the decision need not be set aside or the case need not be remanded for fresh trial or rehearing.[6]

It was held by the Supreme Court that as regards the rejected evidence, the question under Section 167, is not so much whether the evidence rejected would not have been accepted against the other testimony on record; it is whether that evidence "ought not to have varied the decision". Where it is clear from the record that the prosecution, though it had cited certain person as a witness, was not very keen to examine him and when that person objected to giving evidence, the prosecution dropped him, it is not a case in which evidence can be said to have been rejected by the court within Section 167; in such a case, the prosecution does not in fact tender the person as a witness.[7]

The appellate Court is entitled to examine the evidence for itself and to substitute its own verdict for the verdict of the jury if on examining the record for itself it comes to the conclusion that the verdict of the jury was erroneous or that there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent man has been convicted.[8]

Statement under Section 313 of Cr.P.C. cannot be taken as evidence, hence Section 167 of Evidence Act was not attracted.[9]

2. DECISION

The word 'decision' is more generally used as applicable to civil proceedings, but it is by no means inappropriate to criminal cases; and if it was the intention of the Legislature to use an expression which would apply equally to civil as to criminal proceedings, there is probably no other word which would have answered their purpose better.[10]

3. IN ANY CASE

These words are very wide and include criminal trials by jury.[11]

When a part of the evidence which has been allowed to go to the jury is found to be irrelevant and inadmissible, it is open to the High Court in appeal either to uphold the verdict upon the remaining evidence on the record under this section or to quash the verdict and order a retrial.[12]

4. CIVIL

In the case of first appeals the provisions of this section have to be read with Section 99 of the Civil Procedure Code (Act V of 1908) which provides "No decree shall be reversed or substantially varied nor shall any case be remanded, in appeal on account of ..... any error, defect or irregularity in any proceeding in the suit not affecting the merits of the case ..." see also O. XLI, Rr. 27 to 29.

In second appeals, one of the grounds justifying the appeal is "a substantial error or defect in the procedure... which may possibly have produced error or defect in the decision of the case upon the merits [S. 100(1)(c) of the Civil Procedure Code of 1908].

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5. *Nika Ram* v. *State of H.P.*, AIR 1972 SC 2077; *Jago* v. *State of Rajastan*, 1953 All 406 (inadmissible evidence); *Abdul Rahim* v. *R*, AIR 1946 PC 82; *State* v. *Ram Prasad Singh*, AIR 1953 Pat 354; *In re. Moorthy*, 1956 Mad 536; *Ram Kishan* v. *State of Bombay*, AIR 1955 SC 104; *Amalesh Chandra* v. *State*, AIR 1952 Cal 481; *Kasim Ali* v. *King*, 1950 Assam 75; *Sudhindra Nath* v. *State*, AIR 1953 Cal 339; *Sunil Chandra Roy* v. *State*, AIR 1954 Cal 305; *Danda Pani Das* v. *Mohan Nayak*, AIR 1954 Ori 67.
6. *Jagabandhu Sahu* v. *Girdhari Swain*, (1970) 36 Cut LT 1194.
7. *Narayan* v. *State of Punjab*, AIR 1959 SC 484.
8. *Ramkishan* v. *State of Bombay*, AIR 1955 SC 104.
9. *Ranjit Mondal & Sajal Barui* v. *State*, 1997 Cr LJ 1586 (Cal). The Court referred to *State* v. *Sukhdev*, AIR 1992 SC 2100 : 1992 Cr LJ 3454.
10. *Queen* v. *Hurribole Chunder*, ILR (1876) 1 Cal 207.
11. *Queen Emperor* v. *Ramachandra Govind Harshe*, ILR (1895) 19 Bom 749, 762.
12. *Queen-Empress* v. *Ramachandra Govind Harshe*, ILR (1895) 19 Bom 749 CONTRA, *Wafadar Khan* v. *Queen Empresses*, (1894) 21 Cal 955; *Dal Singh* v. *King Emperor*, (1917) 19 Bom LR 510 44 IA 137; ILR 44 Cal 876; *Ramesh Chandra Dass* v. *Emperor*, ILR (1919) 46 Cal 895.

Where a document was admitted by the Court with direction to the party to pay the necessary amount of the stamp duty and was acted upon while pronouncing judgment, the said judgment could not be challenged in appeal in view of this section.[13]

5. LETTERS PATENT, CLAUSE 26

The provisions of this section apply to the High Court when acting under Clause 26 of the Letters patent.[14]

6. CRIMINAL

In Criminal Cases also the Legislature has provided a similar safeguard "No finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered..... on appeal or revision, on account of any misdirection in any charge to a jury unless such error omission, irregularity, or misdirection has in fact occassioned a failure of justice (S. 465 of the Criminal Procedure Code).

7. THE COURT BEFORE WHICH SUCH OBJECTION IS RAISED

The Court which is to decide upon the sufficiency of the evidence to support the conviction is the court of review or the appellate court,[15] but not the Court below.[16]

Where the first Court improperly admits evidence the High Court has power to interfere and remand the case for a new trial.[17] The Omission to receive an important document,[18] or to examine a material witness,[19] justifies a reversal of the decision. Where admission of inadmissible evidence had seriously influenced the minds of the jury or the court in giving the verdict, the High Court has to set aside the verdict and conviction.[20] Where the findings of the lower appellate court were based on irrelevant evidence and also on relevant evidence it is not possible to say whether conclusions were based upon consideration of the relevant evidence alone and the case has to be remanded for retrial in such cases. The Court can interfere where the trial court refused to receive evidence which ought to have been admitted.[21] Where the court acts on material, partly relevant and partly irrelevant, it is not possible to say to what extent the mind of the Court was affected by the irrelevant material in giving a finding, such a finding is vitiated because of the use of inadmissible material.[22]

Disregarding of a Commissioners report constitutes no error or defect in procedure, nor does it affect, the merits of the case within the meaning of Section 100(1)(c), C.P.C. to justify interference in second appeal, if there was other evidence on record, sufficient for the disposal of the case and there was proper exercise of jurisdiction by the court.[23] Even in a second appeal, the High Court has to see whether there is other evidence justifying the decision, after excluding the irrelevant evidence admitted in the trial Court.[24]

Section 167 bars a fresh trial, unless it could be established that there would have been a material difference in the result if the evidence allegedly rejected improperly had been allowed to be produced.[25] Where the court examined the accused as a court witness against his protest, to prove a fact which prosecution was bound to prove, it was held that the act of the Magistrate was in direct contravention of

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13. ***Babulal*** v. ***Mohammad Sharif***, AIR 1996 MP 147 (para 8).
14. *Queen* v. *Hurribole Chunder Ghose*, ILR (1876) 1 Cal 207; *Imperatrix* v. *Pitamber Jina*, ILR (1877) 2 Bom61; *Emperor* v. *Narayan*, (1907) 9 Bom LR 789, 32 Bom 111, FB. See *Emperor* v. *Panchu Das*, (1920) 47 Cal 671 (FB).
15. PER WESTROPP, CJ, in *Imperatrix* v. *Pitambar Jina*, ILR (1877) 2 Bom 61, 65
16. *Queen* v. *Hurribole Chunder Ghose*, ILR (1876) 1 Cal 207, 217.
17. *Palakdhari Raj* v. *Manners*, ILR (1895) 23 Cal 179.
18. *Devidas Jagjivan* v. *Pirjada Begm*, ILR (1884) 8 Bombay 377; *Talwar Singh* v. *Bhagavan Dass*, ILR (1907) 12 CWN 312 : 8 CLJ 147.
19. *Moni Lal Bandhopadhyaya* v. *Khiroda Dass*, ILR 1893 20 Cal 740.
20. *Gokul Chandra Chatterjee* v. *State*, AIR 1950 Cal 306; ***Amalesh Chandra*** v. ***State***, AIR 1952 Cal 481; ***Kashmiri Ali*** v. *King*, (1950) Assam 75.
21. *Palakdhari Roy* v. *Manners*, ILR (1895) 23 Cal 179.
22. *Kalappa Saidappa* v. *Bhima Govind*, AIR (1961) Mys 160.
23. *Bibhuti Bhushan Bank* v. *Sadhan Chandra*, AIR (1965) Cal 199.
24. *Gajadhar* v. *Nanda Lal*, AIR 1934 Pat 55; *Hari Ahir* v. *Sat Sanghat Chacha*, 1934 Pat 617.
25. *Jasoda Haldar* v. *Sailendra Nath Somanatha*, AIR 1957 Cal 372.

Section 342A, (old) Cr.P.C. [now Section 315(1)] and the question of correctness of the conviction should be examined by eschewing the evidence of the accused, and there was no ground to quash the entire proceedings in view of Section 167 Evidence Act.[26] Mere exclusion of evidence by the trial court would not be a sufficient ground for reversing the decree, unless the appellate Court comes to the conclusion, that if the evidence which was refused had been received, it would have varied the decision.[27] Where the Court refused to allow the use of confessional statement to contradict or corroborate the evidence of the witness approver, it was held that when there was other evidence corroborating the testimony of the approver and on facts, there was no prejudice to the accused, the order of refusal would not be interfered with in revision.[28] In a case of departmental enquiry under the Central Reserve Police Rules 1965 in respect of unauthorised overstay after leave, the delinquent did not deny the allegation of overstay and did not produce evidence to show that his overstay was for reasons beyond his control, which burden he had to discharge. But, he contended that he was not given an opportunity to cross-examine the officer who made a report against him behind his back. It was held that the enquiry would not be said to be vitiated, for non-cross examination of the officer, as no prejudice was shown to have been caused by such non cross-examination.[29] Where statement of two witnesses had been wrongly admitted under Section 288 Cr.P.C. (old), it was held that it could not affect the verdict, as other evidence of the eye-witness if believed, would have sustained the charge. Hence the objection as to improper admission of that evidence was of no avail.[30] It is not in every case in which something extraneous has been taken into consideration that the High Court would upset a finding. Where it is patently clear that there could have been no other decision, taking into account the extraneous circumstances alone would not vitiate the order.[31] Where the Magistrate was not satisfied with the voluntariness of the confession, and the accused did not understand language in which the questions were put to him or with the answers were attributed to him such a confession must be excluded from the evidence. But if the exclusion of the confession did not affect the value of the circumstantial evidence against the accused the conviction can be up held.[32] Where there was improper admission or rejection of evidence but even if it is excluded, if the other independent evidence is sufficient the decision need not be varied.[33]

When the court took into consideration all documentary evidence before recording a finding, the finding would not be vitiated by reason of the fact that one of such documents was not duly proved.[34]

The accused was originally charged for certain offences and also for the offence of waging war against the State which was later given up by the prosecution. During evidence some evidence was given to prove earlier incidents to bring out the political views of the accused. It was held that the evidence could not have prejudiced the accused, since the trial was concerned only with the criminal acts done by the accused on the date of occurrence. In such cases unnecessary evidence can be excluded.[35]

The Lower Court upheld the jurisdiction of the Municipality to levy cart tax by invoking a presumption under Section 99(4) of the Madras District Municipality Act. It was held that the presumption under Section 99(4) was confined to carriage and had no application to a cart but as the presumption was not the only basis and there was evidence of facts and circumstances to justify its jurisdiction to levy the tax, the decision of the lower court cold not be interfered with (1961 Mad LJ (Cri) 306. When the court refused to summon a defence witness, it was not a case of rejection of proper evidence and so Section 167 is not attracted. (1976 Chand LR (Cri) : 1977 Sim LC 145 (HP).....).

The reception of inadmissible evidence is less injurious than the rejection of admissible evidence, because, in the former case in arriving at the decision, the evidence wrongly admitted can well be excluded from consideration whereas the evidence wrongly excluded can only be brought on record by

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26. *John* v. *Shertally Municipality*, AIR (1959) Ker 323 : ILR 1950 Ker 150.
27. *De Souza* v. *Pestanji*, ILR 8 Bom 408.
28. *Birendra Chandra De* v. *State*, AIR (1957) Assam 168.
29. *Shyam Singh* v. *D.I.G. Central Reserve Police*, AIR (1965) Raj 140.
30. *Chhotka* v. *State*, AIR 1958 Cal 482.
31. *Madanlal Chawla* v. *H.B.T. Institute, Kanpur*, AIR 1962 All 166.
32. 1957 Jab LR 460.
33. *Gopi Harachandan* v. *Rama Krishna Paltan Singh*, ILR 1967 Cut 862 : 33 Cut LT 1098.
34. *Sukh Ram* v. *Ram Swarup*, (1969) All LJ 129.
35. *Kandan Narayanan* v. *State*, (1952) Tra/co 459.

having recourse to further proceeding, necessitating thereby the prolongation of the trial, and possible harrasment to the persons concerned.[36]

It is the duty of the court to apply its mind to the question whether after discarding the evidence improperly admitted, there is left sufficient evidence to justify the conviction.[37]

8. OMISSION TO CONSIDER RELEVANT EVIDENCE

Where a decision was given without considering certain recitals in a document, it was held that the decision is not vitiated if it would not have been different even if those recitals had been considered by the court.[38] Where the finding is one of fact, and it is based on the trivial error of record but the rest of the material on record is sufficient to justify that finding, it cannot be said that the finding is vitiated.[39]

Where the court excluded the main evidence in support of a party's case, and there was no evidence apart from the rejected evidence the court would be justified in ordering a fresh hearing of the case.[40]

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36. *State* v. *Mysore* v. *Sampangramiah*, AIR 1953 Mys 80; In re *S.N. Appannaiengar*, 9 Mys LJ 69.
37. *Bihari* v. *State*, (1956) All LJ 182.
38. *Gangadhar Mohanti* v. *Priyanath Das*, (1963) 29 Cut LT 357.
39. *Gangadhar Mahanti* v. *Priyanath Das*, (1963) 29 Cut LT 357.
40. *Channoo Mahto* v. *Jang Behadur Singh*, AIR 1957 Pat 293.

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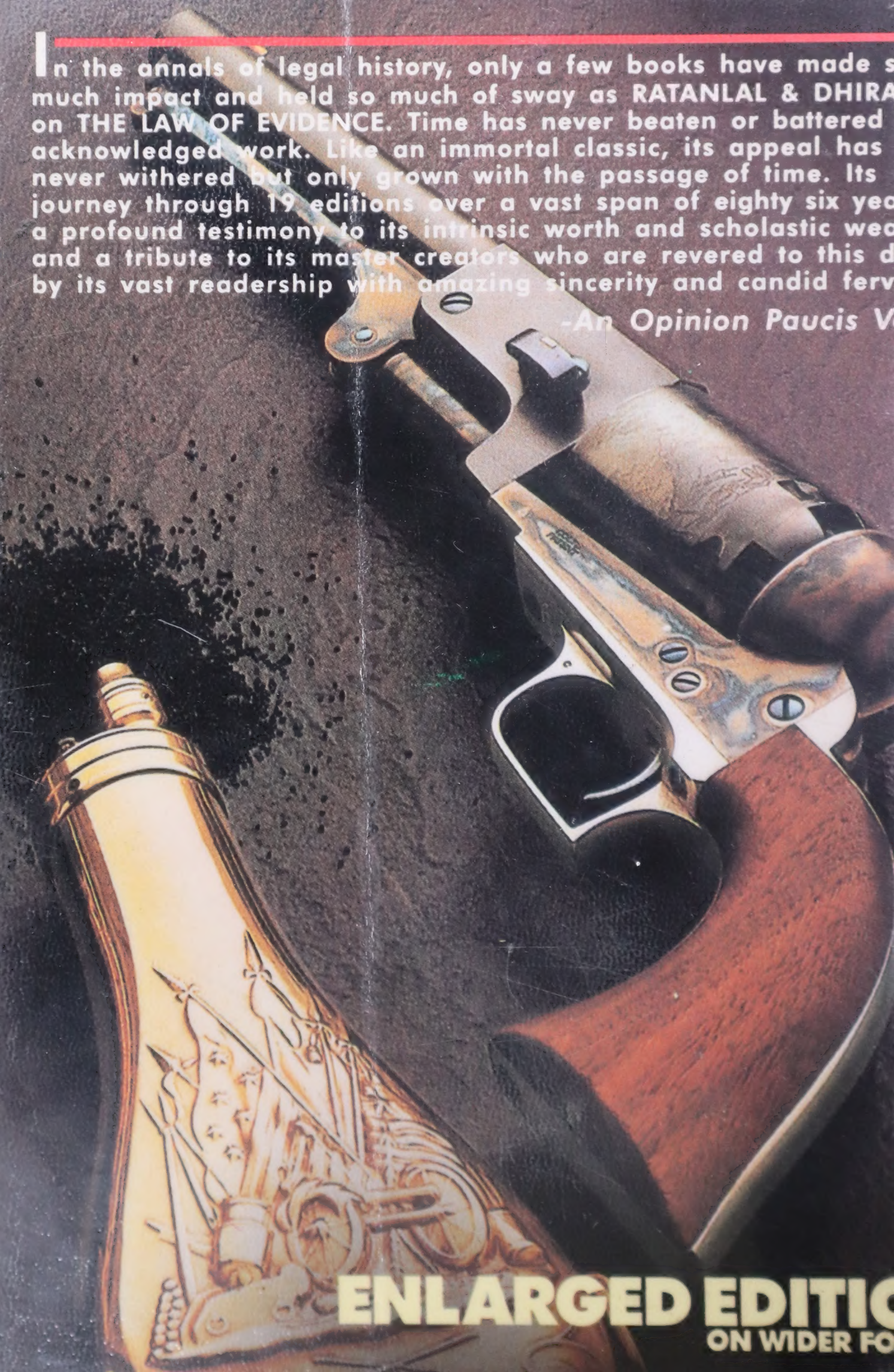

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